Regd. DA-23

Mobile : 017-1168-8860
Tel : 831-5193; 935-6928
831-2503

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THE

DHAKA LAW REPORTS

(A MONTHLY LAW JOURNAL)

Founder Editor : Late Obaidul Huq Chowdhury
Editor : Md Khurshid Alam Khan, Advocate, Supreme Court
Reporter : Md Nawab Ali, Advocate, Supreme Court
Kazi Md Arifur Rahman, Advocate, Supreme Court, High Court Division

Fourth Issue

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available in the Arbitration Clause and that there being no illegality committed by the Court of appeal below, the judgment and decree passed by the court of appeal below deserves no interference by the High Court Division. He finally submits that without considering these legal aspects of the matter both the Rules were made absolute and hence the impugned judgments and orders passed by the High Court Division in both the Rules are liable to be set-aside and leave should be granted.

11. Mr. Khair Azaz Masud, the learned Advocate for the respondent No.1 submits that there is no illegality in the impugned judgment and order as such both the leave petitions are liable to be dismissed in limini.

12. We have heard the learned Counsels appearing for both the parties, perused the impugned judgment and order passed by the High Court Division and other materials available on record.

13. In the instant case there is a provision for arbitration in Clause 25 of the contract of work which provides amongst others that all questions and disputes relating to the meaning of the specifications, designs, drawings and instruction and also as to the quality of workmanship or materials used on the work, or as to any other questions, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the work or the execution or failure to execute the same whether arising during the progress of the works or after the completion or abandonment thereof shall be referred to the tender accepting authority of BEPZA in the manner provided by law relating to arbitration for the time being in force who after such investigation as he may think proper shall deliver his award which shall be final, conclusive and binding on all parties to the contract. Admittedly in the instant case arbitration shall be governed by the Arbitration Act,2001. Section 10 of the Arbitration Act,2001 envisages power of the Court to stay illegal proceedings where there is an arbitration agreement between the parties to refer the Arbitration. It is pertinent to re-produce section 10 of the Arbitration Act which reads as under:

"10. Arbitrability of the dispute—

(1) Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may, at any time before filing a written statement, apply to the Court before which the proceedings are pending to refer the matter to arbitration.

(2) Thereupon, the Court shall, if it is satisfied that an arbitration agreement exists, refer the parties to arbitration and stay the proceedings, unless the court finds that the arbitration agreement is void, inoperative or is incapable of determination by arbitration.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, arbitration may be commenced or continued and an arbitral award made."

14. In the instant case it is noticed by the High Court Division that the defendants-petitioners by filing written statements contested the suit. They submitted themselves to the jurisdiction of the Civil Court i.e. the trial court and thereby they failed to avail the opportunity of resorting to arbitration by seeking stay of the suit. In that view of the matter the High Court Division rightly observed as follows:

"So none of the parties had intention to settle up the dispute through arbitration. It is also clear that section 10 of the Arbitration Act, 2001 does not operate as a bar against filing of the instant suit and the learned District Judge completely failed to take notice of this aspect of law. Therefore, we are of the opinion that the learned District Judge has committed an error of law resulting in an error in the decision occasioning failure of justice in holding that the suit was not maintainable for not redressing the dispute through the arbitrator."

15. In coming to the aforesaid conclusion the High Court Division has rightly considered the decision in the case of *State of UP vs Janki Saran Kailash Chandra* reported in *AIR 1973 SC 2071 at page 2075,* para 7 wherein the Supreme Court of India observed as under:

"When a party to an arbitration agreement commences any legal proceedings against any other party to the said agreement with respect to the subject matter thereof, then the other party is entitled to ask for such proceedings to be stayed so as to enable the arbitration agreement to be carried out. It is, however, to be clearly understood that the mere existence of an arbitration clause in an agreement does not by itself operate as a bar to a suit in the Court. It does not by itself impose any obligation on the Court to stay the suit or to give any opportunity to the defendant to consider the question of enforcing the arbitration agreement. The right to institute a suit in some Court is conferred, on a person having a grievance of a civil nature, under the general law. It is a fundamental principle of law that where there is a right there is a remedy. Section 9 of the Code of Civil Procedure confers this general right of suit on aggrieved person except where the cognizance of the suit is barred either expressly or impliedly. A party seeking to curtail this general right of suit has to discharge the onus of establishing his right to do so and the law curtailing such general right has to be strictly complied with. To enable a defendant to obtain an order staying the suit apart from other conditions mentioned in section 34 of the Arbitration Act, he is required to present his application praying for stay before filing his written statement or taking any other step in the suit proceedings. In the present case, the written statement was indisputably not filed before the application for stay was presented. The question is whether any other step was taken in the proceeding as contemplated by section 34 and it is this point with which we are directly concerned in the present case. Taking other steps in the suit proceedings connotes the idea of doing something in aid of the progress of the suit or submitting to the jurisdiction of the Court for the purpose of adjudication of the merits of the controversy in the suit."

16. In the case of *Popular Biscuit Limited vs Beximco Bremer Export Cantor Brand* reported in *4 ADC (2007) 743* this Division discussed the extent and scope of section 34 of the Arbitration Act,1940 and held to the effect that when parties to the suit submit themselves to the jurisdiction of the civil court, the dispute should not be referred to arbitration. At page 756, para 29 this Division observed as under:

"The High Court Division while staying the proceedings of the trial court, did not at all take into consideration the two basic lawful aspects of the case i.e. the respondent nos. 3-6 took steps on several occasions to adjourn the case in the name of filing written statement and that the respondent nos. 1 and 2 backed out from the arbitration proceedings which was pending before the ICC Paris. So the judgment and order dated 15-5-2000 passed by the High Court Division in staying the suit cannotbe sustained."

17. In view of the provisions of section 10 of the Arbitration Act, 2001 and the principles enunciated by the Apex Courts of the Sub-Continent including this Court we are of the opinion that section 10 of the Arbitration Act enables either of the parties to the arbitration agreement "at any time before filing of written statement to apply to the Court before which the proceedings are pending to refer the matter to the arbitration" whereupon the Court having been "satisfied that an arbitration agreement exists refer the parties to the arbitration and stay the proceedings."

18. While considering section 10 of the Arbitration Act,2001 this Division in the case of *Maico Jute and Bag Corporation vs Bangladesh Jute Mills Corporation* reported in *8 MLR (AD) 4 = 55 DLR (AD) 23* proceeded to the effect that section 10 of the Arbitration Act, 2001 provides for reference of dispute for settlement by arbitration if there is any such clause in the contract agreement and in that event the court shall, if it is not found inoperative or incapable of such settlement, refer the dispute to the arbitrator for settlement and award and thereupon shall stay further proceedings of the suit. There is nothing wrong if the Court stays suo motu the further proceedings of the suit pursuant to an arbitral reference.

19. We have already noticed that the defendant has submitted themselves to the jurisdiction of the Civil Court by filing written statement and contested the suit and thereby they failed to avail the opportunity of resorting to the arbitration by seeking stay of the suit before the Civil Court.

20. As regards admissibility of the photocopies of some documents of the tender file which were marked as Exhibits-l series, in the instant case the High Court Division elaborately discussed the relevant provisions of law as to the admissibility of documentary evidence. The photocopies of some documents of the tender file are secondary evidence. Admissibility of secondary evidence is regulated by section 63 of the Evidence Act, 1872. The High Court Division rightly noticed that admittedly the original tender documents are in the possession of the defendant-petitioner. Section 65 of the Evidence Act provides that secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any person legally bound to produce it, or when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest.

21. In the instant case it appears that the defendant-petitioner was directed by the Court to produce the same at the time of trial as per prayer of the plaintiff-respondent. Moreover, the defendant-petitioner has not challenged that Exhibit 1 series were not the original photocopies of the originals or that those were not supplied by the defendant-petitioner to the plaintiff-respondent. In that view of the matter the High Court Division rightly held that:

> "This being the position, it is crystal clear that as per section 65(a) of the Evidence Act, the documents marked as Exhibit 1 series are admissible in evidence and consequently, we are led to hold that the learned District Judge was wrong in his finding that those photocopies in Exhibit 1 series were not admissible in evidence."

22. It appears that the High Court Division rightly found that the learned District Judge allowed the appeals on two technical grounds without entering into merit of the case and without reversing the findings of the trial court about the plaintiffs' entitlement of decree in both the suits. It has also been rightly noticed by the High Court Division that admittedly in the midst of tender work, the plaintiffs of both the money suits were verbally directed by the defendants to reduce

the formation level of earth from 4.00 metre to 3.50 metre height and no revised or fresh written work-order was issued to that effect. It has also been noticed that by this verbal work-order the period for completion of work was extended from 27-8-2001 to 26-9-2001 which has been conceded by the learned Advocate for the petitioners (BEPZA) before the High Court Division.

23. Having considered the submissions advanced on behalf of the defendant-petitioner and the material evidence on record the High Court Division rightly observed as follows:

> "We find that the learned Joint District Judge rightly held that the plaintiffs were entitled to part decrees as no other condition was imposed in the works done. The learned Joint District Judge appears to have found, by referring to the admission of DW 1 Monir-uz-zaman who himself is defendant No.1 to the effect that the plaintiffs did their work as per approval, there was no scope to deduct compensation from the bills of the plaintiffs at the rate 3%. This finding appears to be based on evidence. We also do not find any reason to realise compensation from the payable amount.
>
> In view of the discussions made above, we find that the learned District Judge appears to have committed errors of law in his finding as regards the maintainability of the suits on the grounds that those were hit by arbitration clause referred to above and inadmissibility of the photocopies of note sheet of the tender file in evidence which resulted in an error in the decision occasioning failure of justice and thus it calls for our interference. The Rules, therefore merit consideration."

24. In view of the above discussions and findings, we do not find any illegality in the impugned judgment and order dated 17-11-2009 passed by the High Court Division in both the Civil Revision No.389 of 2008 and Civil Revision No.422 of 2008 calling for no interference by this Court. In consideration thereof, we do not find any merit in these two leave petitions.

Accordingly, these leave petitions are dismissed.

Ed.

APPELLATE DIVISION
(Criminal)

Md Muzammel Hossain CJ
Surendra Kumar Sinha J
Md Abdul Wahhab Miah J
Hasan Foez Siddique J
AHM Shamsuddin Choudhury J

Judgment
February 24th, 2014.

