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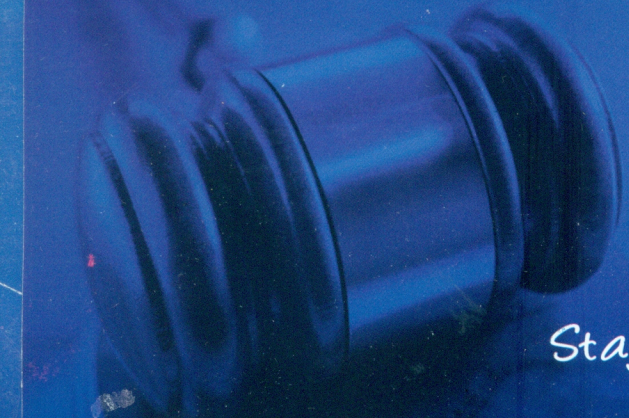
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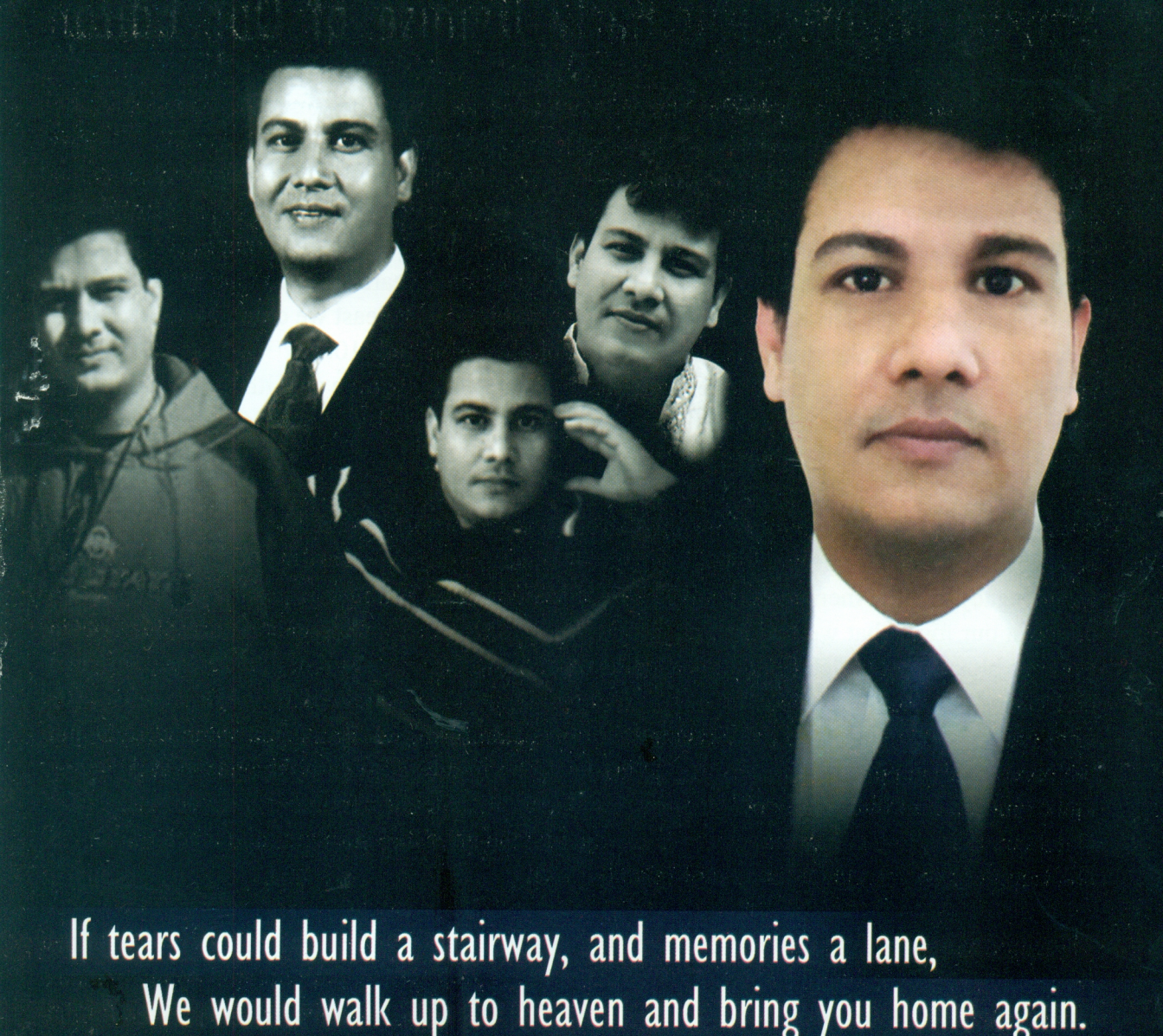
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If tears could build a stairway, and memories a lane,
We would walk up to heaven and bring you home again.

Late Khondoker Shariful Islam

Came into Earth: 27 July, 1971
Depart towards Eternity: 27 July, 2014
Editor, Mainstream Law Reports
Solicitor, Supreme Court of England & Wales
Managing Director, Mainstream Info Tech, United Kingdom

Stormy Nights: The Early Demise of Our Editor

July 27th, 2014 - the day ended in the MLR office as soon as it began. The young soul who stepped up to fill the shoes of our Founder Editor, the current editor, Khondoker Shariful Islam, was no more (Inna Lillahi wa inna ilaihi raji'un). He had set sails for eternity while being treated by some of the best hands in the world, in Neuroscience, at Birmingham, England. It was a disastrous news that struck us all out of the blue, since it was the last that we expected at such a time. It had been a struggle in MLR for the past three years to heal from the loss of our Founder Editor, Late Khandoker Md. Abu Bakar, and it was the least we could expect coming. It was a massive stroke that had our editor hospitalized on July 10th, 2014, but we had our hopes up, that he would soon recover and return to his role, and guide us with his skillful hands once more. But alas, the unexpected had to happen - death struck a silent blow and took away our beacon of hope, our guiding north star.

It was a journey back home for him from there and it was nothing short of the way he came into this world. Friends, family and well-wishers all came in to pay respect to him, to pay homage to his legacy and the memories he left behind. Many stories and memories after, there was no doubt in our mind that we had lost an ambitious and creative mind so early. It was his golden years to blossom completely and take helms of the ship he just assumed, but it was mere bad luck for us to watch him depart so early, joining a better place somewhere in the universe. His final resting place happened to be where his roots came from, where the sun shined bright and the breeze rattled past the leaves softly to leave a calm impression, with the nearest and dearest faces bidding him his final goodbye. It was a tearful, melancholic moment indeed, but to us, it also meant living up to his expectations - to channel the grief into strength, and reach the height that he intended us to be at the end of the day.

The emptiness he left in our hearts, in the middle of MLR may not be ever filled, but we know for sure that he is at a better place now - a place where imagination and dreams come alive, as he expected. He believed that there exist a place that matches no other in the universe on the other side and we are sure it is fitting for him, for a dreamer of a person that he was by nature.

But still, at the end of the day, we still mourn his early demise. It is hard to believe that he has left us so early, but we know that we have to go on to live on with his dreams, that we have to make his visions come true and reshape legal journalism as he wanted it to be.

"You touched so many lives on Earth,
With your laugh and through your pain.
I'll live my life as God has planned, I'll hold my head up high,
I'll treasure all the time we had, and with that, I'll say goodbye.
Onward the flow, I'm letting you go,
Because I know, we'll meet again."

(Sue Lueck Carlson)

APPELLATE DIVISION (Criminal)

Md. Muzammel Hossain–C.J.
Surendra Kumar Sinha–J.
Md. Abdul Wahhab Miah–J.
Nazmun Ara Sultana–J.
Syed Mahmud Hossain–J.
Muhammad Imman Ali–J.
Md. Shamsul Huda–J.

CRIMINAL APPEAL N0.06 OF 2005 WITH JAIL PETITION N0.08 OF 2003.

(From the judgment and order dated the 19th day of May, 2004 passed by the High Court Division in Criminal Appeal No.2967 of 2002 with Death Reference No.44 of 2002).

Md. Mehedi Hasan @ Modern and others ..... Appellants.

Vs.

The State ..... Respondent.

For the Appellants : Mr. Khandaker Mahbub Hossain, Senior Advocate with Mr. Khurshid Alam Khan, Advocate instructed by Syed Mahbubar Rahman, Advocate-on-Record.

For the Respondent : Mr. Rajik-Al Jalil, Deputy Attorney General instructed by Mrs. Sufia Khatun, Advocate-on-Record.

Judgment: June 3, 2012

Penal Code, 1860–
Sections, 299, 300, 302–

Nari-O-Shishu Nirjatan Damon Ain, 2000–
Section 7–

Children Act, 1974–
Sections 6 and 66–

It well settled law is that to constitute an offence of culpable homicide, the causing of death must be established the doing of an act and presence of the intention to kill or knowledge that the act is likely cause death and for which a person committing act must have knowledge or intension which has caused the death of another.

In view of the above, now a very pertinent question to be decided is whether the appellants committed the offence of culpable homicide within the meaning of section 300 of the Penal Code and thus, .made themselves liable .for punishment under sections 302/34 thereof.

Section 302 of the Penal Code has simply provided punishment for murder, and to see whether the appellants have committed murder, we are to fall back upon sections 299 and 300 of the Penal Code which read as follows:

299. Whoever causes death by doing an act with the intention of causing death, or with the inten-

tion of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. (Illustrations are not quoted as being not relevant in the context)

Explanation 1.- A Person who causes bodily injury to another who is laboring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2. Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3. The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly.-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

Fourthly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

(There are illustrations, exceptions and explanation to the section. Those are not quoted being not relevant in the context) ..... (Para 40)

From a reading of section-299, it appears that a person shall be guilty of the commission of offence of culpable homicide if he does an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with knowledge that he is likely by such act to cause death. Three explanations have been added to the section. The explanations have stipulated of the bodily injuries to be inflicted on another person caus-

ing death to that person and the other act causing death of a child in the mother's womb respectively to attract the offence of culpable homicide. From a reading of section 300 it is clear that all culpable homicides are not murder. In the section, there are four clauses. As per this section except in the cases excepted therein culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. However, we are not required to consider the exceptions mentioned in the section, because these exceptions will come into play only when it is proved or established beyond reasonable doubt that the accused, here the appellants commit the offence of culpable homicide. ..... (Para 41)

From a combined reading of the two sections (sections 299 and 300) of the Penal Code, it is apparent that in order to convict a person under section 302, the prosecution must prove that he had the intention to cause death of the victim by an act as contemplated therein or the knowledge that an act done by him would cause death of the victim. So, we are to see whether the acts of the appellants in chasing Trisha upto the pond of Idris Ali at Khapara and thus, preventing her from going home in her normal route and then encircling her prompting her to jump into the pond which eventually caused her death at all attract any of the clauses of section 300 of the Penal Code. ..... (Para 42)

For the discussions made above, we are constrained to hold that the prosecution failed to bring home the charges levelled against the appellants under sections 302/34 of the Penal Code and the High Court Division fell into an apparent error in confirming the death sentence awarded against them by the learned Sessions Judge finding them guilty under the said sections. It further appears that both the Courts below approached the case from an emotional point of view rather than sifting the evidence on record in its proper perspective and in arriving at the finding of guilt keeping in mind the culpability of the appellants in

view of the charges levelled against them. The Judges should not be swayed by emotion as that may impair even handed justice. In a criminal proceedings where accusation is made against an accused as to the commission of an offence under any law, be it the Penal Code or other law, the Court is to see whether the evidence adduced by the prosecution in the case proved the accusation and if so to hand down the punishment on the accused as per the dictate of the law, no matter how serious or heinous the offence might be.

Be that as it may, the evidence on record show that the prosecution proved beyond reasonable doubt that the appellants committed the offence under section 7 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and they are liable to be punished for the commission of such offence. And, in order to do complete justice in the matter, we invoke our power under article 104 of the Constitution and dispose of the appeal finally without sending the case back on remand for trial afresh by the concerned Nari-O-Shishu Nirjatan Daman Tribunal, Gaibandha, under the Ain, 2000. Accordingly, we find the appellants guilty under section 7 of the said Ain and sentence each of them to suffer rigorous imprisonment for 14 years and also to pay a fine of taka 2,000.00 each in default to suffer rigorous imprisonment for 3(three) months more. ..... (Para 70)

JUDGMENT

MD. MUZAMMEL HOSSAIN-C.J: I have gone through the judgments proposed to be delivered by my brothers, Surendra Kumar Sinha, J., Md. Abdul Wahhab Miah, J. and Muhammad Imman Ali, J. I agree with the reasoning and findings given by Md. Abdul Wahhab Miah, J.

Surendera Kumar Sinha-J: I have read the draft copy of the judgment written by my learned brother Md. Abdul Wahhab Mia, J. I agree with the conclusions arrived at by learned brother but since a vital question of law is involved in this appeal, I would like to express my own opinion.

Though facts relevant for the disposal of the question involved in these appeals have been exhaustively narrated by my learned brother, a decision on the question being dependant on facts, I feel it proper to state short facts for the brevity of my separate opinion. Victim Trisha, a minor girl of school going standard four student was returning home on 17th July, 2002 at about 3.30 p.m. from school and when she reached near the Gaibandha Madhyapara Maternity Center, the appellants blocked her way and the victim being frightened started running away towards Kha-Para lane. Appellants by chasing took her on the bank of Idris Ali's pond and gheraoed her when the victim finding no other

alternative jumped into the pond. The appellants did not rescue her and as the victim could not swim drowned into the water. The trial Court convicted the appellants under sections 302/34 of the Penal Code and sentenced them to death. The High Court Division confirmed the sentence. Now the question is whether the facts proved by the prosecution attracts an offence punishable under sections 302/34 of the Penal Code.

2. It is argued that the facts proved by the prosecution do not come within the mischief of culpable homicide amounting to murder and therefore, the conviction is illegal. It is further contended that the knowledge or intention to commit an act specified in section 299 is totally absent in this case and therefore, act of the appellants cannot constitute any offence under the Penal Code. This takes us to consider, what is culpable homicide; or in the alternative, what act or acts constitute culpable homicide? If the act or acts of the appellants do not come within the mischief of culpable homicide, then conviction of the appellants cannot be maintained. To constitute an offence of culpable homicide, the causing of the death must be established the doing of an act and the presence of the intention to kill or knowledge that the act is likely to cause death. So a person committing act must have knowledge or intention which has caused the death of another. So the essential elements to constitute culpable homicide defined in section 299 of the Penal Code are; (i) the mentality of the accused; (ii) the nature of his act and (iii) its effect upon the human victim.

3. The first point to be looked into is what is said to be causing a death. An act may be said to cause death when the death results from the act itself, or from consequences naturally or necessarily flowing from that act. Anything contributing to, or bringing about the effect is spoken of as its cause. A person can be said to cause something to happen only if that thing would not have occurred at the time and in the manner in which it could not occur if he had not done what he did. Suppose, if A puts poison in B's drink, intending thereby to kill B, but before B drinks it, or a fatal amount of it, B dies of a heart attack, A cannot be guilty of murder. Reference in this connection is the case of R. V. White (1910)2 KB 124. It was observed in that case that A might be convicted for attempting to commit murder but he cannot be convicted for murder. The expression 'cause' is being used in the wider sense of being a factor, it will *be* used in the latter sense for the purposes of criminal law.

4. By doing an act, means the act by which the death is caused. No one can be said to cause death unless he does an act; in relation to the victim which has a fatal ending. Ordinarily such act may consist of beating or use of force or administering poison or communicating a shock news in distress condition which has caused the death. Such power may be exercised by application

of force as in the case of beating or it may be in the form of an alarming message to the victim in distress condition. In each case it is an 'act' because it is something done in relation to another which has fatal ending. Now dealing with the question of 'knowledge', suppose a person is engaged in an unlawful act in course of which he commits homicide, the unlawfulness of his act will not dispense with the proof of knowledge of likelihood since his unlawful act was deliberate. The knowledge mentioned in the section can only be knowledge of the likelihood of a future event. The question whether in a given case from which it can be reasonably inferred that the accused had knowledge that his act was likely to cause death is a question of fact to be proved by the prosecution.

5. The accused must normally have foreseen that consequences prohibited by the law would be likely .to result from his conduct. If the accused did not have this necessary foresight he will be acquitted because of lack of *mens rea.* On the other hand, if he did foresee that these prohibited consequences would be likely to result from his conduct and he caused those consequences, he will normally have caused those consequences, for the purposes of the criminal law. Assuming that the accused has the necessary *mens rea* for a crime and that his conduct caused the prohibited consequences of that crime, the fact that the accused did not foresee the precise way in which those circumstances occurred does not affect criminal liability. Stephen,J. explained the doctrine of mens *rea* in R.V. Tolson (1889) 23 QDB 168(187) "The full *definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition."* These arguments have been approved by the House of Lords in Sweet V. Parsley (1970) AC 132.

6. Many crimes are defined almost entirely in terms of *actus-reus* but for the doctrine of *mens rea,* anyone who caused actus-reus would be guilty of offence. Suppose it is an offence for a Muslim being married to marry any other woman during the life time of his wife. The actus-reus of this offence is complete if A marries B while still married to C. But A will be acquitted because of lack of *mens rea* if A thought that C was dead. The doctrine of *mens rea* originated in the idea that a person should not be held criminally responsible and so liable to punishment unless he is morally blameworthy. A person will not, as a general rule, be held to be criminally responsible unless; (i) he was acting voluntarily; (ii) knew what he was doing; and (iii) in those offences where particular consequences form part of the *actus reus* he foresaw the likelihood of those consequences.

7. Therefore, we find that it must be proved that (a) the conduct was volun-

tary; (b) in the case of acts, the accused knew that he was doing that act, and (c) in case of omissions, the accused did not believe that he was doing what he was under a duty to do. If A mixes poison in the food of B, with the intention of killing B, and B eats food and is killed thereby, A would be guilty of murder, even though the eating of the poisoned food, which was voluntarily act of B intervened between the act of A and B's death. Suppose, A had discovered that food was poisoned or merely thinking that it was not fit to be eaten, threw it away in some unfrequented place so as to put it out of harm and B happening afterwards to pass that way picked it up and ate it and was killed, the act of A in mixing the poison in the food could in that case hardly be said to have caused B's death within the meaning of section 299.

8. On the other hand, suppose, A finding B standing near him and without suspecting that there was anything wrong with the food gives a portion of it to B and he ate it and was killed, could it be said that A who had given the poisoned food to B kill was not responsible for the death? The doctrine of criminal causation has reasonable limits. It is not interminable, and there are causes when the court would regard the cause as too remote to support a criminal charge. The above cases clearly show that the cause must not only be the *"causa sine qua non"*, but it must also be a cause reasonably proximate. If it is too remote, it is a negligible cause as much to support a criminal prosecution as it is to support an action in tort. The doctrine of "causation" as applied in English law is not altogether applicable in our rule in view of the language used in section 299 of the Penal Code. Under the English rule if the accused's conduct caused the prohibited consequence of a crime, the fact that the accused did not foresee the precise way in which those circumstances occurred does not affect his criminal liability.

9. This principle is illustrated in R.V. Pitts (1842) C & M 284 as under:

> "If *Y, under* apprehension *of immediate violence from X and in an attempt to escape, does an act,* i.e. *jumps out of a window or into a river, which causes his* death. X is *regarded as having caused Y's death, for the purpose of the criminal law, even though he may not have foreseen this possibility. The test is, not whether the accused foresaw the effect of his actions, but whether the action of the victim was the natural result of what the accused said and did, in the sense that it could reasonably have* been foreseen. *The test is an objective one".*

Section 299, on the other hand, speaks of intention or knowledge that the act is likely to cause death-the intention of causing death or the intention of causing such bodily injury as is likely to cause death or the knowledge that the act is likely to cause death. So there must be at least knowledge connecting the act with the effect as a likely contingency. This

knowledge of likelihood is the very least which makes homicide culpable whether the act in the course of which it was committed be legal or illegal. This provision is embodied in illustration (c) to section 299 which is as follows:

> *"A by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush, A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B or cause death by doing an act that he knew was likely to cause death".*

10. Here we find in direct conflict with the corresponding rule of English law, according to which, if a person, whilst committing an unlawful act, accidentally kills another, he would be liable for manslaughter or murder according to his act was felony or misdemeanor. Therefore, in determining the nature of the offence, the Court is required to see the mentality of the accused, the nature of his act and its effect upon human victim. It is, therefore, indispensable that the death of a person should be connected with the act of violence or other primary cause, not merely by a chain of causes and effect, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances.

In Joginder Singh V. State of Punjab, AIR 1979 SC 1876, Joginder Singh, Kishan Singh and Balwinder Singh were charged for the murder of Kuldip Singh and Rupinder Singh. According to the prosecution, three accused persons pounded upon Kuldip Singh with deadly weapons when Rupinder Singh out of fear started running away towards the field. Joginder Singh and Balwinder Singh chased him abusing. Rupinder Singh jumped into a well in order to save himself. The dead body of Rupinder Singh was recovered from the well and Kuldip Singh died on the spot. The Sessions Judge found Joginder Singh and Balwinder Singh guilty for the murder of Rupinder Singh. The Supreme Court was of the view that there is no evidence that these two accused drove Rupinder Singh to jump into the well without the option of pursuing any other course, the result might have been different. In the absence of evidence that these two accused inflicted injury on Rupinder Singh and then he was thrown into the well. The death of Rupinder Singh was not caused by "doing of an *act by Joginder Singh and Balwinder Singh with the intention or knowledge specified in section 299, Indian Penal Code.*" We find no reason to depart from the conclusions arrived by the Supreme Court.

11. In the above case it was found that accused Joginder Singh and Balwinder Singh did not compel victim Rupinder Singh to jump into the well leaving him no option except to do so which caused him death and therefore,

their act of chasing does not attract the offence of culpable homicide. Therefore, to constitute an offence of culpable homicide there must be deliberation on the part of the accused to commit the act. It must be established that accused had knowledge that his act is likely to cause death. Even in presence of intention the homicide may be justified - sections 76, 77, 78, 79, 81 and 100 of the Penal Code hut in the absence of knowledge, the act cannot be attracted the offence of culpable homicide enumerated in section 299. In other words, the act of the accused must have been shown to be deliberate. This leads me to come to the conclusion that in the absence of intention or knowledge specified in section 299, *a* person cannot be held responsible for an offence of murder defined in section 300. From the above discussion we can safely conclude that under the English law the offence of culpable homicide *is* considered objectively but in our law, it is considered subjectively.

Learned Additional Attorney General submits that even if it, is assumed that the act of the appellants do not cover culpable homicide, that is to say, they did not compel the victim to jump into the pond but their omission to rescue the victim amounts to illegal omission, inasmuch as, they could have saved the victim from being drowned. According to him "act" defined in section 32 extends also to illegal omission. The Common Law, imposes a duty to act, except in regard to the law of murder and manslaughter, this Common Law duty is no longer of importance because they have been suspended by statute. It is now a statutory offence to fail to provide the necessary care for children or to fail to assist a constable to suppress a breach of peace, besides the duty after an accident or to report the accident to the police. On the other hand, if a person in the course of unlawful conduct caused the death of another, he was automatically guilty of manslaughter, notwithstanding that he did not foresee death or even any harm occurring to the deceased. If a person's omission causes the death of another and there is a duty cast upon him to prevent harm to that person, then it will be either murder, if he foresaw that death or grievous hurt would be Likely to follow from the omission, if he foresaw some harm or was criminally negligent. (R.V. Bonnyman (1942)28 Cr. App. R. 131).

12. There is an exception to this rule. In a case, there may be a duty, there is apparently, a general principle that if a person to whom duty to prevent harm is owed by the accused is able to take care of himself, or remove himself from the dominion of the accused, but does not do so, the accused is not criminally liable. Every person under, *a* duty to prevent harm to a person by taking care of him and providing the necessaries of life for him, if he has undertaken, whether by contract or not, to look after him and that person is helpless or infirm.

The position in our rule is different. According to section 32, the words

which refer to "acts" done extend also to "illegal omissions". The illegal omission within the meaning of the Penal Code means an omission to do a thing is whether or not illegal must be judged by the terms of section 43, which reads:

> *"The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action: and a person is said to be "legally bound to do" whatever it is illegal in him to omit".*

Illegal means anything which is prohibited by law; which constitutes an offence if law prohibits. This word illegal is applicable to everything which is an offence for which *it* is prohibited by law or which furnishes ground for a civil action. What amounts to illegal omission has been explained in an old case in Gopal Chaunder V. Foolmani, ILR 8 Cal 728. The duty of a Magistrate and a police means to prevent commission of a crime was a matter of legal obligation; the failure of which constituted the legal omission within the meaning of section 43. If, however, the same offence has been committed in the presence of another person, say a village guard, not charged with the same duty, he could not have been charged with abetment because his omission was not illegal. Therefore, the omission of the accused to rescue the victim cannot be termed as an illegal omission within the meaning of section 32 read with section 43 of the Penal Code.

13. In the case in hand, the admitted case of the parties is that convict Mahedi Hasan had loved Trisha but the latter and her parents did not like it and as a resut, the convict with a view to abduct her for the purpose of marriage obstructed her with other convicts on her way back home from school and on seeing them, she ran away towards the small pathway of the village and as soon as she reached the main road she found that the accused convicts were waiting for her, she was frightened and started running away. They also chased her and at one stage they gheraoed her and finding no alternative she jumped into the pond. This fact sufficiently proved that the intention or motive of the accused was to abduct the victim for marriage. They did not throw her into the pond or compel her to jump into the pond. Her jumping into the pond was her deliberate act. There is even no allegation that the appellants instigated or compelled her to jump.

Therefore, under no stretch of imagination can it be said that by dint of their act, the appellants had accelerated the death of the victim. Their attempt to abduct was deliberate but they did not compel her to jump into the pond. It may assume its least culpable aspect where the death is the consequence of their negligence. The victim's decision was on the spur of the moment. Neither they had intention nor knowledge to compel her to jump into the pond. They ought to have rescued her but their omission to rescue

her cannot be termed as "illegal" within the meaning of section 43 of the Penal Code.

Learned Additional Attorney General tried to convince us that their omission to rescue the victim is an illegal omission within the meaning of culpable homicide and in this connection, he has referred Explanation-2 of section 299. Explanation-2 read thus:

> *"Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented".*

This 'Explanation' lays down that no person can be heard to say that he did not cause the death because it might have been prevented by resorting to proper remedies or skilful treatment to the victim. While explaining the true meaning of this Explanation, Lord Hale in Gulsha (1914); 25 1C 1005 noticed the report of the Law Commission that *"The meaning of the commissioners we concede to be is that, where in countries in which good medical treatment is common, it is difficult: to suppose that a person inflicting a slight wound on another could contemplate his death as a probable result, such a result may be supposed to enter into his contemplation in a country where bad medical treatment is far more common than good, and, therefore, the definition of homicide ought not to exclude death resulting from a slight wound as the primary or original powers"* and opined that if the injury was so serious that, in the ordinary course it was sufficient to cause death, it is homicide; but, if the injury was not mortal and death was due to other supervening causes, as such, gangrene or fever brought about: by bad treatment, then the court would be justified in holding that, death was not due to the injury as its "causa *causans" (1* hale PC 428).

As observed above, to hold a person liable for culpable homicide it is necessary to prove that the death of the deceased should be connected with the act of violence or other primary cause, not merely by a chain of causes and effect, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances. An act itself to cause death within the meaning of section 299 when the death results either from the act itself or from some consequences necessarily or naturally flowing from that act., and reasonably contemplated as its result. Where without the intervention of any considerable change of circumstances death is connected with the act of violence by chain of causes and effects, the death must be regarded as a proximate and not too remote a consequence of the act of violence.

'Cause' and 'intention' are two vital elements for constitution of a crime. The question of 'cause' is subservient to the question of intention so that in

some cases the one question is obscured by the other. This question was considered by Birdwood and Parsons, JJ. in Khandu, ILR 15 Bom 194. They differed as to the real crime of the offender. The point was, the assailant fearing detection sets fire to the hut in which the victim fell, and the fire and smoke killed him. His object in setting the hut on fire was to destroy the traces of his guilt. Birdwood, J. holding that the offence of the offender was no more than an attempt; because the death of the victim was caused by the fire when the offender had no intention of causing his death, and when in fact he believed him to be dead. Parsons, J. was in favour of presuming an intention to kill, because of the fact of killing. But it was apparent not the view of Sergent, C.J, to whom the case was referred in consequence of this difference of opinion, and who was for judging of the criminality of the act by the actual and not a merely presumed or constructive intention of the offender and so agreeing with Bridwood,J., sentenced the offender only for an attempt under section 307 of the penal Code.

14. The High Court Division on appreciation of the evidence on record and the confessional statements of the appellants came to the conclusion that "the act *of the convict appellants could not* be *at all characterized as an over haste act rather the same was a deliberate act and they had definite knowledge of the ultimate result of the act which were imminently dangerous acts.* It is further held, the words imminent in common parlance means *something is ready to fall or happen on the* instant. *A danger is said to be imminent if it is immediately threatened or impeding. Before an imminently dangerous act can constitute murder it* requires *proof that there was no excuse for committing the act, offence committed by the appellants* was thus *culpable homicide amounting to murder'.*

15. The learned Judges failed to comprehend what was the deliberate act of the appellants. Their deliberate act was an attempt to abduct the victim but not to compel her to jump into the pond. It is not at all the prosecution case that they had compelled the victim to jump into the pond. The positive case of the prosecution case is that the appellants attempted to abduct the victim for the purpose of marriage. Therefore, the act of jumping of the victim into the pond which resulted the death of the victim by drowning is not the deliberate act of the appellants.

16. Learned Judges were of the view that, their act was 'imminently dangerous'. This expression 'imminently dangerous' has been used in clause '4thly' of section 300 which read; *"4thly-if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death,* and *commits, such act without any excuse for incurring the risk of causing death or such injury as aforesaid.'* If this clause is read along with illustrations (d) to section 300, the cor-

rect meaning of this clause can be ascertained. Illustration (d) said 'A *without any excuse lires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual'.*

Clause '4thly' covers cases in which there is no intention to cause death of any person particularly. It comprehends generally the commission of imminently dangerous acts which must in all probability cause death or cause such bodily injury as is 1ikely to cause death. Clause '4thly' would be applicable where the knowledge of the offender to the probability of the death of a person or persons in general – as distinguished from a particular person or persons being caused from his imminently dangerous act, proximates to a practical certainty. Such knowledge on the part of the offender must be the highest degree of probability; the act having been committed by the offender without any excuse for incurring the causing death or such injury as aforesaid. This clause will attract only when the act of the accused falls within the mischief of culpable homicide.

17. The learned Judges though noticed sections 299 and 300, failed to address which clause contained in section 299 attracts the act of the accused and abruptly came to the conclusion that their act was so 'imminently dangerous' that the death is culpable homicide amounting to murder. As observed above, since the act of the appellants does not attract the offence of culpable homicide, clause '4thly' of section 300 is not attracted in this case. When such an act is committed with the knowledge that death might be the probable result and without any excuse for incurring the risk of causing death or injury as is likely to cause death and the offence is murder. It applies in the case of dangerous action without an intention to cause specific bodily injury to any person. The knowledge which accompanies the act must, be that the act was so imminently dangerous that it must in all probability cause death. The facts proved by the prosecution do no at al1 attract clause '4thly' of section 300. and therefore, the findings of the High Court Division is based on misconception of law.

18. Now question is whether the appellants are entitled to be acquitted of their deliberate act of attempting to abduct the victim, who was barely a minor girl which compelled her to take her life in order to save her modesty from their clutches. On behalf of the appellants it was argued before the High Court Division that even if the act of the accused are taken to be true, the appellants' act attracted section 7 of Nari-O-Shishu Nirjatan Daman Ain, 2000 and the offence was triable by Nari-O-Shishu Nirjatan Daman Tribunal and that the learned Sessions Judge acted illegally in holding trial for an offence of murder.

19. Learned Judges noticed the definition of 'অপহরন' defined in section 2 (Kha) of Ain, 2000 and section 7 of the

said Ain and observed that since attempt to abduct has not been made an offence in the Ain of 2000, the act of the appellants does not attract the Ain of 2000 and thus the victim has not been abducted by the appellants within the meaning of the said Ain. Further it was argued, the appellants did not challenge the jurisdiction of the learned Session Judge to hold the trial and concluded *"It is too late in the day to raise the contention which is absolutely untenable and cannot, also, be countenanced"*. There is fallacy in the arguments of the learned Judges for the learned Judges failed to appreciate the definition of 'অপহরন' defined in the Ain, 2000. What's more, the Court is not concerned to see whether or not the objection as regards the jurisdiction of the learned Sessions Judge to try the offence was raised.

20. The Court is required to examine this point at the time of framing charge. If the act attracts an offence under the Ain of 2000, it will go to the root of the case. The judgment in such case would be nullity since he had no jurisdiction to try the offence. Therefore, the learned Judges have approached the matter in the wrong perspective. The argument that since an attempt to abet abduction has not been included in the definition of the Ain, the learned Sessions Judge has rightly convicted the appellants is also not a sound proposition of law. The confessions of the appellants were found true and voluntary, from which, it is evident that the appellants had attempts to abduct the victim.