Durnity Daman Commission and another...Petitioner

vs

Dr. Khandaker Mosharraf Hossain and another.....
.....Respondents*

Code of Criminal Procedure (V of 1898)
Section 498

Anticipatory Bail—After the implementation of the Masdar Hussain judgment *[52 DLR (AD) 82]*, transfer, promotion of the Magistrates are in the hands of the High Court Division, and as such bail petitioners' political assimilation cannot *ipso facto* ignite any apprehension of unfairness or impropriety.

The High Court Division's Order does not depict that the legal and factual aspect stemming from the FIR story was processed through the conduit of heedful observation, nor have they elaborated the reason for their satisfaction as to the foundation of apprehension in the impugned order. It goes without saying that the High Court Division has

*Criminal Petition for Leave to Appeal No. 66 *with* 81 of 2014.

(From the order dated 10-2-2014 passed by the High Court Division in Criminal Miscellaneous Case No.4161 of 2014 in granting anticipatory bail to the accused respondent No.1in Ramna Model PS Case No. 13 dated 6-2-2014)

visibly failed to appreciate the exigency associated with the allegation and its ramification. Money laundering can wreak havoc on national economy. .....(25 & 26)

Code of Criminal Procedure (V of 1898)
Sections 173 and 498
Anti-Corruption Commission Rules, 2007
Rule 10

Anticipatory bails shall not survive post charge-sheet stage. .....(24)

Anticipatory Bail

An omnibus statement that he is a political personage and the Magistrates or the lower court/tribunal Judges, as the case may be are controlled by the government (which has neither factual nor legal basis these days) is not enough. Equally well, the Judges of the High Court Division concerned must also assign reason for their satisfaction on this primordial point, which must be reckoned to be the door opener. .....(21 & 22)

Code of Criminal Procedure (V of 1898)
Section 498

Anticipatory Bail—Criteria

The following criteria shall follow while disposing of anticipatory bail applications;

To open the jurisdictional door they shall satisfy themselves that reasons for apprehension have specifically, explicitly, plausibly, credibly and with sufficient clarity been assigned, instead of relying on any generalised pretension. That must be treated as the precursor.

Political threshold of the petitioner or claimed rivalry, by itself, without further ado, shall not be a ground for entertaining an application.

Non-bailability of the offence cited in the FIR cannot be a reason for the High Court Division's intervention for even the Magistrates/lower court/tribunal Judges are competent enough to enlarge on bail a person accused of non-bailable offences in deserving cases.

Effect of the accused's freedom on the investigation process must not be allowed to float on obfuscation.

The High Court Division must scrutinise the text in the FIR with expected diligence and shall ordinarily be indisposed to grant anticipatory bail where the allegations are of heinous nature, keeping in mind the ordains figured at paragraph 19 of the case reported in 51 DLR (AD) 242.

Interest of the victim in particular and the society at large must be taken into account in weighing respective rights.

If satisfied in all respects, the High Court Division shall dispose of the application instantaneously by enlarging the accused on a limited bail, not normally exceeding four weeks, without issuing any Rule. It must be conspicuously stated in the bail granting order that in the event of any filance of bail application, the Court below will consider the same using its own legal discretion without reference to the High Court Division's anticipatory bail order.

.....(23 & 24)

State vs Zakaria Pintu, 31 BLD (AD) 20 = 62 DLR (AD) 420 and State vs Abdul Wahab Shah Chowdhury, 51 DLR (AD) 243 ref.

Mahbubey Alam, Attorney-General, instructed by Sufia Khatun, Advocate-on-Record—For the Petitioner: (In Criminal Petition No. 81 of 2014).

Khurshid Alam Khan, Advocate, Supreme Court,

instructed by Sufia Khatun, Advocate-on-Record—For the Petitioner: (In Criminal Petition No. 66 of 2014).

Moudud Ahmed, Senior Advocate, instructed by Taufique Hossain, Advocate-on-Record—For the Respondents (In both the cases).

Judgment

AHM Shamsuddin Choudhury J: This Criminal Petition for Leave to Appeal under consideration has been filed by the Durnity Daman Commission (henceforth the Commission) invoking Article 103 of the Constitution.

2. By this petition the Commission sought leave to appeal against an order a Division Bench of the High Court Division passed on 10th February 2014 in Criminal Miscellaneous Case No. 4161 of 2014, granting anticipatory bail to one Dr. Khandaker Mosharaf Hossain.

3. Non contentious facts as are pertinent in disposing of this petition, run as below;

4. A Director of the Commission's Rajshahi Divisional office, having a camp in Dhaka now, lodged a First Information Report (FIR) with Ramna Police Station, Dhaka, on 6th February of the instant year and the same engendered Ramna PS Case No. 13 dated 6-2-2014, under section 13 of the Prevention of Money Laundering Act 2002, section 4 of the Prevention of Money Laundering Act 2009 and section 4 of the Money Laundering Act 2012.

5. Allegations as appear from the typed copy of the FIR, which was produced before the High Court Division with the bail application, in conspectus, reveal that having obtained approval from the Commission, the informant on inquiry unearthed that the aforenamed respondent No. 1 before us (henceforth referred to as the bail petitioner) having accumulated foreign currencies by abusing power, resorting to corruption and money laundering, deposited an amount of 8,04,142.13 British Pound Sterling on a fixed term with Lloyds TSB Offshore Private Bank, at St Peterport, Guernsey, Channel Island, UK, and had thereby committed offences under section 13 of the Money Laundering Act 2002, section 4 of the Money Laundering Act 2004 and section 4 of the Money Laundering Act 2012.

6. The informant further stated that various documents divulge that during the period between 2001 and 2006, the bail petitioner amassed huge volume of properties in the UK, which includes £ 8,04,142.13 that has been poured in at the Fixed Deposit Account No. 108492, maintained in the joint names of Dr Khandaker Mosharrof Hossain and his spouse, Bilqis Aktar Hossain, with Lloyds TSB Bank at Guernsey. It has also been asserted in the FIR that according to a dossier by the Financial Investigation Unit, Bailiwick of Guernsey, the said money stands frozen.

7. The petitioner asserted before the High Court Division that the law enforcers raided his residence at the late hours on 7th February 2014, though he was not home at that time and that is how he came to know about the FIR.

8. The bail petitioner, through his bail application, admitted that he does indeed have the FIR stated Pound Sterling in a Guernsey bank.

9. It has also been stated in the bail petition that he disclosed this fact to the tax authorities in Bangladesh and paid tax on it.

10. His explanation, however, is that after completing his doctoral research in the year 1975, he and his spouse remained in full time employment in the United Kingdom for two years and that his spouse worked full time in the UK from 1976 through 1975 and paid taxes in the UK and they invested these money in the UK share market as well as in different sectors by opening an account with Lloyds TSD Bank in Gurnesey.

11. In advancing his arguments on entitlement to apply for anticipatory bail, the bail petitioner contended before the High Court Division

that (I) the offence cited in the FIR being a cognizable and non-bailable one, the police may arrest him at any time (2) as the service, transfer, promotion the Magistrates and lower court/ tribunal Judges are controlled by the government he apprehends that he may not be legally and properly dealt with (3) the case is a politically oriented one, filed with *malafide* motive (4) *prima facie*, no offence has been disclosed against him (5) he apprehends torture and humiliation in the hands of the police.

12. As the proceeding commenced before us Mr AJ Mohammad Ali profferred for the respondent that the High Court Division was quite right to grant anticipatory bail as the prosecution has been tempted by ulterior motive to harass the respondent purely on political consideration. He also echoed the respondent's claim that he and his spouse earned the subject money when he was pursuing his doctoral research in the UK.

13. Mr Mahbubey Alam, the learned Attorney-General on the other hand contended that the High Court Division utterly misdirected itself by failing to follow the guidelines the Appellate Division spelt out from time to time on anticipatory bails. He also canvassed the proposition that the FIR does divulge a strong *prima facie* case.

14. Anticipatory bail is obviously an extraordinary measure in that ordinarily an accused is required to pray bail from the lowest ladder of the Criminal Court with jurisdiction. In fact that is what the relevant legal scheme contemplates. When an accused invokes section 498 to use the High Court Division as the first forum to seek bail, he jumps all the Criminal Courts below. While there is nothing to step the High Court Division from enlarging an accused on anticipatory bail, the proposition that discretion to enlarge accused persons on anticipatory bail must be exercised sparingly in exceptionally deserving cases, is supported by unbroken chain of authorities of high preponderance, not only because by assuming this power, the High Court Division in a sense destabilises the normal pattern and usurp the discretion meant to be set apart for the lower courts, but also because it is the courts at the lowest strata that can deal with the matter with greater precision as it would normally have the relevant papers before it. Converting the High Court Division into a Magistrate's Court is least desired.

15. For the reasons stated above this Division has laid down in a number of cases certain principles that should be followed in exercising this extraordinary jurisdiction. The High Court Division Judges are bound to adhere to them by virtue of Article III of the Constitution.

16. In expressing the *ratio decidendi* in *State vs Zakaria Pintu, 31 BLD (AD) 20 = 62 DLR (AD) 420* this Division kept no room for deviation from the following essentialities:

i) Assumption of jurisdiction to consider anticipatory bail is an extra-ordinary one.

ii Discretion of the High Court Division in granting bail, very wide though, must be encompassed by judicial circumspection based on established legal principles, without resorting to arbitrary consideration.

iii) The Judges concerned must go through the FIR meticulously and it must be reflected in their order that they have thoroughly scanned the facts and the allegations scripted in the FIR.

iv) Sometimes it is imperative on the part of the Court to refuse pre-arrest-bail when allegations against the petitioners are of serious nature, because the Court must always nurture in their introspection that justice must eventually be done by ensuring punishment for the offenders, as otherwise the fabrics of the civilized society will crumble.

v) The Judges must not be oblivious of the interest of the victims and the society as a whole, for justice connotes even handedness.

vi) Anticipatory bail application must be considered in the backdrop of the possibility that investigation process, in consequence of enlarging the accused on bail, may be impeded.

vii) Prevailing situation should not be ignored.

17. In *State vs Abdul Wahab Shah Chowdhury, 51 DLR (AD) 243,* ATM Afzal CJ, making it abundantly clear that pre-arrest bail is an extra-ordinary remedy, an exception to the general law of bail, can be granted only in extra-ordinary and exceptional circumstances upon proper and intelligible exercise of discretion.

18. His Lordship recorded with approval the learned Attorney-General's profferment that the allegations that the case is false or that the same has been initiated out of political rivalry or the omnibus allegation that the Magistrates and lower court Judges are controlled by the government, cannot, by themselves ground for anticipatory bail.

19. Such a bail prayer can be considered, expressed his Lordships, "When it appears to the Court that the purpose of the alleged proceeding as far as the accused is concerned, is not what it purports to be, but to achieve a collateral purpose by busing the process of law, such as harassment, humiliation etc. of the accused which cannot be permitted."

20. Latifur Rahman J, as he then was, expressed that "ordinarily when a person is wanted in connection with a non-bailable offence of grave nature, he is not entitled to anticipatory bail. All persons charged with non-bailable offences must be treated equally, unless of course there are special circumstances which need special consideration."

21. These guidelines sermon that the petition must disclose explicitly and specifically what is the basis of his apprehension of not to be treated fairly. An omnibus statement that he is a political personage and the Magistrates or the lower court/tribunal Judges, as the case may be are controlled by the government (which has neither factual nor legal basis these days) is not enough.

22. Equally well, the Judges of the High Court Division concerned must also assign reason for their satisfaction on this primordial point, which must be reckoned to be the door opener.

23. Having dissected the ratio and the ordains that emanated from high profile authorities, we are inclined to set forth the following criteria the High Court Division shall follow while disposing of anticipatory bail applications;

(a) To open the jurisdictional door they shall satisfy themselves that reasons for apprehension have specifically, explicitly, plausibly, credibly and with sufficient clarity been assigned, instead of relying on any generalised pretension. That must be treated as the precursor.

24. A metaphorical avowal that the Magistracy/lower judiciary is controlled by the executive should not be treated as specific because Magistrates/lower court/tribunal Judges do no longer dwel in the realm governed by the executive. If allegation of bias is aired against a particular or a group of Magistrates/Judges, cause of suspicion must be specifically spelt out. The Judges concerned, shall give reasons for their satisfaction on this unraveling point.

(b) Political threshold of the petitioner or claimed rivalry, by itself, without further ado, shall not be a ground for entertaining an application.

(c) Non-bailability of the offence cited in the FIR cannot be a reason for the High Court Division's intervention for even the Magistrates/lower court/tribunal Judges are

competent enough to enlarge on bail a person accused of non-bailable offences in deserving cases.

(d) Effect of the accused's freedom on the investigation process must not be allowed to float on obfuscation.

(f) The High Court Division must scrutinise the text in the FIR with expected diligence and shall ordinarily be indisposed to grant anticipatory bail where the allegations are of heinous nature, keeping in mind the ordains figured at paragraph 19 of the case reported in 51 DLR (AD), *supra.* Claim that the allegations are cooked up shall also not be adjudged at that of point if the FIR or the complaint petition, as the case is, *prima facie*, discloses an offence. Whether the allegations are framed or genuine can only be determined through investigation and sifting of evidence.

(g) Interest of the victim in particular and the society at large must be taken into account in weighing respective rights.

(h) If satisfied in all respects, the High Court Division shall dispose of the application instantaneously by enlarging the accused on a limited bail, not normally exceeding four weeks, without issuing any Rule. It must be conspicuously stated in the bail granting order that in the event of any filance of bail application, the Court below will consider the same using its own legal discretion without reference to the High Court Division's anticipatory bail order. Anticipatory bails shall not survive post charge-sheet stage.

25. Now, in the case in hand, the bail petitioner asserted that the service, transfer, promotion of the Magistrates are regulated by the government, a claim that has no relevance with the truth, whether legally or factually. After the implementation of the Masdar Hussain Judgment, transfer, promotion of the Magistrates are in the hands of the High Court Division, and, as such, bail petitioners' political assimilation cannot *ipso facto* ignite any apprehension of unfairness or impropriety. Bail petitioner's contention that the FIR does not *prima facie* disclose any offence, is simply unsustainable legally and de-facto. The FIR does *prima facie* disclose offences of very grave nature. The bail petitioner admits that he has the stated amount of Pound Sterling in the Lloyds TSB Bank in a Channel Island of the United Kingdom. The exactitude or otherwise of his claim that the money were earned legally by himself and his wife while in the UK during the 70s, and that the same subsequently multiplied into the present figure after that money were invested in the stock market, can only be ascertained through investigation and evidence, not at the anticipatory bail petition stage.

26. The High Court Division's Order does not depict that the legal and factual aspect stemming from the FIR story was processed through the conduit of heedful observation, nor have they elaborated the reason for their satisfaction as to the foundation of apprehension in the impugned order. It goes without saying that the High Court Division has visibly failed to appreciate the exigency associated with the allegation and its ramification. Money laundering can wreak havoc on national economy.

27. For the reasons figured above, we are inclined to and hereby do set-aside the High Court Division's order of granting anticipatory bail. Pitiably the High Court Division failed to follow the guidelines that emanated from this Division time and again.

28. We are, least said, dismayed at the paradoxical order on the part of the High Court Division.

29. The petition for Leave to Appeal is disposed of with the above observations and guidelines.

Ed.

APPELLATE DIVISION
(Civil)

Nazmun Ara Sultana J
Syed Mahmud Hossain J
Md Imman Ali J

Judgment
October 10th, 2013.

Zakir Hossain and another....Petitioners

vs

Md Shahnewaz and others...Respondents*

Code of Civil Procedure (V of 1908)
Sections 96 and 97

If an appeal is filed against the preliminary decree and if the preliminary decree is modified or set-aside then the final decree falls through. .....(7)

Order XLI, rule 31

When no appeal is preferred against the final decree and only the preliminary decree is appealed against but a copy of the final decree has been placed on the record of the appeal it is the duty of the appellate Court in dealing with the appeal to give necessary and consequential directions regarding the final decree. .....(12)

Kamal-ul-Alam, Senior Advocate, instructed by Zainul Abedin, Advocate-on-Record—For the Petitioners.

Md Nawab Ali, Advocate-on-Record—For Respondent Nos.1 and 48.

None Represented—Respondent Nos.2-47.

Judgment

Syed Mahmud Hossain J : This petition for leave to appeal is directed against the judgment and order dated 23-8-2009 passed by the High Court Division in Civil Revision No. 3046 of 2008 discharging the Rule and affirming the order dated 23-6-2008 passed by the learned District Judge, Chittagong, in Other Appeal No.413 of 2007 admitting the appeal upon condonation of delay of 1492 days filed against the preliminary decree dated 20-11-2000 and final decree dated 18-10-2003 passed by the learned Acting Senior Assistant Judge, Fifth Court, Chittagong in Partition Suit No.84 of 1999 decreeing the same.

2. The facts, in a nutshell, are that the plaintiff instituted a suit for partition against the defendants. The trial Court upon hearing the parties by its judgment and order dated 20-10-2000 decreed the suit ex-parte in preliminary form and the final decree was drawn on 18-10-2003. Against the preliminary and final decrees, defendant No.13 along with her son as the appellants preferred Other Appeal No.413 of 2007 before the learned District Judge, Chittagong, which was out of time. The learned District Judge, Chittagong by his impugned judgment and order dated 23-6-2008 condoned the delay and admitted the appeal for hearing.

3. Being aggrieved by and dissatisfied with the judgment and order dated 23-6-2008, the plaintiffs-petitioners filed a revisional application before the High Court Division and obtained Rule in Civil Revision No. 3046 of 2008. After hearing the parties, the learned Single Judge of the High Court Division, by the judgment and order dated 23-8-2009, discharged the Rule without any order as to costs and vacated the order of stay granted earlier by this Court and also directed the Court of appeal below to dispose of the appeal within three months from the date of receipt of a copy of the judgment and order.

4. Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the leave-petitioners have filed this civil petition for leave to appeal before this Division.

5. Mr Kamal-ul-Alam, learned Senior Advocate, appearing on behalf of the leave-petitioners,

*Civil Petition for Leave to Appeal No. 753 of 2010.

(From the judgment and order dated 23-08-2009 passed by the High Court Division in Civil Revision No.3046 of 2008).

submits that the learned District Judge condoned the delay in respect of the appeal filed against the final decree and not against the preliminary decree and that the High Court Division without considering this aspect of the case discharged the Rule and, as such, the impugned judgment should be set-aside. He further submits that by one appeal, respondent Nos.1 and 2 cannot challenge both the preliminary decree and the final decree and that since the delay has been condoned with respect to the final decree, the appeal may be treated to have been filed against the final decree only and, as such, the impugned judgment delivered by the High Court Division should be set-aside.

6. We have considered the submissions of the learned Advocate, perused the impugned judgment and the materials on record.

7. There is no gainsaying the fact that respondent Nos.1 and 2 have challenged both the preliminary decree and the final decree in one appeal. An appeal against a preliminary decree is filed under section 96 of the Code of Civil Procedure and that against the final decree under section 97 of the Code of Civil Procedure. If an appeal is filed against the preliminary decree and if the preliminary decree is modified or set-aside then the final decree falls through.

8. It is contended that the learned District Judge admitted the appeal condoning the delay of 1492 days which are equal to 4 years and 32 days and that as such, the appeal shall be deemed to have been admitted in respect of the final decree only.

9. Having gone through the entire order dated 23-6-2008 delivered by the learned District Judge, it appears that he has not stated anywhere that the delay has been condoned in respect of the final decree only. The entire order reveals that the appeal has been admitted against both the preliminary decree and the final decree. The learned District Judge committed a clerical mistake while converting years and days into days. Such a clerical mistake cannot stand on the way of getting the desired relief by respondent Nos.1 and 2. The learned District Judge was, however, satisfied with the explanation furnished by respondent Nos.1 and 2 in the application filed under section 5 of the Limitation Act.

10. Respondent Nos.1 and 2 should have filed two appeals, one against the preliminary decree and the other against the final decree. Therefore, the appeal filed by respondent Nos.1 and 2 shall be deemed to have been admitted in respect of preliminary decree. Mere filing of an appeal against the preliminary is sufficient because the final decree falls through as soon as the preliminary decree is set-aside or modified.

11. In this connection, reliance may be made on the case of *Taleb Ali vs Abdul Aziz, AIR 1929 (Calcutta) 189* (Full Bench), in which, it has been held that an appeal from a preliminary decree is not incompetent even if a final decree is made before the appeal is presented. Nor is it necessary for a party aggrieved by a preliminary decree to appeal both from that decree and against the final decree in order to maintain this appeal against the preliminary decree.

12. Reliance may also be made on the case of *Saradindu Mukherjee vs Jahar Lall Agarwalla, AIR 1942 (Calcutta)153*, in which, it has been held that when no appeal is preferred against the final decree and only the preliminary decree is appealed against but a copy of the final decree has been placed on the record of the appeal it is the duty of the appellate Court in dealing with the appeal to give necessary and consequential directions regarding the final decree.