In the definition of 'অপহরন' it is said: 'অপহরন অর্থ বলপ্রয়োগ বা প্রলুব্ধ করিয়া বা ফুসলাইয়া বা ভুল বুঝাইয়া বা ভিতি প্রদর্শন করিয়া কোন স্থান হইতে কোন ব্যক্তিকে অন্যত্র যাইতে বাধ্য করা'. A plain reading of this definition one can arrive at a conclusion that 'অপহরন' includes use of force or allurement or enticement or misrepresentation or by causing fear if a person is compelled to move from one place to another. Admittedly the appellant Mehedi Hasan wanted to develop an affair with the victim but the latter refused to the proposal with abhorrence, and as a sequel, of that desire, Mehedi Hasan with the help of other convicts attempted to abduct her. Naturally, she harboured a sense of horror towards him. Is it not sufficient to come to the conclusion that the appellants compelled the victim to move from the Gaibandha Maternity Center to the pond where she was drowned? Therefore, the act of the appellants certainly attracts the last part of definition of 'অপহরন' defined in Ain, 2000 as quoted above.

21. Section 7 of the Ain of 2000 provides that except in cases provided in section 5, if any person abducts any female or child he will be liable to punishment. There is, therefore, no doubt that the act of the appellants attracts the definition of 'অপহরন' defined in section 2 (Kha) of the Ain of 2000, and therefore, they have committed an offence punishable under section 7 of

the Ain, 2000. Besides, section 30 of the Ain relates to the abetment or instigate the offence punishable under the Ain of 2000. This section provides "**অপরাধে প্ররোচনা বা সহায়তার শাস্তি**– যদি কোন ব্যক্তি এই আইনের অধীন কোন অপরাধ সংঘটনে প্ররোচনা যোগান এবং সেই প্ররোচনার ফলে উক্ত অপরাধ সংঘটিত হয় বা অপরাধটি সংঘটনের চেষ্টা করা হয় বা কোন ব্যক্তি যদি অন্য কোন ব্যক্তিকে এই আইনের অধীন কোন অপরাধ সংঘটনে সহায়তা করেন, তাহা হইলে ঐ অপরাধ সংঘটনের জন্য বা অপরাধটি সংঘটনের চেষ্টার জন্য নির্ধারিত দণ্ডে প্ররোচনাকারী বা সহায়তাকারী ব্যক্তি দণ্ডনীয় হইবেন" It is significant to note that the conjunction 'or' has been used before the expression 'অপরাধটি সংঘটনের চেষ্টা করা'. This use of conjunction 'or' before the said expression 'অপরাধটি সংঘটনের চেষ্টা করা' makes it clear that the said expression is used in disjunctive. Therefore, the appellants Md. Shahin and Ariful Islam Asha had abetted the offence of abduction.

22. Now the question is whether the conviction of the appellants is vitiated by reason of their trial under the qeneral law despite the fact that they had committed an offence which is trialable by the Tribunal under the Ain, 2000. There is no doubt that the trial is without jurisdiction but, by the same time, it can not be ignored that the act committed by the appellants is barbarous one. Their act shakes the conscience of the people at large. They attempted to abduct a minor girl for the purpose of marriage. The victim was so frightened by the past conduct of the convict Mehdi Hasan that she felt it proper to immolate her life rather than to surrender to his wishes. Knowing well that she could not swim, she jumped into the pond which resulted in her death by drowning. The act of the accused is not only a crime against humanity but also barbaric.

23. Though the learned Sessions Judge had no jurisdiction to try the offence unless the Tribunal takes cognizance of the offence on the basis of the police report or complaint, if this case is remanded to the Tribunal on this technical ground for fresh trial, the appellants will be prejudiced thereby since they have suffered a lot in the meantime. Further, there wi11 be uncertainty as to when the trial will be concluded in view of the fact that about 10 years had elapsed in the meantime and normally in such cases, it would be difficult on the part of the prosecution to produce witnesses at such belated stage. We find sufficient evidence on record to convict the appellants under the Ain of 2000 and if the case is remanded, the result would not be otherwise.

24. What *is* more, a Tribunal under the Ain is constituted from amongst the sessions or Additional Sessions Judges. In this case the Sessions Judge has tried the offence, though in respect of a distinct offence. While we discourage this sort of negligence on the part of the prosecution and the Court as well in not bringing proper charge against the accused convicts at the initial stage, considering the nature of the offence committed by the appellants, we find it a proper case to alter their

conviction in exercise of powers under Article 104 of the Constitution for ends of justice. As regards the plea of minority of the appellants, I endorse the views of my learned brother Md. Abdul Wahhab Miah, J.

25. Accordingly, I convert the conviction of the appellants to one under section 7 read with section 30 of the Nari-O-Shishu Nirjatan Daman Ain, 2000. The maximum period of sentence for an offence punishable under suction 7 is imprisonment for 1ife and the minimum sentence is 14 years. The nature of the offence deserves imposition of maximum period of sentence upon the appellants. We noticed that all the appellants were tender aged boys below the age of 20 years. They had suffered in the condemned cell for more than 9 years. Considering their age and the mental agony of death sentence they faced, I feel it proper to award the appellants the minimum sentence provided in the section.

Accordingly, the appellants are sentenced to 14 years rigorous imprisonment with fine of Tk. 2,000/- each in default to suffer rigorous imprisonment for 3 (three) months more. The appeal is allowed in part.

26. Md. Abdul Wahhab Miah-J: This appeal, by leave, is directed against the judgment and order dated 19.05.2004 passed by a Division Bench of the High Court Division in Criminal Appeal No.2967 of 2002 heard analogously with Death Reference No.44 of 2002 dismissing the appeal and accepting the death reference.

27. Facts giving rise to this appeal are as follows:

The appellants being three in number, namely: Md. Mehedi Hasan Modern, Md. Shahin and Ariful Islam Asha were put on trial before the Sessions judge, Gaibandha in Sessions Case No. 53 of 2002 and were charged under sections 302/34 of the Penal Code to which they pleaded not guilty and claimed to be tried.

The prosecution case as stated by PW-1, informant (hereinafter referred to as the PW), in short, was that Sadia Sultana Trisha (hereinafter referred to as Trisha) aged about 10 years was a student of class four of Madhapara Government Primary School, Gaibandha. Accused Modern, Shahin and Asha (hereinafter referred to as the appellants) used to tease Trisha on her way to and from school. On the date of occurrence (17.07.2002), at about 3:30 pm, the appellants as per their previous plan took position at the *Panshop* of Afzal Munshi in front of vaccination centre situated by the side of Gaibandha Madhapara Matrisadan. After school hours on her way home when Trisha reached in front of Matrisadan on foot, the appellants blocked her way in order to abduct her. Trisha was frightened and started running towards the lane of Khapara, the appellants also chased her upto the bank of the pond of Idris Ali and they

then encircled her from all sides. Trisha finding no way to escape jumped into the water of the pond of Idris Ali. As Trisha did not know how to swim, she by moving her hands begged (আকুতি মিনতি করে) to save her life, but the appellants enjoyed her death standing on the bank of the pond and thus, they ensured her death. At that time, the witnesses: Nayan, Shohag, Rana and Fuad raised hue and cry and hearing their cry, other people also came and they got down in-the pond to rescue Trisha, but they failed. Witness, Yousuf Ali telephoned the fire-brigade and the police; the fire-brigade recovered the dead body of Trisha from the pond of Idris Ali and sent the body to Sadar Hospital, Gaibandha, where the Doctor on duty declared her dead. In the meantime, the local people arrested the appellants while they were fleeing away and handed them over to the police. At the time of occurrence, the PW was engaged in his business establishment, Hasan Traders near *Bara mosque* at Gaibandha town. On being informed by maid, Hasina of his house about the occurrence, the PW went to the place of occurrence and heard about the occurrence from the witnesses and then went to Gaibandha Sadar Hospital where he saw the dead body of Trisha. The appellants killed his foster daughter-Trisha by drowning her. The PW got the First Information Report (FIR) written by Shohel, his neighbour hearing about the occurrence from the witnesses and lodged the same with the police station.

28. In order to substantiate the charges levelled against the appellants, the prosecution produced as many as 26 witnesses and of them PW24, constable-Md. Mokarram Hossain was tendered. The defence did not examine any witness, but cross examined the prosecution witnesses except PWs 19, 20, 21, 23, 24 and 25. The case of the defence as it appears from the trend of cross examination of the prosecution witnesses and their examinations under section 342 of the Code of Criminal Procedure (the Code) was that no occurrence as alleged took place. The appellants did not chase Trisha and they did not compel her to jump into the pond of Idris Ali at Khapara and that she slipped into the pond while going home by the sideof the bank of the pond. The appellants were not arrested from the place of occurrence, they were arrested from the house of PW-1 when they had gone there to see the dead body of Trisha and they were implicated in the case falsely. They made the confessional statements as tutored out of fear of torture and that they being under the age of 16 years were triable by a Juvenile Court under the provisions of the Children Act, 1974.

On conclusion of trial, the learned Sessions Judge by his judgment and order dated 30.09.2002 found the appellants guilty under sections 302/34 of the Penal Code and sentenced each of them to death.

29. The learned Sessions Judge submitted the proceedings of the Sessions

case to the High Court Division under section 374 of the Code for confirmation of the death sentence and the reference was registered as Death Reference No.44 of 2002. The appellants also filed Criminal Appeal No.2967 of 2002. A Division Bench of the High Court Division on hearing the death reference along with the appeal by the impugned judgment and order accepted the death reference and dismissed the appeal.

Being aggrieved by and dissatisfied with the impugned judgment and order, the appellants filed Criminal Petition for Leave to Appeal No.313 of 2004 before this Division. The appellants also filed Jail Petition No.8 of 2003 from Central Jail, Rajshahi. This Division hearing the leave petition and the jail petition granted leave on the 29th day of February, 2005 to consider the submissions made by the learned Counsel for the appellants to the following effect:

"In support of the petition, Mr. Khondaker Mahbub Hossain, learned Senior Advocate appearing on behalf of the petitioners submits, *inter alia,* that the learned Judges of the High Court Division in affirming the death sentence failed to consider that the confessional statements made by condemned-petitioners, which the trial court and High Court Division relied upon in convicting petitioners, will categorically show that death of Trisha was accidental and neither there was intention nor knowledge of the condemned-petitioners that due to their alleged act Trisha would jump into a pond and die. So in the absence of any intention or knowledge to cause death that their act is likely to cause death, if even the prosecution case is admitted, the conviction and sentence of the petitioner under sections 302/34 of the Penal Code is not sustainable in law.

30. He further submits that the High Court Division failed to appreciate the principle laid down by the apex courts for awarding capital sentence to an accused and thus caused serious miscarriage of justice in awarding capital punishment to the petitioners under the facts and circumstances of the case which is not warranted by law.

He lastly submits that the convict-petitioners submitted papers to show their age in the trial court at the very beginning of the trial and it will be seen from the statement made under section 342 of the Code of Criminal Procedure of the condemned-petitioners that the ages stated by them and written in the statement under section 342 of the Code of Criminal Procedure were tampered by putting fluid on the dates of their birth and inserted different age to show them adult which is evident from the lower court record and the said act is a clear act of forgery which the learned judges failed to consider in rejecting the contention of the defence lawyer, that the trial of the condemned petitioners has been vitiated as because Sessions Judge has no

jurisdiction to try the case under the Children Act, 1974 the accused being youthful offender under 16 years of age."

31. Mr. Khandaker Mahbub Hossain, learned Counsel, appearing for the appellants, has made his submissions in line with the leave granting order. In support of his submissions, Mr. Mahbub Hossain has also referred to the evidence of the PWs, particularly: the eye witness, PW3 and the confessional statements made by the appellants under section 164 of the Code. He has further submitted that in maintaining the order of conviction and sentence passed by the learned Sessions Judges, the High Court Division misconceived the case of the prosecution as well as the Fourth clause of section 300 of the Penal Code. Mr. Hossain has elaborated his submission that in order to find the appellants guilty under sections 302/34 of the Penal Code, the prosecution must prove that they committed the offence of culpable homicide amounting to murder as stipulated in section 300 thereof. The facts and circumstances of the case and the evidence on record do not, at all, attract any of the clauses of section 300 of the Penal Code and as such, the appellants are entitled to be acquitted of the charges brought against them. In support of his contention, Mr. Hossain has relied upon the case of Joginder Singh and another-vs-State of Punjab, AIR 1979 (SC) 1876.

32. Mr. Rajik-Al Jalil, learned Deputy Attorney General, appearing on behalf of the State, on the other hand, has contended that if the evidence of PW3 along with the confessional statements of the appellants is read together, it would appear that the appellants had the knowledge that Trisha would die because of the drowning into the pond and after she jumped into the pond, the appellants did not try to rescue her from the water and thus, they contributed to her death. Therefore, the learned Sessions Judge rightly found them guilty under sections 302/34 of the Penal Code and the High Court Division rightly confirmed the sentence of death. The learned Deputy Attorney General has further contended that all the appellants being above the age of 18 years as found by the learned Sessions Judge, he had no lack of jurisdiction in holding their trial. There being no merits in the appeal, the same be dismissed.

33. From the judgment of the learned Sessions Judge, it appears that he, on consideration of the evidence on record, came to the specific finding that they are the appellants who chased Trisha towards the lane of Khapara while she had been returning home on foot after school hours on the date of occurrence and Trisha in order to save herself from them jumped into the pond of Idris Ali and she died because of drowning and thus, they were responsible for her killing. In coming to the said finding, the learned Sessions

Judge relied upon the evidence of PWs 2, 3 and the other PWs as well who deposed that they heard that the appellants used to tease Trisha on her way to and from school and that on the date of occurrence, the appellants chased her upto the pond of Idris Ali at Khapara lane compelling her to jump into the pond. The learned Sessions Judge, considering the confessional statements of the appellants made under section 164 of the Code, which was recorded by PW22, Mr. Kiron-Chandra Roy, Magistrate, first class, Gaibandha, found those voluntary and true. The learned Sessions Judge discarded the objection of the defence that he had no jurisdiction to try the case as the appellants, being under the age of 16, were triable by a Juvenile Court under the provisions of the Children Act, 1974, (the Act, 1974). In discarding the objection as to the jurisdiction, the learned Sessions Judge observed that neither at the time of framing charge nor during examination of the witnesses upto PWs 1-17, (PWs 18 and 19 are fire brigade men, PW 20 prepared the inquest report, PW 21 is the doctor who held the autopsy, PW 22 recorded the statements of the appellants under section 164 of the Code, PW 23 escorted the dead body to the morgue, PW24 was tendered, PW25 recorded the FIR), the defence drew the attention of the witnesses as to the age of the appellants and only at the time of cross examination of PW26, i.e. the investigation officer, a suggestion was given to the effect that the age of the respective appellant was less than 16 years which he denied. The learned Sessions Judge further observed that the defence by examining witnesses did not try to prove that the appellants were under the age of 16 (sixteen) years. The learned Sessions Judge discarded the affidavits filed on behalf of the appellants and the other papers on the ground that those papers having been filed during examination of the appellants under section 342 of the Code were not acceptable. The learned Sessions Judge specifically observed to the effect "অত্র মোকদ্দমায় আসামীদের বিরুদ্ধে অভিযোগ গঠনকালে আদালত আসামীদের আকার, চেহারা ও উচ্চতা পর্যবেক্ষণ করে দৃঢ়মত পোষণ করেছে যে, আসামীরা সকলেই সাবালক এবং তাদের সবারই বয়স ১৮ বৎসরের উর্দ্ধে। কাজেই আসামীগণকে নাবালক দাবী করা এবং নাবালকের সুবিধা পাওয়ার কোন কারণ নেই।"

34. From the impugned judgment, it appears that before the High Court Division, a specific point was taken to the effect that the prosecution case was that the appellants obstructed Trisha on her way home after school hours in order to abduct her. And appellant, Modern in his confessional statement also confessed that he loved Trisha and decided to marry her on taking her to Dhaka by way of abduction, at best, could be an offence under section 7 of the Nari-O-Shishu Nirjatan Daman Ain, 2000, in short, the Ain, 2000 and as such, the case was triable by the Nari-O-Shishu Nirjatan Daman Tribunal (the Tribunal) in view of the provisions of section 20 of the Ain, 2000, the Sessions Judge had no juris-

diction to try the case under the "General Law of Land", but the High Court Division discarded the said point on the finding that *"Since attempt to abduct has not been shaped an offence in The Ain of 2000 the question of commandeering of jurisdiction by Nari-O-Shishu Nirjatan Daman Tribunal did not and does not at all arise. "* In coming to the said finding, the High Court Division considered definition of 'অপহরন' as given in section 2(Kha) of the Ain, 2002 and section 7 thereof. The High Court Division further observed that the question of jurisdiction of the learned Sessions Judge to try the appellants of the charges brought against them, was not at all raised during the trial and the question of jurisdiction had been mooted only before the High Court Division *"by way of contention, it is too late in the day to raise the contention."*

35. The point that during the occurrence, during framing of charge as well as during examination of the appellants under section 342 of the Code, they were under the age of 16, they were entitled to be treated as juveniles under the Act, 1974 and they were required to be tried by the Juvenile Court and that having not been done, the whole trial by the Sessions Judge was vitiated. Therefore, the order of conviction and sentence passed by the learned Sessions Judge against the appellants could not be sustained, was also taken before the High Court Division. The High Court Division considering the age of the appellants mentioned in the FIR, in the confessional statements and during their examinations under section 342 o the Code came to the clear finding that *"convict appellants were neither had been child nor juvenile within the meaning of Children's Act during course of commission of felony and also framing of charge. They stand proved to be major or adult at the time of commission of offence and also, framing of charge."* The High Court Division discarded the registration cards of Secondary School Certificate Examination of appellants, Modern and Asha and the affidavits sworn by the parents of the appellants stating their respective dates of birth being allegedly 24.11.1986, 03.01.1987 and 31.12.1986 filed during their examinations under section 342 of the Code on the ground that they *"could easily lead defence evidence both documentary and ocular, in support of the last time plea to he aged below 16 years "* but they declined to lead any evidence in support of the defence plea while they were examined under section 342 of the Code. The High Court Division observed that plea of *"convict appellants being juveniles is not only an afterthought matter but a concoction of their imagination at a belated stage to thwart the course of justice by having resort to wrangles of procedures and technicalities of law. "* The High Court Division concluded by saying that *"such efforts transpires to have been made only to hide the real age of the convict appellants and to engender doubt in the mind of the Court."*

36. Before the High Court Division, it was further argued that the appellants had neither any intention to kill Trisha nor any knowledge that she would jump into the pond and die because of drowning due to their alleged act of chasing and death of Trisha was purely an act of accident, the appellants could not, in any way, be found guilty of the charges of the commission of offence under sections 302/34 of the Penal Code, at best the appellants committed an offence under section 304A of the Penal Code. Therefore, the order of conviction and sentence passed by the Sessions Judge was not sustainable in law. The High Court Division though accepted the argument that the appellants had no intention to kill the deceased, confirmed the death sentence on the finding that acts carried out by convict-appellants were imminently dangerous acts and convict-appellants had requisite knowledge that acts would in all probability cause Trisha death.

37. Before we proceed to see the soundness of the submissions of the learned Counsel for the appellants and the learned Deputy Attorney General for the State keeping in view the findings of the High Court Division and the points on which leave had been granted, we consider it necessary to have a brief account of the evidence on record adduced by the prosecution.

As stated earlier, of the 26 witnesses produced by the prosecution, only PW24 was tendered. Of the remaining 25 witnesses, in fact, PW3 is the only witness who saw the actual part of the occurrence. This witness in his deposition categorically stated that at the time of occurrence, he was a student of class X of Gaibandha Islamia High School; on 17.07.2002, like every day, after school hours at 3:00 p.m. he practised handball for half an hour in the field of school and then started for his home at Khapara, Gaibandha town and when he came in front of Gaibandha Government Primary School, he found that school hours of Madhapara Government Primary School was also over and he saw Trisha coming out from school and going towards her home in front of them, when Trisha reached in front of Matrisadan, the appellants came on her way from a tea stall and seeing them Trisha started running and the appellants also ran behind her. Trisha entered into a lane running, the appellants also chased her, seeing the appellants chasing Trisha, the PW went ahead to see what they were going to do to Trisha. The PW saw the appellants to encircle Trisha on the bank of the pond of Khapara. Trisha after keeping her school bag on the bank of the pond jumped into it, her body and head went under water. Trisha raised her two hands and begged for life. He further stated that the appellants, Shahin and Asha wanted to rescue Trisha, but appellant, Modern forbade them saying if they went to rescue her, they might be put into trouble and then none of them rescued her; when Trisha

had been completely drowned, the appellants left the place. He also complained that while leaving the place of occurrence, appellant, Modern threatened him not to disclose the incident to any one and if he did so, he would be driven away from the 'para'. This PW also made statements before Mr. Kiron Chandra Roy, Magistrate, first class, Gaibandha (PW22) under section 164 of the Code. His statement was proved by PW22 and was marked as exhibit-'3'. This statement was recorded by the Magistrate on 18.07.2002, i.e. the next day of the occurrence. In the statement, this PW categorically stated the fact of chasing Trisha by the appellants to Khapara, the encirclement of Trisha by them and her jumping into the pond and drowning. The PW was cross examined by the state defence lawyer. Although there was some minor discrepancies as to the other facts as stated by him in his deposition as PW, the fact that he saw the appellants to chase Trisha upto the lane of Khapara and then her encirclement by them and jumping of Trisha into the pond and then her drowning remained unassailed. PW2 is also a very vital witness. This PW did not see the actual occurrence of chasing Trisha by the appellants upto the pond of Idris Ali at Khapara. He deposed that on the date of occurrence (17.07.2002), at about 3:30 p.m., the appellants came to his shop and they after taking cigarette, tea and *pan* remained sitting there and at about 4:00/4:15 p.m., after school hours of Madhapara Government Primary School when Trisha was going home in front of his shop, the appellants advanced towards her and then Trisha started going fast and she was followed by the appellants and after some time, he heard that Trisha died because of drowning in the pond of Idris Ali at Khapara. Subsequently, he heard that the local people apprehended the appellants and handed them over to the Police. Thus, this PW clearly corroborated the testimony of PW3, the eye witness that after school hours while Trisha was going home, the appellants chased her. This PW also made statements before PW22 and his statement was recorded under section 164 of the Code on 21.07.2002. His statement was proved by PW22 and marked as exhibit-'2'. The PW made similar statements as made before the Court as a witness. In cross examination by the state defence lawyer, no material contradiction could be extracted from the PW to shake the credibility of his testimony as stated hereinbefore. It further appears that PWs 13 and 14 deposed that they along with others apprehended the appellants while they were making good their escape from the scene of the occurrence. They further deposed that the local *murubbis* handed over the appellants to the police and their testimony of apprehending the appellants were corroborated by PWs 4, 5, 9, 10, 11 and 17. The testimonies of these PWs proved that the appellants were arrested from the place of occurrence and belied the defence case that they

were apprehended from the house of PW1 when they went to see the dead body of Trisha. PWs 1, 4, 5, 6, 7, 8, 9, 10, 11,13 and 14 although did not see the occurrence stated that they heard that while Trisha was going home after school hours, the appellants chased her to the lane of Khapara and she being encircled by them jumped into the pond and died because of drowning. PWs 1, 5 and 7 further deposed that previously the appellants used to tease Trisha on her way to and from school. By cross examining these witnesses, the defence could not make them unworthy of believing them.

From the testimonies of PWs 18 and 19, we find that they recovered the body of Trisha from the pond and sent the body to Gaibandha Sadar Hospital where the Doctor on duty declared her dead. From the evidence of PW21, Dr. Amal Chandra, it is clear that Trisha died due to asphyxia as a result of drowning.

PWs 15 and 16 who were the head-master and the class teacher of Trisha respectively of Gaibandha Madhapara Government Primary School deposed that Trisha was a student of that school and on the date of occurrence, i.e. on 17.07.2002, she had gone to school and after school hours, she started for home and then they heard that Trisha died because of drowning. The defence by cross-examining these witnesses, could not, in any way, shake the credibility of their testimonies that Trisha was a student of Madhapara Government Primary School and on the date of occurrence, she had gone to school and after school hours started for her home.

38. All the appellants made confessional statements before PW 22. This PW categorically stated that he recorded the statements of the three appellants under section 164 of the Code observing all formalities as mandated by law. He categorically stated that none of the appellants made any complaint of torture and duress and thus made them compel to make the confessional statements, he further stated that he gave .three hours time to each of the appellants for their reflections before making their confessional statements. We have gone through the confessional statements of the 3(three) appellants. It appears to us that the confessional statements of the three appellants were voluntary and true. In their confessional statements, the appellants stated the fact of love of Modern for Trisha and chasing her into the lane of Khapara and the confessional statements are clearly in line with the testimonies of PWs 2 and 3. However, we consider it relevant to quote the confessional statements of the three appellants which are as follows:

Statement of Md. Mchedi Hassan Modern

"আমি তৃষাকে ভালবাসতাম। কিন্তু তৃষা এবং তার আত্মীয়-স্বজন ইহা পছন্দ করত না তাই আমি তাকে অপহরণ করে ঢাকা নিয়ে বিবাহ করার মনস্থির করি। গত ১৭.৭.০২ইং তারিখ বিকাল ৩:৩০টার দিকে আমি

আমার বন্ধু শাহীন ও আশা গিয়া মাতৃসদনের নিকট অপেক্ষা করতে থাকি। তৃষা সে পথে স্কুল থেকে বাড়ী ফিরছিল। আমাদিগকে দেখে সে প্রথম খাঁ পাড়ার গলির ভিতর প্রবেশ করে। কিছুক্ষণ পর সে পুনরায় রাস্তায় বের হলে আমরা তার দিকে এগিয়ে যাই। সে তখন দৌড় দেয়। এক পর্যায়ে তৃষা পুকুরে ঝাপ দেয়। আমি তখন বাচানোর চেষ্টা করলে আমার বন্ধুরা বলে যে লোক জানা জানি হবে। মামলা হবে তখন আমরা পলানের চেষ্টা করলে তখন দেখে ফেলে পরে লোকজন ধরে ফেলে।"

Statement of Md. Shahin "গত ১৭.৭.০২ তারিখ বিকালে মেহেদী হাসান মর্ডান আমাকে ডেকে নিয়ে যায়। সে তৃষা নামে একটি মেয়েকে ভালবাসত। তাকে ঢাকায় নিয়ে গিয়ে বিয়ে করবে বলে জানায়। ঘটনার দিন আমি মর্ডানের সংগে সিভিল সার্জন সাহেবের বাড়ীর সামনে যাই। তখন তৃষা সে পথে আসে। আমি, মর্ডান এবং আশা তাকে ধরতে যাই। তখন তৃষা দৌড় দেয়। এক সময় সে পুকুরে ঝাপ দেয়। আমরা কিছুক্ষণ অপেক্ষা করেই চলে আসি।"

Statement of Ariful Islam Asha

"গত ১৭.৭.০২ বিকাল ৩:৩০টার সময় শাহীন ও মর্ডান আমাকে ডেকে নিয়ে যায়। মর্ডান তৃষা নামে একটি মেয়েকে ভাল বাসত। সে ঐ দিন তাকে হাইজ্যাক করে ঢাকা নিয়ে গিয়ে বিবাহ করতে চায়। বেলা ৩:৩০ টার দিকে তৃষা স্কুল থেকে বাড়ী যাচ্ছিল। মর্ডান তখন বলে চল তৃষাকে ধরি। আমরা তার দিকে যেতে থাকলে সে দৌড় দেঃয় এক পর্যায়ে তৃষা পুকুরে ঝাপ দেয়। আমরা কিছুক্ষন অপেক্ষা করে চলে আসি।"

39. From the evidence of the PWs as well as the confessional statements of the appellants, it is clear that the appellants chased Tristia upto the pond of Idris Ali at Khapara while returning home after school hours but then she jumped into the pond herself (নিজে নিজেই) apparently to save herself out of the clutches of the appellants being encircled by them. From the confessional statements, it is also clear that appellant, Modern loved Trisha and he wanted to abduct her to marry and the other two appellants, namely: Shahin and Asha just accompanied him to fulfill his desire.

40. *In view of the above, now a very pertinent question to be decided is whether the appellants committed the offence of culpable homicide within the meaning of section 300 of the Penal Code and thus, .made themselves liable .for punishment under sections 302/34 thereof.*

Section 302 of the Penal Code has simply provided punishment for murder, and to see whether the appellants have committed murder, we are to fall back upon sections 299 and 300 of the Penal Code which read as follows:

299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. (Illustrations are not quoted as being not relevant in the context)

Explanation 1.- A Person who causes bodily injury to another who is laboring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2. Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3. The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly.-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

Fourthly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

(There are illustrations, exceptions and explanation to the section. Those are not quoted being not relevant in the context)

41. *From a reading of section-299, it appears that a person shall be guilty of the commission of offence of culpable homicide if he does an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with knowledge that he is likely by such act to cause death. Three explanations have been added to the section. The explanations have stipulated of the bodily injuries to be inflicted on another person causing death to that person and the other act causing death of a child in the mother's womb respectively to attract the offence of culpable homicide. From a reading of section 300 it is clear that all culpable homicides are not murder. In the section, there are four clauses. As per this section except in the cases excepted therein culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or- If the person commit-*

ting the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. However, we are not required to consider the exceptions mentioned in the section, because these exceptions will come into play only when it is proved or established beyond reasonable doubt that the accused, here the appellants commit the offence of culpable homicide.

42. *From a combined reading of the two sections (sections 299 and 300) of the Penal Code, it is apparent that in order to convict a person under section 302, the prosecution must prove that he had the intention to cause death of the victim by an act as contemplated therein or the knowledge that an act done by him would cause death of the victim. So, we are to see whether the acts of the appellants in chasing Trisha upto the pond of Idris Ali at Khapara and thus, preventing her from going home in her normal route and then encircling her prompting her to jump into the pond which eventually caused her death at all attract any of the clauses of section 300 of the Penal Code.*

43. From the prosecution case, vis-a-vis, the evidence on record, particularly, those of the eye witness (PW3), the confessional statements of the appellants and the medical evidence, it is crystal, clear that the appellants did not have any intention of causing death of Trisha. Admittedly, the appellants did not cause any bodily injury on the person of Trisha and no such injury was also found on the body of Trisha, so the question of attracting the first 3(three) clauses of the section does not arise at all. The learned Deputy Attorney General has tried to bank upon the Fourth clause of section 300 by submitting that the appellants knew that if the victim jumped into the pond, she could be drowned and that she could die because of such drowning. Similar view has been taken by the High Court Division in coming to the finding that the appellants committed the offence under sections 302/34 of the Penal Code. The High Court Division observed that *"Hounding of victim of crime Trisha by convict-appellants up to the hank of episode pond and jumping on the pond in despair and non-action on the part of convict-appellants to rescue and save victim Trisha in spite of her offering imploration to save had been well established by clinching and credible evidence of PW-3, judicial confessional statements of convict-appellants, other evidences and facts and circumstances of the case."* So, now we are to examine whether the High Court Division was justified in taking the said view, in other words, whether the prosecution could bring home the charges levelled against the appellants under sections 302/34 of the Penal Code.

44. It is not the prosecution case that being chased by the appellants, Trisha straightaway jumped into the pond to save herself out of their clutches or the

appellants pushed back Trisha into the pond or that they actually caught hold of Trisha and she while fighting to free herself out of their clutches fell into the pond. The prosecution case was that the appellants after chasing Trisha upto the bank of the pond of Idris Ali at Khapara encircled her from all sides and finding no way to escape, she jumped into the pond. In this regard, the testimony of PW3, the only eye witness, is very pertinent. He said to the effect "... তারপর খাঁপাড়া পুকুরের পাড়ে আসামীরা তৃষাকে ঘিরে ফেলে। তৃষা তখন তাহার স্কুল ব্যগটি পুকুর পাড়ে রাখিয়া পুকুরের পানিতে লাফ দেয়। তৃষার শরীর ও মাথা পানিতে ডুবিয়া যায়।" From this, it is obvious that before jumping into the pond, Trisha got chance and time as well to keep her school bag on the bank of the pond. The circumstances further suggest that Trisha jumped into the pond on the spur of the moment. Therefore, the question of knowledge of the appellants that Trisha would jump .into the pond being encircled by them, on the bank of the episode pond, does not arise at all.

45. A plain reading of the Fourth clause of section 300 of the Penal Code shows that in order to attract the clause, the act(s) must be such that the person (here the appellants) committing the act must have the knowledge that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and the commission of the act must be such that such act without any excuse for incurring the risk of causing death or such injury as aforesaid. In the instant case, as already stated, Trisha suddenly jumped into the pond and then drowned. And therefore, by no logic, it can be said that the appellants knew that because of their chasing and subsequent encirclement, Trisha would jump into the pond and would be drowned and eventually, would die. From (he confessional statements of the appellants along with the evidence of the prosecution witnesses, it is clear that the intention of the three appellants *in* chasing Trisha was to abduct her so that appellant-Modern, could marry her.