13. From the cases referred to above, it appears that if the respondents appeal is treated to be admitted against the preliminary decree then they may get the desired relief provided they succeed in the appeal.

14. Having gone through the judgment of the High Court Division, we find that the learned

Advocate for the petitioners has not raised this question before the High Court Division. Therefore, the High Court Division did not have the opportunity to address the question now raised by the learned Advocate for the petitioners.

15. The findings arrived at and the decision made by the High Court Division having been based on proper appreciation of laws and facts do not warrant interference by this Division. Accordingly, this civil petition for leave to appeal is dismissed.

Ed.

APPELLATE DIVISION
(Civil)

ABM Khairul Haque CJ
Md Muzammel Hossain J
SK Sinha J

Judgment
December 8th, 2010.

Monir Hossain Md (Moni) and another.. .....Appellants

vs

Md Yousuf and others.....Respondents*

Transfer of Property Act (IV of 1882)
Section 106

Premises Rent Control Act (III of 1991)
Section 10

If a tenant becomes defaulter by failing to comply with the mandatory provision of law, he always remains defaulter unless the landlord expressly waive that default, and once a tenant is found to be defaulter, he is liable to be evicted. .....(10)

Shamsuddin Ahmed vs Mohd Hassan, 31 DLR (AD) 155 ref.

Nur Hossain Chowdhury, Advocate, instructed by Md Nawab Ali, Advocate-on-Record—For the Appellants

Md Aftab Hossain, Advocate-on-Record—For the Respondent Nos.2 & 3.

None Represented—For the Respondent No.1.

*Civil Appeal No. 271 of 2002.

(From the judgment and order dated 20.08.2000 passed by the High Court Division in Civil Revision No.2948 of 1999).

Judgment

Md Muzammel Hossain, J : This appeal by leave is directed against the judgment and order dated 20-8-2000 passed by a Single Bench of the High Court Division in Civil Revision No.2948 of 1999 making the Rule absolute and reversing the judgment and decree dated 15-6-1999 passed by the learned Subordinate Judge, 1st Court and Judge of the Small Causes Court, Faridpur in Small Causes Court Suit No.6 of 1996.

2. The facts of the case, in brief, are that the appellants as plaintiffs filed SCC Suit No.4 of 1995 in the Court of Assistant Judge and SCC Judge, Faridpur Sadar against the respondents as defendants for a decree for ejectment. Subsequently, the case was transferred to the Court of Subordinate Judge No.1, Faridpur and renumbered as SCC Suit No.6 of 1996. The suit premises constitute a portion of Municipal Holding No.133/1, known as Room No.5 of the said holding belonged to Abdul Aziz and another from whom the plaintiffs purchased the same by three registered kabalas dated 31-8-1994, 28-9-1994 and 02-11-1994 and got delivery of possession. Prior to their purchase, the defendants were tenants in respect of the suit premises, a shop room, at a monthly rent of Taka 200 payable according to Gregorian Calendar under an agreement dated 26-2-1987; that following the purchase of the plaintiffs Janab Hafez Tamizuddin, constituted attorney of the plaintiffs' vendors introduced the plaintiff No.1 with all the existing tenants including the respondents with instruction to pay the rent to the plaintiff No.1 and to execute fresh lease agreement with the said purchasers, which the defendants agreed to do but as they did not act according to their promise and did neither pay any

rent nor enter into any agreement and thus became defaulter; that the plaintiffs after duly terminating the tenancy by service of notice under section 106 of the Transfer of Property Act,1882 filed the suit for a decree for ejectment.

3. The respondents as defendants contested the suit by filing written statement denying the material allegations made in the plaint contending, *inter alia,* that the suit is not maintainable; that the defendants obtained lease of the suit premises from Hafez Md Tamizuddin, attorney for the owners Abdul Aziz and another i.e. the plaintiffs' predecessor initially at a monthly rent of Taka 150, which was later enhanced to Taka 200 per month under an agreement for lease dated 26-2-1987 together with consideration of Taka 17,000 for possession on condition to pay the rent for each month within three days of the month next following; that the defendants regularly paid the rent without any receipt upto 03-10-1994 and on that date the defendants obtained an acknowledgement in writing from the said attorney Tamizuddin; that in view of non-acceptance of the rent on 3-1-1995 the defendants remitted the rent by money order on 10-1-1995 and in view of refusal by the landlord to receive the same they deposited the same with the Rent Controller and Senior Assistant Judge, Faridpur Sadar in Miscellaneous Case No.3 of 1995; that on receipt of the notice of the said suit, the landlord contested the same by filing written objection wherein the factum of sale of the suit holding was disclosed for the first time; that thereafter the defendants sent the rent on 9-4-1995 by money order to the plaintiffs of the SCC Suit and on refusal added the plaintiffs as opposite parties in the House Rent Case and, as such, the defendants are not defaulters; that the plaintiffs did not serve any notice under section 106 of the Transfer of Property Act,1882 and, as such, the suit is liable to be dismissed.

4. The learned Subordinate Judge, 1st Court and Judge of the Small Causes Court, Faridpur by the judgment and decree dated 15-6-1999 decreed the suit. Being aggrieved by the aforesaid judgment and decree dated 15-6-1999 the defendant respondents moved the High Court Division in Civil Revision No.2948 of 1999 and a Single Bench of the High Court Division by the judgment and order dated 20-8-2000 made the Rule absolute.

5. Being aggrieved by the impugned judgment and order passed by the High Court Division the petitioners filed a Civil Petition for Leave to Appeal before this Court.

6. Leave was granted to consider the following points:

(1) whether the learned Single Judge of the High Court Division erred in law in failing to notice that the agreement of lease (Exhibit A) is a void agreement, being hit by section 10 of the Premises Rent Control Act, 1991 read with section 23 of the Contract Act, 1872 in consequence of which the status of the tenants becomes that of a monthly tenant as per the pro-position laid down by their Lordships of the Appellate Division in a number of cases including the cases reported in 31 DLR (AD) 155.

(II) whether the learned Single Judge of the High Court Division erred in law in holding without any justification that the tenants in the instant case are non-evictable tenants and are not liable to be evicted by giving notice under section 106 of the Transfer of Property Act,1882 which is absolutely unwarranted and against the law and will have the effect of making the landlord a rent receiver and equating the lease of a premises with permanent lease with no remedy available to the landlord against defaulting tenants.

7. Mr Nur Hossain Chowdhury, the learned Advocate appearing for the appellants submits that the High Court Division erred in law in failing to notice that the agreement for lease (Exhibit-A) is a void agreement, being hit by section 10 of the Premises Rent Control Act, 1991 read with section 23 of the Contract Act, 1872 in consequence of which the status of the tenants becomes that of a monthly tenant. In support of his contention he has cited the decision reported in *31 DLR (AD) 155.* He then submits that the learned Single Judge of the High Court Division erred in law in holding that the tenants in the instant case are non-evictable tenants and are not liable to be evicted by giving notice under section 106 of the Transfer of Property Act, 1882 which is absolutely unwarranted and against the law and will have the effect of making the landlord a rent receiver. He further submits that the learned Single Judge of the High Court Division erred in law basing his decision on the agreement for lease (Exhibit A) against the mandate of the statute and in making out a third case of usage, there being no such case either in the pleading or in the evidence, in derogation of the statutory law. He finally submits that the case raises questions of law of public importance as to the interpretation of the law relating to lease of premises, in particular section 10 of the Premises Rent Control Act, 1991, section 23 of the Contract Act, 1872 and the related provisions of the Transfer of Property Act, 1882 and, as such, the appeal is liable to be allowed.

8. In the instant case it appears that admittedly the appellants are the owners of the premises by three purchase deeds dated 31-8-1994, 28-9-1994 and 02-11-1994 and got delivery of possession and admittedly prior to their purchase, the respondents were tenants in the suit premises, a shop room at a monthly rent of Taka 200. It is the case of the appellants that the respondents were introduced to the appellants by the vendor who asked them to pay rent to the appellants to which they agreed; that the respondents became defaulter in making payment of rent which caused the appellant to terminate the tenancy by serving notice under section 106 of the Transfer of Property Act, 1882 and filed the SCC Suit. The contention of the respondents as appears from their written statement and evidence is that they are not defaulter rather they purchased possession of the suit premises from the vendor of the appellant with a cash of Taka 17,000 and agreed to pay rent of Taka 200 per month. The agreement (Exhibit-A) in respect of sale of possession of the premises by the vendor of the appellants to the respondents is a void agreement being hit by section 10 of the Premises Rent Control Act, 1991 which provides that the landlord shall not claim, receive or invite offers or asked for any premium, jamanat, salami, fine or any other like sum in addition to the rent in consideration of the grant, renewal or continuance of a tenancy of any premises. Section 23 of the Contract Act, 1872 precisely provides that the consideration or object of an agreement is lawful unless it is forbidden by law. Therefore no suit lies to enforce an illegal contract. According to section 10 of the Premises Rent Control Act, 1991 the respondents' alleged agreement (Annexure-A) is a void agreement because of the provision of section 10 of the Premises Rent Control Act, 1991 read with section 23 of the Contract Act, 1872 in consequence of which the status of the tenants becomes a monthly tenant. In this regard it is pertinent to refer to the decision of the case of *Shamsuddin Ahmed vs Mohd Hassan* reported in *31 DLR (AD) 155* where tenancy was created for a period of two years. In clause 1 of the agreement it was not mentioned that the appellant was taking the premises at a monthly rent of Taka 1,600 payable according to Gregorian Calendar month. Clause 2 of the agreement mentions the payment of an advance of Taka 19,200 out of which an amount of Taka 800 will be deducted every month towards the payment of rent. After the advance has been deducted in this way within a period of twenty four months the tenant will pay rent at

Taka 1600 in cash every month. This Division held that Clause (a) of section 10 of the Premises Rent Control Ordinance,1963 prohibits the acceptance of any sum of money over and above the rent payable by a tenant. This clause has also made illegal even any claim or invitation of an offer for the payment of such sum of money in the form of premium, salami or fine either when tenancy is being created or renewed, or during its continuance. Under Clause (b) no one is allowed to claim or receive a payment of more than one month's rent in advance. The Appellate Division further held that the agreement for lease was void under section 23 of the Contract Act, 1872 as its object was not lawful and that it having not been registered was unenforceable and also inadmissible in evidence. The agreement to pay Taka 19,200 by way of advance rent was undoubtedly a part of the consideration of the transaction as defined in section 2(d) of the Contract Act, 1872. This contravenes the positive statutory mandate as provided in section 10(b) of the Premises Rent Control Ordinance,1963. In view of the unenforceability of the agreement the position is that the appellants are monthly tenant who is liable to ejectment if he makes default in payment of rent as provided in section 18(5) of the Premises Rent Control Ordinance. This Division further held that as long as the respondents had the unadjusted amount in their hands, they could have adjusted it towards the payment of rent for the months of October, November and December. In view of the provisions of section 18(5) of the Ordinance which do not seem to have been contravened by the appellant no default appears to have been made by him in paying the rent for the months of October, November and December, 1973.