46. In conclusion, we say that in the facts and circumstances of the case and the evidence on record, Fourth clause of section 300 is not at all attracted. The High Court Division totally misconceived Fourth clause of section 300 vis-a-vis the prosecution case in observing that:

> "acts carried out by convict-appellants were eminently (sic) dangerous acts and convict-appellants had requisite knowledge that acts would in all probability cause death, though, there was no intention to cause death to victim Trisha. In other, words, it can be well said that convict-appellants knew that their acts were also eminently (sic) dangerous that those must in all probability would cause death. Convict-appellants must have known that they were running the risk of causing the death of victim Trisha and they had no excuse for incurring that risk and the offence

must be taken to fall within Fourth clause of section 300 of The Penal Code and offence of convict-appellants was culpable homicide amounting to murder, even if, they did not intend causing death of victim Trisha. Prosecution, thus, could bring home the charge of section 302 of the Penal Code beyond all shadow of doubt."

and thus fell into an error in finding the appellants guilty under section 302 of the Penal Code while confirming the sentence of death awarded against them by the learned Sessions Judge.

47. Another pertinent question to be decided is as to whether the omission of the appellants to rescue Trisha while drowning after she jumped into the pond amounts to "illegal omissions" and thus to construe as "acts" within the meaning of section 32 of the Penal Code and to fix them up with the commission of the offence of culpable homicide within the meaning of section 299 thereof or any of the explanations thereto and find them guilty of the charges brought against them under sections 302/34. The learned Deputy Attorney General has submitted that the failure of the appellants in rescuing Trisha, while drowning, was an act of illegal omission on their part within the meaning of section 32 of the Penal Code, so they were guilty of the commission of the offence of culpable homicide within the meaning of section 299 thereof, the High Court Division rightly confirmed the order of conviction and sentence passed by the learned Sessions Judge against them finding them guilty under sections 300/34 and as such, no interference is called for with the impugned judgment and order. In section 32 of the Penal Code, the words, which refer to "acts done", have been also extended to "illegal omissions." But "illegal omissions" within the meaning of the Penal Code have to be understood and judged by the term illegal as used in section 43 thereof which reads as follows:

> "43. The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action: and a person is said to be "legally bound to do" whatever it is illegal in him to omit."

Thus "illegal" means anything prohibited by law; which constitutes an offence if law prohibits. The word illegal as expressed in the section is applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action; a person is said to be legally bound to do whatever it is illegal in him to omit. Yes assuming that the appellants could have rescued Trisha, while drowning, but they did not do so and thereby omitted to do some act, but that omission on their part cannot, in no way, be termed as "an illegal omissions" within the meaning of section 32 read with section 43 and therefore, such omission does not attract section

299 or any of the explanations thereto and thus to find them guilty of the charges brought against them under sections 302/34 of the Penal Code. To make it clearer, it can be said that to bring an omission within the periphery of section 32 of the Penal Code, it is incumbent that the omission must be illegal and the onus is surely upon the prosecution show that omission (here failure to rescue Trisha while drowning) which is being treated as an act, is either an offence or is prohibited by law or which furnishes ground for a civil action as stipulated in section 43 thereof. But we could not lay our hand on any provisions of the Penal Code or any other law, which has termed the omission on the part of a person(s) (here the appellants) to rescue a drowning person (here Trisha) as illegal and therefore, the question is answered in the negative.

48. We have considered the other provisions of the Penal Code to see whether the evidence on record attracts any other penal provisions thereof so that the appellants can be found guilty of such offence and can be convicted accordingly. But we could not fix any provision of the Penal Code.

49. We have also given our anxious thought to see whether the acts of the appellants attract any penal provisions of the Ain, 2000 and we find that the evidence clearly 'attracts the provision of section 7 of the Ain, 2000. This will be clear if we see the definition of "অপহরণ" as given in section 2(খ) of the Ain, 2000 which reads as follows:

> (খ) "অপহরণ" অর্থ বল প্রয়োগ বা প্রলুব্ধ করিয়া বা ফুসলাইয়া বা ভুল বুঝাইয়া বা ভীতি প্রদর্শন করিয়া কোন স্থান হইতে কোন ব্যক্তিকে অন্যত্র যাইতে বাধ্য করা;

"অপহরণ" has been made punishable under section 7 of the Ain, 2000. As per definition given in the Ain, 2000 "অপহরণ" shall be complete the moment a person (নারী/শিশু) is compelled to go from one place to another place either by force or by allurement or by enticement (ফুসলাইয়া) or through misunderstanding or by threat. Section 7 reads as follows:

> "৭। **নারী ও শিশু অপহরণের শাস্তি।**– যদি কোন ব্যক্তি (৫) এ উল্লিখিত কোন অপরাধ সংঘটনের উদ্দেশ্য ব্যতীত অন্য কোন উদ্দেশ্যে কোন নারী বা শিশুকে অপহরণ করেন, তাহা হইলে উক্ত ব্যক্তি যাবজ্জীবন করাদণ্ডে বা অন্যূন চৌদ্দ বৎসর সশ্রম কারাদণ্ডে দণ্ডনীয় হইবেন এবং ইহার অতিরিক্ত অর্থদণ্ডেও দণ্ডনীয় হইবেন।"

50. In this case, it has been proved beyond reasonable doubt that after school hours, Trisha was going home (not at Khapara), but was prevented by the appellants from going there and she had to go to Khapara lane because of the chase led by the appellants and thus, she was compelled to go from one place to other within the meaning of section 2(Kha) of the Ain, 2000 and chasing definitely involved the element of threat within the meaning of definition of "অপহরণ". Therefore, the appellants clearly committed the offence under section 7 of the Ain, 2000. These

factual and legal aspects of the case in spite of having been brought to the notice of the High Court Division, though in a round about way, did not find merit on the finding that Trisha had not been abducted by the appellants and that *"Examination of judicial confessional statements signifies that convict appellants had intention to abduct Trisha. "* The High Court Division concluded by saying that *"attempt to abduct has not been shaped an offence in the Ain, 2000."* In taking the above view, the High Court Division totally missed the words ". . . কোন স্থান হইতে কোন ব্যক্তিকে অন্যত্র যাইতে বাধ্য করা।" as used in the definition of "অপহরণ" in the Ain, 2000. It appears to us that the High Court Division suffered from the intuition that "কোন স্থান হইতে কোন ব্যক্তিকে অন্যত্র যাইতে বাধ্য করা" must be a far place; It further appears to us that the High Court Division was obsessed with the definition of abduction as given in section 362 of the Penal Code in corning to the finding that there had been no abduction, but there was an attempt to abduct.

51. The next point to be considered by us is whether papers were filed by the appellants in the trial Court at the very beginning of the trial to show their age under 16 and whether the High Court Division was justified in affirming the finding of the learned Sessions Judge that from the size, the facial appearance and the height, the appellants appeared to him major and were above 18 years of age. To decide the point, we are to see the definition of child as given in section 2(f) of the Act, 1974 and the other relevant provisions therein:

> "child" means a person under the age of sixteen years (emphasis supplied), and when used with reference to a child sent to a certified institute or approved home or committed by a Court to the custody of a relative or other fit person means that child during the whole period of his detention notwithstanding that he may have attained the age of sixteen years during that period.

Sub-section (1) of section 6 of the Act, 1974 has imposed a bar to charge a child with, or tried for, any offence together with an adult notwithstanding the provisions of section 239 of the Code or any other law for the time being in force. Sub-section (2) of the section has further provided that if a child is accused of an offence for which under section 239 of the Code or any other law for the time being in force such child but for the provisions of sub-section (1) could have been tried together with an adult, the Court taking cognizance of the offence shall direct separate trials of the child and the adult. Section 3 has empowered the Government to establish one or more Juvenile Courts for any local area by notification in the official gazette notwithstanding anything contained in the Code. Section 4 has specified 5(five) classes of Courts who have been empowered to exercise the powers of Juvenile Courts. Sections 5 and 7 have dealt with the powers of Juvenile Courts and its sittings. From a com-

bined reading of these sections, it is clear that in order to attract the jurisdiction of the Juvenile Court under the Act to try an offence, one must be a child within the meaning of section 2(f) of the Act, 1974 as quoted hereinbefore. In the context, section 66 of the Act is relevant which is as follows:

"66.(1) Whenever a person, whether charged with an offence or not is brought before any criminal court otherwise than for the purpose of giving evidence, and it appears to the Court that he is a child (emphasis supplied), the Court shall make an inquiry as to the age of that person and, for that purpose, shall take such evidence as may be forthcoming at the hearing of the case, and shall record a finding thereon, stating his age as nearly as may be (emphasis supplied).

(2) An order or judgment of the Court shall not be invalidated by am subsequent proof that the age of such person has not been correctly stated by the Court, and the age presumed or declared by the Court to be the age of the person so brought before it shall, for the purpose; of this Act be deemed to be the true age of that person and, where it appears to the Court that the person so brought before it is of the age of sixteen years or upwards, (emphasis supplied) the person shall, for the purpose of this Act, be deemed not be a child."

52. To answer the point, the meaning of the word "appear" used in sub-section (1) of section 66 of the Act, 1974 appears very important and relevant. Since the word "appear" has not been defined in the definition given in section 2 of the Act, 1974, we are to fall back upon the dictionary meaning of the same and that is permissible. Lord Coleridge held in R-V-Peters (1886), 16 Q BD 636 *"dictionaries are not to be taken as authoritative exponents of the meanings of word used in Act of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books."*

53. As per the Chambers Dictionary, 10" edition appear means *"to become visible (emphasis supplied); to present oneself formally before an authority, court, etc; to act as the legal representative or counsel for another; to come into view (emphasis supplied), to come before the public; to perform (on stage or on film, etc); to be published; to be manifest (emphasis supplied); to seem (emphasis supplied). "* In New Oxford Advanced Learners Dictionary as many as 8 (eight) meanings have been shown against the word "appear" and of these 8 meanings, meaning No. 1 is relevant in the context. Meaning 1. appear means "LOOK/SEEM (emphasis *supplied) linking verb (not used in the progressive tenses) to give the impression of being (emphasis supplied) or doing sth SYN SEEM (emphasis supplied): [VADJ] She did not appear at all surprised at the news [V-N]. He appears a perfectly normal per-*

son [v to inf] She appeared to he in her late thirties (emphasis supplied). They appeared not to know what was happening. There appears to have been a mistake [v (that) it appears that there has been a mistake. It appears unlikely that interest rates will fall further. It would appear that this was a major problem." It is also the golden rule of construction that all statutes are to be construed according to the plain, literal and grammatical meaning of the words and when words in a statute are clear and unambiguous they should be construed according to their tenor and meaning for that reflects the intent and purpose of a legislation; the court to construe a provision of a statute according to the ordinary and natural meaning of the language used by the legislature as the language so supplied best declares the intention of the legislature and recourse to any other principle of interpretation is unnecessary. The language used in sub-section (1) of section 66 is very plain, simple, clear and unambiguous. Keeping in view the dictionary meaning of the word "appear" and from a reading of the words "and it appears to the court that he is a child (emphasis supplied)" used in subsection (1) of section 66, it *prima facie* appears to us that the legislature has given a plenary jurisdiction or power to the Court to take a first hand decision by way of presumption/ assumption/ formation of opinion as to the age of a person, whether charged with an offence or not, whenever is brought before it otherwise than for the purpose of giving evidence whether he is a child and then to make an inquiry in that respect as mandated in the section itself. Reading the sub-section in its entirety, it also appears to us that to take recourse to the process of inquiry as to the age of the person so brought before a court and record *a* finding stating his age, it is a pre-condition that the Court must first presume/ assume/ form an opinion that the person so brought is a child.

54. The Act, 1974 is a special law and various benefits have been given in the Act to a child offender which are not available to an adult offender, so to give those benefits to a child offender, the Court before whom a person is brought, must presume/ assume/ form opinion first as to his/her age and if it appears to it that he/ she is a child and then on inquiry as mandated in section 66(1) if it is determined that he is really under the age of 16, then and then only he/ she would be given the benefits of the Act. There is a good logic behind such scheme by the legislature. The reason, as we could see, is that there may be divergent types of cases which may come before a Court. There may be cases when admittedly in the FIR or in the petition of complaint as the case may be or in the charge sheet and may be in a confessional statement made by such person, the age has uniformally been written or mentioned under 16,i.e. may be 14 years, 15 years or just under 16 years and such mentioning of age is not disputed by the

prosecution or the private party concerned, then no presumption/ assumption/ formation of a first hand idea as to whether the person is *a* child or not would be needed or called for. There may be cases when the age of the person so brought is mentioned in the above mentioned documents as 16 or any other approximate age (but not under 16) or even above, there may be cases where no age is mentioned and the person s t claims to be a child by filing documents, but the prosecution or the state or the private party concern opposes the claim of the person to be a child claiming that he/she is adult, i.e. above 16 or high. There may be cases where the age of a person is exaggeratively mentioned by the complaining party or the law enforcing agencies to show him adult, but in fact, he is under the age of 16, yet there may be a case where only in one document, such as, the confessional statement made by a person under section 164 of the Code, as happened in the instant case, in the confessional statements of appellant-Asha recorded by the Magistrate, First Class, his age was mentioned 16, but the Sessions Judge found him major and above 18 along with two other appellants and in all these cases, the Court first has to assume/ presume/ form a first hand idea that the person so brought is a child and, then and then, only it would be obligatory upon it to make an inquiry as to the age of that person in the manner as stated in section 66(1) of the Act, 1974 and record a finding stating his age as nearly as may be (emphasis supplied). If it is interpreted that whenever any person, whether charged with an offence or not, is brought before any criminal Court and he claims to be under the age of 16 on the date of occurrence or on a particular date may be on the date of framing of charge *"then it must be accepted that on that date he could have been below 16 and not above 16"* as opined in the separate opinion by learned brother, Muhammad Imman Ali, J, though actually, the person apparently appears to be above 16 and much more high age as in the instant case, then the Court before whom such person is brought shall have no option but to go for inquiry to determine his/her age 'as mandated in the Section, in that case the Court shall be stripped of the plenary power/jurisdiction given to it by the legislature to presume/ assume/ from its first hand opinion whether that person is a child or not and in the process, the first part of the section shall become meaningless or redundant. But the provisions of a statute cannot be interpreted in such a way that renders any part thereof meaningless or redundant. Moreso, interpretation of a statute cannot be such that nugates the power given to Court by the legislature and giving such interpretation, we shall be questioning the wisdom of the legislature. We must also keep in mind another cardinal principle of construction that the legislature never uses any word unnecessary or without any meaning or pur-

pose and no word in a statute should be treated as surplus or redundant and a construction which would render any part of the language of a statute without any effect will normally be rejected.

55. Presumption/assumption/ formation of opinion by the Court whether the person brought before it is a child or not, as envisaged in sub-section (1) of section 66, may be from his physical appearance (as was presumed the instant case) or with reference to papers and documents produced by the patties concerned and may be in consideration of both. And to presume/ assume/ form such a first hand idea by a Court, it need not be a doctor or a medical expert and no radiological or bone ossification report is necessary. It is also significant to note that even after inquiry the Court shall record a finding as to the age of the person so brought "as nearly as may be." (emphasis supplied)

We conclude by saying that a criminal Court shall be under an obligation to make an inquiry as to the age of a person who is brought before it whether charged with an offence or not, otherwise than for the purpose of giving evidence as mandated in section 66(1) of the Act, 1974, if it appears to it (here the Sessions Judge) that the person so brought is a child. The section has further mandated to take such evidence as may be forthcoming at the hearing of the case for the purpose of determining the age "as nearly as may be"(emphasis supplied). Same view has been taken by this Division in the cases of Bimal Das-vs-the State, 14BLD (AD)(1994) 218 and Abdul Munem Chowdhury @ Momen-vs-The State, 47DLR (AD) 96. In the first case (it was a leave petition), a contention was made on behalf of the accused-petitioner that under section 66(1), it was the duty of the Special Tribunal to find out the age of the petitioner before proceeding with the case. This Division dismissed the leave petition. Mustafa Kamal, J (as then he was) who wrote the judgment for the Court observed that:

> "The said section is applicable when it appears to the Court that a person charged with an offence (or not) is a child. If it does not do so appear he has no duty to ascertain the age of that person. The Special Tribunal, therefore, did not act illegally in the matter."

56. In the second case (it was also a leave petition), the accused-petitioner was facing trial along with others in a Sessions case before the Sessions Judge, Moulavi Bazar. On the date of framing of charge, on 31.08.1994, an application was filed by the petitioner to discharge him from the case on the ground that he being a minor was liable to be tried only under the Act, 1974 and not under sections 302/34 of the Penal Code along with others. The application was rejected on 17.09.1997, against which the petitioner took a revision, which was summarily rejected by the High Court Division

and then the leave petition was filed. In this case, a contention was made on behalf of the petitioner that his application was wrongly rejected ignoring his age as entered in the registration card produced by him. The petition was dismissed by this Division. ATM Afzal, J (as then he was) who wrote the judgment for the Court held as follows:

> "Under section 66 of the Children Act it is for the Court to consider whether a person charged with an offence and brought before it for trial appears to be a child or not and then to proceed accordingly. In the instant case the learned Additional Sessions Judge observed that the age of the petitioner could not be less than 16 years. He also noticed that there was sign of interpolation in the registration card and the certificate issued from the school. Therefore, he could not rely upon the documents produced by the petitioner."

Sub-section (2) of section 66 also postulates that an order or judgment of the Court shall not be invalidated by any subsequent proof that the age of such person has not been correctly stated by the Court, and the age presumed or declared by the Court to be the age of the person so brought before it shall, for the purposes of the Act, be deemed to be the true age of that person and, where it appears to the Court that the person so brought before it is of the age of sixteen years or upwards, the person shall for the purpose of this Act be deemed not to be a child. Interpretation of sub-section (1) is equally applicable in respect of the words *"where it appears to the Court that the person so brought before if is of the age of .sixteen years or upwards, the person shall, for the purpose of this Act. be deemed not to be a child" as used in sub-section (2).*

57. Learned brother Muhammad Imman Ali, J in giving his separate opinion about appellant, Ariful Islam Asha (hereinafter referred to as Asha) that on the date of occurrence, he was a child as in his confessional statement recorded under section 164 of the Code on 20.07.2002, he claimed to be about 16 years of age (occurrence took place on 17.07.2002), but *"neither the Court nor the prosecution took any steps to act in accordance with section 66 of the Children Act",* though he observed *"However, since the trial is over (here is no practical gain to be had in inquiring into the procedures followed or not followed during trial of the instant case."* He has observed that the Judges are not experts in assessing age and has also discarded the idea of assessing the age on physical appearance and in support of his view, has relied upon the cases of Mahomed Syedol Ariffin bin Mahomed Ariff-Vs-Yeah Oai dark, AIR 1916 Privy Council 242, his own article published in the journal section of 61 DLR, 33, Hasina Begum-Vs-State and another, 1BLC 315 and Prafullah Kamal Bhattacharya-Vs-Ministry of Home Affairs, Govt. of Bangladesh 28 DLR, 123.

58. The first case arose from a judgment and order of the Court of Appeal

of the Supreme Court of the Straits Settlement. The action was brought by the respondent, who was money-lender, against the appellant for certain sums of money, in all, amounting to 29,521 dollars. To this action, the appellant lodged a defence that at the time of the transaction sued upon, he was an infant. It appears that certificate was procured from a .doctor to show that the defendant was 21 years of age when the property was mortgaged against the loan taken by him. On the other hand, in support of the case of the defendant entry, in book of birth and death in the family kept by the father of the minor, *ante litem motem* was produced. In the above context, their Lordships opined that *"Doctor's certificate which* is *only an assessment of opinion and the minor's declaration before the Magistrate as to age are no proof"* and discarding the doctor's certificate accepted the entry, in book of birth and death in the family kept by the father of the minor considering the provisions of section 32 of the Straits Settlement Evidence Ordinance, 1893. The second case arose out of application filed under section 491 of the Code. The question involved was to the release of a girl from judicial custody and a Division Bench of the High Court Division relying on the school certificate of the girl held that as soon as the girl attains the age of 18 years from 01.12.1978, she must be released from the judicial custody on her own bond even if the criminal case remains pending. The learned Judges considering section 45 of the Evidence Act observed that the opinion of the doctor that the age of the girl was between 16 and 18 years was absolutely vague and indefinite, so the report could not be relied upon. The last case also arose out of an application under section 491 of the Code. In that case, rule was issued asking the opposite parties, namely, the Ministry of Home Affairs, Government of Bangladesh and others as to why the detenue Shipra Rani Bhattacharya should not be released from jail custody and be made over to the custody of her father. The petitioner claimed that her daughter was minor and was born on 13.06.1963 and was a student of class VIII of Elenga Girls' High School. None of the opposite parties appeared to contest the Rule. The detenue appeared through a privately engaged lawyer to contest the Rule. The question for determination was the age of the detenue. A medical Board was formed at the direction of the High Court Division which after examining the detenue opined that she was about 19 years old. But the learned Judges discarded the opinion of the medical Board as to the age of the detenue relying on other documents produced before them such as school certificate, passport and declaration made before the Indian Immigration authorities while the detenue with his family entered into India on 13.08.1971, i.e. during the war of liberation. The girl was also produced before the learned Judges

and seeing the detenue, they observed as under:

> "We have seen her, but from her appearance she does not show her to be 19 years old. The age as given by the Medical Board does not fit in her appearance. She looks very tender-aged, and though it is not possible for us to determine her exact age from her appearance, we think that her age could not be 16 years. To us she appears to be aged below 16 years and as such she is minor."

59. In none of the cases relied upon by the learned brother, the Court was authorized by any statute to presume/ assume/ form an opinion as to the age of a person as in the instant case. So whatever observations might have been made in those cases cannot be followed in interpreting the language of sub-section (1) of section 66 of the Act, 1974 as to whether the Court was justified in observing that all the appellants were major and above 18 years of age from the other judgments relied upon by my learned brother (of which he was the author Judge while in the High Court Division), it does not appear that the language used in section 66(1) to the effect "and it appears to the Court that he is a child (emphasis supplied)" was at all considered and interpreted. In the context, we like to observe further that a provision of law has to be interpreted and applied in the given facts of a case and it cannot be interpreted or applied in the vacuum.

60. For the discussions made above, we hold that this Division rightly interpreted the provisions of section 66(1) of the Act, 1974 in the cases of Abdul Momen Chowdhury @. Momen-Vs-State (supra) and Bimal Das-Vs-the State (supra) in taking the view that under the section, it is for the Court to consider whether a person charged with an offence and brought before it for trial appears to be a child or not and then to proceed accordingly and if it does not so appear to a Court that the person so brought is a child, it has no duty to ascertain the age of that person. Therefore, question of revisiting those decisions as opined by the learned brother does not arise at all (the case of Mona alias Zillur Rahman-Vs-the State will be considered later on in another context). It may be kept on record that neither at the hearing of the leave petition (as apparent from the leave granting order) nor at the final hearing of the appeal, submission was made by the learned Counsel for the appellants that the decision of this Court in the said two cases were wrong and those need to be revisited or reconsidered.

61. Now, we shall see whether, in the instant case, there was any scope of appearance to the Sessions Judge that the appellants were under the age of 16 years when they appeared before him at the time of framing charge and thus to oblige him to make an inquiry as to their age within the meaning of sub-section (1) of section 66 of the Act, 1974.

62. In the FIR, the age of the appellants, namely: Md. Mehdi Hasan, Asha and Md. Shahin were mentioned as 19,

20 and 19 respectively, so in the charge sheet as well. In the confessional statements of the appellants, their ages were recorded as 19, 20 and 16 years respectively, i.e. the appellants were of the age of 16 and above. From the record, it does not appear that at any point of time, right from the stage of framing charge upto the examination of the Investigation Officer (PW26) or even prior to that, i.e. before the framing of charge, fact that the appellants were under the age of 16 years, was raised. From the impugned judgment, it is also apparent that during examination of the appellants under section 342 of the Code, their ages were mentioned as 19, 20 and 19 respectively and admitting their said age, they duly put their signatures therein. The learned Sessions Judge who had the privilege of seeing the appellants physically in the dock clearly stated in his judgment that "অত্র মোকদ্দমায় আসামীদের বিরুদ্ধে অভিযোগ গঠনকালে আদালত আসামীদের আকার, চেহারা ও উচ্চতা পর্যবেক্ষন করে দৃঢ়মত পোষণ করেছে যে, আসামীরা সকলেই সাবালক এবং তাদের সবারই বয়স ১৮ বৎসরের উর্দ্ধে। কাজেই আসামীগণকে নাবালক দাবী করা এবং নাবালকের সুবিধা পাওয়ার কোন কারণ নেই।" and as discussed above, the learned Sessions Judge was quite authorized under section 66(1) of the Act, 1974 to hold such presumption/ assumption/ formation of his opinion as to the age of the appellants. So, there was no scope of appearance to the Sessions Judge that the appellants were under the age of 16 years and as such, the question of making an enquiry as to their age within the meaning of section 66(1) did not arise at all. It is to be also noted that in reply to the charges brought against them, none of the appellants (including Asha), at all, claimed that they were children. For the same reason, the learned Sessions Judge did not accept the papers such as registration cards of Secondary School Certificate of appellants, Modern and Asha and the affidavits sworn by the parents of the appellants which were filed during their examinations under section 342 of the Code in a bid to show that they were under the age of 16 years. The High Court Division also on consideration of the age of the appellants as mentioned in the FIR, in their confessional statements and in their examinations under section 342 of the Code, gave specific finding that:

> "From evidence produced and materials placed before court below it is manifestly clear that convict appellants were neither had been child nor juvenile within the meaning of Children's Act during course of commission of felony and also framing of charge. They stand proved to be major or adult at the time of commission of offence and, also, framing of charge."

63. The High Court Division did not take into consideration the documents filed by the appellants during their examinations under section 342 of the Code as those were not proved by examining defence witness. Moreso, the appellants in reply to the question

put to them whether they would examine any defence witness declined to examine any defence witness.

64. We see nothing wrong with the above views taken by the learned Sessions Judge and the High Court Division, because a document has to be proved as per the rules of evidence. When the appellants filed those documents apparently in support of their plea that they were under the age of 16, onus was squarely upon them to prove those by examining competent witnesses, particularly, when there were other documents on record (FIR and charge sheet) showing their respective age above 16 and the learned Sessions Judge while framing charge had already opined that all were major and above the age of 18, but the appellants failed to discharge their onus. And then they putting signatures in the statements under section 342 of the Code knowing fully well that their ages mentioned therein were 19, 20 and 19 respectively made their case worse. In this regard, it is necessary to state that a document(s) filed during the examination of an accused under section 342 of the Code *ipso facto* cannot be taken as proved, particularly, when there are other materials on record to contradict the contents of such documents and further none of the documents filed by the appellants has got any presumptive value as well within the meaning of section 114 of the Evidence Act; none of the documents filed by the appellants including Asha during their examination under section 342 of the Code can be grouped in clause (e) of the illustrations to section 114 of the Act.

65. Learned brother Muhammad Imman Ali, J. in his separate opinion has raised a point as to *"the occasion on which the age of the offender is relevant; whether it should be taken to be at the time of commission of the offence or at the time of framing of charge"* and opined that *"this aspect has been wrongly interpreted by this Division in a number of cases (although he mentioned one only) where it has been held that the relevant time to consider the age is as on the date of framing the charge. "* In support of his opinion, he has referred to the cases of State-Vs-Md. Roushan Mondal @ Hashem, 59 DLR 72, the State-Vs-the Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka and others 16 MLR 254, the State-Vs-the Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka and others, 19 BLT 376 (in all these cases, the learned brother is the author Judge while he was in the High Court Division) and of these cases, he has heavily relied upon the case of Roushan Mondal. He also relied upon the cases of Protap Singh-Vs-State of Jharkhand and another, 2005(3) SCC 551 (the judgment was not unanimous) Jitendra Singh @ Babloo Singh and another-Vs- State of U.P. (2010) 13 SCC 523, Gopinath-Vs-State of W.B. 1984 Supp SCC 228 and another decision from Australian jurisdiction. The point raised by my learned brother was never raised either before

the learned Sessions Judge or before the High Court Division or in the leave petition, in the concise statement or during the hearing of the appeal (emphasis supplied). At the risk of repetition, it needs to be further mentioned that since the learned Counsel for the appellants did not address us on the point as raised in the separate opinion, no reply was called for from the State. It is true that the learned Sessions Judge proceeded in the premise that at the time of framing the charge against the appellants, no objection was taken as to their age and he observed in his judgment that:

> "অত্র মামলার অভিযোগ গঠন কালে আসামীগণ তাদের বয়সের বিষয়ে কোনরূপ আপত্তি উত্থাপন করেনি কিংবা ১-১৭নং পর্যন্ত সাক্ষীগণের দৃষ্টি আকর্ষণ করেনি কিংবা সাফাই সাক্ষীর মাধ্যমে আসামীগনের কম বয়স প্রমানের চেষ্টা করেনি।"

and then by referring to the order passed at the time of framing charge came to the finding as to the age of the appellants as stated earlier. From the judgment of the learned Sessions Judge, it does not appear that any specific point was taken as to what should be the occasion on which the age of the appellants was relevant i.e. the date of commission of the offence or the date of framing the charge. Naturally, the learned Sessions Judge did not say anything in that regard. The subordinate Courts (here the Sessions Judge) do not settle the law. Both the Divisions of the Supreme Court settle the law. From the impugned judgment, it does not appear that any specific point as to what should be the *"occasion on which the age of the offender is relevant"* was raised before it, so the High Court Division did not also dwell upon the same. However, as also quoted earlier, the High Court Division gave specific finding that *"From evidence produced and materials placed before court below it is manifestly clear that convict appellants were neither had been child nor juvenile within the meaning of Children's Act during course of commission of felony and also framing of charge. They stand proved to be major or adult at the time of commission of offence and, also, framing of charge. "* In the context, it is very relevant to refer to rule 5 of Order XX of the Supreme Court of Bangladesh (Appellate Division) Rules, 1988 (the Rules, 1988) which reads as follows:

> "5. The appellant shall not, without the leave of the Court, rely at the hearing on any grounds not specified in his petition of appeal and the concise statement."

From the leave granting order, it is crystal clear that no leave was granted to decide the point raised by the learned brother. In the concise statement filed by the appellants reasons assigned to allow the appeal are exactly same on which leave was ground. To make the point clearer, the reasons need to be perused and the same are quoted below:

> "I. Because the learned Judges of the High Court Division in affirming the Death sentence failed to consider that the confessional statements

made by condemned-petitioners which the trial court and High Court (sic) relied upon in convicting petitioners will categorically show that death of Trisha was accidental and neither there was intention nor knowledge of the condemned-petitioners that due to their alleged act Trisha would jump into a pond and die. So in the absence of any intention or knowledge to cause death that their act is likely to cause death, if even the prosecution case is admitted, the conviction and sentence of the petitioner under section 302/34 of the Penal Code is not sustainable in law and as such impugned judgment and order is liable to be set aside.

II. Because the learned Judges of the High Court Division failed to consider that P.W.3 the alleged eye witness made vital contradiction in between his statement before the learned Magistrate made under section 164 of the Code of Criminal Procedure and before the trial Court further more he himself did not make any attempt to rescue Trisha and as such no reliance can be placed upon his evidence in convicting and sentencing the condemned-petitioners and as such the impugned judgment and order is liable to be set aside.

III. Because the convict-petitioners submitted papers to show their age in the trial court at the very beginning of the trial and also under section 342 of the Code of Criminal Procedure statements and it will be seen from the 342 Code of Criminal Procedure statements of the condemned-petitioners that the age stated by them and written in 342 Code of Criminal Procedure statements originally were tampered by putting fluid on the dates of their birth and inserted different age to show them adult which is evident from the lower court record and said Act is a clear Act of forgery which the learned Judges failed to consider to reject the contention of the defence lawyer, that the trial of the condemned-petitioners has been vitiated as because Sessions Judge has no jurisdiction to try under the Children Act, 1974 youthful offender under 16 years of age and as such impugned judgment and order is liable to be set aside.

IV. Because the learned Judges of the High Court Division misread the evidences of P.W.I0, P.W.11, P.W.I3 and P.W.I4 in coming to finding that the condemned-petitioners were caught from the bank of the pond by them. But the evidence of those witnesses will show that when they reached the place of occurrence hundreds of people assembled there and were trying to rescue the victim from the pond and these witnesses gave hearsay evidence and as such the learned Judges came to wrong finding that those witnesses are eye witnesses to the occurrence and sentenced the condemned-petitioners to death and as such impugned judgment and order is liable to be set aside."

66. It further needs to be pointed out that as, at the time of hearing the appeal, no ground, not specified in the petition of appeal and in the concise statement, was relied upon by the appellants, the question of granting leave by this Court to argue the point raised by the learned brother did not arise at all. More so, a point of law has to be decided in the given facts of a case. In the facts and circumstances of the case, the evidence on record, finding given by the High Court Division and the leave granting order vis-a'-vis rule 5 of Order XX of the Rules, 1988, we are not, at all, called upon to duel and decide the issue raised by the learned brother in his separate opinion. And we are not inclined "to revisit" the decision in the case of Mona @ Zillur Rahman-Vs-the State 23 BLD (AD) 187 as opined by him.