9. In the instant case it appears that the learned Single Judge of the High Court Division erred in law in failing to notice that the agreement of lease (Exhibit-A) is a void agreement in view of section 10 of the Premises Rent Control Act, 1991 read with section 23 of the Contract Act, 1872. The learned Single Judge of the High Court Division also failed to notice that the respondents are monthly evictable tenants and, as such, they are liable to be evicted by giving notice under section 106 of the Transfer of Property Act, 1882 which is attracted in the facts and circumstances of the case. On perusal of the judgment of the trial Court it appears that the learned Judge of SCC Court has found that admittedly the appellants are the owners of the premises by purchase and the respondents are tenants under the appellants. It has also been found by the Court below that the respondents by failing to make payment of rent within the stipulated period became defaulter as a result of which a notice under section 106 of the Transfer of Property Act, 1882 was duly served upon them and consequently the SCC Suit was filed against them.

10. It is the consistent view of this Division that if a tenant becomes defaulter by failing to comply with the mandatory provision of law, he always remains defaulter unless the landlord expressly waive that default, and once a tenant is found to be defaulter, he is liable to be evicted.

11. For the aforesaid reasons we find that the learned Single Judge of the High Court Division erred in law in passing the impugned judgment and order making the Rule absolute and reversing the judgment and order passed by the SCC Court. Accordingly, we find merit in the appeal.

In the result, the appeal is allowed with cost of Taka 10,000 in favour of the appellants. The impugned judgment and order dated 20-8-2000 assed by a Single Bench of the High Court Division in Civil Revision No.2948 of 1999 is hereby set-aside and the judgment and decree dated 15-6-1999 passed by the learned Sub-Ordinate Judge, 1st Court and Judge of the Small Causes Court, Faridpur in SCC Suit No.6 of 1996 is hereby restored.

Ed.

APPELLATE DIVISION
(Civil)

ABM Khairul Haque CJ
Md Muzammel Hossain J
SK Sinha J

Judgment
January 6th, 2011.

Ramesh Chandra Adhikari.....Petitioner

vs

Bulbuli...Respondent*

Hindu Marriage

Marriage under the traditional Hindu Law is a holy union for the performance of religious duties. It is a sacrament for the purification of the body from inherited taint. It is not a contract. Of course the marriage is necessarily the basis of social organization and the foundation of important legal rights and obligations.....(23)

Hindu Law of Marriage and Succession

Time has come for the legislature to think about this burning issue to find out correct solution to the problem by proper enactment or codification of Hindu Law of marriage and succession. If the codification of the Hindu Law is made, most of the matrimonial problems now being faced by both the parties can be resolved or minimized with least trouble.

.....(23)

Codification of Hindu Law

An uniform and comprehensive system governing all Hindus containing a series of coherent provisions carefully considered after having gone through by eminent pundits and researchers and law commission a codification of Hindu Law of marriage and succession should be enacted. Time has come for the legislators to think about the codification of the Hindu Law of Marriage and Succession in Bangladesh. .....(23)

Chellammal vs Ranganatham Pillai, (1911) ILR 34 Mad 277; Mrs Valsamma Paul vs Cochin University, AIR 1996 SC 1011; Swarajya Lakshmi vs Dr GG Padma Rao, AIR 1974 SC 165; V. Tulasamma vs V. Sesha Reddi (Dead) By L. Rs, AIR 1977 SC 1944; Veerappa Chettiar vs S. Michael Etc, AIR 1963 SC 933; Chunilal vs Surajram (1909) 33 Bom. 433; Kally Churn vs Dukhee (1880) ILR 5 Cal.692; Utpal Kanti Das vs Monju Rani Das, 17 BLD (AD) 289 = 50 DLR (AD) 47 and Bhaurao Shankar Lokhande vs State of Maharashtra, AIR 1965 SC 1564 ref.

Abul Kalam Mainuddin, Advocate, instructed by Md Nawab Ali, Advocate-on-Record—For the Petitioner.

None Represented—For the Respondent.

Judgment

Md Muzammel Hossain J: This petition for leave to appeal under Article 103 of the Constitution of People's Republic of Bangladesh is directed against the judgment and decree dated 29-10-2008 passed by a Single Bench of the High Court Division in Civil Revision No. 2325 of 2005 discharging the Rule and affirming the judgment and decree dated 2-10-2004 passed by the learned District Judge, Narail in Family Appeal No.03 of 2004 dismissing the appeal and affirming those dated 20-1-2004 passed by the learned Senior Assistant Judge and Family Court, Narail in Family Suit No. 87 of 2000 decreeing the suit.

2. The present respondent as plaintiff instituted Family Case No.87 of 2000 in the Court of Senior Assistant Judge and Family Court, Narail for maintenance against the defendant petitioner stating, *inter alia,* that the plaintiff and the defendant being neighbours knew each other since their child-

*Civil Petition for Leave to Appeal Nos. 431 of 2009.

(From the judgment and decree dated 29-10-2008 passed by the High Court Division in Civil Revision No.2325 of 2005)

hood; that during their study in Rajshahi University they came in close contact and fell in love with each other and subsequently, according to Hindu Shastra the defendant-petitioner married the plaintiff-respondent in the Rajshahi Kali Mondir in the month of December,1989 in presence of witnesses; that marriage ceremony was solemnized by the Puruhit and Shayamol, brother of the petitioner offered him and Maharaj Biswas (PW 3), uncle of the respondent offered her to each other in the marriage. Thereafter, they lived together as husband and wife. After completion of their education from Rajshahi University both of them joined as lecturers in two different colleges. From the very beginning the petitioner demanded dowry and started to torture the plaintiff-respondent both physically and mentally as a result of which the plaintiff lodged complaint before the superintendent of police who on 15-3-1998 compromised the matter by a written agreement and again the defendant demanded dowry on 21-1-2000 and drove away the plaintiff from the house and refused to give maintenance on 20-10-2002 and hence the suit.

3. The present petitioner as defendant contested the suit by filing written statement, stating, *inter alia* that he had not married the plaintiff-respondent and he has no relationship with her; that the plaintiff-respondent being influenced by superintendent of police forcibly entered into the house of the defendant-petitioner and managed to have a signature from him on blank stamp paper and thereafter filed the Suit.

4. The learned Assistant Judge and Family Court, Narail by the judgment and decree dated 20-1-2004 decreed the suit.

5. The defendant being aggrieved by the aforesaid judgment and decree dated 20-1-2004 preferred an appeal being Family Appeal No.03 of 2004 in the Court of District Judge, Narail who by the judgment and decree dated 02-10-2004 dismissed the appeal.

6. Being aggrieved by the aforesaid judgment and decree dated 2-10-2004 passed by the learned District Judge, Narail the defendant-petitioner moved the High Court Division in Civil Revision No.2325 of 2005 and a Single Bench of the High Court Division by the impugned judgment and decree dated 29-10-2008 discharged the Rule affirming those passed by the learned District Judge.

7. Thereafter, the defendant-petitioner being aggrieved by the impugned judgment and decree passed by a Single Bench of the High Court Division moved the instant Civil Petition for Leave to Appeal before this Division.

8. Mr. Abul Kalam Mainuddin, the learned Advocate appearing for the defendant-petitioner submits that the High Court Division failed to notice that there is no single evidence showing valid marriage under the Hindu Law by invocation before sacred fire and saptapadi performed by the couple and, as such, the impugned judgment and decree is liable to be set-aside. He then submits that the plaintiff-respondent did not adduce any evidence of wedding ceremony but the courts below failed to consider this aspect of the matter and, as such, the impugned judgment and decree is liable to be set-aside. Mr. Mainuddin finally submits that since the defendant-petitioner denied the marriage the onus lies upon the plaintiff-respondent to prove marriage between them but the plaintiff-respondent failed to prove their marriage and, as such, the impugned judgment and decree passed by the High Court Division is liable to be set-aside.

9. We have heard the learned Advocate appearing for the petitioner, perused the impugned judgment and decree of the High Court Division and other materials on record.

10. The pertinent question in this case is whether the defendant-petitioner had married the plaintiff-respondent according to Hindu Law. It appears that the plaintiff-respondent as PW 1

deposed in support of her case stating that she having fallen in love with the defendant-petitioner married him according to the ceremonies prescribed by the Hindu "Shastras" in presence of the brother of the petitioner; that she cannot say whether the 'Brahmin' who solemanized the ceremonies of the marriage is alive or not; that she stated the photograph which was taken during marriage; that she wore "Shakha and Sindur"; that she lived with him in a house as husband and wife and she left her husband's house because of his torture and demand of dowry; that she lodged complaint to the superintendent of police; that there was a conciliation by local superintendent of police when the petitioner gave an undertaking to take her in his house where she stayed with him. The plaintiff-respondent also proved that marriage took place in the Rajshahi Kali Mondir in presence of the witnesses and brother of defendant-petitioner. The plaintiff-respondent's neighbour Nirmal Kumar Gupta as PW 2 corroborated the evidence of the plaintiff PW 1 stating that the defendant married the plaintiff in Rajshahi in his presence; that the 'Puruhit' solemnized the marriage in Kalibari Rajshahi according to Hindu Shastra and the defendant-petitioner's brother offered him; that a cameraman of Rajshahi took photograph of the marriage ceremony. The plaintiff-respondent's uncle Maharaj Biswas as PW 3 also corroborated the evidence of PW 1 and PW 2 stating that he offered her niece in marriage to the defendant-petitioner and the 'Puruhit' solemnized the marriage by reciting "mantra" in the Kalibari Rajshahi in his presence and Nirmal went to Rajshahi with him. PW 1 to PW 3 by their evidence proved that after the marriage both the plaintiff and the defendant lived together in the same house in Rajshahi as husband and wife. PW 4-Tarafdar Rezaul Islam, a resident of the locality and common friend of both of them deposed that he has no enmity with the defendant-petitioner and PW 4 also corroborated the plaintiff-respondent's statement in respect of compromise agreement in the Office of the Superintendent of Police where the defendant and other witnesses were present. The defendant did not deny the fact of this compromise in the presence of PW 4. Exhibit-1-voter-list shows that the defendant has been shown as the husband of the plaintiff and they have also joint photograph as husband and wife marked as Exhibit-3. Both the trial court and the court of appeal below as the final court of facts on consideration of both oral and documentary evidence on record found that they united in marriage and there is a relationship of husband and wife between them.

11. According to Mulla there is an extreme strong presumption of the validity of marriage and the legitimacy of children born out of the lawful marriage if from the time of the alleged marriage both the parties are recognized by all persons concerned as man and wife and also described in important documents and on important occasions. It has been held in the case of *Chellammal vs Ranganatham Pillai, (1911) ILR 34 Mad 277* that the fact that a woman was living under the control and protection of a man who generally lived with her and acknowledged her children arises strong presumption that she is the wife of that man. But the same presumption can be rebutted showing that no marriage could have taken place. In the instant case from the material evidence on record we find that there was evidence of compromise by the plaintiff and the defendant in presence of PW 4; that voter list Exhibit-1 shows that the defendant is the husband of the plaintiff and there was also evidence of joint photograph as husband and wife. All these evidences support the case of the plaintiff-respondent that there was a valid marriage between the petitioner and the respondent. However, there is also an argument in the modern society that recognition by family of both the parties or community is not a pre-condition for a valid marriage. While considering this aspect of marriage Supreme Court of India in the case of *Mrs Valsamma Paul vs Cochin University, AIR 1996 SC 1011,* observed as under:

> "Though it was consistently held that recognition is a circumstance to be taken into consideration, marriage being personal right of

the spouses they are entitled to live, after marriage, openly to the knowledge of all the members of the community or locality in which they live and by such living they acquire married status. In the light of the constitutional philosophy of social integrity and national unity, right to equality assured by the human rights and the Constitution of India, on marriage of a man and a woman, they become members of the family and entitled to the social status as married couple, recognition *per se* is not a pre-condition but entitled to be considered, when evidence is available. It is common knowledge that with education or advance of economic status, young men and women marry against the wishes of parents and in many a case consent or recognition would scarcely be given by either or both the parties or parents of both spouses. Recognition by family or community is not a pre-condition for married status."

12. The concept of marriage in Hindu Law has been propounded in several cases decided by the Indian Supreme Court. In the case of *Swarajya Lakshmi vs Dr GG Padma Rao, AIR 1974 SC 165,* it was observed,

> "Marriage according to Hindu Law, is a sacrament and a holy union for the performance of religious duties."

13. In the same way in the case of *V. Tulasamma vs V. Sesha Reddi (Dead) By L. Rs, AIR 1977 SC 1944,* it was observed,

> "Under the Shastric Hindu Law, a marriage, unlike a marriage under the Mohammadan Law which is purely contractual in nature, is a sacrament -a religious ceremony which results in a sacred and a holy union of man and wife by virtue of which the wife is completely transplanted in the household of her husband and takes a new birth as a partner of her husband becoming a part and parcel of the body of the husband."

14. The Hindu Shasrya Law enjoins all men to marry for the purpose of procreating a son necessary for the continuation of line of paternal ancestors and for the spiritual benefit of their soul. It is known to all that the ancient Hindu law recognized eight forms of marriage, of which four were approved forms and the others were unapproved forms. The approved forms were Brahma, Daiva, Araha and Prajapatya and the unapproved forms were Asura, Gandharva, Rakshasa and Paisacha. Presently two forms of marriage are recognized, namely, (i) the Brahma form, which is one of the approved forms; and (ii) the Asura form, which is one of the unapproved forms. In the case of *Alarst Veerappa Chettiar vs S Michael Etc, AIR 1963 SC 933,* the essence of the Asura marriage was discussed by the Supreme Court of India in following terms:

> "The essence of the said marriage is the sale of a bride for a price and it is one of the unapproved forms of marriage prohibited by Manu for all the four castes of Hindu society. The vice of the said marriage lies in the receipt of the price by the bride's father or other persons entitled to give away the bride as a consideration for the bride. If the amount paid or the ornaments given is not the consideration for taking the bride but only given to the bride or even to the bride's father out of affection or in token of respect to them or to comply with a traditional or ritualistic form, such payment does not make the marriage an A'sura marriage."

15. The distinction between the approved and unapproved forms of marriage is that wife married in a approved form becomes 'Patni' but in an disapproved form she does not become 'Patni'. In this modern days the distinction between 'Brahma' or 'Asura' form of marriage is immaterial. In above mentioned case *(AIR 1963 SC 933)* it was held that whenever a question arises whether a marriage is a Brahma or Asura, the presumption is that the marriage is in Brahma form and the burden is upon the

person who asserts the contrary to prove that the marriage was either an Asura or any other form.

16. According to the Principles of Hindu Law by Mulla 21st Edition (2010) when a question arises as to whether a marriage was in the 'Brahma' form or the 'Asura' form, the court would presume, even where the parties are Shudras; that it is in the 'Brahma' form i.e. no consideration for the marriage passed from the bridegroom to the father or other guardian of the bride. But this presumption may be rebutted by showing that the marriage was in the 'Asura' form. The Apex Courts of the Subcontinent including this Court in a number of cases held that where a question arises as to whether a marriage was in approved or in unapproved form, the presumption is that it was in approved form unless the contrary is proved. If the celebration of marriage in fact is established then there shall be a presumption of there being a marriage in law and the observance of the essential ceremonies. Generally there are two ceremonies essential to the validity of a marriage either in the Brahma form or in the Asura form, namely, (i) invocation before the sacred fire, and (ii) saptapadi, i.e. the taking of seven steps by the bridegroom and the bride jointly before the sacred fire.

17. The marriage becomes completed when the seventh step is taken. Before that step it is imperfect and revocable. *(Chunilal vs Surajram (1909) 33 Bom. 433).* In the case of *Kally Churn vs Dukhee (1880) ILR 5 Cal.692* it has been held that apart from the complete performance of the two ceremonies a marriage may be completed when custom of the caste allows otherwise. The essential requisite for recognition of such a custom is that it must be sufficiently ancient and definite and the members of the caste or sub-caste or family must recognise it as obligatory. But those customs cannot be altered by the will and pleasure of the caste or sub-caste to whom the parties belong. When the caste has been able to establish its usage regulating the form and the requisites of a valid marriage, such a usage being transcendent law is obligatory and is binding upon the parties. The Courts are bound to recognise the usage giving effect to the same. In the case of *Utpal Kanti Das vs Monju Rani Das* reported in *17 BLD (AD) 289 = 50 DLR (AD) 47,* this Division enumerated the usual ceremonies of Hindu Marriage which are as follows:

(a) On the forenoon of the day fixed for marriage "Nandimukha" or "Vriddhi Sraddha" is performed. The bride's father or other male relation invokes the departed souls of the ancestors and make offerings to them to get their blessings.

(b) In the evening when the bridegroom comes in a procession to the bride's place the bridal party is received with great hospitality and the bridegroom is given a ceremonious reception by the near relations of the bride, making over to him new wearing apparels.

(c) The bridegroom dressed up in new clothings is then circled by the bride seven times, at the end of which the bride and the bridegroom exchange garlands of flowers.

(d) Then follows 'sampradana' or gift of the bride to the bridegroom."

This Division further observed as under:

"17. It is obvious that nuptial rites in Hindu Shastra are so complicated that an exact observance of their details is not easy and is beyond the comprehension of the ordinary participants or the attendants of the ceremony. But once the celebration of a marriage in fact is established there shall be a presumption of there being a marriage in law and observance of the essential ceremonies." [17 BLD (AD) 289 at page 292]

18. In the same judgment *[17 BLD (AD) 289]* at paragraph 8 his Lordship referred to the submission of the learned counsel for the appellant wherein it was argued that on paragraph 437 of Mulla's "Principles of Hindu Law" (eleventh edition) and

also on "A Treatise of Hindu Law" by Golapchandra Sarkar Sastri (sixth edition), chapter III on marriage, two essential ceremonies to the validity of a Hindu marriage have been categorically enumerated. They are, namely, (1) invocation before the sacred fire, and (2) steps by the bridegroom and the bride jointly before the sacred fire which is known as saptapadi.

19. Supreme Court of India in the case of *Bhaurao Shankar Lokhande vs State of Maharashtra, AIR 1965 SC 1564* while determining what the essential ceremonies for a valid marriage are, cited Mullas Hindu Law, 12th Edition as authority wherein it has been stated as under:

> "(1) There are two ceremonies essential to the validity of a marriage, whether the marriage be in the Brahma form or the Asura form, namely—
>
> (1) invocation before the sacred fire, and
>
> (2) saptapadi, that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire.
>
> (2) A marriage may be completed by the performance of ceremonies other than those referred to in sub-section (1), where it is allowed by the custom of the caste to which the parties belong."

20. From the above discussion it is abundantly clear that there are two ceremonies essential to the validity of a marriage whether the marriage be in the Brahma form or the Asura form. The ceremonies are (1) invocation before the sacred fire and (2) saptapadi, that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire.

21. On meticulous scrutiny of the evidence of the witnesses and other materials on record it has been proved that in the instant case marriage was performed in fact and therefore we can safely presume that marriage is valid in law and all the necessary ceremonies have been performed. There is no evidence to the contrary to show that no marriage ceremony was solemnized according to Hindu Shastra. In the instant case the respondent proved that the ceremonies prescribed by the Shastra were performed. The defendant-petitioner as DW 1 did not depose that no "Saptapadi" was performed before the sacred fire. Therefore, the petitioner having not raised the plea of invalidity of marriage because of non-performance of an essential rite any plea to the effect that the marriage is bad in law for want of any essential ceremony such as Saptapadi is not tenable in law.

22. It is well established that the marriage between man and woman is inseparable under Hindu Law. In Shastriya Hindu Law marriage is treated as sacrament not a contract. It appears that the trial court having considered the material evidence on record rightly found that the marriage between the plaintiff-respondent and the defendant-petitioner was duly completed by the performance of the essential ceremonies which have made the marriage valid in law; that they lived together as husband and wife till she was driven out from the house of her husband and the court of appeal below as the final court of facts made concurrent findings of facts and rightly affirmed the judgment and decree passed by the trial Court and the High Court Division being the revisional Court having considered the evidence of the witnesses and findings of the courts below found that there are concurrent findings of facts by both the trial court and the court of appeal below and, as such, there is no illegality in the impugned judgment and decree passed by the High Court Division.