67. However, in an appropriate case, the question may be looked into with notice to the State.

Leave was also granted to consider the submission made on behalf of the appellants that *"it will be seen from the statement made under section 342 of the Code of Criminal Procedure of the condemned-petitioners that the ages stated by them and written in the statement under section 342 the Code of Criminal Procedure were tampered by putting fluid on the dates of their birth and inserted different age to show them adult which evident from the lower Court record and the said act is a clear act forgery which the Judges failed to consider (emphasis supplied) in rejecting the contention of the defence lawyer, that the trial of the condemn petitioners has been vitiated as because Sessions Judge has no jurisdiction to try the case under the Children Act, 1974 the accused being youthful offender under 16 years of age.* " Let us see whether the submission any factual basis.

68. From the impugned judgment, it does not appear that the allegation of tampering the dates of birth of the appellants as mentioned in their statements while examined under section 342 of the Code by putting fluid and thus, inserting different age to show them adult, as taken before Division was made before the High Court Division. Before the High Court Division, it was contended in a general way that at the time of occurrence and at the time of framing charge as well as at the time of examination of the appellants under section 342 of the Code, they were under the age of 16 years, so the learned Sessions Judge committed gross illegality in not treating them juveniles under the Act, 1974 and they being children were required to be tried by Juvenile Court and therefore, the whole trial was vitiated and consequently, the judgment and order of conviction and sentence passed by the learned Sessions Judge could not be maintained.

69. The appellants relied upon the registration cards of Secondary School Certificate Examination of Modern and Asha and the affidavits sworn by their

parents which were filed during their examinations under section 342 of the Code. At the risk of repetition, it is stated that besides these papers, no other paper was filed before the trial Court on behalf of the appellants to show that they were under the age of 16. From the judgment of the learned Sessions Judge, it does not appear that the allegation of tampering the ages of the appellants as stated by them in their statements under section 342 of the Code by putting fluid on the dates of their birth and "inserting different age" thereon was, at all, made before him. We do not also find any earthly reason why there would be an attempt by the prosecution to tamper the dates of birth of the appellants by inserting different dates with the fluid to show them adult when the plea of being under the age 16 was not taken by them till examination of the Investigation Officer. Further, if there was tampering of the dates of birth of the appellants as mentioned in their statements, why they chose not to examine defence witness to prove the documents filed in support of such plea and why they did not take that point before the High Court Division. When the allegation of tampering the dates of birth of the appellants mentioned in their statements under section 342 by putting fluid and inserting different age to show them adult was no taken before the Courts below (the learned Sessions Judge and the High Court Division) which, in fact, are the Courts of facts, we see no factual basis of such allegation and entertain the same now. Therefore, we find no merit in the submission.

70. *For the discussions made above, we are constrained to hold that the prosecution failed to bring home the charges levelled against the appellants under sections 302/34 of the Penal Code and the High Court Division fell into an apparent error in confirming the death sentence awarded against them by the learned Sessions Judge finding them guilty under the said sections. It further appears that both the Courts below approached the case from an emotional point of view rather than sifting the evidence on record in its proper perspective and in arriving at the finding of guilt keeping in mind the culpability of the appellants in view of the charges levelled against them. The Judges should not be swayed by emotion as that may impair even handed justice. In a criminal proceedings where accusation is made against an accused as to the commission of an offence under any law, be it the Penal Code or other law, the Court is to see whether the evidence adduced by the prosecution in the case proved the accusation and if so to hand down the punishment on the accused as per the dictate of the law, no matter how serious or heinous the offence might be.*

Be that as it may, the evidence on record show that the prosecution proved beyond reasonable doubt that the appellants committed the offence under section 7 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and they are liable to

be punished for the commission of such offence. And, in order to do complete justice in the matter, we invoke our power under article 104 of the Constitution and dispose of the appeal finally without sending the case back on remand for trial afresh by the concerned Nari-O-Shishu Nirjatan Daman Tribunal, Gaibandha, under the Ain, 2000. Accordingly, we find the appellants guilty under section 7 of the said Ain and sentence each of them to suffer rigorous imprisonment for 14 years and also to pay a fine of taka 2,000.00 each in default to suffer rigorous imprisonment for 3(three) months more.

The appeal is allowed in part.

The judgment and order of conviction and sentence dated 30.09.2002 passed by the Sessions Judge, Gaibandha in Session Case No.53 of 2002 convicting the appellants under sections 302/34 of the Penal Code and sentencing each of them to death as confirmed by the High Court Division in Death Reference No.44 of 2002 heard analogously with Criminal Appeal No.2967 of 2002 (criminal appeal was dismissed) is set aside. The appellants are acquitted of the charges brought against them under sections 302/34 of the Penal Code. The appellants are found guilty under section 7 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and sentenced to suffer rigorous imprisonment for 14(fourteen) years each and also to pay a fine of taka 2,000.00 each in default to suffer rigorous imprisonment for 3(three) months more.

The jail petition is disposed of accordingly.

71. Nazmun Ara Sultana, J: I have gone through the judgments proposed to be delivered by my brothers, Surendra Kumar Sinha, J., Md. Abdul Wahhab Miah, J. and Muhammad Imman Ali, J. I agree with the reasoning and findings given by Md. Abdul Wahhab Miah, J.

Syed Mnhmud Hossain, J: I have gone through the judgments proposed to be delivered by my brothers, Surendra Kumar Sinha, J., Md. Abdul Wahhab Miah, J. and Muhammad Imman Ali, J. I agree with the reasoning and findings given by Md. Abdul Wahhab Miah, J.

72. MUHAMMAD IMMAN ALI–J: This criminal appeal by leave arises out of judgment and order dated 19.05.2004 passed by a Division Bench of the High Court Division upholding the conviction of the appellants under section 302 of the Penal Code and also confirming the sentence of death.

73. After hearing the matter at length, this Division decided to set aside the conviction of all the condemned accused for murder under section 302 of the Penal Code while finding them guilty and convicting them for abduction under section 7 of the Nari-O-Shishu Nirjatan Daman Ain, 2003 and sentencing them to rigorous imprisonment for 14 years and also to pay a fine of Tk. 2,000 each, in default to suffer rigorous imprisonment for three months more.

74. While I agree with my learned brothers and sister that the conviction should be under section 7 of the Nari-O-Shishu Nirjatan Daman Ain, 2003, for reasons I shall explain in this opinion, I am of the view that accused Ariful Islam Asha was a child at the time of occurrence and he ought to have been dealt with in accordance with the provisions of the Children Act, 1974, hereafter referred to as "the Act", and the Children Rules 1976, hereafter referred to as "the Rules". Moreover, as I shall endeavour to show in the course of my opinion, many misconceptions have surfaced in the judgment of the trial Court and that of the High Court Division with regard to trial of youthful offenders. I feel that such misconceptions, if not pointed out and clarified by this Division, arc likely to propagate further misconceptions in the future leading to miscarriage of justice.

75. The Children Act 1974 is a special law enacted to give various benefits to children under the justice system, in particular to those children who come into conflict with the law and are described as youthful offenders. In fact the law contains favourable provisions in respect of children, which are otherwise discriminatory and not applicable to adult offenders. The law creates a separate and palpably distinct criminal trial and sentencing system, when compared with the system which is in place for adults. However, this positive discrimination, though contrary to article 27 of the Constitution, is a manifestation of article 28(4) which provides:

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

76. Thus the legislature is empowered by the Constitution to enact provisions in the law which are specifically favourable to women, children and any backward section of citizens. Therefore, when any offender is a child the law requires that s/he must, be dealt with in accordance with the provisions of the Act, no matter how serious or heinous the offence might be. The same principle is applicable in cases of offences under special laws. Hence, as soon as a child offender is arrested for any crime, the police are obliged to inform the parents or guardian of the child [section 13(2)] as well the probation officer [section 50]. The Officer-in-Charge of the Police Station must also consider bail of the child even in cases of non-bailable offences [section 48]. Apart from persons whose presence is felt necessary by the Court, all other persons may be excluded from the hearing [sections 9, 10 and 12]. No matter how heinous the offence, a child offender cannot be sentenced to death or imprisonment for life [section 51]. Even upon conviction of offences carrying the death penalty or imprisonment for life, the sentence that may be awarded is detention in a certified institute for a period of between two and ten years [section 52]. S/he

may only be sentenced to imprisonment in exceptional cases to a maximum period of ten years [first and second provisos to section 51]. Thus it is of fundamental importance that an offender, who claims to be a child and as such is entitled to benefits under the law, must be given the opportunity to establish his claim to such rights and those may not be denied due to the whims and caprices of those involved in the juvenile Justice system.

77. At the outset, one must recall the cardinal principle of criminal justice that the benefit of any legal provision must be construed in favour of the accused. Where two different meanings are possible, the one which is more favourable to the accused will be given preference. Hence, when the accused claims to be about (emphasis added) 16 years of age on a particular date, then it must be accepted that on that date he could have been below 16 and not above 16. If he was below 16 he would be entitled to certain substantive and procedural benefits under the Act and the Rules, which should not be denied to him, particularly keeping in mind that if he is wrongfully denied the due benefits he cannot be adequately compensated. Moreover, if he was sixteen years of age on the date of the confession then he must have been below sixteen on the date of commission of the offence, which arguably is the relevant date for calculating age of the accused for the purpose of establishing jurisdiction of the Court under the Children Act, 1974. If the accused can establish that he was a child on the relevant date then the provisions of the Act will be applicable and he will be entitled to all the benefits under that law.

78. It should also be borne in mind that claim to legal rights may be made at any time during the course of the proceedings and should not be allowed to be frittered away by misconceived notions held by trial judges and wrong application of legal provisions. Moreover, substantive rights do not disappear by lapse of time or failure to bring the legal right to the notice of the Judge because the right accrues at the time of framing of the charge (or arguably at the time of commission of the offence, which aspect will be discussed later) and continues to exist. If the accused was a child at the relevant time, then under the Children Act and Children Rules he would have become entitled to all the benefits of a trial as a youthful offender and the effect of those provisions would continue throughout the trial and beyond. Hence, if at any time the accused can establish that he was a child at the relevant time, then he would not be liable to be held in prison during the trial and would automatically become eligible to be sentenced in accordance with sections 51 to 53 of the Act even though the offence may be one which carries a possible death sentence or life imprisonment; section 51 prohibits the imposition of a sentence of death or life imprisonment or imprisonment on a youthful offender.

A sentence of imprisonment may be imposed only under two exceptional circumstances as provided in the first proviso to section 51, and that is limited by the second proviso to that section to a maximum period of ten years. These aspects of sentencing were elaborately discussed in the case of ***Fahima Nasrin v. Government of Bangladesh and others,*** reported in *61 DLR 232.*

79. Another very important issue is the occasion on which the age of the offender is relevant; whether it should be taken to be at the time of commission of the offence or at the time of framing of charge. With due respect, I am constrained to say that this aspect has been wrongly interpreted by this Division in a number of cases where it has been held that the relevant time to consider the age is as on the date of framing the charge. This issue was discussed at length with reference to international instruments and decisions from other jurisdictions in the case of *State vs: Md Roushan Mondal @ Hashem,* reported in 59 *DLR* 72, where it was observed:

> "In view of the international covenants, declarations and other instruments, we feel inclined to the view that the relevant date must be the date on which the offence is committed, otherwise the whole thrust of the law to protect those who are immature, impetuous, unwary, impressionable, young, fickle-minded and who do not know the consequences of their act, would be lost. It is the mental capacity of the offender at the time of committing the offence which is of crucial importance. It was observed in the case of *Pratap Singh v. Slate of Jharkhand and another, 2005 (3) SCC 551* as follows:
>
> *"Children Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing mens rea as in the case of an adult. This being the intendment of the Act, a clear finding has to be recorded that the relevant date for applicability of the Act is the date on which the offence takes place. It is quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child. "*

80. Thus the Supreme Court of India settled the issue over-turning one of their earlier decisions in the case of *Arnit Das v. State of Bihar, 2000* (5) *SCC 488.* We may also add that, the relevant laws of a vast majority of the countries looked at by us take the date of the offence to be the relevant date for applicability of the Act. In at least two decisions of our High Court Division, *Bablu (supra)* and *State vs Deputy Commissioner, Satkhira (supra),* the relevant date has been taken to be the date of occurrence, which we believe, with respect, is the correct approach. On the other hand there are many decisions of our superior courts holding the view that the relevant date is the date of framing charge or commencement of

trial. In our humble and respectful view, this misinterpretation arose initially due to the inaptly applied wording of section 6(1) of the Act, which provides as follows:

"6. No joint trial of child and adult.- (l) Notwithstanding anything contained in section 239 of the Code or any other law for the time being in force, no child shall be charged with, or tried for any offence together with an adult."

Dr. Malik submitted that this provision is concerned with the matter of separate trial for children and does not lay down the point in time at which the age will be relevant for the purpose of determining whether the accused is a child. We are inclined to agree with this submission, particularly in view of the stance taken by the Indian Supreme Court, bearing in mind the similar provision which exists in the (Indian) Juvenile Justice (Care and Protection of Children) Act, 2000:

"18. No joint proceeding of juvenile and person not a juvenile.-(1) Notwithstanding anything contained in section 223 of the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, no juvenile shall be charged with or for any offence together with a person who is not a juvenile."

81. We have noted earlier that the Indian Supreme Court has decided that the relevant date is the date of commission of the offence and not the date of trial.

The view taken by the courts in Australia can be gauged from the decision in *Jason Joseph Braun V R Eric Ebatarintja V R* decided on 14 March 1997 by the Court of Criminal Appeal of The Northern Territory of Australia, (as reported in Australian- Northern Territory Report) where it was deliberated as follows:

"Is the Court's jurisdiction affected if the accused has "attained the age of 17 years" by the time he appears before it charged with offences he committed before he attained the age of 17? That question was squarely posed and answered by Muirhead J 11 years ago in Seears v *Oldfield (1985) 36 NTR 65; his Honour said at 70: "Having considered the matter and the authorities, I am satisfied that the age of the person charged when he or she committed the alleged offence is the critical test of the jurisdiction of the Juvenile Court".*

The learned Judges went on to hold:

"We accept for the purpose of these proceedings the approach to dealing with accused persons who have turned 17, first expressed by Muirhead J in relation to the Juvenile Court in Seears v Oldfield (supra), and adopted as regards the Supreme Court in R v Williams (supra) and the other authorities mentioned (p6)."

82. We also bear in mind that the whole purpose of the Act may be defeated by the capricious dealings of

the investigating agency, who may intentionally or whimsically delay the investigation and thereby deprive the accused the benefits of the Act. It is the act of the youthful offender done in a moment of indiscretion due to his lesser mental faculty that is being targeted by the Act. Therefore the relevant point in time at which to qualify for the benefits of the Act must be the time of the commission of the offence. We may refer to the reasoning found in a decision of the US Supreme Court,

> *"[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."* JohnsonJohnson v. Texas, 509 U.S. 350, 359-362 *(1993).*

83. In the light of our views above and bearing in mind the views already expressed by our Superior Courts, we would, with respect suggest that the 'relevant date' aspect for the purpose of jurisdiction of the Juvenile Court may be rethought and brought into line with the aims and purports of the children's legislation worldwide."

On perusal of the judgments of the instant case delivered by the trial Court and the High Court Division, it is clear that both Courts are confused on this issue. The High Court Division, as quoted in the judgment of the majority, observed, "the convict-appellants were neither has been (sic.) child nor juvenile within the meaning of Children's Act (sic.) during course of commission of felony and also framing of charge. They stand proved to be major or adult at the time of commission of offence and also, framing of charge."

The judgment of the majority in the instant case appears to be based on the premise that the date on which age of the offender is relevant is the date of framing of the charge. I respectfully disagree with such reasoning as the basic foundation of the premise relied upon is faulty. Apart from the discussion on this issue in the *Roushan Mondal* case quoted above, for the purpose of guidance reference may be made to section 83 of the Penal Code, which provides as follows:

"Nothing is an offence which is done by a child above nine and below twelve years of age who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct *on "that occasion."* (emphasis added).

84. Thus the important factor is the sufficiency of maturity on the occasion of commission of the offence. I would therefore strongly urge this Division to revisit its earlier decisions on this issue which held the relevant occasion to be the date of framing of charge and, to that extent, to reverse those decisions. I believe the interpretation given earlier was erroneous and to follow the same in the instant case results in perversity which will inevitably be replicated by the subordinate judiciary.

In the light of the above discussion, I would base my remaining opinion on the premise that the occasion on which the age of the offender is relevant is the date of commission of the offence.

In order for any juvenile offender to benefit from the provisions of the Act, s/he must prove that s/he is a child within the definition as given in section 2(f) of the Act. S/he must be below the age of 16 years. It is the duty of the Court to assess the age of an offender on the very first occasion when s/he is brought before any criminal Court, as provided by section 66(1) of the Act. Naturally, it is important that the age of the offender be assessed at the very initial stage as many consequences follow with regard to whether the offender may be granted bail, or where s/he should be kept in custody pending trial and which Court will have the jurisdiction to try her/him. It is absolutely illegal for a child to be held in jail custody pending trial, as was held in *The State -Versus- The Secretary, Ministry of Home Affairs and others, 16 MLR 254* and in *The State -Versus- The Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka and others, 19 BLT 376.* Thus it is of crucial importance that age is assessed in accordance with the law so that a child is not sent to jail custody in violation of the law.

The way to assess the age is clearly spelt out in section 66, which provides as follows:

"66. Presumption and determination of age.- (1) Whenever a person whether charged with an offence or not, is brought before any criminal Court otherwise than for the purpose of giving evidence, and it appears to the Court that he is a child, the Court shall make an inquiry as to the age of that person and, for that purpose, shall take such evidence as may be forthcoming at the hearing of the case, and shall record a finding thereon, stating his age as nearly as may he."

85. It is therefore a mandate upon the trial judge to hold an inquiry to assess the age and to consider all evidence that may be forthcoming, and *to record a finding stating the age as nearly as may be.* (emphasis added). To say that an "accused is not a child" or "is above 16 years of age" or "is an adult" does not fulfil the requirement of the law. An approximate figure must be given, for example, "the accused is about 12 years old" or "is about 18 years old".

Judges are not experts in assessing age. Indeed doctors, some of whom during the course of their studies gain knowledge in age assessment have been denied the status of being experts in age assessment in a Privy Council decision (cited below). Reference may profitably be made to an article written by the author titled "Are Judges Experts in Determining Age" [61 DLR Journal 33] where this topic has been discussed. A number of decisions were cited on the topic of age assessment based on physical appearance. It was stated that estimating a person's age accurately simply from physical appearance can be so dif-

ficult, if not impossible. So many factors play a part in moulding a person's appearance that it would be foolhardy to guesstimate without having knowledge of all the deciding factors, such as hereditary traits, nutritional habits, exposure to maladies etc. Medical Jurisprudence accepts that age can be estimated only within a range. Hence, in the case of *Hasina Begum vs. Slate and another, 1 BLC 315* where the doctor had opined that the girl was 16 to 18 years old, the High Court Division held that to be absolutely vague and indefinite and chose to rely upon the date of birth given in her school records.

86. It was further observed with reference to decided cases, that where doctors, who are perhaps better placed to estimate age due to their professional qualifications, learning and experience and due to their use of technology such as skiagrams of bone ossification, are not accepted by the Courts as accurate, learned Judges should not venture to assume special expertise in age determination. In the case of *Prafullah Kamal Bhattacharya vs. Ministry of Home Affairs, Govt. of Bangladesh, 28 DLR 123,* referring to many decisions of the sub-continent on the issue of age determination, the High Court Division discarded medical assessment of age in preference to the date of birth as stated in the school admission register. Shahabuddin Ahmed J. (as he was then) observed that it is not possible to determine exact age from appearance, but opined that the girl appeared to be below 16 years.

87. In the instant case, the trial Court depending entirely on physical assessment for the purpose of determining the age, discarded documentary evidence on suspicion. It appears that the Judge found the other two co-accused to be adults and lumped appellant Asha in the same reasoning without giving any specific reason why his document was unacceptable. Moreover, he weighed all the accused on the one scale, whereas the rights accruing to each accused is individual to himself.

88. The High Court Division took the stance that if the accused does not physically appear to be a child then the obligation to hold an enquiry to assess the age is not relevant. This has found favour in the view of the majority of this Division relying upon the decision in *Abdul Munem Chowdhury @ Momen -vs- The State, 47DLR (AD) 96.* In that case while considering section 66(1) it was observed that "The said section is applicable when it appears to the Court that a person charged with an offence (or not) is a child. If it does not so appear he has no duty to ascertain the age of that person." With respect, it must be observed that such argument is tautological. This very question is often asked by many a trial Judge, i.e. whether he is still bound to go through with the process of determining age if the person brought before him does not appear to him to be a child, or if the police state the age to be above 16 years. In other words, does the duty to determine the age arise only if the per-

son brought before *him 'prima facie* appears to be a child? The fallacy of the contention is all too apparent. If he appears to be a child then there would be no need to determine the age. He would automatically become eligible to get the benefit of the provisions of the law. On the other hand, if a fifteen year old youth with a fully grown moustache is brought before the Court and the learned Judge forms the view that he is not a child, or if the police state in the First Information Report (FIR) or Charge Sheet that he is 17 years old then that would absolve the Judge from the need to determine the age. This is also not acceptable. The fact that the informant may be swayed by ulterior motive to give a higher age for the accused cannot be ignored. It cannot be overlooked that the police may capriciously state a higher age in order to avoid the formalities of submitting a separate charge sheet in respect of the child offender. Thus failing to determine the age of the child because in the opinion of the judge or magistrate he does not appear to be a child or because the informant or the police state an age above 16, would lead to grave injustice to children as it may mean that children are unlawfully kept in prison and treated and tried under the same regime as adults. Be it noted that the duty to assess and determine the age arise on the first day when the alleged offender is brought before a criminal court, which in all likelihood would be before a magistrate within 24 hours of his arrest.

89. In the instant case the High Court Division noted that "the learned Additional Sessions Judge observed that the age of the petitioner could not be less than 16 years." Sadly, the High Court Division failed to note that the law requires that the Court must record a finding stating the age as nearly as may be. It must be stated without any hesitation that the learned trial Judge in this case did not record any finding m accordance with section 66(1) of the Act. The learned Additional Sessions Judge stated in his judgment that at the time of framing charge the Court upon observing their features, appearance and height formed the firm opinion that the accused were all adult and that all of them were above 18 years of age. Hence there was no scope for the accused to claim that they are minors or to claim benefits as such. Thus it would appear that the age of the accused was broached at the time of framing the charge and the assessment of the age by the trial Judge was purely on the basis of physical appearance. Furthermore, there does not appear to he any individual indicators. mentioned in respect of accused Asha which led the Judge to believe that he was above 18.

90. In paragraph 55 the High Court division observed that the learned Sessions Judge being trial judge had the opportunity of noticing size, facial appearance and height of convict-appellants and positively held that they were all major and all of them had been above 18 years of age and, thus, dis-

carded their claim as juvenile or child. Thus the claim of the appellants that they were children within the definition of the Children Act was rejected by the High Court Division.

I believe that it is altogether inappropriate for this Division to endorse such arbitrary and archaic method of determining age. To exclude supporting documentary evidence because the Judge came to the conclusion that the accused has a physical appearance of being over 18 years is abandoning logic altogether. This is totally unacceptable. The personal opinion of a Judge cannot override documentary evidence. It is one thing to say that the documentary evidence is not acceptable because it has not been proved in accordance with the Evidence Act or that it has been proved to be false by expert or other evidence, and yet another to say that the document must be false because the Judge was of the firm view that the age of the accused was not as claimed. If the documents had been legally proved to be false or forged then that could lend support to the judge's view that the claimed age is false, but not *vice versa.* This Division is now justifying the decision of the trial Judge for a different reason than that given by the trial Judge. We are not aware if the certificates relating to age were produced and exhibited without any objection, in which case there was no reason why they should be doubted, particularly since they are official documents issued by the appropriate authority and would have probative value under section 114 of the Evidence Act unless and until they are proved to be false or forged. In all fairness, if the Judge had doubts he himself could have taken steps for verifying the veracity of the documents in question.

91. Another issue addressed by the High Court Division was with regard to failure of the accused to agitate the aspect of age and hence jurisdiction of the Court at the earliest stage. In this regard, as we have already noted above, from the judgment of the trial Court it appears that opinion was noted about the age at the time of framing charge. Then palpably, it appears that age was an issue at the inception of the trial. Moreover, we must bear in mind that that litigants depend largely on the vagaries and acumen of their counsel. The failure of counsel to take steps in any case should not necessarily take away the rights of the accused which is enshrined in law. There are many examples where the High Court Division has remanded the case to determine the age of the accused. [See *Monir Hossain (Md) @ Monir Hossain vs The State, 53 DLR 411.]* The decision of the Indian Supreme Court in the case of *Gopinath Ghosh* (cited below) exemplifies how the failure to claim to be a minor at the earliest stage does not deprive the accused from exerting his right even before the Supreme Court for the first time. The essence of the decision is that if the right existed at that time then the right subsists no matter at what stage it is claimed.

92. In order to do justice, one must look at the law in its proper context and gauge the intention behind the legal provision. One may go one step further and suggest that the fate of children accused of having committed an offence should not be left to the vagaries of the learned advocates of the Bar, who often fail in their duties, as they did in the above mentioned case of *Monir Hossain.* Conversely, it may be suggested that, for the sake of justice, the duty should be cast squarely on the Court to determine in every case whether the accused would stand to benefit from the provisions of the Children Act, and, if so, to enquire as to the age of the accused and to determine the age before proceeding further with the trial. This duty becomes all the more obligatory when an accused claims to be below 16 years of age. In such an event the Court must ascertain upon inquiry whether his claim is correct without arbitrarily brushing aside his claim purely on visual assessment. This claim should be raised at the earliest opportunity in order to get the benefits of the legal provisions from the very beginning. However, there is no bar to raising the claim at any time during the trial until and unless the age is assessed and the Court's finding recorded in accordance with section 66 of the Act. Once the age is finally determined on inquiry and recorded in accordance with section 66, then such order is appealable under section 76 of the Act. The final determination of age by the assessing court or, on appeal, the appellate court, will subsist throughout the trial as provided by section 66(2) of the Act.

These days with the improvement of nutrition many boys aged about 14-15 years sport a moustache and beard. Conversely there are some men who never show growth of any beard. To say that a person who has a moustache and beard is *ipso facto* adult would be an arbitrary exercise of non-existent power and unjust denial of legal rights enshrined in statutes.

The conclusion that one would reach is that it is dangerous to state the age of an accused based only on visual assessment.

93. The Privy Council in Saydul Arefin Vs. Y.O. Gark, AIR 1916 PC 242, observed that a Civil Surgeon had issued a certificate showing the age of the person to be 20 years basing his opinion on physical appearance only. In the latter case Lord Shaw observed:

"Doctor's certificate which is only an assertion of opinion and the minor's declaration before the Magistrate as to age are no proof as to age."

94. In the instant case, an indication of the age of the appellant came in his confessional statement. When an accused person makes a confession, it becomes part of the record and is sent to the Court along with other materials. During the trial the judge has direct control over all the materials in the case docket and is bound to consider all the evidence and materials placed

before him. It appears that accused Asha made a statement to the Magistrate on 20.07.2002 giving details of his involvement in the occurrence. This was recorded by a Magistrate First Class under section 164 of the Code of Criminal Procedure. In the printed form of the statement, the age of the confessing accused is written as about 16 years. This figure was either guessed by the Magistrate or given by the accused. It is obvious that the accused was not advised about the benefits under the Children Act of being below 16, otherwise he would have stated that he was 15 years of age. So, it can be presumed that the age stated was recorded based upon the estimation of the learned Magistrate, or if given by the accused, then it was without any ulterior motive and is therefore to be accepted as being as accurate as could be.

95. It is in tact that accused-appellant Ariful Islam Asha was arrested on the date of occurrence on 17.07.2002 and had his statement recorded by a Magistrate 20.07.2002 after having been kept on remand in police custody for two days. At the time of the examination of the accused under section 342 of the Code of Criminal Procedure, all the accused claimed that they were below the age of 16 years and produced some papers in support. Arguments were placed before the court by the learned advocate for the appellants to the effect that they were below 16 years of age. The learned judge also observed that the appellants' lawyer suggested in cross examination to the investigation officer (PW 26) that the accused were aged below 16 years, which he denied. However, these materials and suggestions were not relied upon by the learned trial judge. He noted that if at the time of framing of charge the accused were above 16 years of age then they would not get the benefits of the Children Act and that during the framing of charges in the instant case the court formed the opinion based on their height and other features that all the accused were above 18 years. Accordingly, there is no cause for the accused to claim that they were minors in order to get the benefits as such.

96. In the case of *Gopinath Ghosh V. State of W. B., 1984 Supp SCC 228,* it was urged for the first time before the Supreme Court of India that on the date of the offence the appellant was aged below 18 years and was therefore a child within the meaning of the expression in the West Bengal Children Act, 1959. In view of such contention, the Supreme Court framed the following issue for determination:

> "What was the age of the accused Gopinath Ghosh (appellant) on the date of the offence for which he was tried and convicted?"

and remitted the issue to the learned Sessions Judge, Nadia to certify the finding after giving an opportunity to both sides to lead oral and documentary evidence.

In due course, the learned Additional Sessions Judge, First Court, Nadia received a report of the Chief Medical Officer of Health and also examined him in court. In addition he examined the Radiologist, the Orthopedic Surgeon as well as the mother of the appellant. The case was adjourned as the appellant wanted to examine the headmaster of his school to prove entries from the admission register. The headmaster was duly examined and in due course the learned Additional Sessions Judge after hearing both sides certified his finding that the appellant Gopinath Ghosh was aged between 16 and 17 years on the date of the offence.

97. The Supreme Court of India observed that appellant Gopinath Ghosh never questioned the jurisdiction of the Sessions Court which tried him for the offence of murder. Even the appellant had given his age as 20 years when questioned by the learned Additional Sessions Judge. Neither the appellant nor his learned counsel appearing before the learned Additional Sessions Judge as well as at the hearing of his appeal in the High Court ever questioned the jurisdiction of the trial court to hold the trial of the appellant, nor was it ever contended that he was a juvenile delinquent within the meaning of the Act and therefore, the Court had no jurisdiction to try him; as well as the Court had no jurisdiction to sentence him to suffer imprisonment for life. The Supreme Court of India held that, in view of the underlying intendment and beneficial provisions of the Act read with clause (f) of Article 39 of the Constitution which provides that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment, they considered it proper not to allow a technical contention that this contention is being raised in that Court for the first time to thwart the benefit of the provisions being extended to the appellant, if he was otherwise entitled to it. The Supreme Court went on to hold that the entire trial of the appellant was without jurisdiction and was vitiated. The case was remitted to the learned Magistrate for proceeding further in accordance with law keeping in view the provisions of the Act.

98. In the case of Jitendra Singh @ Babboo Singh and anr. Vs. State of U.P., (2010) 13 SCC 523 the Supreme Court of India adjourned the hearing of the appeal pending before it in order to ascertain the age of the appellant, in spite of the fact that the juvenility of the appellant was not raised during the trial or during hearing of the appeal by the High Court. It was observed that in the ordinary course any one claiming to be a minor on the date of the incident (which is the relevant date under Indian law) ought to make such a claim at the earliest available opportunity before the Trial Court or at least before

the High Court, but the very fact that no such claim is for any reason made, may not by itself disentitle him to do so before the Apex Court.

99. In the present case, with regard to the confessional statement made by the accused the finding of the learned trial judge was that it was true and voluntary and as such it was believable and acceptable. The learned judge further observed that, from the evidence on record, it appeared that all the accused were adults and that they were all above 18 years of age. Upon scrutiny of the records, we do not find any evidence with regard to the age of the accused apart from those produced in their support by the accused themselves when they were examined under section 342 of the Code of Criminal Procedure. So far as accused Ariful Islam Asha is concerned, we find that his age was recorded in his confessional statement as "about 16 years" and there is no suggestion or indication that he was aware about the provisions of the Children Act or that he had been in contact with any lawyer or anyone else who might have advised him to give a lower age in order to get the benefits of the Children Act. Me would therefore, have been below 16 years of age at the time of the occurrence.

100. The death reference and criminal appeal were heard by a Division Bench of the High Court Division. By the impugned judgment dated 19.5.2004 the reference was accepted upholding the conviction and sentence passed by the trial court.