23. Marriage under the traditional Hindu Law is a holy union for the performance of religious duties. It is a sacrament for the purification of the body from inherited taint. It is not a contract. Of course the marriage is necessarily the basis of social organization and the foundation of important legal rights and obligations. In view of the modern social dimensions the Hindu Community in this Country in respect of marriage, divorce and inher-

itance faces multifarious problems. In many cases the alleged husband does not recognize marriage or deny the existence of marriage with the female partner and the female partner also faces difficulty in respect of her right to inheritance and the issues of the marriage are also sometime disowned by the male partner to be the legitimate offspring of their wed-lock and, as such,, the children sometimes find difficulty to get recognition and their right of inheritance. In consequence of these varying problems being faced by the Hindu Community in this Country where the society has advanced and the women are also very much conscious about their rights and status in respect of marriage, divorce, inheritance, we believe time has come to think about the social needs and the demand of different Hindu Women right activists and other social and non-government organizations for codification of the Hindu Law of marriage and succession. We are not unmindful about the other fractions of the society, who are not in favour of any codification of the Hindu Law in this Country. We are very much conscious about the extreme sensitive issue involved in this particular matter. But our view is that far reaching and fundamental changes could be achieved and we shall be able to have fair and equitable solution to some of the most difficult questions relating to the law of marriage and succession in consequent thereof. It is our earnest desire and belief that an uniform and comprehensive system governing all Hindus containing a series of coherent provisions carefully considered after having gone through by eminent pundits and researchers and law commission a codification of Hindu Law of marriage and succession should be enacted. We have seen that our closest neighbour India has enacted Hindu Marriage Act,1955 which embodied all the necessary provisions of Hindu Law and thereby promulgated all rules of the law of marriage or custom or usage having the force of law in respect of all these matters which are properly dealt with in the Act of 1955. The Hindu Marriage Act, 1955 supersedes any other law contained in any central or state legislation in force immediately before the enactment of the Act. We are of the view that enactment of codified Hindu Law is not only a pious desire of a section of the Hindu rights activists or some of the NGOs of this country but also majority people of the country. In our deep anxiety we have noticed that time has come for the legislators to think about the codification of the Hindu Law of Marriage and succession in Bangladesh. Sometimes, Female Partners and the children are being deprived of their rights. To our utter dismay some-times we find that the male partner disowned the very existence of the marriage including the children born out of the wed-lock. In the instant case we have also found that both the plaintiff-respondent and the defendant-petitioner having fallen in love with each other during their university days ultimately united in marriage at Rajshahi Kali Mandir in presence of witnesses and relations of both the parties. The High Court Division rightly found that the Trial Court and the Court of appeal below made concurrent findings of facts that there was a valid marriage in law between the parties. But to our utter surprise the defendant-petitioner, the husband of the plaintiff-respondent denied the very existence and validity of the marriage between them which is very unfortunate. Had there been proper codification of Hindu Law of marriage and succession with a provision for registration of marriage definitely the male partner could not have denied the solemnization of marriage ceremony between the parties. However, time has come for the legislature to think about this burning issue to find out correct solution to the problem by proper enactment or codification of Hindu Law of marriage and succession. If the codification of the Hindu Law is made, it is our considered view that most of the matrimonial problems now being faced by both the parties can be resolved or minimized with least trouble.

24. Since there is no misreading or non-consideration of any material evidence on record, the High Court Division rightly passed the impugned judgment and decree in discharging the Rule and

affirming the judgment and degree passed by the learned District Judge, Narail. In view of the above findings and observations we do not find any merit in the leave petition.

Accordingly, the leave petition is dismissed with cost of Taka 5,000 (five thousand).

Ed.

APPELLATE DIVISION
(Criminal)

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

Judgment
June 3rd, 2012.

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

vs

State.....
.....Respondent*

Children Act (XXXIX of 1974)
Section 66(1)

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, if it appears to it that the person so brought is a child. *(Per Md Abdul Wahhab Miah J, majority).* ...(78)

*Criminal Appeal No. 6 of 2005 with Jail Petition No. 8 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).

The case reported in 10 BLC 1 has been reversed partially with modification of sentences, findings and observations.

Children Act (XXXIX of 1974)
Sections 2(f) and 66

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. ***(Per Md Imman Ali J, minority)*** .....(151 & 153)

Constitution of Bangladesh, 1972
Article 104
Nari-o-Shishu Nirjatan Daman Ain (VIII of 2000)
Section 7

In order to do complete justice, 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 Tribunal, under the Ain, 2000. *(Per Md Abdul Wahhab Miah J, majority)* .....(94)

Nari-o-Shishu Nirjatan Daman Ain (VIII of 2000)
Section 7
Penal Code (XLV of 1860)
Sections 302 and 362

Crime against humanity—There is no doubt that the trial is without jurisdiction but, by the same time, it cannot be ignored that the act committed by the appellants is barbarous one. Their act shakes the conscience of the people at large. The act of the accused is not only a crime against humanity but also barbaric. *(Per SK Sinha J, agreeing with Md Abdul Wahhab Miah J majority)* ...(36)

Children Act (XXXIX of 1974)
Section 66(1)

This Division rightly interpreted the provisions of section 66(1) of the Act, in the cases of *Abdul Momen Chowdhury @ Momen vs State (supra)* and *Bimal Das vs 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. Question of revisiting those decisions as opined by the learned brother does not arise at all. Neither at the hearing of the leave petition 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. *(Per Md Abdul Wahhab Miah J, majority)* .....(83)

Children Act (XXXIX of 1974)
Section 66

I am of the firm view that the interpretation of law in the cases of *Abdul Monem Chowdhury alias Momen vs State, Bimal Das vs State and Mona alias Zillur Rahman vs 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. *(Per Muhammad Imman Ali J, mijority)* .....(152)

Children Act (XXXIX of 1974)
Section 66(1)

Since the word "appear" has not been defined in the definition given in section 2 of the Act, we are to fall back upon the dictionary meaning of the same and that is permissible. *(Per Md Abdul Wahhab Miah J, majority)* .....(74)

Nari-o-Shishu Nirjatan Daman Ain (VIII of 2000)
Sections 2(Ka) and 7
Penal Code (XLV of 1860)
Section 362

After school hours, Trisha was going home, 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 and chasing definitely involved the element of threat within the meaning of definition of "অপহরণ". The appellants committed the offence under section 7 of the Ain. High Court Division suffered from the intuition that "কোন স্থান হইতে কোন ব্যক্তিকে অন্যত্র যাইতে বাধ্য করা" must be a far place. High Court Division was obsessed with the definition of abduction as given in section 362 of the Penal Code in coming to the finding that there had been no abduction, but there was an attempt to abduct. *(Per Md Abdul Wahhab Miah J, majority).* .....(71)

Children Act (XXXIX of 1974)
Section 66(1)

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 or with reference to papers and documents produced by the parties 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. Even after inquiry the Court shall record a finding as to the age of the person so brought "as nearly as may be." (*Per Md Abdul Wahhab Miah J, majority).* .....(77)

Children Act (XXXIX of 1974)
Section 66

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 Act, which in my humble opinion is a mandatory and most salutary provision of law for the purpose of the rights of youthful offenders. ***(Per Muhammad Imman Ali J, minority)*** .....(144)

Supreme Court of Bangladesh (Appellate Division) Rules, 1988
Order XX, rule 5

We are not inclined "to revisit" the decision in the case of *Mona @ Zillur Rahman vs State 23 BLD (AD) 187 = 9 BLC (AD) 125* as opined by him. However, in an appropriate case, the question may be looked into with notice to the State. *(Per Md Abdul Wahhab Miah J, majority)* .....(90)

Children Act (XXXIX of 1974)
Section 51

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. ***(Per Muhammad Imman Ali J, minority)*** .....(101)

Nari-o-Shishu Nirjatan Daman Ain (VIII of 2000)
Sections 2(Ka), 5, 7 and 30

No doubt that the act of the appellants attracts the definition of 'অপহরণ' defined in section 2(Kha) of the Ain, and therefore, they have committed an offence punishable under section 7 of the Ain. Besides, section 30 of the Ain relates to the abetment or instigate the offence punishable under the Ain. The conjunction 'or' has been used before the expression 'অপরাধটি সংঘটনেরর 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. *(Per SK Sinha J, agreeing with Md Abdul Wahhab Miah J majority)* .....(35)

Nari-o-Shishu Nirjatan Daman Ain (VIII of 2000)
Section 7
Children Act (XXXIX of 1974)
Section 51

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. 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. Even upon conviction under section 7 of the 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. *(Per Muhammad Imman Ali J, minority)* .....(149 & 150)

Constitution of Bangladesh, 1972
Article 104

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.

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. *(Per SK Sinha J, agreeing with Md Abdul Wahhab Miah J majority)* .....(37 & 38)

Observations

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. *(Per Md Abdul Wahhab Miah J, majority)* .....(93)

Joginder Singh vs State of Punjab, AIR 1979 SC 1876; Bimal Das vs the State, 14 BLD (AD) 218; Abdul Munem Chowdhury @ Momen vs State, 47 DLR (AD) 96; Abdul Munem Chowdhury @ Momen vs The State, 47 DLR (AD) 96; Mahomed Syedol Ariffin bin Mahomed Ariff vs Yeah Oai Gark, AIR 1916 Privy Council 242; 61 DLR 33, Hasina Begum vs State, 1 BLC 315; Prafullah Kamal Bhattacharya vs Ministry of Home Affairs, Govt. of Bangladesh 28 DLR, 123; State vs Md Roushan Mondal @ Hashem, 59 DLR 72; State vs Secretary, Ministry of Home Affairs, Bangladesh Secretariat, 16 MLR 254; State vs Secretary, Ministry of Home Affairs, 19 BLT 376; Protap Singh vs State of Jharkhand and another, 2005(3) SCC 551; Jitendra Singh @ Babloo Singh and another vs State of UP (2010) 13 SCC 523; Gopinath vs State of WB 1984 Supp SCC 228; Mona @ Zillur Rahman vs State 23 BLD (AD) 187 = 9 BLC (AD) 125; Fahima Nasrin vs Government of Bangladesh, 61 DLR 232; State vs Md Roushan Mondal @ Hashem, 59

DLR 72; Amit Das vs State of Bihar, 2000 (5) SCC 488; Bablu (supra) and State vs Deputy Commissioner Satkhira (supra); Hasina Begum vs State and another, 1 BLC 315; Prafullah Kamal Bhattacharya vs Ministry of Home Affairs, Govt. of Bangladesh, 28 DLR 123; Abdul Munem Chowdhury @ Momen vs State, 47 DLR (AD) 96; Monir Hossain (Md) @ Monir Hossain vs State, 53 DLR 411; Saydul Arefin vs YO Gark, AIR 1916 PC 242; Gopinath Ghosh vs State of W B, 1984 Supp SCC 228; Jitendra Singh @ Babboo Singh vs State of UP, (2010) 13 SCC 523 and Abdul Monem Chowdhury alias Momen vs State, 47 DLR (AD) 96 ref.