With regard to the claim by the appellants that they were below 16 years of age at the relevant time of occurrence, and the claim of the appellants that they ought to have been tried in accordance with the provisions of the Children Act, the High Court Division observed that the defence claimed that registration cards of Secondary School Certificate Examination along with affidavits produced during the examination of the convict appellants under section 342 of the Code of Criminal Procedure are evidence that the appellant's had been minors at the time of occurrence and framing of charge. The court observed that in their judicial confessional statements the accused had given their ages as 19, 20 and 16 years but in their affidavits they had given dates of birth which make them all below the age of 16 years at the time of their examination under section 342 of the code of Criminal Procedure. However, the court observed that these were all afterthought matters and created documents by which their real date of birth and age could not be screened. The conclusion that the lower age claimed at the stage of the statement under section 342 of the Code was an afterthought may be acceptable in the case of accused Modern and Shahin, but the record shows that accused Asha had all along claimed his age to be around 16. So, his cannot be said to be an afterthought. It was further

observed that any accused above 16 years of age at the time of framing charge cannot get the benefit of the provisions of the Children Act. In this regard the prosecution relied upon the cases of *Ahdul Monem Chowdhury alias Momen versus State, 47 DLR (A.D.) 96, Bimal Das vs. the State, 14 BLD (A.D.) 218 and Mono alias Zillur Rahman versus the State, 23 BLD (A.D.) 187.*

101. The High Court Division then noted some relevant sections of the Children Act, but then proceeded to quote section 6(1) and wrongly added that "the law was subsequently amended by adding subsection 1 with section 6 and it was enacted that if at the time of trial the offender is not below the age of 16 years at the time of framing charge the trial can be held together with adult and no separate trial is necessary." We do not find this to be a correct reflection of the existing law. Section 6 (1) provides as

> "6. No joint trial of child and adult. (1) Notwithstanding anything contained in section 239 of the Code or any other law for the time being in force, no child shall be charged with, or tried for any offence together with an adult."

102. It was observed in the case of *Roushan Mondal* that section 6(1) relates to the mode of trial where a child offender is accused of commission of an offence along with an adult. It is correct that if all the offenders are above 16 years of age then they would be tried together as adults by the same court. However, the effect of sections 6(1), 6(2) and 8(1) is such that in a joint trial where any one of the offenders is below the age of 16 then his trial is to be held separately from that of the adult. It must be understood that these provisions relate to the mode of trial and have no bearing on the relevancy of age on the date of framing of charge. It was further observed that the relevant date to determine the age of the offender would be the date of the alleged commission of the offence since it is necessary to ascertain that the offender understood the consequences of his actions and had the necessary *mens rea* on that occasion. This is evident from the provisions of section 83 of the Penal Code, which clearly makes it a requirement for the Court to be satisfied that the accused had the mental capacity of understanding the consequence of his actions on that occasion (meaning on the date of commission of the offence). Moreover, it was held that the relevant date is the date of commission of the offence, otherwise the whole purpose of the provisions contained in the international instruments would be defeated.

103. It is stated in the judgment of the High Court Division that during examination under section 342 Of the Code of Criminal Procedure, the age of Asha was claimed to be below 16 and evidence was submitted in support of such claim. It was observed by the High

Court Division that the "Convict-appellants could easily lead defence evidence, both documentary and ocular, in support of the last time claim to be aged below 16 years." The High Court Division further observed that "the plea of convict-appellants being Juveniles is not only an afterthought matter but a concoction of their imagination at a belated stage to thwart the course of Justice by having resort to wrangles of procedures and technicalities of law. Convict-appellants tried to create a smoke screen with respect to their age. Such efforts transpires to have been made only to hide the real age of convict-appellants and to engender doubt in the mind of Court. Judicial system cannot be allowed to be taken ransom by having resort to imaginative and concocted grounds. Efforts ventured by convict-appellants are not likely to advance the interest of justice but on the contrary to frustrate it." We note however that the High Court Division did not take into account the age stated for accused Asha in his confessional statement.

104. With regard to the age of the appellants, the High Court Division concluded that "From evidence produced and materials placed before Court below it is manifestly clear that convict-appellants were neither had been child nor Juvenile within the meaning of Children's Act during course of commission of felony and also framing of charge. They stand proved to be major or adult at the time of commission of offence and, also, framing of charge."

105. It is clear from the last foregoing paragraph that the date of commission of the offence had some relevance according to the views of the High Court Division, although their Lordships were somewhat equivocal by mentioning the date of framing of charge as also being relevant. Hence it is by no means settled as to which the relevant date is for the purpose of determination of age of the accused. The views of the High Court Division on this issue in various cases are divergent and that of the Appellant Division, though consistent, is arguably based on misinformation. The matter was discussed at length in the case of *Rowshan Mondal,* where it was concluded that the date relevant for establishing the age of the accused must be the date of commission of the offence, otherwise the whole purpose of the law of protecting the immature and impulsive child would be defeated. The relevant consideration must be whether the accused was capable of understanding the cause and effect of his action and that must of necessity relate to the date of the commission of the offence. Hence I am constrained to conclude that the date of the alleged commission of the offence is the relevant date on which the age of the accused is to be established, i.e. whether or not he was below the age of 16 years on that date.

106. In the instant case, I am constrained to hold that the accused

claimed to be about 16 years of age on the date of recording of his confessional statement and, therefore, he was below 16 years of age on the date on which he is alleged to have committed the offence. This assertion was part of the record and neither the Court nor the prosecution took any steps to act in accordance with section 66 of the Children Act, which in my humble opinion is a mandatory and most salutary provision of law for the purpose of the rights of youthful offenders.

107. Although it has been held in the case *of Bimal Das Vs The State, 14 BLD (AD) 218* that the Court has no duty to ascertain the age once it is satisfied that the accused is not a child, with all due respect, this tends to give a perverse interpretation of the law. In that case the provision was given such a literal interpretation as to lead to an absurdity that the Court will only inquire into the age of the accused if it is of the opinion that she or he is a child. That is an absurdity because if she or he is a child then there would be no need to ascertain the age for the purpose of establishing whether the case is to be tried in accordance with the provisions of the Children Act. It was observed in the case of *Monir Hossain* that whenever an accused claims to be below 16, then a duty is cast upon the Court to direct an enquiry to satisfy itself whether the accused is a, child below 16 years of age, otherwise the Court may commit an error regarding jurisdiction. For jurisdictional purposes the duty to ascertain the age extends to the highest court as exemplified by the Indian Supreme Court in the *Gopinath Ghosh* case.

108. If the trial of the accused were to take place under the provisions of the Children Act, then certain consequences would follow. For example, pending the trial the accused would not be kept in prison and would by law be bound to be kept in a place of safety in accordance with section 2(j) of the Act. It has been held in *The State v. The Secretary, Ministry of Home Affairs, 19 BLT 376* that children cannot be held in prison during trial. The law allows for children to be enlarged on bail even where they are alleged to have committed an offence which is non-bailable. The only alternative is that they must be held in a place of safety as defined in the Act [Sec *The State v. The Secretary, Ministry of Home Affairs, 16 MLR 254].*

Another consequence of trial under the provisions of (he Children Act is that the environment of the hearing and method of trial would be regulated by sections 7 to 13 of the Act and rules 3 and 4 of the Rules. The leniency of the trial procedure, laxity of the provisions of the law of Evidence and the system of protecting the child offender from overexposure to the rigours of the criminal justice system are apparent in those provisions.

109. However, since the trial is over there is no practical gain to be had in inquiring into the procedures followed

or not followed during trial of the instant case. On the other hand, the sentence awarded is a matter of great concern. Section 52 of the Act read with section 51 provides that on conviction a child offender cannot be sentenced to death, imprisonment for life or imprisonment and may only be committed to a certified institute for detention for a period not less than two and not more than ten years. Imprisonment may be given in two exceptional circumstances, as detailed in the first proviso to section 51, where the child offender has committed an offence which is so serious in nature that the sentence possible under section 52 is felt to be not sufficient or is inadequate; imprisonment can also be awarded if the offender is so depraved in character that it would not be suitable to keep him in detention in a certified institute.

The second proviso to section 51 restricts the length of imprisonment that can be awarded even in those exceptional circumstances mentioned above, to ten years. Issues of sentencing under the Children Act have been elaborately discussed in the case of *Fahima Nasrin v Government of Bangladesh and others, 61 DLR 232.*

110. Turning to the facts of the instant case, there is no doubt that the accused have committed a heinous offence. However, where any special law gives specific benefit to an accused, then he deserves to be treated in accordance with such beneficial provisions. As stated above, under the second proviso to section 51, an accused found guilty of any offence, even one carrying the sentence of death or life imprisonment, may be sentenced in exceptional circumstances to imprisonment for a maximum period of ten years. Hence, even upon conviction under section 7 of the Nari-o-Shishu Ain, accused Asha may not be sentenced to 14 years in prison. The sentence that may be lawfully imposed is a maximum of ten years' imprisonment.

111. Finally, I note that in paragraph 104 the High Court Division stated as follows: "the villainy committed by convict-appellants is extremely shocking and revolting and it shocks Judicial conscience. In such a shocking nature of felony it is necessary to impose maximum punishment which is death under the law as means of social necessary. Mere young age of convict-appellant cannot be ground for desisting from imposing death penalty and cannot be termed as a mitigating circumstances in imposing punishment and no mercy can be shown to the culprits who pollute the society." This statement is clearly indicative of the emotions of the author judge which were stirred by the terrible turn of events. It is undeniable also that the Courts have a duty to uphold the rule of law and protect the interest of the State and its citizens. On the other hand it is also the duty of the Courts to implement the legal provisions enacted by Parliament, which in a democracy is done by the will of the people. Rights and benefits accruing to

a citizen, be he an accused or otherwise, have to be ensured and cannot be denied or disregarded due to emotional or sentimental considerations of the judge. An accused person has rights and privileges afforded by the law, in this case the Children Act and Children Rules, which must be zealously guarded by the Judge, particularly since the accused by the nature of the trial process stands in a vulnerable position.

112. This Division is the last port of call for any litigant attempting to establish his rights under the law. It is not uncommon to find that this Division has reconsidered its earlier decision and corrected errors earlier committed or given new interpretation where it is felt appropriate and just. This is a process of evolution of the justice system, which cannot be allowed to stagnate and stand still. I am of the firm view that the interpretation of law in the cases of *Abdul Momen Chowdhury alias Momen versus State, Bimal Das vs. the State and Mona alias Zillur Rahman versus the State* were not correct so far as it relates to the duty of the Court to determine the age of the accused and the occasion on which the age of the accused is relevant. Hence it is the duty of this Division to revisit those earlier decisions and, to the extent necessary, overrule them.

I would conclude by saying that in my humble opinion an accused will be entitled to the benefits of the provisions of the Children Act if he can establish that he was a child on the date of commission of the offence and that it is the duty of the Court to initiate an inquiry before the commencement of the trial to determine the age of the accused in order to establish jurisdiction of the Court and ensure the due rights of the accused in accordance with law. To that extent the decision referred above are not correct and it is the duty of this Division to declare accordingly. Accused Asha established that he was a child at the time of commission of the offence and accordingly his trial ought to have been held under provisions of the Children Act and Children Rules. His sentence as awarded by the trial Court and confirmed by the appellate Court and as proposed by this Division, with all due respect, are not in accordance with the law. The maximum period of imprisonment that can be imposed on accused-appellant Asha under the prevailing law is for a period of 10 years. Under the Children Act there is no question of imposing fine in addition to sentence of imprisonment. I, therefore, agree that appellant Ariful Islam Asha be convicted under section 7 of the Nari-o-Shishu Nirjatan Daman Ain, 2003. Keeping in mind the seriousness of the offence and the fact that he is a youthful offender, he is sentenced to imprisonment for 10 years.

..... J.

113. Md. Shnmsul Huda: I have gone through the judgments proposed to be delivered by my brothers, Surendra Kumar Sinha, J., Md. Abdul Wahhab

Miah, J. and Muhammad Imman Ali, J. I agree with the reasoning and findings given by Md. Abdul Wahhab Miah, J.

..... J.

Court's Order

114. The appeal is allowed in part by majority decision.

The judgment and order of conviction and sentence dated 30.09.2002 passed by the Sessions Judge, Gaibandha in Session Case No.53 of 2002 convicting the appellants under sections 302/34 of the Penal Code and sentencing each of them to death as confirmed by the High Court Division in Death Reference No.44 of 2002 heard analogously with Criminal Appeal No.2967 of 2002 (criminal appeal was dismissed) is set aside. The appellants are acquitted of the charges brought against them under sections 302/34 of the Penal Code. The appellants are found guilty under section 7 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and sentenced to suffer rigorous imprisonment for 14(fourteen) years each and also to pay a fine of taka 2,000'00 each in default to suffer rigorous imprisonment for 3(three) months more.

The jail petition is disposed of accordingly.

Cases cited:

* ***Fahima Nasrin Vs. Government of Bangladesh and others, 61 DLR 232.***
* ***State Vs. Md Roushan Mondal @ Hashem, 59 DLR 72.***
* ***Pratap Singh Vs. State of Jharkhand and another, 2005 (3) SCC 551.***
* ***Arnit Das Vs. State of Bihar, 2000 (5) SCC 488.***
* ***Bablu (supra) and State Vs. Deputy Commissioner, Satkhira (supra)***
* ***Seears Vs. Oldfield (1985) 36 NTR 65.***
* ***JohnsonJohnson Vs. Texas, 509 U.S. 350, 359-362 (1993).***
* ***The State Vs. The Secretary, Ministry of Home Affairs and others, 16 MLR 254.***
* ***The State Vs. The Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka and others, 19 BLT 376.***
* ***Hasina Begum Vs. Slate and another, 1 BLC 315.***
* ***Prafullah Kamal Bhattacharya Vs. Ministry of Home Affairs, Govt. of Bangladesh, 28 DLR 123.***
* ***Abdul Munem Chowdhury @ Momen Vs. The State, 47DLR (AD) 96.***
* ***Monir Hossain (Md) @ Monir Hossain Vs. The State, 53 DLR 411.***
* ***Privy Council in Saydul Arefin Vs. Y.O. Gark, AIR 1916 PC 242.***
* ***Gopinath Ghosh Vs. State of W. B., 1984 Supp SCC 228.***
* ***Jitendra Singh @ Babboo Singh and anr. Vs. State of U.P., (2010) 13 SCC 523.***
* ***Ahdul Monem Chowdhury alias Momen Vs. State, 47 DLR (A.D.) 96.***
* ***Bimal Das Vs. the State, 14 RLD (A.D.) 218.***
* ***Mono alias Zillur Rahman Vs. the State, 23 BLD (A.D.) 187.***
* ***Bimal Das Vs. The State, 14 BLD (AD) 218.***
* ***State Vs. The Secretary, Ministry of Home Affairs, 19 BLT 376.***

HIGH COURT DIVISION
(Special Original Jurisdiction)

Syed Refaat Ahmed–J.
And
Mahmudul Hoque–J.

WRIT PETITION NO. 4681 OF 2004

(An application under Article 102 (1)(2) of the Constitution of the People's Republic of Bangladesh.)

Rahima Khatoon, widow of late Tajuddin Ahmed & others .... Petitioners.

Vs.

Bangladesh, represented by the Secretary, Ministry of Housing and Public Works, Bangladesh Secretariat, Ramna, Dhaka & others .... Respondents.

For the Petitioners : Mr. M.I. Farooqui, Advocate with Mrs. Nazneen Nahar.

For Respondent No. 2 : Mr. Shahidul Islam, D.A.G. with Mr. Sukumar Biswas, A.A.G and Mrs. Nasreen Banu, A.A.G.

Judgment: March 9, 2014

President's Order No. 16 of 1972 (P.O. No. 16 of 1972)–

Ordinance No. LIV of 1985–

Section 5(1)– It is settled law that without giving of service of statutory notice upon the occupants no property can be listed abandoned property. Notice is a precondition to enlist the property in question as abandoned and in the absence of such notice the very enlistment of the property as abandoned is without lawful authority.

We have already taken into notice that the respondent No.2 could not show any paper to substantiate the claim that notice was served upon the petitioners before inclusion of the properly in 'Kha' list like other co-lessees and it is found that in the absence of such notice the petitioners had no scope to file any case or application seeking release of their property from 'Kha' list and the Court of Settlement also had no jurisdiction to entertain such a separate and independent application. This Court is of the view that had there been no case pending before the Court of Settlement seeking exclusion of the plot No. 251 by co-lessees covering the petitioners' property then the matter could have been decided by this Court in its Writ Jurisdiction. However, given the rather unique facts and circumstances in the present instance, in that a ease has already been flied within time before the Court of Settlement by the respondent Nos. 4-6, the joint lessees of the plot No.251 admitting service of notice upon them, and the said case involves plot No. 251 in its entirety

and also given that the subject matter is pending for effective adjudication and disposal before the Court of Settlement, this Court is disinclined, at this stage, to enter into the merit of the case as would in any way appear to pre-empt a substantive disposal by the Settlement Court and to decide finally and effectively whether inclusion of such property covered by plot No. 251 in the "Kha" list of abandoned buildings published on 23.09.1986 is right or not. We think that ends of justice in such circumstances would be met if we direct the Court of Settlement to so dispose of the case on merit expeditiously making the petitioners party as co-petitioners in the said Settlement Case being No. 59 of 2003. ..... (Para 22)

JUDGMENT

MAHMUDUL HOQUE–J: In this application under Article 102-of the Constitution of Bangladesh a Rule Nisi was issued at the instance of the petitioners calling upon the respondents to show cause as to why the enlistment of Plot No. 251, Road No.22, Dhanmondi Residential area, Dhanmondi, Dhaka in 'Kha' list of abandoned properties published in Bangladesh Gazette Extra-ordinary dated 23.9.86 at page No. 9764(14) against serial No.5 under the caption "Dhanmondi Residential Area, Dhaka" (Annexure-C) so far as it relates to its northern portion measuring about 6978 sq feet (9 Kathas 11 Sataks and 3 sq feet) with a residential house built thereon being Municipal Holding No. 72/A, Road No. 22 (old) and 12/A (now), Dhanmondi Residential Area, Police Station-Dhanmondi, Dhaka should not be declared to have been made without lawful authority and is of no legal effect and as to why order dated 20.4.2004 passed by First Court of Settlement in Case No. 59 of 2003 (Annexure D-1) rejecting the petitioners' application for addition of party in the said case should not be declared to have been passed without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Facts relevant for disposal of this rule, in short, are that the petitioners are the citizens of Bangladesh by birth. Petitioner No.1 is a widow and mother of the petitioners No.2-4 who are established businessmen dealing in wholesale business of Umbrella, Lubricating Oil and Shoes. Their father late Tajuddin Ahmed had also been an established businessman dealing in Umbrellas since 1955.

3. The case plot No.251 measuring one bigha situated at Dhanmondi Residential Area originally belonged to the then Government of East Pakistan which leased it out to one Golam Ahmed Khan alias G.A Khan for a period of 99 years by a registered deed being No. 502 dated 10.01.1956. Said G.A. Khan constructed a one storied

building at the southern portion of the said plot keeping the northern portion vacant. The original lessee said G.A. Khan was a citizen of Bangladesh by birth and hailed from District Manikgonj. While in peaceful possession he transferred northern portion of plot No. 251 measuring 9 Khatas 11 Sataks and 3 Square feet to the petitioners by a registered deed of conveyance on 29.06.1966 on obtaining permission from the Ministry of Works vide memo dated 17.03.1966. Thereafter, the Government as lessor recognized the petitioners as co-lessee of the northern portion of the plot No. 251 and accordingly mutated their name as lessees vide memo no 117/L dated 15.11.1967.

4. The case plot No. 251 was bifurcated into two separate and independent holdings as Holding No. 27 for the northern portion in the names of the petitioners and Holding No. 28 for the southern portion in the name of G.A. Khan. Subsequently, G.A. Khan's holding was renumbered as Holding No. 72 and that of the petitioners as Holding No. 72A, Road No. 12A.

5. The petitioners constructed a residential building thereon obtaining sanction from the then Dhaka Improvement Trust vide Memo No. 4205 TP dated 12.10.1966 and mutated their names in the record of Dhaka Municipality (DCC) and paying all the utility bills to the concerned authority. The original lessee G.A. Khan was a confirmed bachelor. During his lifetime he transferred the remaining 10 (ten) Kathas land (Southern portion) of plot No. 251, Holding No. 72 with a building constructed thereon to his nephew Abdus Salam Khan and grandson Iqbal Hossain Khan son of Abdus Salam Khan by two registered Heba-bil-Ewaj being numbers 26505 and 26504 dated 24.07.1978 and handed over possession thereof. Said G.A. Khan died on 30.07.1978 and Abdus Salam Khan died on 05.07.1990 leaving behind the respondents No. 4-6 as his heirs. For the purpose of construction of a multistoried building on their land, the petitioners approached different authorities for necessary permissions and in that way they came to know that the plot in question has been enlisted in the 'Kha' list of the abandoned properties and also came to know that the owners of Southern portion of the plot No. 251 had filed Case No. 59 of 2003 in the Court of Settlement for exclusion of the plot No.251 from 'Kha' list.

6. On coming to know about filing of the case the petitioners filed an application before the First Court of Settlement, Dhaka for their addition as co-petitioners in the aforesaid Case No. 59 of 2003. But the Court of Settlement rejected the application holding it as barred by limitation. At this stage the petitioners move this court by filing this petition under Article (02 of the Constitution of Bangladesh and obtained the present Rule.

7. The Respondent No. 2 Secretary, Ministry of Housing and Public Works contested the Rule by filing affidavit-in-opposition contending inter alia that the petitioners cannot file such an application for addition of party in the Case No.59 of 2003 beyond the period of limitation, but they instead ought to have filed a separate Case claiming exclusion of their portion of the holding and as such the Court of Settlement rightly rejected the application for addition of parties. It is further stated that the petitioners are to prove that they are citizens of Bangladesh by birth and they never left the case property uncared for at the relevant time. The claimants of Settlement Case No. 59 of 2003 in. their application for release admitted that they received the notice and as such it is established that after completion of all the formalities the property in question has been enlisted in the list of abandoned property and accordingly the gazette has been published.

8. It is also stated that the notice was served upon the owner and occupiers who were 'blind on the case property and question of service or non-service of notice is a question of fact and determination of the same requires evidence to be adduced.

9. The Respondent No. 2 asserts that since the petitioners adduced/produced no rebuttable evidence to show that the original owner and the petitioners were present in Bangladesh and occupied, managed or supervised the disputed house when President's Order No. 16 of 1972 ("P.O. No. 16 of 1972") came into operation the very listing of the case property in the "Kha" list published on 23.05.1986 is lawful and constitutes conclusive proof of facts.

10. It is submitted further that as per Section 7 of the Ordinance No. LIV of 1985 any person claiming any right or interest in any building which has been included in the list published under Section 5 of the Ordinance, may, within a period of 180 days from the date of publication of the list in the Official Gazette, make an application to the Court of Settlement for exclusion of such building from such list or restoration of building to him or pray for any other relief. However, the petitioners instead of filing a case praying for exclusion of their property from the 'Kha' list filed an application after long lapse of time for addition as co-petitioners in the Case No.59 of 2003 filed by other persons claiming southern portion of the property and as such the Court of Settlement rightly rejected the application of the petitioners and hence the present Writ is not maintainable in law and the rule is liable to be discharged.

11. Mr. M. I. Farooqui the learned Advocate with Mrs. Nazneen Nahar, the learned Advocate appearing for the petitioners submits that the petitioners are citizens of Bangladesh by birth, have been living at their portion

of the plot with their families since its purchase in the year 1966. They never left their properly uncared for at any point of time and were never engaged in any activity prejudicial to the interest of Bangladesh, No notice required under the law relating to the abandoned character of the property was ever served upon them. Mr. Farooqui further submits that some unscrupulous officials of the respondent No.2 with malafide intention included the plot No.251 in the 'Kha' list without mentioning Municipal Holdings and without looking into the records of the respondent No.2. He also submits that service of a statutory notice upon the occupants is a condition precedent to enlist the property in question as abandoned and in the absence of such notice the very enlistment of the petitioners' property as abandoned is without lawful authority. In support of his submissions he referred to the cases of Helaluddin Ahmed Vs. Bangladesh reported in 2 BLC (HCD) 427, Bangladesh Vs. Helaluddin reported in 4 MLR (AD) 140, Bangladesh Vs. Bibi Morium and others reported in 54 DLR (AD) 100, Abdur Rashid Mollah Vs. Bangladesh reported in 58 DLR (AD) 20.

12. It is also argued that the entire property has appeared in "Kha" list of abandoned properties as "plot No. 251" which consists of two Municipal Holding Nos. 72 and 72/A respectively. Buildings particularly in Urban area are identified by Municipal Holdings and not by the plot number of the land and the enlistment has been done in the present case in a manner as is absolutely misleading and against the principle of enlistment of building as abandoned property.

13. Mr. Farooqui, further argued that the petitioners filed application for addition of party in the Case. No. 59 of 2003 filed by the respondent No. 4 and his father Abdus Salam Khan (since deceased) as they mentioned in their application plot No.251 as a whole and there was no conflicting interest and as per provisions of law where a common interest is involved in a case any person who has interest in the case property may be joined as party to avoid conflicting decision. As the application for addition of party has been rejected by the Court of Settlement and there was no competent court to go to avail and no alternative effective remedy for the petitioners to avail of the petitioners can invoke Writ Jurisdiction Under Article 102 of the Constitution to enforce their fundamental right and right to property even though they availed the alternative remedy but failed on technical ground of limitation. In support of his submissions he referred to the cases of Jebon Naher and others Vs. Bangladesh reported in 49 DLR (HCD) 108, Bangladesh Vs. Chand Sultana reported in 1 MLR (HCD) 310 and 51 DLR (AD) 24 and Sarwari Begum Vs. Bangladesh reported in 45 DLR (HCD) 571.

14. Mr. Shahidul Islam, the learned Deputy Attorney General with Mr. Sukumar Biswas, the learned Assistant Attorney General and Mrs. Nasreen Banu, the learned Assistant Attorney General appearing for the respondent No, 2 submit that under Section 7 of the Ordinance No. LIV of 1985 any person claiming or disputing the enlistment of a property as abandoned property may make an application to the Settlement Court within 180 days from the date of publication of the list in the Gazette. The petitioners having failed to file the case within time but filed the application for addition of party in the case filed by other claimants long after the period of limitation as prescribed by the Ordinance instead of filing of a separate and independent case, the Settlement Court rightly rejected the said application for being time barred.

15. It is also argued by the respondent that the case property was duly listed in the 'Kha' list after issuance of notices under Section 5(1)(b) of the Ordinance to the persons found in actual possession. By the said notices the occupants were asked to appear before the office of the Respondent No. 2 along with necessary papers pertaining thereto and it was duly served upon them. Mr. Islam further submits that the burden of proof squarely lies on the petitioners to prove that they occupied, managed or supervised the case property on the relevant date on 28.2.1972 to establish that the said property is not an abandoned property. But the petitioners having failed to prove the same, inclusion of the building in the 'Kha' list is proof of its being an abandoned property and the Government has nothing to prove or deny. It is for the aggrieved persons to establish their claim by whatever evidences they choose to produce. In the present case the petitioners could not show that they were present in Bangladesh on material dates or that they occupied, managed or supervised the case property when P.O. 16 of 1972 on 28.2.1972 came into operation, as such the listing of the property in the 'Kha' list as abandoned property is lawful and conclusive proof of facts. In support of his submission he referred to the cases of Bangladesh & others Vs. Md. Jalil and others reported in 48 DLR (AD) 10, Secretary, Ministry of Works Vs. Rowshan Ara Begum reported in 57 DLR (AD) 167 and an unreported judgment dated 29.10.2009 passed in the case of Md Feroj Mia and another Vs. Bangladesh in Writ Petition No. 4971 of 2001.

16. It is also argued that the petitioners in Case No. 59 of 2003 filed the Case claiming exclusion of their portion of land covered by plot No.251, i.e. for a separate and distinct Holding being No. 72. But the present petitioners are claiming northern portion of the plot No.251 bearing holding No. 72/A and as such they are required to file a separate case and they cannot be joined and/or added as co-petitioners

in a case filed by the respondent No.4 and one Abdus Salam Khan (since deceased) claiming exclusion of their holding from the 'Kha' list and as such the Court of Settlement rightly rejected the application for addition of party and there is no illegality in the order passed by the Settlement Court.

17. Heard the learned advocates for the parties, perused the petition, affidavit-in-opposition, affidavit-in-reply and the annexures annexed thereto.

The petitioners in support of their claim annexed to the writ petition a Memorandum of Agreement dated 25.03.1966 (Annex-A), Deed of Conveyance dated 29.06.1966 (Annex-A1), letter dated 17.03.1966 issued by the respondent no. 2, granting permission to transfer of part of plot No. 251 (Annex-A2), letter dated 15.11.1967 issued by the respondent no. 2 recognizing the petitioners as joint lessees of their northern portion (Annex-A3), permission for construction on plot no. 251(p) granted by Dhaka Improvement Trust (now RAJUK) dated 11.10.1966 (Annex-B), Municipal Tax receipts for the years 1970-71, 1971-72, 1972-73, 1978-79, 1979-80, (Annex-B3), and Chalan dated 25.01.1971 and 26.12.1975 showing payment of ground rent (Anne.x-B4, B5), to show that the petitioners are all Bangladeshis and they have always been in possession of the case property, supervising and managing the same and at no point of time they ceased to occupy, supervise and manage the case property in person and the property was resultantly never abandoned. Therefore, their whereabouts cannot possibly remain unknown to the Government. It is asserted that the respondent no, 2 also do not claim that the petitioners are not Bangladeshi or they are not in possession of the case property in their affidavit-in-opposition.

18. The petitioners claim that no notice under Section 5(1)(b) of Ordinance No. LIV of 1985 was issued and served upon the petitioners, as a result they were not aware of inclusion of the case property in the 'Kha' list. By the time they came to know about the inclusion of the case property in the 'Kha' list' Case No.59 of 2003 had already been filed by the Respondent No. 4 and one Abdus Salam Khan (since deceased), the owners of southern portion of plot No.251 (Holding No.72) before the Court of Settlement for exclusion of the plot in question from the 'Kha' list of the abandoned buildings. On coming to know about filing of the above mentioned case the petitioners filed an application for addition of party as co-petitioners in the Case No. 59 of 2003 pending before the Court of Settlement on 01.01.2004. But the Court of Settlement upon hearing the parties rejected the said application vide impugned order dated 20.04.2004 holding that the application is time-barred and the petitioners ought to have filed a separate case

within 180 days from the day of publication of the Gazelle on 23.03.1986 as the petitioners have no claim in the property for which Abdus Salam Khan and another filed Case No.59 of 2003.

19. From a perusal of the petition in Case No. 59 of 2003 filed by Md. Abdul Salam Khan and Iqbal I lossain Khan as contained in the Settlement Court's record, it appears that they described the case property at serial No. 5 page No. 9764(14) as Bari No. "২৫১, রোড নং-২২ (পুরাতন), নতুন-১২/এ, ধানমন্ডি আঃ/এ, ঢাকা" and clearly stated in paragraph No.4 of the petition annexed thereto that the northern portion of plot no.251 is owned by the present petitioners. The petitioners of Case No. 59 of 2003 claimed exclusion of the plot No. 251 as a whole, not in part, as found from their petition filed before the Court of Settlement and it is also not disputed that the plot No. 251 in its entirety has been enlisted as abandoned property in the 'Kha' list. This Court holds that the job of the Court of Settlement is to decide whether the case property is an abandoned property or not and it should be borne in mind that the Court of Settlement is not mandated by law to decide the title of the petitioners thereto. Since the petitioners in Case No.59 of 2003 clearly mentioned in their petition the plot No.251 as a whole and they admitted in their application that northern portion of the plot in question is owned by the present petitioners and since there is no conflict of interest between the parties, the Court of Settlement ought to have allowed the application for addition of party as co-petitioners in Case No. 59 of 2003 for effective and complete adjudication of the matter in dispute. Moreover, where a co-lessee already filed a case claiming exclusion of the plot No. 251 in its entirety from the "Kha" list of abandoned building as per Section 7 and in compliance with Section 8 of the Ordinance, in such a case, in the absence of any notice, question of limitation for addition of party as Co-petitioners, cannot arise at all. In a pending proceedings any person whose common interest is involved may be added as party.

20. From the papers and documents annexed with the petition this Court finds that the petitioners have sufficient reason to be added as party in the Case Ko.59 of 2003. Averments made in the petition filed by the petitioners before the Court of Settlement sufficiently establish that the petitioners are necessary party in whose absence an effective adjudication of the matter in dispute cannot be done, and to decide whether the plot in question has been rightly enlisted in the 'Kha' list of abandoned buildings their active presence is necessary as co-lessees of the plot No. 251. The respondent No.2 admittedly could not show, any paper to the effect that a notice as required by law was ever issued or served upon the petitioners before inclusion of the property in the 'Kha' list. In the circumstances this Court finds that the

Court of Settlement ought to have made the present petitioners of this Writ Petition party in the Case No. 59 of 2003 as Co-petitioners for the purpose, of proper and effective disposal of the case, but in not doing so committed illegality leaving the petitioners without a remedy and as such the order dated 20.04.2004 passed by the Settlement Court is not valid in law.

21. Mr. Farooqui vigorously argued that admittedly no notice was issued or served upon the petitioners before inclusion of the case property in the 'Kha' list as required by Art. 7 of P.O. 16 of 1972 and Section 5(1)(b) of Ordinance No. LIV of 1985 and failure to comply with this requirement renders such inclusion ultra vires and Constitutionally invalid. It is also argued that in the absence of notice under Section 5(1)(b) of the Ordinance the petitioners have had no scope to file a case before the Court of Settlement for exclusion of the case property from the "Kha" list and the Settlement Court had also no jurisdiction to entertain such case in the absence of service of notice as it is a condition precedent to such listing. In that regard, Mr. Farooqui argues that the question now posed is fundamentally of the Court of Settlements jurisdiction to act. Since, a jurisdictional fact is raised, and if this Court's enquiry boils down to ascertaining in a Writ of Certiorari the absence of the Settlement Court's power so to act then in such circumstances this Court can indeed invoke jurisdiction under Article 102 of the Constitution when inclusion of the case property in the 'Kha' list has been done by adopting a procedure which is ultra vires even though the petitioners moved before the Court of Settlement with an application for addition of party, but failed.

22. *We have already taken into notice that the respondent No.2 could not show any paper to substantiate the claim that notice was served upon the petitioners before inclusion of the properly in 'Kha' list like other co-lessees and it is found that in the absence of such notice the petitioners had no scope to file any case or application seeking release of their property from 'Kha' list and the Court of Settlement also had no jurisdiction to entertain such a separate and independent application. This Court is of the view that had there been no case pending before the Court of Settlement seeking exclusion of the plot No. 251 by co-lessees covering the petitioners' property then the matter could have been decided by this Court in its Writ Jurisdiction. However, given the rather unique facts and circumstances in the present instance, in that a ease has already been flied within time before the Court of Settlement by the respondent Nos. 4-6, the joint lessees of the plot No.251 admitting service of notice upon them, and the said case involves plot No. 251 in its entirety and also given that the subject*

matter is pending for effective adjudication and disposal before the Court of Settlement, this Court is disinclined, at this stage, to enter into the merit of the case as would in any way appear to preempt a substantive disposal by the Settlement Court and to decide finally and effectively whether inclusion of such property covered by plot No. 251 in the "Kha" list of abandoned buildings published on 23.09.1986 is right or not. We think that ends of justice in such circumstances would be met if we direct the Court of Settlement to so dispose of the case on merit expeditiously making the petitioners party as co-petitioners in the said Settlement Case being No. 59 of 2003.

23. From the foregoing discussions and in the facts and circumstances of the case, we are, accordingly, of the view that the petitioners are necessary parties in the Case No. 59 of 2003 now pending before the Court of Settlement and they are required to be added as co-petitioners of the case for the interest of adjudication of the matter in dispute completely and effectively.

24. It is, hereby, declared that the order dated 20.04.2004 passed by the First Court of Settlement in Case No. 59 of 2003 (Annexure-D) rejecting the petitioners' application for addition of party in the said case as co-petitioners is illegal, without lawful authority and is of no legal effect. The Court of Settlement is, hereby, directed to make the petitioners parties as co-petitioners in Case No.59 of 2003 an 1 to dispose of the case within 6(Six) months from the date of receipt of the judgment and record of Case No. 59 of 2003 affording adequate opportunity to the petitioners to adduce evidence (both oral and documentary) in support of their claim in the light of the observations made in the body of this Judgment.

25. Accordingly, the Rule is made absolute- in- part without any order as to costs.

26. Communicate a copy of this Judgment and Order and send down the record of case No. 59 of 2003 to the Court of Settlement, at once.

Cases cited:

* ***Helaluddin Ahmed Vs. Bangladesh, 2 BLC (HCD) 427.***
* ***Bangladesh Vs. Helaluddin, 4 MLR (AD) 140.***
* ***Bangladesh Vs. Bibi Morium and others, 54 DLR (AD) 100.***
* ***Abdur Rashid Mollah Vs. Bangladesh, 58 DLR (AD) 20.***
* ***Jebon Naher and others Vs. Bangladesh, 49 DLR (HCD) 108.***
* ***Bangladesh Vs. Chand Sultana, 1 MLR (HCD) 310 and 51 DLR (AD) 24.***
* ***Sarwari Begum Vs. Bangladesh, 45 DLR (HCD) 571.***
* ***Bangladesh & others Vs. Md. Jalil and others, 48 DLR (AD) 10.***
* ***Secretary, Ministry of Works Vs. Rowshan Ara Begum, 57 DLR (AD) 167 .***

* ***An unreported judgment dated 29.10.2009 passed in the case of Md Feroj Mia and another Vs. Bangladesh in Writ Petition No. 4971 of 2001.***

HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Shahidul Islam–J.

CIVIL REVISION NO. 3895 OF 2004

(From the judgment and decree dated on 08.09.2004 passed by the Additional District Judge, 3rd court, Rangpur arising out of other class Suit No. 25 of 2000 passed by Joint District Judge, Rangpur.)

Md. Nurul Islam and others .....
..... Plaintiff-Petitioners.

Vs.

Most. Lajjatunnessa being dead her heirs Md. Lutfor Rahman and others ..... Defendant-Opposite Parties.

For the Petitioner : Mr. Muhammad Jamiruddin Sircar with Mr. Syed Humayun Kabir Khadem.

For the Opposite Party : Mr. Asad Hossain Chowdhury with Mr. Md. Sirajul Islam.

Judgment: March 20, 2012

Specific Relief Act, 1872–

Section 42– Seeking simple declaration of title against other co-sharers is barred under the proviso to section 42 of the Specific Relief Act.

Upon perusal of the schedule property it appears that the plaintiffs have sought for declaration of title upon a part of bigger plot without specifying the suit land and without mentioning any boundary. Admittedly the defendant No. 1-4 are co-sharers in the suit land and the plaintiffs are purchaser from one of the co-sharers namely, the defendant No. 2. The plaint does not disclose any case that by amicable partition the plaintiffs vendor Nurul Islam had been in exclusive possession in the suit land measuring 6.10 acres of land. Declaration of title against other co-sharers is barred under the proviso to section 42 of Specific Relief Act. Had there been any case disclosed in the plaint that the plaintiffs vendor was in exclusive possession in the suit land upon amicable partition with other defendants, in that case, the suit would have been made maintainable. ..... (Para 16)

JUDGMENT

SHAHIDUL ISLAM–J: This Rule was issued calling upon the opposite party No.1 to show cause as to why the impugned judgment and decree dated 8.9.2004 passed by the learned Additional District Judge, 3rd Court, Rangpur in Other Appeal No. 77 of

2003 allowing the appeal and reversing those dated 24.6.2003 passed by the learned Joint District Judge, Rangpur in Other Suit No. 25 of 2000 should not be set aside and / or such other or further order or orders passed as to this Court may seem fit and proper.

2. This Court by order dated 24.10.2004 stayed operation of the impugned judgment and decree.

3. Facts relevant for disposal of the Rule are that the petitioners as plaintiff instituted Other Suit No. 25 of 2000 in the Court of learned Joint District Judge, 1st Court, Rangpur seeking for declaration of title to 6.10 acres of land from different khatian and different plot as mentioned in the schedule 1-19 and also further declaration that the exparte judgment and decree dated 4.1.1982 passed by the learned Sub-ordinate Judge, Rangpur in Other Suit No. 347 of 1980 as void, illegal and not binding upon the plaintiff contending, inter alia, that the schedule 1-19 property belonged to Dr. Nazamuddin, the predecessor of the vendor of the plaintiff. Said Dr. Nazamuddin transferred 11.94½ acres of land by kabala deed dated 1.1.1980 in favour of his son Nurul Islam, the defendant No. 2 in the suit and said Nurul Islam transferred by different deeds an area of 6.10 acres in favour of the plaintiff. The plaintiff got possession in their purchased land, mutated their names, paid rent and during their possession they received a notice of Partition Suit No. 16 of 2000 and on going through the plaint they could come to know that their vendor's deed dated 1.11.1980 had been set aside by the judgment and decree passed in Other Suit No. 347 of 1980. Thereafter the plaintiffs petitioners instituted the suit being No. 25 of 2000.

4. That suit was contested by the defendant No. 1 by filing written statement contending, inter alia, that the suit is not maintainable as it stands framed and the plaintiffs got no locus standi to file the suit and the suit is barred under section 42 of the Specific Relief Act. The fact of their case was that the suit land along with other land belonged to Dr. Nazamuddin who died leaving behind widow Bulbuli, the defendant No. 3, 2 daughters, the defendant No. 1 and 4 and a son, the defendant No. 2. During bed ridden of Dr. Nazamuddin his son created a kabala deed in his favour dated 1.11.1980 and thereafter Dr. Nazamuddin died on 8.11.1980. After death of father the defendant No. 1 came to know about the existence of the kabala deed dated 1.11.1980 and he being plaintiff instituted Other Suit No. 347 of 1980 for cancellation of deed. That suit was decreed exparte by the judgment and decree dated 4.1.1982 and the deed was set aside. The defendant No. 2 with a view to set aside the exparte judgment and decree passed in Other Suit No. 347 of 1980 instituted Other Suit No. 87 of 1990 and that was dismissed for default on

30.6.1992, for want of putting in proper Court fees. Thereafter instituted Other Suit No. 18 of 1993 for setting aside the exparte decree passed in Other Suit No. 347 of 1980 and that was dismissed for default on 11.7.1994. Thereafter a Miscellaneous Case being No. 54 of 1994 was filed and the Other Suit No. 18 of 1993 was restored to its file and number. Thereafter that suit was dismissed for default on 2.6.1996 and the exparte judgment and decree passed in Other Suit No. 347 of 1980 remained unaffected. Thereafter the defendant No. 1, 2, 3, 4 of the instant suit as plaintiff instituted a suit for partition being Other Suit No. 16 of 2000 in the Court of learned Joint District Judge, Rangpur seeking for a preliminary decree for partition to the land left by Dr. Nazamuddin wherein they impleaded the petitioners of this Rule as defendants. With these averments they prayed for dismissal of the suit.

5. The learned Joint District Judge framed the following issues for deciding the suit:

a) Is the suit maintainable in its present form?

b) Is there any cause of action for filing the suit?

c) Is the suit barred by limitation?

d) Is the suit properly valued and stamped?

e) Have the plaintiff any title and possession in the suit land?

f) Are the plaintiffs entitled to a decree?

g) What more relief they are entitled to?

6. The plaintiff examined 4 PWs and they exhibited their purchase deeds which were exhibited as exhibit 1-11/12 series/13-23/ 24 series/ 25 series. The defendant examined 4 DWs and their documents were admitted into evidence as exhibit-Ka series, Kha series and Ga series.

7. The learned Joint District Judge by the judgment and decree dated 24.6.2003 decreed the suit in full.

8. Being aggrieved by the said judgment and decree the defendants preferred Title Appeal No. 77 of 2003. That appeal was heard by the learned Additional District Judge, 3rd Court, Rangpur who by the impugned judgment and decree dated 8.9.2004 allowed the appeal, set aside the judgment of the trial Court and dismissed the suit holding that a suit for declaration of title is not maintainable and the plaintiffs remedy is available in the Partition Suit.

9. Being aggrieved by the impugned judgment and decree the plaintiffs have obtained the instant Rule.

10. Mr. Syed Humayun Kabir Khadem, the learned Advocate appeared for the plaintiff petitioner who read out the judgments of the Courts below and submitted that the exparte judgment and decree passed in

Other Suit No. 347 of 1980 was illegal and obtained by practicing fraud upon the Court and as such the trial Court was justified in setting aside the exparte judgment and decree but the Court of appeal upon wrong conception of law has set aside the said judgment without considering the evidence on record. Mr. Khadem further submitted that the plaintiffs have purchased the suit land by valuable consideration and have been in possession in the suit land as such the trial Court declared title of the plaintiff but the Court of appeal without considering the plaintiffs valid purchase as well as possession have set aside the judgment of trial Court with a view that the suit for declaration of title was not maintainable. He submitted that the impugned judgment and decree are not proper and liable to be set aside.

11. Mr. Asad Hossain Chowdhury, the learned Advocate with Mr. Md. Sirajul Islam, the learned Advocate appeared for the defendant opposite parties. Mr. Chowdhury at first submitted that the suit was barred by limitation. In elaborating his submissions he pointed out that the exparte judgment and decree passed in Other Suit No. 347 of 1980 was passed on 4.1.1982 and the defendants of that suit took several attempts for setting aside the exparte decree by filing 2 regular suits and also by filing a Miscellaneous Case but ultimately failed. He submitted that the plaintiff of the suit has stepped into shoe of their vendor the defendant No. 2 against whom the exparte judgment and decree has been passed and as such the said judgment and decree is binding upon all the plaintiffs. Mr. Chowdhury further submitted that the view taken by the appellate Court is lawful and the plaintiffs are not entitled to any decree for declaration of title. With these submissions he prayed for discharge of the Rule.

12. Today Mr. Muhammad Jamiruddin Sircar, the learned Advocate appearing for the plaintiff petitioner submitted that the rule may be disposed of with an observations that the plaintiffs may get their saham in pending suit for partition being Other Suit No. 16 of 2000.

13. Considering the plaint's case, defence case, considering the submissions made by both the parties 1 am inclined to frame the following points for determination in deciding the Rule:

a) Was the suit being Other Suit No. 25 of 2000 maintainable in its present form?

b) Whether the plaintiffs of the suit were entitled to a declaration of their title to 6.10 acres of land?

c) Whether the impugned judgment and decree are sustainable in law?

d) What remedy is open before the plaintiffs for protecting their interest?

14. Let us take up the points for determination (1).

15. The suit was for declaration of title of all the plaintiffs, as many as 18 in number upon 6.10 acres of land as mentioned in the schedule 1-19 in the plaint.

16. *Upon perusal of the schedule property it appears that the plaintiffs have sought for declaration of title upon a part of bigger plot without specifying the suit land and without mentioning any boundary. Admittedly the defendant No. 1-4 are co-sharers in the suit land and the plaintiffs are purchaser from one of the co-sharers namely, the defendant No. 2. The plaint does not disclose any case that by amicable partition the plaintiffs vendor Nurul Islam had been in exclusive possession in the suit land measuring 6.10 acres of land. Declaration of title against other co-sharers is barred under the proviso to section 42 of Specific Relief Act. Had there been any case disclosed in the plaint that the plaintiffs vendor was in exclusive possession in the suit land upon amicable partition with other defendants, in that case, the suit would have been made maintainable.*

17. In view of the above the suit for declaration of title in a part of a common land against other co-sharer is not maintainable and the Court of appeal has not committed any illegality in dismissing the plaintiffs claim.

18. The other prayer was made by the plaintiff for a declaration that the exparte judgment and decree passed on 4.1.1982 in Other Suit No. 347 of 1980, cancelling the kabala deed dated 1.11.1980, executed by Dr. Nazimuddin in favour of the defendant No. 2 to be illegal, void and not binding upon the plaintiff. The plaintiffs have stepped into shoe of Nurul Islam, the defendant No.2. The said defendant No. 2 by filing 2 regular suits being No. 78 of 1990 and 18 of 1993 unsuccessfully prayed for setting aside of the exparte decree passed in Other Suit No. 347 of 1980. Those decrees are binding upon the plaintiffs. The question of limitation for setting aside of an exparte decree is 3 years. The plaintiffs have filed the suit long after 3 years and as such the suit was barred by limitation to the extent that the decree passed in Other Suit No. 347 of 1980 were not binding upon them and as such the learned Additional District Judge as being the appellate Court has not committed any error of law resulting an error in the decision occasioning failure of justice in allowing the appeal and dismissing the suit.

19. Let us take up the points for determination (2). Upon the facts and circumstances whether the impugned judgment and decree are sustainable in law? Already I have seen that the learned Additional District Judge, 3rd Court, Rangpur has passed the impugned judgment and decree in

appeal lawfully and as such the judgment and decree is sustainable in law.

20. Now let me take up the point for determination as to what remedy is opened before the plaintiff petitioners for getting their relief. From the plaint's statements it appears that the defendant Nos. 1, 3 and 4 as plaintiff have instituted Partition Suit No. 16 of 2000 before the learned Joint District Judge, Rangpur and the suit is pending. The plaintiffs of the instant suit have been made defendants in the said suit. During hearing and as required by this Court Mr. Chowdhury supplied a photocopy of certified copy of the plaint of Other Suit No. 16 of 2000 before this Court. Upon perusal of the said plaint it appears that the said suit has been filed by the plaintiffs bringing into hotchpot a total area of 27.43 acres of land for partition and claiming 4 annas 6 pies share in schedule Ka, Kha, Ga schedule land and claiming 9 annas share in the Gha schedule land and claiming for a preliminary decree to the extent of 7.15 acres of land. Upon the death of Dr. Nazamuddin his wife, the defendant No. 3 inherited 2 annas share and 2 daughters Lajjatun and Rezia being defendant No. 1 and 4 inherited each 3 annas 6 pies share each and son Nurul Islam inherited 7 annas share. The plaintiffs of this suit have purchased 6.10 acres of land and they are in possession. In the instant suit the plaintiffs have led evidence supporting possession but that fact has not been denied. Since the plaintiff have been made defendant in partition suit they are entitled to Saham.

21. In view of the above their interest is very much safe and they may get their remedy in the suit for partition making a prayer for saham, either separately or individually. The instant suit is misconceived.

22. In view of the above I find that the observation made by the Additional District Judge as to the maintainability of the suit and remedy of the plaintiffs are very much lawful.

23. From the facts and circumstances I do not find any merit in the Rule.

24. In the result, the Rule is discharged, however, without any order as to costs. The impugned judgment and decree dated 8.9.2004 passed by the learned Additional District Judge, 3rd Court, Rangpur in Other Appeal No. 77 of 2003 allowing the appeal and reversing those dated 24.6.2003 passed by the learned Joint District Judge, Rangpur in Other Suit No. 25 of 2000 are affirmed. The order of stay granted by this Court dated 24.10.2004 stands vacated. The learned Joint District Judge. Rangpur is directed to proceed on with the trial of Other Suit No. 16 of 2000.

25. The office is directed to send down the lower Court's record.

[পূর্বের ইস্যুর পর হইতে]

৩৬। বার্ষিক প্রতিবেদন।– বিশ্ববিদ্যালয়ের বার্ষিক প্রতিবেদন সিন্ডিকেটের নির্দেশ ও তত্ত্বাবধানে প্রণীত হইবে এবং পরবর্তী শিক্ষা বৎসর আরম্ভের ৩০ (ত্রিশ) দিনের মধ্যে বা তৎপূর্বে উহা মঞ্জুরী কমিশনের মাধ্যমে সরকারের নিকট পেশ করিতে হইবে।

৩৭। বার্ষিক হিসাব।– (১) বিশ্ববিদ্যালয় যথাযথভাবে উহার হিসাব সংরক্ষণ করিবে এবং হিসাবের বার্ষিক বিবরণী প্রস্তুত করিবে।

(২) বিশ্ববিদ্যালয়ের বার্ষিক হিসাব মঞ্জুরী কমিশন কর্তৃক মনোনীত কর্তৃপক্ষের দ্বারা নিরীক্ষার জন্য ভাইস-চ্যান্সেলর যথাযথ ব্যবস্থা গ্রহণ করিবেন।

(৩) উপ-ধারা (২) এর অধীন মনোনীত কর্তৃপক্ষ মঞ্জুরী কমিশন কর্তৃক নির্ধারিত পদ্ধতিতে হিসাব নিরীক্ষা করিবে।

(৪) মহা-হিসাব নিরীক্ষক ও নিয়ন্ত্রক স্বতন্ত্রভাবে হিসাব নিরীক্ষা করিবার অধিকার সংরক্ষণ করিবেন।

৩৮। পরিদর্শন ও প্রতিবেদন।– (১) বিশ্ববিদ্যালয় বিশেষভাবে দায়িত্বপ্রাপ্ত ব্যক্তি বা ব্যক্তিবর্গ দ্বারা প্রত্যেক মাদ্‌রাসা সময় সময় পরিদর্শন করাইবেন এবং উক্ত পরিদর্শিত কোন মাদ্‌রাসাকে নির্দিষ্ট সময় সীমার মধ্যে প্রয়োজনীয় যে কোন ব্যবস্থা গ্রহণের নির্দেশ দান করিতে পারিবে।

(২) সিন্ডিকেট, একাডেমিক কাউন্সিল এবং কেন্দ্রের চাহিদা অনুযায়ী প্রত্যেক মাদ্‌রাসা যে কোন প্রতিবেদন, বিবরণ ও তথ্য সরবরাহ করিবে।

৩৯। মাদ্‌রাসায় শিক্ষাদান এবং বিশ্ববিদ্যালয় ও মাদ্‌রাসার মধ্যে সহযোগিতা, ইত্যাদি।– (১) একাডেমিক কাউন্সিলের পরামর্শক্রমে, সিন্ডিকেট কোন মাদ্‌রাসাকে যে সকল বিষয়ে ও যে পর্যায়ে শিক্ষাদানের অনুমতি প্রদান করিবে, মাদ্‌রাসা সেই সকল বিষয়ে এবং সেই পর্যায়ে শিক্ষাদান করিবে এবং উক্ত কর্তৃপক্ষের পূর্বানুমোদন ব্যতিরেকে মাদ্‌রাসা অন্য কোন কোর্সে শিক্ষাদান করিতে পারিবে না।

(২) একাডেমিক কাউন্সিল এবং অন্যান্য সংশ্লিষ্ট কর্তৃপক্ষের সুপারিশ বিবেচনা করিয়া এবং বিশ্ববিদ্যালয়ের সহযোগিতার ভিত্তিতে মাদ্‌রাসাসমূহ নিজেদের মধ্যে আলোচনাক্রমে আন্ত:মাদ্‌রাসা শিক্ষাদানের ব্যবস্থা করিতে পারিবে।

৪০। মাদ্‌রাসা সম্পর্কিত সাধারণ বিধান।– (১) প্রত্যেক মাদ্‌রাসা সর্বসাধারণের শিক্ষা প্রতিষ্ঠান হইবে।

(২) প্রত্যেক মাদ্‌রাসা একটি গভর্ণিং বডি দ্বারা পরিচালিত হইবে এবং উক্ত গভর্ণিং বডির গঠন, ক্ষমতা ও কার্যাবলী সংবিধি দ্বারা নির্ধারিত হইবে।

(৩) প্রত্যেক অধ্যক্ষ মাদ্‌রাসার অভ্যন্তরীণ প্রশাসন ও শৃঙ্খলার জন্য দায়ী থাকিবেন।

(৪) প্রত্যেক মাদ্‌রাসা সিন্ডিকেটকে এই মর্মে সন্তুষ্ট করিবে যে, মাদ্‌রাসাটিকে অব্যাহতভাবে এবং দক্ষতার সহিত পরিচালনার জন্য উহার যথেষ্ট আর্থিক সংগতি ও নির্ধারিত পরিমাণ নিজস্ব ভূমি রহিয়াছে।

(৫) কোন মাদ্‌রাসা কর্তৃক ধার্যকৃত শিক্ষার্থী বেতন ও অন্যান্য ফিস্ প্রবিধান দ্বারা নির্ধারিত সর্বনিম্ন হারের কম বা সর্বোচ্চ হারের অধিক হইবে না।

(৬) প্রত্যেক মাদ্‌রাসা সংবিধি, বিশ্ববিদ্যালয় বিধি ও প্রবিধান মানিয়া চলিবে।

(৭) বিশ্ববিদ্যালয় বিধি ও প্রবিধান দ্বারা নির্ধারিত শর্ত সাপেক্ষে মাদ্‌রাসায় শিক্ষার্থী ভর্তি করা যাইবে।

(৮) প্রত্যেক মাদ্‌রাসা সাধারণতঃ বিশ্ববিদ্যালয়ের বর্ষসূচী, অবকাশ ও ছুটির সহিত সামঞ্জস্য বিধান করিয়া চলিবে।

(৯) প্রত্যেক মাদ্‌রাসা বিশ্ববিদ্যালয় বিধি ও প্রবিধান দ্বারা নির্ধারিত রেজিস্টার ও রেকর্ডপত্র সংরক্ষণ করিবে এবং সময় সময় বিশ্ববিদ্যালয়ের চাহিদা মোতাবেক সংশ্লিষ্ট তথ্যাবলি সরবরাহ করিবে।

(১০) প্রত্যেক মাদ্‌রাসা পরবর্তী শিক্ষা বৎসর আরম্ভের ৩০ (ত্রিশ) দিনের মধ্যে বা তৎপূর্বে, পূর্ববর্তী শিক্ষা বৎসরের কার্যাবলীর একটি প্রতিবেদন মাদ্‌রাসা পরিদর্শকের নিকট পেশ করিবে যাহাতে শিক্ষক সংখ্যা ও ব্যবস্থাপনা ক্ষেত্রে কোন পরিবর্তন হইয়া থাকিলে উহার বিবরণ, ছাত্রসংখ্যা, আয়-ব্যয়ের হিসাব এবং অন্যান্য প্রয়োজনীয় ও প্রাসঙ্গিক তথ্যাবলী সন্নিবেশিত থাকিবে।

৪১। বিশ্ববিদ্যালয় পাঠক্রমে ভর্তি।– (১) এই আইন, সংবিধি ও বিশ্ববিদ্যালয় বিধি সাপেক্ষে মাদ্‌রাসাসমূহে ফাজিল (স্নাতক), কামিল (স্নাতকোত্তর) পাঠক্রমে শিক্ষার্থী ভর্তি, এতদুদ্দেশ্যে গঠিত ভর্তি কমিটি কর্তৃক প্রণীত বিধি দ্বারা পরিচালিত হইবে।

(২) কোন ভর্তিচ্ছু ছাত্র বা ছাত্রী বাংলাদেশ মাদ্‌রাসা শিক্ষা বোর্ডের অধীনে দাখিল (মাধ্যমিক) ও আলিম (উচ্চ মাধ্যমিক) অথবা বাংলাদেশে বর্তমানে বলবৎ কোন আইনের অধীন অনুষ্ঠিত কোন উচ্চ মাধ্যমিক বা সমমানের কোন পরীক্ষায় উত্তীর্ণ না হইয়া থাকিলে এবং বিশ্ববিদ্যালয় বিধি দ্বারা নির্ধারিত অন্যান্য যোগ্যতা না থাকিলে উক্ত ছাত্র বা ছাত্রী মাদ্‌রাসায় ভর্তির যোগ্য বিবেচিত হইবে না।

(৩) যে সকল শর্তাধীনে মাদ্‌রাসার ডিগ্রী, সার্টিফিকেট, স্নাতক ও স্নাতকোত্তর পাঠক্রমে ছাত্রভর্তি করা হইবে তাহা সংবিধি ও বিশ্ববিদ্যালয়ের বিধি দ্বারা নির্ধারিত হইবে।

(৪) ডিগ্রীর উদ্দেশ্যে কোন পাঠক্রমে ভর্তির জন্য বিশ্ববিদ্যালয় বিধি দ্বারা নির্ধারিত পদ্ধতিতে অন্য কোন বিশ্ববিদ্যালয় কর্তৃক প্রদত্ত ডিগ্রীকে স্বীয় কোন ডিগ্রীর সমমানের বলিয়া স্বীকৃতি দান করিতে পারিবে অথবা স্বীকৃত কোন বোর্ড বা বিশ্ববিদ্যালয়ের পরীক্ষাকে উচ্চ মাধ্যমিক পরীক্ষার সমমানের বলিয়া স্বীকৃতি দান করিতে পারিবে।

৪২। পরীক্ষা।– (১) ভাইস-চ্যান্সেলরের সার্বিক নিয়ন্ত্রণাধীনে পরীক্ষা নিয়ন্ত্রক পরীক্ষা পরিচালনার যাবতীয় ব্যবস্থা গ্রহণ করিবেন।

(২) একাডেমিক কাউন্সিল পরীক্ষা কমিটিসমূহ গঠন করিবে এবং উহাদের গঠন, ক্ষমতা ও কার্যাবলী বিশ্ববিদ্যালয় বিধি দ্বারা নির্ধারিত হইবে।

(৩) কোন কারণে কোন পরীক্ষক দায়িত্ব পালনে অসমর্থ হইলে ভাইস-চ্যান্সেলর তাহার শূন্যপদে অন্য পরীক্ষককে নিয়োগ দান করিবেন।

৪৩। চাকুরীর শর্তাবলী।– (১) বিশ্ববিদ্যালয়ের সকল শিক্ষক, কর্মকর্তা ও কর্মচারী সততা ও কর্তব্য পরায়ণতার সহিত দায়িত্ব পালন করিবেন।

(২) নিয়োগের শর্তাবলীতে স্পষ্টভাবে ভিন্নরূপ উল্লেখ না থাকিলে, বিশ্ববিদ্যালয়ের প্রত্যেক শিক্ষক, কর্মকর্তা ও কর্মচারী বিশ্ববিদ্যালয়ের সার্বক্ষণিক শিক্ষক, কর্মকর্তা ও কর্মচারীরূপে গণ্য হইবেন।

(৩) বিশ্ববিদ্যালয় স্বার্থের পরিপন্থী কোন কার্যকলাপের সহিত বিশ্ববিদ্যালয়ের কোন শিক্ষক, কর্মকর্তা ও কর্মচারী নিজেকে জড়িত করিতে পারিবেন না।

(৪) বিশ্ববিদ্যালয়ের শিক্ষক, কর্মকর্তা ও কর্মচারীগণের চাকুরীর শর্ত তাহাদের নাগরিক ও অন্যান্য অধিকার অক্ষুণ্ন রাখিয়া এবং বিশ্ববিদ্যালয় লক্ষ্য ও উদ্দেশ্যের সহিত সামঞ্জস্যপূর্ণ করিয়া সংবিধি দ্বারা প্রণীত হইবে।

(৫) কোন বিশ্ববিদ্যালয় শিক্ষক, কর্মকর্তা বা কর্মচারীকে তাহার চাকুরীর শর্তাবলী ভঙ্গ, কর্তব্য অবহেলা, অসদাচরণ, নৈতিক স্খলন বা অদক্ষতার কারণে, সংবিধি দ্বারা নির্ধারিত পদ্ধতিতে, চাকুরী হইতে অপসারণ বা পদচ্যুত করা অথবা অন্য কোন প্রকার শাস্তি প্রদান করা যাইবেঃ

তবে শর্ত থাকে যে, তাহার বিরুদ্ধে আনীত অভিযোগ সম্পর্কে কোন তদন্ত কমিটি কর্তৃক তদন্ত অনুষ্ঠিত না হওয়া পর্যন্ত এবং তাহাকে ব্যক্তিগতভাবে বা কোন প্রতিনিধির মাধ্যমে আত্মপক্ষ সমর্থনের সুযোগ না দিয়া তাহাকে অপসারণ বা পদচ্যুত করা যাইবে না।

(৬) কোন বিশ্ববিদ্যালয়ের শিক্ষক, কর্মকর্তা ও কর্মচারী কোন রাজনৈতিক দল বা কোন রাজনৈতিক দলের সহযোগী সংগঠনের সহিত সংযুক্ত থাকিতে পারিবেন না এবং রাজনৈতিক দলের সহিত সংযুক্ত অথবা কোন স্থানীয় ও জাতীয় পর্যায়ে নির্বাচনে প্রার্থী হইতে চাহিলে মনোনয়নপত্র দাখিলের পূর্বে উক্ত শিক্ষক, কর্মকর্তা ও কর্মচারীকে স্বীয় পদ হইতে ইস্তফা দিতে হইবে।

৪৪। সংবিধি।– এই আইন ও অর্ডার এর বিধান সাপেক্ষে, সংবিধি দ্বারা নিম্নবর্ণিত যে কোন বিষয়ে বিধান করা যাইবে, যথাঃ–

(ক) সিন্ডিকেট, একাডেমিক কাউন্সিল, অর্থ কমিটি, পরিকল্পনা ও উন্নয়ন কমিটি, ফাজিল (স্নাতক) শিক্ষা বিষয় কেন্দ্র, কামিল (স্নাতকোত্তর) শিক্ষা, প্রশিক্ষণ ও গবেষণা কেন্দ্র, কারিকুলাম উন্নয়ন ও মূল্যায়ন কেন্দ্র এবং বিশ্ববিদ্যালয়ের অন্যান্য কর্তৃপক্ষের ক্ষমতা ও দায়িত্ব;

(খ) বিশ্ববিদ্যালয় শিক্ষক, কর্মকর্তা ও কর্মচারীগণের পদবী, দায়িত্ব ও কর্তব্য এবং চাকুরীর শর্তাবলী;

(গ) ফেলোশীপ, বৃত্তি ও পুরস্কার প্রবর্তন;

(ঘ) ছাত্রবাস, হোস্টেল বা হল স্থাপন ও সংরক্ষণ;

(ঙ) বিশ্ববিদ্যালয় শিক্ষক, ফেলো, কর্মকর্তা ও কর্মচারী নিয়োগ ও পদোন্নতির পদ্ধতি;

(চ) সম্মানসূচক ডিগ্রী প্রদান;

(ছ) বিশ্ববিদ্যালয় শিক্ষক, কর্মকর্তা ও কর্মচারীদের অবসর ভাতা ও ভবিষ্য তহবিল, ইত্যাদি গঠন;

(জ) এই আইনের অধীন সংবিধি দ্বারা নির্ধারিত হইবে বা হইতে পারে এইরূপ সমুদয় বিষয়।

৪৫। সংবিধি প্রণয়ন।– (১) এই ধারায় বর্ণিত পদ্ধতিতে সিন্ডিকেট সংবিধি প্রণয়ন, সংশোধন বা বাতিল করিতে পারিবে।

(২) তফসিলে বর্ণিত বিশ্ববিদ্যালয়ের প্রথম সংবিধি চ্যান্সেলরের অনুমোদন ব্যতীত সংশোধন বা বাতিল করা যাইবে না।

(৩) সিন্ডিকেট কর্তৃক প্রস্তাবিত সকল সংবিধি অনুমোদনের জন্য চ্যান্সেলর সমীপে পেশ করিতে হইবে।

(৪) কোন সংবিধি অনুমোদনের জন্য চ্যান্সেলরের নিকট প্রেরণ করা হইলে, চ্যান্সেলর উক্ত সংবিধি বা উহার কোন বিধান পুনঃবিবেচনার জন্য সিন্ডিকেটের নিকট ফেরৎ পাঠাইতে পারিবেন।

(৫) সিন্ডিকেট কর্তৃক প্রস্তাবিত সংবিধি চ্যান্সেলর কর্তৃক অনুমোদিত না হওয়া পর্যন্ত উহার কোন কার্যকারিতা থাকিবে না।

(৬) এই আইনে ভিন্নরূপ কোন বিধান না থাকিলে, সিন্ডিকেট, বিশ্ববিদ্যালয়ের কোন কর্তৃপক্ষের মর্যাদা, ক্ষমতা ও গঠন প্রভাবিত করে এইরূপ কোন সংবিধি প্রণয়নের প্রস্তাবের উপর কোন কর্তৃপক্ষের লিখিত মতামত প্রকাশের সুযোগ না দেওয়া পর্যন্ত চ্যান্সেলরের নিকট পেশ করিবে না এবং উহা সিন্ডিকেট দ্বারা গঠিত কমিটি কর্তৃক মূল্যায়নের পর প্রাপ্ত প্রতিবেদন বিবেচনার জন্য সিন্ডিকেটের সভায় উপস্থাপনপূর্বক বিবেচিত হওয়ার পর প্রস্তাবিত সংবিধির খসড়াসহ চ্যান্সেলর এর নিকট পেশ করিতে হইবে।

৪৬। বিশ্ববিদ্যালয় বিধি।– এই আইন ও সংবিধির বিধান সাপেক্ষে, বিশ্ববিদ্যালয় বিধি দ্বারা নিম্নবর্ণিত সকল বা যে কোন বিষয় সম্পর্কে বিধান করা যাইবে, যথাঃ–

(ক) মাদ্‌রাসায় শিক্ষার্থী ভর্তি এবং তাহাদের নিবন্ধন;

(খ) মাদ্‌রাসার ডিগ্রী, ডিপ্লোমা ও সার্টিফিকেট কোর্সের পাঠক্রম ও পাঠ্যসূচী প্রণয়ন;

(গ) মাদ্‌রাসার ডিগ্রী, সার্টিফিকেট ও ডিপ্লোমা পরীক্ষায় অংশগ্রহণ এবং ডিগ্রী, সার্টিফিকেট ও ডিপ্লোমা পাওয়ার যোগ্যতার শর্তাবলী নির্ধারণ;

(ঘ) মাদ্‌রাসার বিভিন্ন পাঠক্রমে অধ্যয়ন, পরীক্ষায় অংশগ্রহণ এবং বিভিন্ন কোর্সের জন্য প্রদত্ত ফিস্ নির্ধারণ;

(ঙ) বিশ্ববিদ্যালয়ের আঞ্চলিক কেন্দ্রসমূহের গঠন ও উহাদের ক্ষমতা ও দায়িত্ব;

(চ) বিশ্ববিদ্যালয়ের বিভিন্ন একাডেমিক বোর্ড ও কমিটির গঠন, ক্ষমতা ও দায়িত্ব;

(ছ) মাদ্‌রাসার পরীক্ষা পরিচালনা;

(জ) মাদ্‌রাসা শিক্ষকদের জন্য প্রশিক্ষণ ও রিফ্রেশার্স কোর্স, ইত্যাদির ব্যবস্থাপনা এবং স্টাফ ডেভেলপমেন্ট সম্পর্কিত যাবতীয় বিষয়াদি;

(ঝ) ফেলোশীপ, স্কলারশীপ বা বৃত্তি, পুরস্কার, সম্মাননা ও পদক প্রবর্তন; এবং

(ঞ) এই আইন বা সংবিধির অধীনে বিশ্ববিদ্যালয় বিধি দ্বারা নির্ধারিত হইবে বা হইতে পারে এইরূপ অন্যান্য বিষয়।

৪৭। বিশ্ববিদ্যালয় বিধি প্রণয়ন।– একাডেমিক কাউন্সিলের সুপারিশ অনুযায়ী সিন্ডিকেট চ্যান্সেলরের অনুমোদনক্রমে সংশ্লিষ্ট বিষয়ে বিশ্ববিদ্যালয় বিধি প্রণয়ন করিবেঃ

তবে শর্ত থাকে যে, একাডেমিক কাউন্সিল কর্তৃক প্রস্তাবিত বিশ্ববিদ্যালয় বিধির কোন খসড়ার সহিত সিন্ডিকেট একমত হইতে না পারিলে খসড়াটি সিন্ডিকেট ও একাডেমিক কাউন্সিলের যৌথ সভায় পেশ করিতে হইবে এবং যৌথ সভার সিদ্ধান্ত চ্যান্সেলরের অনুমোদনের জন্য পেশ করা হইবে।

৪৮। প্রবিধান।– (১) বিশ্ববিদ্যালয় কর্তৃপক্ষ নিম্নবর্ণিত উদ্দেশ্যে এই আইন, সংবিধি ও বিশ্ববিদ্যালয়

বিধির সহিত সংগতিপূর্ণ প্রবিধান প্রণয়ন করিতে পারিবে, যথাঃ–

(ক) সভার কার্যবিধি প্রণয়ন এবং কোরাম গঠনের জন্য প্রয়োজনীয় সদস্য সংখ্যা নির্ধারণ;

(খ) এই আইন, সংবিধি বা বিশ্ববিদ্যালয় বিধি মোতাবেক প্রবিধান দ্বারা নির্ধারণযোগ্য সকল বিষয় সম্পর্কে বিধান; এবং

(গ) কেবলমাত্র বিশ্ববিদ্যালয়ের সহিত সংশ্লিষ্ট , অথচ এই আইন, সংবিধি বা বিশ্ববিদ্যালয় বিধিতে বিধৃত নয় এইরূপ সমুদয় বিষয়।

(২) বিশ্ববিদ্যালয় কর্তৃপক্ষ উহার সভার তারিখ এবং আলোচ্য বিষয় সম্পর্কে কার্যবিবরণী রেকর্ড করিবার জন্য প্রবিধান প্রণয়ন করিবে।

(৩) সিন্ডিকেট এই ধারার অধীন প্রণীত কোন প্রবিধান সংশোধন করিবার বা বাতিল করিবার নির্দেশ দিতে পারিবে।

৪৯। শিক্ষার মাধ্যম।– বিশ্ববিদ্যালয়ের শিক্ষার মাধ্যম হইবে বাংলা ভাষা, তবে,ক্ষেত্রমত, আরবি ও ইংরেজী ভাষাও ব্যবহার করা যাইবে।

৫০। বিশ্ববিদ্যালয় কর্তৃপক্ষের সদস্য হওয়ার ক্ষেত্রে বিধিনিষেধ।– কোন ব্যক্তি বিশ্ববিদ্যালয় বা কোন মাদ্‌রাসার কোন পদে অধিষ্ঠিত থাকিবার অথবা বিশ্ববিদ্যালয় বা কোন মাদ্‌রাসার কোন কর্তৃপক্ষ বা সংস্থার সদস্য হওয়ার বা থাকিবার যোগ্য হইবেন না যদি তিনি–

(ক) অপ্রকৃতিস্থ বা অন্য কোন অসুস্থতাজনিত কারণে ২ (দুই) বৎসরের অধিককাল তাহার দায়িত্ব পালনে অক্ষম হন;

(খ) আর্থিকভাবে দেউলিয়া ঘোষিত হইবার পর দায় হইতে অব্যাহতি লাভ না করিয়া থাকেন;

(গ) নৈতিক স্খলনজনিত অপরাধে আদালত কর্তৃক দোষী সাব্যস্ত হন;

(ঘ) সিন্ডিকেটের বিশেষ অনুমতি ব্যতিরেকে বিশ্ববিদ্যালয় কর্তৃক পরিচালিত কোন পরীক্ষার পাঠক্রম হিসাবে নির্ধারিত কোন বই, তাহা স্বলিখিত হউক বা সম্পাদিত হউক, এর প্রকাশনা, সংগ্রহ বা সরবরাহকারী কোন প্রতিষ্ঠানের অংশীদার হিসাবে বা অন্য কোন প্রকারে আর্থিক স্বার্থে জড়িত থাকেন; এবং

(ঙ) বিশ্ববিদ্যালয় বা কোন মাদ্‌রাসার সঙ্গে স্বীয় ব্যবসায়িক সম্পর্ক থাকে।

৫১। সাময়িকভাবে শূন্য পদ পূরণ।– বিশ্ববিদ্যালয় কর্তৃপক্ষ বা অন্য কোন সংস্থার পদাধিকারবলে সদস্য নন এইরূপ কোন সদস্য পদে সাময়িকভাবে শূন্যতার সৃষ্টি হইলে যে ব্যক্তি বা কর্তৃপক্ষ উক্ত সদস্যকে নিযুক্ত বা মনোনীত করিয়াছিলেন সেই ব্যক্তি বা কর্তৃপক্ষ যথাশীঘ্র সম্ভব উক্ত শূন্য পদ পূরণ করিবেন এবং যে ব্যক্তি এইরূপ শূন্য পদে নিযুক্ত বা মনোনীত হইবেন তিনি যাহার স্থলাভিষিক্ত হইয়াছেন, তাহার অসমাপ্ত কার্যকালের জন্য উক্ত কর্তৃপক্ষ বা সংস্থার সদস্য পদে বহাল থাকিবেন।

৫২। কার্যধারার বৈধতা ইত্যাদি।– বিশ্ববিদ্যালয়ের কোন কর্তৃপক্ষ বা সংস্থার কোন কার্য বা কার্যধারা কেবলমাত্র উহার কোন পদের শূন্যতা বা উক্ত পদে নিযুক্তি বা মনোনয়ন সংক্রান্ত ব্যর্থতা বা ত্রুটির কারণে অথবা উক্ত কর্তৃপক্ষ বা সংস্থার গঠনের বিষয়ে অন্য কোন প্রকার ত্রুটির জন্য অবৈধ হইবে না কিংবা তৎসম্পর্কে কোন প্রশ্ন উত্থাপন করা যাইবে না।

৫৩। বিতর্কিত বিষয়ে চ্যান্সেলরের সিদ্ধান্ত গ্রহণ।– এই আইন বা সংবিধিতে বিশেষভাবে বিধৃত হয় নাই এইরূপ কোন চুক্তি বা বিষয় সম্পর্কে বিশ্ববিদ্যালয় এবং উহার কোন শিক্ষক বা কর্মকর্তার মধ্যে বিরোধ দেখা দিলে বিরোধটি উক্ত শিক্ষক বা কর্মকর্তার লিখিত অনুরোধক্রমে ভাইস-চ্যান্সেলর কর্তৃক চ্যান্সেলরের সমীপে সিদ্ধান্তের জন্য পেশ করা হইবে এবং এই বিষয়ে চ্যান্সেলরের সিদ্ধান্ত চূড়ান্ত বলিয়া গণ্য হইবে।

৫৪। অবসরভাতা ও ভবিষ্য তহবিল, ইত্যাদি।– সংবিধি দ্বারা নির্ধারিত পদ্ধতি এবং শর্তাবলী সাপেক্ষে বিশ্ববিদ্যালয় উহার শিক্ষক, কর্মকর্তা ও অন্যান্য কর্মচারীর কল্যাণার্থে যেইরূপ সমীচীন মনে করিবে সেইরূপ অবসরভাতা, গোষ্ঠীবীমা, কল্যাণ তহবিল গঠন বা আনুতোষিক প্রদানের ব্যবস্থা করিতে পারিবে।

৫৫। অসুবিধা দূরীকরণ।– বিশ্ববিদ্যালয়ের কার্যাবলী সুষ্ঠুভাবে সম্পাদনের ক্ষেত্রে অথবা উহার কোন কর্তৃপক্ষের প্রথম বৈঠকের বিষয়ে বা এই আইনের বিধানাবলী প্রথম কার্যকর করিবার ক্ষেত্রে কোন অসুবিধা দেখা দিলে, বিশ্ববিদ্যালয় কর্তৃপক্ষ গঠিত হইবার পূর্বে যে কোন সময় উক্ত অসুবিধা দূরীকরণ সমীচীন বা প্রয়োজনীয় বলিয়া চ্যান্সেলর এর নিকট প্রতীয়মান হইলে তিনি আদেশ দ্বারা এই আইন ও সংবিধির সহিত যতদূর সম্ভব সংগতি রক্ষা করিয়া যে কোন পদে নিয়োগ দান বা

অন্য কোন ব্যবস্থা গ্রহণ করিতে পারিবেন এবং এই প্রকার প্রত্যেকটি আদেশ এইরূপে কার্যকর হইবে যেন উক্ত নিয়োগদান ও ব্যবস্থা গ্রহণ এই আইনের বিধান অনুসারে করা হইয়াছে।

৫৬। ক্রান্তিকালীন বিধান।– এই আইন বা বর্তমানে বলবৎ অন্য কোন আইনে যাহাই থাকুক না কেন, বিশ্ববিদ্যালয় যতদিন পর্যন্ত দেশের সকল মাদ্‌রাসার নিয়ন্ত্রণ ও তত্ত্বাবধানের দায়িত্ব গ্রহণ না করে,–

(ক) ততদিন পর্যন্ত উক্ত মাদ্‌রাসাসমূহের উপর ইসলামি বিশ্ববিদ্যালয়, কুষ্টিয়ার এখতিয়ার বহাল থাকিবে; এবং

(খ) বিশ্ববিদ্যালয় কর্তৃক পরীক্ষা সংক্রান্ত বিধি প্রণীত না হওয়া পর্যন্ত ইসলামি বিশ্ববিদ্যালয়, কুষ্টিয়ার অনুসৃত পরীক্ষা সংক্রান্ত বিধি বিশ্ববিদ্যালয়ে অনুসরণ করা হইবে।

তফসিল

[ধারা ৪৫ (২) দ্রষ্টব্য]

বিশ্ববিদ্যালয়ের প্রথম সংবিধি

১। সংজ্ঞা।– বিষয় ও প্রসংগের পরিপন্থী কোন কিছু না থাকিলে, এই সংবিধিতে, "সিন্ডিকেট" "একাডেমিক কাউন্সিল", "কর্মকর্তা," "কর্তৃপক্ষ," "অধ্যাপক," "সহযোগী অধ্যাপক", "সহকারী অধ্যাপক", "প্রভাষক," "মাদ্‌রাসা শিক্ষক" অর্থ যথাক্রমে বিশ্ববিদ্যালয়ের সিন্ডিকেট, একাডেমিক কাউন্সিল, কর্মকর্তা, কর্তৃপক্ষ, অধ্যাপক, সহযোগী অধ্যাপক, সহকারী অধ্যাপক, প্রভাষক, মুহাদ্দিস, মোফাস্‌সির, ফকিহ, আদিব এবং মাদ্‌রাসার শিক্ষক।

২। অধিভুক্তি।– (১) বিশ্ববিদ্যালয়ে অধিভুক্তির জন্য কোন মাদ্‌রাসার আবেদন, যে শিক্ষা বৎসর হইতে অধিভুক্তি কার্যকর করিবার আবেদন করা হইয়াছে উহার পূর্ববর্তী শিক্ষা বৎসরের অক্টোবর মাসের ১৫ (পনের) তারিখের মধ্যে রেজিস্ট্রারের নিকট পেশ করিতে হইবে এবং সিন্ডিকেটকে এই মর্মে সন্তুষ্ট করিতে হইবে যে,–

(ক) মাদ্‌রাসাটি একটি গভর্নিং বডির ব্যবস্থাধীন থাকিবে;

(খ) মাদ্‌রাসাটির শিক্ষকগণের সংখ্যা, যোগ্যতা এবং কার্যকালের শর্তাবলী এইরূপ যে, মাদ্‌রাসা কর্তৃক গৃহীত শিক্ষাক্রমে শিক্ষাদান ও প্রশিক্ষণের ব্যবস্থার জন্য ইহা যথেষ্ট হইবে এবং ইহাতে টিউটোরিয়াল ও ব্যবহারিক শিক্ষাদানের পর্যাপ্ত ব্যবস্থা রহিয়াছে;

(গ) মাদ্‌রাসাটি যে ভবনে অবস্থিত উহা যথোপযোগী এবং উহাতে মাদ্‌রাসার সকল একাডেমিক ও প্রশাসনিক কর্মে ব্যবহারের জন্য প্রয়োজনীয় স্থান সংকুলান হইবে;

(ঘ) মাদ্‌রাসা, শিক্ষার্থীদের জন্য মাদ্‌রাসার হোস্টেল বা মাদ্‌রাসা কর্তৃক অনুমোদিত বাসস্থানে বসবাসের ব্যবস্থা করিয়াছে এবং ছাত্রদের খেলাধুলা ও শরীরচর্চাসহ তাহাদের দৈহিক ও সাধারণ কল্যাণের ব্যবস্থা রহিয়াছে এবং মাদ্‌রাসা ক্যাম্পাসে শিক্ষার্থী ও শিক্ষকদের মধ্যে আনুষ্ঠানিকভাবে দেখা সাক্ষাতের সুযোগও রহিয়াছে;

(ঙ) বিশ্ববিদ্যালয় কর্তৃক নির্ধারিত সময়ের মধ্যে মাদ্‌রাসায় এমন একটি গ্রন্থাগারের ব্যবস্থা করা হইবে যাহা প্রতিদিন নিয়মিত সময়ের জন্য খোলা থাকিবে, যেখানে শিক্ষার্থীরা অবসর সময়ে লেখাপড়া করিতে পারিবে বা যেখান হইতে তাহারা নির্ধারিত সময়ের জন্য বই-পুস্তক বাড়ীতে ব্যবহারের জন্য গ্রহণ করিতে পারিবে;

(চ) পরীক্ষামূলক বিজ্ঞানের কোন শাখায় অধিভুক্তির আবেদনের ক্ষেত্রে উক্ত শাখায় শিক্ষাদানের জন্য যথাযথভাবে যন্ত্রপাতি সজ্জিত পরীক্ষাগার বা যাদুঘরের ব্যবস্থা করা হইয়াছে বা করা হইবে;

(ছ) মাদ্‌রাসা চত্বর বা হোস্টেল এলাকায় বা উহার সন্নিকটে অধ্যক্ষ এবং কিছু সংখ্যক শিক্ষকের বাসস্থানের জন্য যথাসম্ভব ব্যবস্থা গ্রহণ করা হইবে;

(জ) মাদ্‌রাসার আর্থিক সংগতি উহার অব্যাহত রক্ষণাবেক্ষণ এবং দক্ষ পরিচালনার জন্য যথেষ্ট হইবে;

(ঝ) মাদ্‌রাসাটিকে অধিভুক্তি দানের ফলে উহার পার্শ্ববর্তী এলাকায় পূর্ব হইতে অবস্থিত অন্য কোন মাদ্‌রাসা বা মাদ্‌রাসাসমূহের স্বার্থ ক্ষুণ্ন হইবে না;

(ঞ) ১০ (দশ) কিলোমিটারের মধ্যে একাধিক মাদ্‌রাসার অধিভুক্তি মঞ্জুর করা যাইবে না।

(২) আবেদনপত্রে আরও নিশ্চয়তা প্রদান করিতে হইবে যে, মাদ্‌রাসাটি অধিভুক্তি হওয়ার পর উহার ব্যবস্থাপনা বা শিক্ষকগণের মধ্যে কোন পরিবর্তন করা হইলে অথবা অন্য যে কোন পরিবর্তন করা হইলে তাহা তাৎক্ষণিকভাবে সিন্ডিকেটকে অবহিত করা হইবে।

(৩) উপ-অনুচ্ছেদ (১) অনুযায়ী আবেদনপত্র প্রাপ্তির পর, ভাইস-চ্যান্সেলরের অনুমোদনক্রমে, মাদ্‌রাসা পরিদর্শক–

(ক) উপ-অনুচ্ছেদ (১) এ বর্ণিত বিষয়াবলী এবং অন্যান্য যে সকল বিষয় প্রয়োজনীয় ও প্রাসংগিক বলিয়া গণ্য হইতে পারে সেই সকল বিষয় সম্পর্কে স্থানীয়ভাবে তদন্ত অনুষ্ঠানের জন্য পাবলিক বিশ্ববিদ্যালয় বা মাদ্‌রাসা শিক্ষার সাথে সংশ্লিষ্ট এক বা একাধিক শিক্ষক সমন্বয়ে পরিদর্শন টীম গঠন করিবেন;

(খ) প্রয়োজনীয় অন্যান্য পরিদর্শন করিবেন;

(গ) দফা (ক) এ বর্ণিত টীম সংশ্লিষ্ট মাদ্‌রাসা পরিদর্শন করিবে এবং একটি প্রতিবেদন পেশ করিবে;

(ঘ) একাডেমিক বিবেচনায় এই আবেদনপত্রের মঞ্জুরীর বিষয়ে অধিভুক্তি কমিটির সুপারিশের ভিত্তিতে সিন্ডিকেট সিদ্ধান্ত গ্রহণ করিবে।

(৪) অধিভুক্তি কমিটির সুপারিশের ভিত্তিতে সিন্ডিকেট প্রত্যেক অধিভুক্ত মাদ্‌রাসার জন্য প্রয়োজনীয় ন্যূনতম শিক্ষকের সংখ্যা এবং শিক্ষাদানের পর্যায় ও পরিধি নির্ধারণ করিবে।

(৫) সিন্ডিকেট শিক্ষকগণের চাকুরীর শর্তাবলীর বিষয়ে সময় সময় নির্দেশ দান করিতে পারিবে।

(৬) কোন মাদ্‌রাসাকে ভূতাপেক্ষ অধিভুক্তি মঞ্জুর করা হইবে না।

(৭) সিন্ডিকেট কর্তৃক নির্ধারিত পরিমাণ ভূমি মাদ্‌রাসার থাকিতে হইবে।

৩। পরিদর্শন ও প্রতিবেদন।– (১) সিন্ডিকেট কোন সময় কোন প্রতিবেদন, রিটার্ণ বা অন্য কোন তথ্য প্রেরণের জন্য নির্দেশ প্রদান করিলে প্রত্যেক মাদ্‌রাসা তাহা সরবরাহ করিতে বাধ্য থাকিবে।

(২) প্রত্যেক মাদ্‌রাসা মাদ্‌রাসা পরিদর্শক অথবা ভাইস-চ্যান্সেলর বা সিন্ডিকেট কর্তৃক নিযুক্ত ব্যক্তি বা ব্যক্তিবর্গ কর্তৃক নিয়মিতভাবে পরিদর্শিত হইবে।

৪। অধিভুক্তি কমিটি।– (১) বিশ্ববিদ্যালয়ের একটি অধিভুক্তি কমিটি থাকিবে এবং উহা নিম্নবর্ণিত সদস্য সমন্বয়ে গঠিত হইবে, যথাঃ–

(ক) ভাইস-চ্যান্সেলর যিনি উহার সভাপতিও হইবেন;

(খ) সকল প্রো-ভাইস-চ্যান্সেলর;

(গ) ডীন, ফাজিল (স্নাতক) শিক্ষা বিষয়ক কেন্দ্র;

(ঘ) ডীন, কামিল (স্নাতকোত্তর) শিক্ষা, প্রশিক্ষণ ও গবেষণা কেন্দ্র;

(ঙ) ডীন, কারিকুলাম উন্নয়ন ও মূল্যায়ণ কেন্দ্র;

(চ) রেজিস্ট্রার;

(ছ) মহাপরিচালক, মাধ্যমিক ও উচ্চ শিক্ষা অধিদপ্তর, ঢাকা;

(জ) সিন্ডিকেট কর্তৃক মনোনীত শিক্ষা সংশ্লিষ্ট বিষয়ে অভিজ্ঞ ২ (দুই) জন সদস্য;

(ঝ) একাডেমিক কাউন্সিল কর্তৃক মনোনীত ৩(তিন) জন অধ্যক্ষ; এবং

(ঞ) মাদ্‌রাসা পরিদর্শক, যিনি উহার সাচিবিক দায়িত্বও পালন করিবেন।

(২) উপ-ধারা (১) এর অধীন গঠিত অধিভুক্তি কমিটির মনোনীত সদস্যদের মেয়াদ হইবে ২(দুই) বৎসরঃ

তবে শর্ত থাকে যে, মনোনীত সদস্যদের মেয়াদ শেষ হওয়া সত্ত্বেও তাহার স্থলাভিষিক্ত ব্যক্তি কার্যভার গ্রহণ না করা পর্যন্ত তিনি তাহার পদে বহাল থাকিবেন।

(৩) উপ-অনুচ্ছেদ (১) এর দফা (জ) ও (ঝ) তে উল্লিখিত মনোনীত সদস্য যে কোন সময় সভাপতিকে সম্বোধন করিয়া তাহার স্বাক্ষরযুক্ত পত্রযোগে স্বীয় পদত্যাগ করিতে পারিবেন।

(৪) অধিভুক্তি প্রদান প্রক্রিয়া হইবে নিম্নরূপ, যথাঃ–

(ক) অধিভুক্তির আবেদনপত্র প্রাপ্তির পর ভাইস-চ্যান্সেলর অধিভুক্তির জন্য আবেদনকারী মাদ্‌রাসার একাডেমিক, প্রশাসনিক ও আর্থিক অবস্থা সরেজমিনে তদন্তের নিমিত্ত পরিদর্শনের নির্দেশ প্রদান করিবেন এবং তিনি পাবলিক বিশ্ববিদ্যালয়ের বা মাদ্‌রাসা শিক্ষা সংশ্লিষ্ট বিষয়ে অভিজ্ঞ এক বা একাধিক শিক্ষক সমন্বয়ে পরিদর্শন টীম গঠন করিতে পারিবেন;

(খ) পরিদর্শন প্রতিবেদন বিবেচনার জন্য অধিভুক্তি কমিটির নিকট পেশ করা হইবে; এবং

(গ) অধিভুক্তি কমিটির সিদ্ধান্ত সুপারিশ আকারে অনুমোদনের জন্য একাডেমিক কাউন্সিলে উপস্থাপন করা হইবে এবং একাডেমিক কাউন্সিল উক্ত সুপারিশ অনুমোদনক্রমে চূড়ান্ত অনুমোদনের জন্য সিন্ডিকেটে পেশ করিবেন।

(৫) অধিভুক্তি কমিটির ক্ষমতা ও দায়িত্ব হইবে নিম্নরূপ, যথাঃ–

(ক) মাদ্‌রাসাসমূহের অধিভুক্তি প্রদান ও নবায়ন এবং অধিভুক্তি বাতিল সম্পর্কে একাডেমিক কাউন্সিল ও সিন্ডিকেটের নিকট সুপারিশ পেশ করা;

(খ) একাডেমিক কাউন্সিল এবং সিন্ডিকেটের বিবেচনার জন্য অধিভুক্তি নিয়মাবলী ও উহার সংশোধনী প্রস্তাব পেশ করা;

(গ) মাদ্‌রাসা শিক্ষক এবং অন্যান্য কর্মকর্তা ও কর্মচারীর চাকুরীর শর্তাবলী সম্পর্কে সুপারিশ পেশ করা;

(ঘ) একাডেমিক কাউন্সিল, সিন্ডিকেট এবং ভাইস-চ্যান্সেলর কর্তৃক প্রদত্ত অন্য যে কোন বিষয় বিবেচনা ও পরামর্শ প্রদান করা;

(ঙ) কোন মাদ্‌রাসার ভূতাপেক্ষ অধিভুক্তি মঞ্জুরের জন্য সুপারিশ না করা; এবং

(চ) অধিভুক্ত কোন মাদ্‌রাসা অন্য কোন স্থানে স্থানান্তরের বিষয়ে সুপারিশ করা বা না করা।

৫। গভর্ণিং বডি।– (১) প্রত্যেক মাদ্‌রাসা সর্বসাধারণের শিক্ষা প্রতিষ্ঠান হইবে।

(২) প্রত্যেক মাদ্‌রাসা একটি গভর্ণিং বডি দ্বারা পরিচালিত হইবে এবং উহার গঠন বিশ্ববিদ্যালয় বিধি দ্বারা নির্ধারিত হইবে।

৬। নির্বাচনী বোর্ড।– (১) রেজিস্ট্রার, মাদ্‌রাসা পরিদর্শক, গ্রন্থাগারিক, পরীক্ষা নিয়ন্ত্রক, অর্থ ও হিসাব পরিচালক এবং পরিকল্পনা ও উন্নয়ন পরিচালক নিয়োগের জন্য নিম্নবর্ণিত সদস্য সমন্বয়ে নির্বাচনী বোর্ড গঠিত হইবে, যথাঃ–

(ক) ভাইস-চ্যান্সেলর, যিনি উহার সভাপতিও হইবেন;

(খ) সকল প্রো-ভাইস-চ্যান্সেলর;

(গ) ট্রেজারার;

(ঘ) ভাইস-চ্যান্সেলরের সুপারিশক্রমে চ্যান্সেলর কর্তৃক মনোনীত ১(এক) জন বিশেষজ্ঞ সদস্য;

(ঙ) সিন্ডিকেট কর্তৃক মনোনীত উহার ২(দুই) জন সদস্য যাহার মধ্যে ১ (এক) জন অবৈতনিক সদস্য হইবেন;

(চ) ভাইস-চ্যান্সেলর কর্তৃক পর্যায়ক্রমে মনোনীত ১(এক) জন ডীন;

(ছ) ভাইস-চ্যান্সেলর, অর্থ ও হিসাব, গ্রন্থাগার, আইসিটি বিভাগে কর্মকর্তা নিয়োগ কমিটিতে স্ব-স্ব ক্ষেত্রে একজন বিশেষজ্ঞ সদস্য অন্তর্ভূক্ত করিতে পারিবেন।

(২) অধ্যাপক এবং সহযোগী অধ্যাপক নিয়োগের জন্য নিম্নবর্ণিত সদস্য সমন্বয়ে নির্বাচনী বোর্ড গঠিত হইবে, যথাঃ–

(ক) ভাইস-চ্যান্সেলর, যিনি উহার সভাপতিও হইবেন;

(খ) সকল প্রো-ভাইস-চ্যান্সেলর;

(গ) চ্যান্সেলর কর্তৃক মনোনীত সংশ্লিষ্ট বিষয়ে ৩(তিন) জন বিশেষজ্ঞ;

(ঘ) সিন্ডিকেট কর্তৃক পর্যায়ক্রমে মনোনীত ১(এক) জন ডীন;

(ঙ) সিন্ডিকেট কর্তৃক মনোনীত উহার ১(এক) জন সদস্য।

(৩) অধ্যাপক এবং সহযোগী অধ্যাপক ব্যতীত অন্যান্য শিক্ষক পদে নিয়োগের জন্য নিম্নবর্ণিত সদস্য সমন্বয়ে নির্বাচনী বোর্ড গঠিত হইবে, যথাঃ–

(ক) ভাইস-চ্যান্সেলর, যিনি উহার সভাপতিও হইবেন;

(খ) সকল প্রো-ভাইস-চ্যান্সেলর;

(গ) ফাজিল (স্নাতক) শিক্ষা বিষয়ক কেন্দ্রের ডীন;

(ঘ) কামিল (স্নাতকোত্তর) শিক্ষা, প্রশিক্ষণ ও গবেষণা কেন্দ্রের ডীন;

(ঙ) সিন্ডিকেট কর্তৃক মনোনীত সংশ্লিষ্ট বিষয়ে ১(এক) জন বিশেষজ্ঞ;

(চ) সিন্ডিকেট কর্তৃক মনোনীত উহার ১(এক) জন সদস্য।

(৪) উপ-অনুচ্ছেদ (১), (২) ও (৩) এ উল্লিখিত শিক্ষক, কর্মকর্তা, ইত্যাদি ব্যতীত বিশ্ববিদ্যালয়ের অন্যান্য কর্মকর্তা পদে নিয়োগের জন্য নির্বাচনী বোর্ড নিম্নবর্ণিত সদস্য সমন্বয়ে গঠিত হইবে, যথাঃ–

(ক) ভাইস-চ্যান্সেলর বা তদ্‌কর্তৃক মনোনীত একজন প্রো-ভাইস-চ্যান্সেলর অথবা ট্রেজারার যিনি উহার সভাপতিও হইবেন;

(খ) ভাইস-চ্যান্সেলর কর্তৃক পর্যায়ক্রমে মনোনীত ১(এক) জন ডীন;

(গ) সিন্ডিকেট কর্তৃক মনোনীত ২(দুই) জন সিন্ডিকেট সদস্য;

(ঘ) শিক্ষা মন্ত্রণালয় কর্তৃক মনোনীত অন্যূন যুগ্ম-সচিব পদমর্যাদার ১(এক) জন কর্মকর্তা;

(ঙ) রেজিস্ট্রার যিনি উহার সদস্য সচিবও হইবেন।

(৫) নির্বাচনী বোর্ডের মনোনীত সদস্য ৩(তিন) বৎসর মেয়াদে সদস্য পদে অধিষ্ঠিত থাকিবেনঃ

তবে শর্ত থাকে যে, মনোনীত সদস্যের মেয়াদ শেষ হওয়া সত্ত্বেও স্থলাভিষিক্ত ব্যক্তি কার্যভার গ্রহণ না করা পর্যন্ত তাহারা স্ব-পদে বহাল থাকিবেন।

(৬) কোন সদস্য যে কোন সময় সভাপতিকে সম্বোধন করিয়া তাহার স্বাক্ষরযুক্ত পত্রযোগে স্বীয় পদ ত্যাগ করিতে পারিবেন।

(৭) উপ-অনুচ্ছেদ (২) এবং (৩) এ উল্লিখিত শিক্ষক নির্বাচনী বোর্ডের সুপারিশের সহিত সিন্ডিকেট যদি একমত না হয় তাহা হইলে, বিষয়টি চূড়ান্ত সিদ্ধান্তের জন্য চ্যান্সেলরের সমীপে প্রেরণ করিতে হইবে এবং চ্যান্সেলরের সিদ্ধান্তই চূড়ান্ত বলিয়া গণ্য হইবে, তবে উপ-অনুচ্ছেদ (১) এবং (৪) এ উল্লিখিত কর্মকর্তা-কর্মচারী নির্বাচনী বোর্ডে এইরূপ সমস্যা দেখা দিলে পুনরায় বিবেচনার জন্য নির্বাচনী বোর্ডে প্রেরণ করা হইবে এবং উল্লিখিত বিষয়ে পরবর্তীতে সিন্ডিকেটের সিদ্ধান্তই চূড়ান্ত বলিয়া গণ্য হইবে।

(৮) বিশেষ যোগ্যতাসম্পন্ন প্রার্থীকে উচ্চতর প্রারম্ভিক বেতন প্রদানের বিষয়ে নির্বাচনী বোর্ড সিন্ডিকেটের নিকট সুপারিশ করিতে পারিবে।

(৯) সিন্ডিকেট তদ্‌কর্তৃক নির্ধারিত ব্যবস্থা ও শর্ত সাপেক্ষে নির্বাচনী বোর্ডের সুপারিশ অনুযায়ী একজন বিশেষ যোগ্যতাসম্পন্ন ব্যক্তিকে বিশ্ববিদ্যালয় শিক্ষক পদে নিয়োগের প্রস্তাব করিতে পারিবে।

৭। ডীন।– ডীন বিশ্ববিদ্যালয়ের অধ্যাপকবৃন্দের মধ্য হইতে একাডেমিক কৃতিত্ব ও শিক্ষা প্রশাসনে অভিজ্ঞতার ভিত্তিতে সিন্ডিকেটের সুপারিশক্রমে, ভাইস-চ্যান্সেলর কর্তৃক ২ (দুই) বৎসরের জন্য নিযুক্ত হইবেন তবে তিনি একই সাথে অন্য কোন প্রশাসনিক পদ গ্রহণ বা দায়িত্ব পালন করিতে পারিবেন নাঃ

তবে শর্ত থাকে যে, কোন কেন্দ্রে অধ্যাপক না থাকিলে কেন্দ্রের জ্যেষ্ঠতম সহযোগী অধ্যাপককে সাময়িকভাবে ডীন পদে নিযুক্ত করা যাইবেঃ

আরও শর্ত থাকে যে, কোন ডীন পরপর দুই মেয়াদের জন্য নিয়াগের যোগ্য হইবেন না।

৮। ফাজিল (স্নাতক) শিক্ষা বিষয়ক কেন্দ্র।– সিন্ডিকেট এবং একাডেমিক কাউন্সিলের সাধারণ তত্ত্বাবধানে ফাজিল (স্নাতক) শিক্ষা বিষয়ক কেন্দ্রের নিম্নবর্ণিত দায়িত্ব থাকিবে, যথাঃ–

(ক) শিক্ষা ও শিক্ষাদান কার্যক্রম সংগঠন, মান নির্ধারণ, সংরক্ষণ এবং তত্ত্বাবধান করা;

(খ) পাঠক্রম ও পাঠ্যসূচী প্রণয়ন, আধুনিকীকরণ এবং প্রয়োজনবোধে পরিবর্তন ও পুনর্বিন্যাসকরণ;

(গ) শিক্ষা ও গবেষণার ক্ষেত্রে আন্তঃমাদ্‌রাসা সহযোগিতায় উৎসাহ দান এবং শিক্ষার গুণগত উৎকর্ষ বৃদ্ধি ও সংহত করার পদক্ষেপ গ্রহণ করা;

(ঘ) কেন্দ্রের লক্ষ্য ও উদ্দেশ্য পূরণকল্পে সহায়ক অন্যান্য দায়িত্ব।

৯। কামিল (স্নাতকোত্তর) শিক্ষা, প্রশিক্ষণ ও গবেষণা কেন্দ্র।– কামিল (স্নাতকোত্তর) শিক্ষা, প্রশিক্ষণ ও গবেষণা কেন্দ্র সিন্ডিকেট এবং একাডেমিক কাউন্সিলের সাধারণ তত্ত্বাবধানে–

(ক) মাদ্‌রাসায় ফাজিল (স্নাতক) ও কামিল (স্নাতকোত্তর) শিক্ষা সংগঠনের জন্য দায়ী থাকিবে;

(খ) একাডেমিক উন্নয়ন কার্যক্রম, মাদ্‌রাসা শিক্ষকদের প্রশিক্ষণ এবং বিশ্ববিদ্যালয়ের প্রাগ্রসর শিক্ষা ও গবেষণার জন্য দায়ী থাকিবে;

(গ) মাদ্‌রাসাসমূহের মঞ্জুরী দান প্রক্রিয়ার সহিত যুক্ত থাকিবে;

(ঘ) কেন্দ্র এবং মাদ্‌রাসা পরিদর্শন দপ্তরের সহযোগিতায় ভাইস-চ্যান্সেলরের অনুমোদনক্রমে, মাদ্‌রাসাকে প্রয়োজনীয় নির্দেশনা দান করিবে এবং একাডেমিক ব্যবস্থাপনা তত্ত্বাবধান করিবে।

১০। কারিকুলাম উন্নয়ন ও মূল্যায়ন কেন্দ্র।– কারিকুলাম উন্নয়ন ও মূল্যায়ন কেন্দ্র সিন্ডিকেট ও একাডেমিক কাউন্সিলের সাধারণ তত্ত্বাবধানে–

(ক) শিক্ষাকে অধিকতর উদ্দেশ্যমুখী এবং জাতীয় ভাবধারার সহিত সংগতি রাখিয়া সমাজের প্রয়োজনের প্রতি মনোযোগী ও যত্নশীল করিবার লক্ষ্যে মাদ্‌রাসা পর্যায়ে পাঠক্রম ও পাঠ্যসূচী প্রণয়নের দায়িত্ব পালন করিবে;

(খ) জ্ঞানের নব-নব সৃষ্টি ও উদ্ভাবন এবং সৃজনশীলতাকে উৎসাহ দান করিবে;

(গ) মানুষের জ্ঞানের দিগন্তকে প্রসারিত এবং মানবীয় দক্ষতা ও সামর্থ বৃদ্ধিতে উৎসাহ যোগাইবে;

(ঘ) দ্রুত প্রসারণশীল জ্ঞান ভাণ্ডার হইতে জ্ঞান আহরণ করিয়া এবং বিজ্ঞান শিক্ষার ক্ষেত্রে অর্জিত অগ্রগতি মাদ্‌রাসা স্তরে শিক্ষার গুণগত মান উন্নয়নে ও শিক্ষাকে অধিকতর জীবনমুখি করার উদ্দেশ্যে তাহা প্রয়োগ করিবে;

(ঙ) আধুনিক শিক্ষা উপকরণ ও যন্ত্রপাতি উদ্ভাবন ও উন্নয়ন এবং শিক্ষাকে জাতীয় অর্থনৈতিক কর্মকাণ্ডের সহিত অধিকতর সম্পৃক্ত করিতে যত্নবান হইবে এবং এই সম্পর্কে স্নাতকোত্তর শিক্ষা, প্রশিক্ষণ ও গবেষণা কেন্দ্রের সহিত সমন্বয়ের মাধ্যমে দায়িত্ব সম্পাদন করিবে;

(চ) মাদ্‌রাসা শিক্ষকদের সম্পর্কে প্রতিবেদন সংরক্ষণ এবং তাহাদের কৃতিত্বের মূল্যায়ন করিবে;

(ছ) স্নাতকোত্তর শিক্ষা প্রশিক্ষণ ও গবেষণা কেন্দ্র, মাদ্‌রাসা পরিদর্শকের দপ্তর ও বিশ্ববিদ্যালয়ের কম্পিউটার ইউনিট এর সহযোগিতায় একটি উপাত্ত সংগ্রহ কেন্দ্র প্রতিষ্ঠা ও পরিচালনা করিবে এবং ইহাতে মাদ্‌রাসাসমূহ ও শিক্ষকদের সম্পর্কে যাবতীয় তথ্যাদি সংরক্ষণ করিবে;

(জ) ভাইস-চ্যান্সেলর, সিন্ডিকেট এবং একাডেমিক কাউন্সিল কর্তৃক ন্যস্ত অন্যান্য সকল দায়িত্ব পালন করিবে।

১১। বোর্ড অব এডভান্সড স্টাডিজ।– (১) কেন্দ্রের জন্য একটি বোর্ড অব এডভান্সড স্টাডিজ থাকিবে এবং উহা নিম্নবর্ণিত সদস্য সমন্বয়ে গঠিত হইবে, যথাঃ–

(ক) ভাইস-চ্যান্সেলর, যিনি উহার সভাপতিও হইবেন;

(খ) সকল কেন্দ্রের ডীন;

(গ) ভাইস-চ্যান্সেলর, ঢাকা বিশ্ববিদ্যালয় ও ভাইস-চ্যান্সেলর, ইসলামি বিশ্ববিদ্যালয়, কুষ্টিয়া কর্তৃক মনোনীত একজন করিয়া ইসলামিক স্টাডিজ বা আরবি বিভাগের অধ্যাপক;

(ঘ) ভাইস-চ্যান্সেলর কর্তৃক পর্যায়ক্রমে মনোনীত ৩ (তিন) জন বিশ্ববিদ্যালয়ের অধ্যাপক বা সহযোগী অধ্যাপক;

(ঙ) পরিচালক, শিক্ষা গবেষণা ইনস্টিটিউট (আইইআর), ঢাকা বিশ্ববিদ্যালয়;

(চ) মাদ্‌রাসা পরিদর্শক;

(ছ) চেয়ারম্যান, বাংলাদেশ মাদ্‌রাসা শিক্ষা বোর্ড;

(জ) সিন্ডিকেট কর্তৃক মনোনীত, প্রত্যেক প্রশাসনিক বিভাগে অবস্থিত ফাজিল (স্নাতক) অথবা কামিল (স্নাতকোত্তর) পর্যায়ে শিক্ষাদান করে এইরূপ মাদ্‌রাসা হইতে ১ (এক) জন করিয়া অধ্যক্ষ।

(২) উপ-অনুচ্ছেদ (১) এর অধীন মনোনীত সদস্য ২ (দুই) বৎসরের জন্য স্ব পদে অধিষ্ঠিত থাকিবেন, তবে তাহাদের স্থলাভিষিক্ত সদস্যবৃন্দ কার্যভার গ্রহণ না করা পর্যন্ত তাহারা স্ব পদে বহাল থাকিবেন।

(৩) বোর্ড অব এডভান্সড স্টাডিজের দায়িত্ব হইবে নিম্নরূপ, যথাঃ–

(ক) ফাজিল (স্নাতক) ও কামিল (স্নাতকোত্তর) স্তরের বিভিন্ন কোর্সের পাঠক্রম ও পাঠ্যসূচী গভীরভাবে পর্যালোচনা, পরীক্ষণ, নিরীক্ষণ, পাঠক্রম ও পাঠ্যসূচী প্রণয়ন;

(খ) একাডেমিক কাউন্সিলের অনুমোদনের জন্য গবেষণার প্রস্তাব পেশ ও প্রত্যেক থিসিস পরীক্ষা ও উত্তরপত্র মূল্যায়নের জন্য সুপারিশ আকারে পরীক্ষকদের তালিকা প্রদান;

(গ) মাদ্‌রাসা শিক্ষকদের প্রশিক্ষণের জন্য উদ্যোগ গ্রহণ এবং সেমিনার ও ওয়ার্কসপ এর আয়োজন;

(ঘ) ফাজিল (স্নাতক) ও কামিল (স্নাতকোত্তর) স্তরের পাঠক্রম ও পাঠ্যসূচীর মানোন্নয়ন;

(ঙ) মাদ্‌রাসা উচ্চ শিক্ষা কার্যক্রমের গুণগত মান উন্নয়ন ও নিশ্চিতকরণের প্রয়োজনীয় উদ্যোগ গ্রহণ ও উৎকর্ষতা অর্জনের উৎসাহ প্রদানের লক্ষ্যে একাডেমিক কাউন্সিলের নিকট পাঠক্রম ও পাঠ্যসূচীর পরিবর্তন ও উন্নয়নের জন্য সুপারিশ করিবে, প্রয়োজনে কোন বিষয় বা বিষয়সমূহের পাঠ্যসূচী প্রণয়নের জন্য বোর্ড এক বা একাধিক কমিটি গঠনের সুপারিশ করিতে পারিবে;

(চ) শিক্ষা উপকরণ ও সরঞ্জাম উন্নয়নের জন্য একাডেমিক কাউন্সিলের নিকট পরিকল্পনা ও প্রস্তাব পেশ;

(ছ) মাদ্‌রাসাসমূহের শিক্ষা কার্যক্রম পরিক্ষণ ও তত্ত্বাবধানের পদ্ধতি নির্ণয় এবং এই সকল কার্যক্রমের রেকর্ড সংরক্ষণের প্রস্তাব পেশ;

(জ) প্রত্যেক শিক্ষক ও প্রতিষ্ঠান সম্পর্কে পৃথক পৃথক উপাত্ত সংগ্রহ, সংরক্ষণ এবং বিশ্লেষণ;

(ঝ) একাডেমিক কাউন্সিল কর্তৃক ন্যস্ত সকল দায়িত্ব সম্পাদন।

মোঃ মাহ্‌ফুজুর রহমান
সচিব।

বাংলাদেশ জাতীয় সংসদ

ঢাকা, ০৯ অক্টোবর, ২০১৩/২৪ আশ্বিন, ১৪২০

সংসদ কর্তৃক গৃহীত নিম্নলিখিত আইনটি ০৯ অক্টোবর, ২০১৩ (২৪ আশ্বিন, ১৪২০) তারিখে রাষ্ট্রপতির সম্মতি লাভ করিয়াছে এবং এতদ্বারা এই আইনটি সর্বসাধারণের অবগতির জন্য প্রকাশ করা যাইতেছেঃ–

২০১৩ সনের ৩৯নং আইন
প্রতিবন্ধী ব্যক্তির অধিকার প্রতিষ্ঠা ও সুরক্ষা নিশ্চিতকরণের লক্ষ্যে এতদ্‌সংক্রান্ত বিদ্যমান আইন রহিতক্রমে পুনঃপ্রণয়নের উদ্দেশ্যে প্রণীত আইন

যেহেতু গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানে সকল নাগরিকের সমঅধিকার, মানবসত্ত্বার মর্যাদা, মৌলিক মানবাধিকার ও সামাজিক সাম্য প্রতিষ্ঠার অঙ্গীকার ব্যক্ত করা হইয়াছে; এবং

যেহেতু বাংলাদেশ প্রতিবন্ধী ব্যক্তির অধিকার সংক্রান্ত জাতিসংঘ সনদ (United Nations Convention on the Rights of the Persons with Disabilities) অনুসমর্থন করিয়াছে; এবং

যেহেতু প্রতিবন্ধী ব্যক্তির অধিকার প্রতিষ্ঠা ও সুরক্ষা নিশ্চিতকল্পে এতদ্‌সংক্রান্ত বিদ্যমান আইন রহিতক্রমে পুনঃপ্রণয়নের লক্ষ্যে বিধান করা সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্‌দ্বারা নিম্নরূপ আইন করা হইলঃ–

১। সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।– (১) এই আইন **প্রতিবন্ধী ব্যক্তির অধিকার ও সুরক্ষা আইন, ২০১৩** নামে অভিহিত হইবে।

(২) এই আইনের–

(ক) ধারা ৩১ ও ৩৬ ব্যতীত অবশিষ্ট ধারা ও তফসিল অবিলম্বে কার্যকর হইবে; এবং

(খ) ধারা ৩১ ও ৩৬, সরকার সরকারি গেজেটে প্রজ্ঞাপন দ্বারা যে তারিখ নির্ধারণ করিবে, সেই তারিখে কার্যকর হইবে।

২। সংজ্ঞা।– বিষয় বা প্রসঙ্গের পরিপন্থী কোন কিছু না থাকিলে, এই আইনে–

(১) **"উপজেলা কমিটি"** অর্থ ধারা ২৩ এর অধীন গঠিত প্রতিবন্ধী ব্যক্তির অধিকার ও সুরক্ষা সংক্রান্ত উপজেলা কমিটি;

(২) **"একীভূত শিক্ষা"** অর্থ শিক্ষা প্রতিষ্ঠানসমূহে প্রতিবন্ধী শিক্ষার্থী এবং অ-প্রতিবন্ধী শিক্ষার্থীর একইসঙ্গে অধ্যয়ন;

(৩) **"কমিটি"** অর্থ এই আইনের অধীন গঠিত, ক্ষেত্রমত, জাতীয় সমন্বয় কমিটি বা জাতীয় নির্বাহী কমিটি বা কোন জেলা কমিটি বা কোন উপজেলা কমিটি বা কোন শহর কমিটি;

(৪) **"জাতীয় নির্বাহী কমিটি"** অর্থ ধারা ১৯ এর অধীন গঠিত প্রতিবন্ধী ব্যক্তির অধিকার ও সুরক্ষা সংক্রান্ত জাতীয় নির্বাহী কমিটি;

(৫) **"জাতীয় সমন্বয় কমিটি"** অর্থ ধারা ১৭ এর অধীন গঠিত প্রতিবন্ধী ব্যক্তির অধিকার ও সুরক্ষা সংক্রান্ত জাতীয় সমন্বয় কমিটি;

(৬) **"জেলা কমিটি"** অর্থ ধারা ২১ এর অধীন গঠিত প্রতিবন্ধী ব্যক্তির অধিকার ও সুরক্ষা সংক্রান্ত জেলা কমিটি;

(৭) **"তফসিল"** অর্থ এই আইনের তফসিল;

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

(৯) **"প্রতিবন্ধিতা"** অর্থ যেকোন কারণে ঘটিত দীর্ঘমেয়াদী বা স্থায়ীভাবে কোন ব্যক্তির শারীরিক, মানসিক, বুদ্ধিগত, বিকাশগত বা ইন্দ্রিয়গত ক্ষতিগ্রস্ততা বা প্রতিকূলতা এবং উক্ত ব্যক্তির প্রতি দৃষ্টিভঙ্গিগত ও পরিবেশগত বাধার পারস্পরিক প্রভাব, যাহার কারণে উক্ত ব্যক্তি সমতার ভিত্তিতে সমাজে পূর্ণ ও কার্যকর অংশগ্রহণে বাধাপ্রাপ্ত হন;

(১০) **"প্রতিবন্ধী ব্যক্তি"** অর্থ ধারা ৩ এ বর্ণিত যে কোন ধরনের প্রতিবন্ধিতাসম্পন্ন কোন ব্যক্তি;

(১১) **"প্রতিবন্ধী ব্যক্তির অধিকার"** অর্থ ধারা ১৬ তে উল্লিখিত এক বা একাধিক যে কোন অধিকার এবং প্রতিবন্ধী ব্যক্তির অধিকার সংক্রান্ত আপাতত বলবৎ অন্য কোন আইন বা আইনের ক্ষমতাসম্পন্ন দলিলে উল্লিখিত অন্য কোন অধিকার, মানবাধিকার বা মৌলিক অধিকার;

(১২) **"প্রতিবন্ধী ব্যক্তির সংগঠন"** অর্থ প্রতিবন্ধী ব্যক্তিগণ স্বয়ং বা যেসকল প্রতিবন্ধী ব্যক্তি নিজেদের অধিকারের কথা প্রকাশ করিতে পারেন না, তাহাদের

পক্ষে তাহাদের মাতাপিতা বা বৈধ বা আইনানুগ অভিভাবক কর্তৃক তাহাদের কল্যাণ ও স্বার্থ সুরক্ষার জন্য গঠিত ও পরিচালিত কোন সংগঠন বা প্রতিষ্ঠান;

(১৩) **"প্রবেশগম্যতা"** অর্থ ভৌত অবকাঠামো, যানবাহন, যোগাযোগ, তথ্য, এবং তথ্য ও যোগাযোগ প্রযুক্তিসহ জনসাধারণের জন্য প্রাপ্য সকল সুবিধা ও সেবাসমূহে অন্যান্যদের মত প্রত্যেক প্রতিবন্ধী ব্যক্তির সমসুযোগ ও সমআচরণ প্রাপ্তির অধিকার;

(১৪) **"প্রয়োজনীয় স্বাচ্ছন্দ্যের জন্য উপযোগী পরিবেশ ও ন্যায্য সুযোগ সুবিধা (reasonable accommodation)"** অর্থ প্রয়োজনীয় এবং যথার্থ পরিমার্জন ও সমন্বয়, যাহা অসামঞ্জস্যপূর্ণ বা মাত্রাতিরিক্ত বোঝা আরোপ না করিয়া প্রয়োজনীয় নির্দিষ্ট ক্ষেত্রে অন্যদের সহিত সমতার ভিত্তিতে প্রতিবন্ধী ব্যক্তির অধিকার উপভোগ ও অনুশীলন নিশ্চিত করে;

(১৫) **"ফৌজদারী কার্যবিধি"** অর্থ Code of Criminal Procedure, 1898 (Act No. V of 1898);

(১৬) **"বাংলা ইশারা ভাষা"** অর্থ শ্রবণপ্রতিবন্ধী ব্যক্তি ও বাকপ্রতিবন্ধী ব্যক্তির জন্য প্রণীত বাংলা ইশারা ভাষা, যাহা তাহাদের নিজস্ব সংস্কৃতি হইতে উৎসারিত এবং অন্যান্য ভাষার মতই গতিশীল ও পরিবর্তনশীল;

(১৭) **"বিচারগম্যতা (access to justice)"** অর্থ সকল আইনী কার্যধারায়, যেমনঃ

অভিযোগ দায়ের, অনুসন্ধান, সাক্ষ্য প্রদান, তদন্ত ও বিচার প্রক্রিয়ায় কোন প্রতিবন্ধী ব্যক্তির, পদ্ধতিগত ও বয়স উপযোগী সুবিধাসহ, সাধারণ ব্যক্তির ন্যায় সমভাবে অংশগ্রহণের অধিকার;

(১৮) **"বিধি"** অর্থ এই আইনের অধীন প্রণীত কোন বিধি;

(১৯) **"বিশেষ শিক্ষা"** অর্থ প্রতিবন্ধিতার ধরন অনুযায়ী বিশেষ ব্যবস্থাপনায় পরিচালিত কোন আবাসিক বা অনাবাসিক শিক্ষা প্রতিষ্ঠান কর্তৃক পরিচালিত শিক্ষা কার্যক্রম, যাহা মূলধারার শিক্ষার সহিত সাদৃশ্যপূর্ণ এবং যেখানে বিশেষ যত্ন ও পরিচর্যার পাশাপাশি প্রতিকারমূলক ব্যবস্থা বিদ্যমান;

(২০) **"বৈষম্য"** অর্থ প্রতিবন্ধীদের প্রতি সাধারণ ব্যক্তিদের তুলনায় অন্যায্য আচরণ এবং নিম্নবর্ণিত এক বা একাধিক কর্মকাণ্ড উক্ত অন্যায্য আচরণের অন্তর্ভুক্ত হইবে, যথাঃ–

(ক) প্রতিবন্ধী ব্যক্তির অধিকার হইতে বঞ্চিত করা;

(খ) পক্ষপাতিত্বমূলক আচরণ করা;

(গ) প্রতিবন্ধী হিসাবে প্রাপ্য কোন সুযোগ বা সুবিধা প্রদানে অস্বীকৃতি বা কম সুযোগ-সুবিধা প্রদান; এবং

(ঘ) সরকার কর্তৃক নির্ধারিত অন্য কোন কর্মকাণ্ড।

(২১) **"ব্রেইল (braille)"** অর্থ দৃষ্টিপ্রতিবন্ধী ব্যক্তির ব্যবহারের জন্য সৃষ্ট বর্ণমালা;

(২২) **"শহর কমিটি"** অর্থ ধারা ২৪ এর অধীন গঠিত প্রতিবন্ধী ব্যক্তির অধিকার ও সুরক্ষা সংক্রান্ত শহর কমিটি;

(২৩) **"শহর এলাকা"** অর্থ সিটি কর্পোরেশন বা, ক্ষেত্রমত, পৌরসভা এলাকায় অবস্থিত সমাজসেবা অধিদপ্তরের কোন শহর সমাজসেবা কার্যক্রম (ইউসিডি) কার্যালয়ের আওতাধীন এলাকা;

(২৪) **"সচিব"** অর্থে সিনিয়র সচিবও অন্তর্ভুক্ত হইবেন;

(২৫) **"সমন্বিত শিক্ষা"** অর্থ মূলধারার বিদ্যালয়ে, প্রতিবন্ধিতার ধরন অনুযায়ী, প্রতিবন্ধী শিক্ষার্থীর উপযোগী বিশেষ ব্যবস্থাধীন শিক্ষা ব্যবস্থা;

(২৬) **"সমাজভিত্তিক পুনর্বাসন"** অর্থ সমাজের সকল কর্মকাণ্ডে প্রতিবন্ধী ব্যক্তির অংশগ্রহণ নিশ্চিত করিবার লক্ষ্যে তাহাকে কোন বিচ্ছিন্ন প্রতিষ্ঠানে না রাখিয়া সমাজের মধ্যেই তাহার উন্নয়ন প্রয়াস;

(২৭) **"সুরক্ষা"** অর্থ, সার্বিক অর্থকে সীমিত না করিয়া, তফসিলে উল্লিখিত কোন কর্মকাণ্ড;

(২৮) **"সমান আইনী স্বীকৃতি (equal recognition before the law)"** অর্থ প্রতিবন্ধী ব্যক্তিকে সর্বত্রই ব্যক্তি হিসাবে সমান আইনী স্বীকৃতি এবং জীবনের সকল ক্ষেত্রে সমান আইনী কর্তৃত্ব (legal capacity) ভোগ;

(২৯) **"স্ব-সহায়ক সংগঠন"** অর্থ প্রতিবন্ধী ব্যক্তি বা তাহাদের পরিবারের কল্যাণ ও স্বার্থ সুরক্ষায় গঠিত ও পরিচালিত কোন সংগঠন।

৩। **প্রতিবন্ধিতার ধরন।**– এই আইনের উদ্দেশ্য পূরণকল্পে, প্রতিবন্ধী ব্যক্তিদের শারীরিক, মানসিক, বুদ্ধিগত, বিকাশগত, ইন্দ্রিয়গত ক্ষতিগ্রস্ততা এবং

প্রতিকূলতার ভিন্নতা বিবেচনায়, প্রতিবন্ধিতার ধরনসমূহ হইবে নিম্নরূপ, যথাঃ–

(ক) অটিজম বা অটিজমস্পেকট্রাম ডিজঅর্ডারস (autism or autism spectrum disorders);

(খ) শারীরিক প্রতিবন্ধিতা (physical disability);

(গ) মানসিক অসুস্থতাজনিত প্রতিবন্ধিতা (mental illness leading to disability);

(ঘ) দৃষ্টিপ্রতিবন্ধিতা (visual disability);

(ঙ) বাকপ্রতিবন্ধিতা (speech disability);

(চ) বুদ্ধিপ্রতিবন্ধিতা (intellectual disability);

(ছ) শ্রবণপ্রতিবন্ধিতা (hearing disability);

(জ) শ্রবণ-দৃষ্টিপ্রতিবন্ধিতা (deaf-blindness);

(ঝ) সেরিব্রাল পালসি (cerebral palsy);

(ঞ) ডাউন সিনড্রোম (Down syndrome);

(ট) বহুমাত্রিক প্রতিবন্ধিতা (multiple disability); এবং

(ঠ) অন্যান্য প্রতিবন্ধিতা (other disability)।

৪। অটিজম বা অটিজমস্পেকট্রাম ডিজঅর্ডারস (autism or autism spectrum desorders)।– যাহাদের মধ্যে নিম্নবর্ণিত দফাসমূহে উল্লিখিত লক্ষণসমূহের মধ্যে দফা (ক), (খ) ও (গ) এর উপস্থিতি নিশ্চিতভাবে এবং দফা (ঘ), (ঙ), (চ), (ছ), (জ), (ঝ), (ঞ) ও (ট) তে বর্ণিত লক্ষণসমূহের মধ্যে এক বা একাধিক লক্ষণ পরিলক্ষিত হইবে, তাহারা অটিজম বৈশিষ্ট্যসম্পন্ন ব্যক্তি বলিয়া বিবেচিত হইবেন, যথাঃ–

(ক) মৌখিক বা অমৌখিক যোগাযোগে সীমাবদ্ধতা;

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

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

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

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

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

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

(জ) অতিরিক্ত চঞ্চলতা বা উত্তেজনা, অসংগতিপূর্ণ হাসি-কান্না;

(ঝ) অস্বাভাবিক শারিরীক অঙ্গভঙ্গি;

(ঞ) একই রুটিনে চলার প্রচন্ড প্রবণতা; এবং

(ট) সরকার কর্তৃক , সময়ে সময়ে, গেজেট নোটিফিকেশনের দ্বারা নির্ধারিত অন্য কোন বৈশিষ্ট্য।

[**ব্যাখ্যাঃ** অটিজম মস্তিষ্কের স্বাভাবিক বিকাশের এইরূপ একটি জটিল প্রতিবন্ধকতা যাহা শিশুর জন্মের এক বৎসর ছয়মাস হইতে তিন বৎসরের মধ্যে প্রকাশ পায়। এই ধরনের প্রতিবন্ধী ব্যক্তিদের সাধারণত শারীরিক গঠনে কোন সমস্যা বা ত্রুটি থাকে না এবং তাহাদের চেহারা ও অবয়ব অন্যান্য সুস্থ ও স্বাভাবিক মানুষের মতই হইয়া থাকে। অনেক ক্ষেত্রে ছবি আঁকা, গান করা, কম্পিউটার চালনা বা গাণিতিক সমাধানসহ অনেক জটিল বিষয়ে এই ধরনের ব্যক্তিরা বিশেষ দক্ষতা প্রদর্শন করিয়া থাকে।]

৫। শারীরিক প্রতিবন্ধিতা (physical disability)।– নিম্নবর্ণিত দফাসমূহে উল্লিখিত বৈশিষ্ট্যসমূহের মধ্যে এক বা একাধিক বৈশিষ্ট্যের অধিকারী ব্যক্তি 'শারীরিকপ্রতিবন্ধী ব্যক্তি' বলিয়া বিবেচিত হইবেন, যথাঃ–

(ক) একটি বা উভয় হাত বা পা না থাকা; বা

(খ) কোন হাত বা পা পূর্ণ বা আংশিকভাবে অবশ অথবা গঠনগত এইরূপ ত্রুটিপূর্ণ বা দুর্বল যে, দৈনন্দিন সাধারণ কাজ-কর্ম বা সাধারণ চলন বা ব্যবহার ক্ষমতা আংশিক বা পূর্ণভাবে ব্যাহত হয়; বা

(গ) স্নায়ুবিক অসুবিধার কারণে স্থায়ীভাবে শারীরিক ভারসাম্য না থাকা।

৬। মানসিক অসুস্থতাজনিত প্রতিবন্ধিতা (mental illness leading to disability)।– সিজোফ্রেনিয়া বা অনুরূপ ধরনের কোন মনস্তাত্ত্বিক সমস্যা, যেমন-ক্লিনিক্যাল ডিপ্রেশন, বাইপোলার ডিজঅর্ডার, পোস্ট ট্রমাটিক স্ট্রেস, দুশ্চিন্তা বা ফোবিয়াজনিত কোন মানসিক সমস্যা, যাহার কারণে কোন ব্যক্তির দৈনন্দিন জীবন বাধাগ্রস্ত হয়, তিনি মানসিক অসুস্থাজনিত প্রতিবন্ধী ব্যক্তি বলিয়া বিবেচিত হইবেন।

[চলিবে]