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

Rajik-al-Jalil, Deputy Attorney-General instructed by Sufia Khatun, Advocate-on-Record—For the Respondent.

Judgment

Md Muzammel Hossain CJ: 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.

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

3. 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 students was returning home on 17th July, 2002 at about 3-30 PM 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 Khapara 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 attract an offence punishable under sections 302/34 of the Penal Code.

4. 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 by 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 the 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 (ii) its effect upon the human victim.

5. 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 its cause. A person can be said to cause something to happen only if that thing would not have occured 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.

6. 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 the 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.

7. 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 vs Parsley (1970) AC 132.*

8. 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 from part of the *actus reus* he foresaw the likelihood of those consequences.

9. Therefore, we find that it must be proved that (a) the conduct was voluntary; (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.

10. 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.

11. This principle is illustrated in *RV 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".

12. 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".

13. 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 which 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.

14. In *Joginder Singh vs 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.

15. 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 but 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.

16. 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 R131).*

17. 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.

18. 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".

19. 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 *Gopal Chaunder vs 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.

20. In the case in hand, the admitted case of the parties is that convict Mehedi Hasan had loved Trisha but the latter and her parents did not like it and as a result, 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.

21. 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.

22. 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".

23. 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 IC 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).*

24. 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.

25. '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, CJ, 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.

26. 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'.

27. 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.

28. 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 correct meaning of this clause can be ascertained. Illustration (d) said 'A without any excuse fires 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'.

29. 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 likely 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.

30. 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 all attract clause '4thly' of section 300 and therefore, the findings of the High Court Division is based on misconception of law.

31. 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.

32. Learned Judges noticed the definition of 'অপহরণ' 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 Sessions 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 'অপহরণ' 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.

33. 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 a 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 attempted to abduct the victim.

34. In the definition of 'অপহরণ' it is said: 'অপহরণ অর্থ বলপ্রয়োগ বা প্রলব্ধ করিয়া বা ফসলাইয়া 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 'অপহরণ' 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 'অপহরণ' defined in Ain, 2000 as quoted above.

35. 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 'অপহরণ' 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 প্ররোচনাযোগান এবং সেই প্ররোচনার ফলে উক্ত অপরাধ সংঘটিত হয় বা অপরাধটি সংঘটনের চেষ্টা করা হয় বা কোন ব্যক্তি যদি অন্যকোন 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 সংঘটনেরর 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.

36. Now the question is whether the conviction of the appellants is vitiated by reason of their trial under the general law despite the fact that they had committed an offence which is triable by the Tribunal under the Ain, 2000. There is no doubt that the trial is without jurisdiction but, by the same time, it cannot 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 Mehedi 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. 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 will 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.

37. 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.

38. 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 section 7 is imprisonment for life 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.

39. 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.

Md. Abdul Wahhab Miah, J: This appeal, by leave, is directed against the judgment and order dated 19-5-2004 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.

41. 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.

42. 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 Madhyapara 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 (17-7-2002), 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 Madhyapara 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 run-

ning towards the lane of Khapara, the appellants also chased her upto the bank of the pond of Idris AH 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 Sohel, his neighbour hearing about the occurrence from the witnesses and lodged the same with the police station.In order to substantiate the charges levelled against the appellants, the prosecution produced as many as 26 witnesses and of them PW 24, 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 side of 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.

44. On conclusion of trial, the learned Sessions Judge by his judgment and order dated 30-9-2002 found the appellants guilty under sections 302/34 of the Penal Code and sentenced each of them to death.

45. 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.

46. 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.

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."

47. 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, PW 3 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.*

48. 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 PW 3 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.

49. 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 PW 22, 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, PW 24 was tendered, PW 25 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 PW 26, 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।"

50. 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 jurisdiction 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 "অপহরণ" 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. "

51. 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 of the Code came to the clear finding that "convict appellants were neither 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, 3-1-1987 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 be 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 transpire to have been made only to hide the real age of the convict appellants and to engender doubt in the mind of the Court."

52. 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's death.

53. 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.

54. As stated earlier, of the 26 witnesses produced by the prosecution, only PW 24 was tendered. Of the remaining 25 witnesses, in fact, PW 3 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 17-7-2002, like every day, after school hours at 3:00 pm 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

Madhyapara 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 (PW 22) under section 164 of the Code. His statement was proved by PW 22 and was marked as exhibit-'3'. This statement was recorded by the Magistrate on 18-7-2002, 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. PW 2 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 (17-7-2002), at about 3-30 PM, the appellants came to his shop and they after taking cigarette, tea and pan remained sitting there and at about 4-00/4-15 PM., after school hours of Madhyapara 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 PW 3, the eye witness that after school hours while Trisha was going home, the appellants chased her. This PW also made statements before PW 22 and his statement was recorded under section 164 of the Code on 21-7-2002. His statement was proved by PW 22 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 PW 1 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

them. Thereafter, on 18-3-2003, Arman surrendered before the Tribunal and prayed for sending the case to the Juvenile Court on the ground that he was also below the age of 16. Thereupon, after examining the materials on record, the Tribunal allowed the said application and sent him to the Juvenile Court for trial along with other child accused. Later on, after examination of PWs 1 and 2, accused Biplob was arrested and produced before the Tribunal on 15-6-2003. He also filed an application to send him to the Juvenile Court, but the Tribunal by order dated 15-6-2003 rejected the same and this order of the Tribunal was subsequently affirmed by the High Court Division in criminal revision.

5. During trial, the prosecution produced as many as 20 witnesses including the said Rifat Akon as approver (PW 5) and defence produced none. With the end of the examination of prosecution witnesses, the accused were examined under section 342 of the Code of Criminal Procedure, whereupon they again denied the charges and refused to adduce any evidence. After completion of the trial, the Tribunal by impugned judgment and order convicted all the three accused, namely Jalal, Biplob and Porash, under sections 302/120B/34 of the Penal Code and sentenced them as aforesaid. Since Rifat was treated as approver, he was exonerated from the charges, but ordered to be kept in jail until disposal of the Juvenile Case.

6. Mr Khandaker Mahbub Hossain, learned Senior Counsel appearing along with Mr Shakhawat Hossain and Mr Sheikh Mohammad Ali, learned Advocates, placed the entire depositions and other materials on record before us. Relevant and material parts of the same are mentioned below:

7. PW 1- (Rumon Chakraborti alias Rinku,), cousin of the deceased, deposed as the informant of the case. According to him, on 26-10-2002, Mr Goswami started for the school at 9-05 AM, which this witness was at Mr Goswami's house at Vuter Goli. An employee of Sikder Store at the Vuter Goli informed him at about 9-30 AM that Mr Goswami was shot in front of Sikder store. This witness rushed to the place of occurrence but found that Mr Goswami was already taken to the Central Hospital, Dhaka. As he visited the Central Hospital, the doctor declared Mr Goswami dead. He, accordingly, informed Mrs Goswami (PW 2) who was at Feni in her parents house. This witness lodged the FIR and signed the inquest report prepared by PW 15 and accordingly proved the same (exhibits 1, 1/1 and exhibits 2, 2/1). After investigation, he was informed by the investigating officer that Mr Goswami was killed by some professional killers named Jillu (Zalal), Arman, Rifat, Shuva, Porash, Joni and Biplob, who were engaged by Shantunu and Apon, two students of the Government Laboratory School, as they were not given promotion. Accused Shantunu was already known to this witness as Shantunu used to obtain tuition from Mr Goswami.

8. PW 2 (Shimla Goswami) was the wife of the deceased. The couple had a child aged $3^1/_2$ years. She went to her parent's house at Feni on 13-10-2002 to offer puja. On 26-10-2002 at 10.30 she was informed by PW 1 over telephone that her husband became sick. She then came back to Dhaka at about 2-00 PM and learned that the dead body of her husband was taken to the Government Laboratory School. She then reached the school and saw the dead body in the coffin box and learned that her husband was killed in front of the Sikder Store by some miscreants at about 9-00 AM. She came to know subsequently that two days before the occurrence three youths came to her house on the pretext of taking tuition from her husband and her husband told his colleague Insan Ali (PW 7) that he was suspicious that those three youths were not students at all. She later came to know that those youths killed her husband. This witness had an emotional out burst on the witness box and screamed demanding justice for the killing of her husband.

9. PW 3 (Mohammad Monju) was an employee of Sikder Store and an eye-witness to the occurrence. According to him, on 26-10-2002 at about 9:15 AM, he was standing in front of the Sikder Store. As Mr Goswami came, he entered the store and Mr Goswami asked for seven Benson cigarettes. At that time, Jillu (Zalal) stood behind Mr Goswami and shot a fire on the back of his neck causing him to fall down. Jillu and Biplob then shot 2/3 more fires at Goswami. Thereafter, Jillu, Biplob and Rifat ran away. This witness gave statement before the Magistrate which he proved accordingly (Exhibits 3 and 3/1). In cross-examination, he deposed that he was alone at the relevant time and there were 2/1 people on the street. He further deposed that in his statement to the Magistrate he did not mention that Jillur and Biplob fired 2/3 more shots as he did not remember the same at that time. For the same reason, he also did not state before the Magistrate that Swapan Goswami fell down after a shot at the back of his neck. He further deposed that he knew Jillu, Biplob and Rifat.

10. PW 4 (Md Shamsul Alam) is also an eye-witness to the occurrence as he was an employee of Crown Decorator situated beside the Sikder Store at the relevant time. On the day of occurrence, he had breakfast at Bhai-Bhai Hotel at about 9-00 AM and saw Jillur, Rifat and Biplob standing beside the mosque. As he came in front of his shop, he saw Mr Goswami standing in front of Sikder Store when Jillur shot Mr Goswami at the back of the neck causing him to fall down. This witness heard two more gun shots and saw Rafat, Jillur and Biplob running away firing blank shots- Biplob and Jillur fled towards right side and Rifat to his house at 2 North Road towards left. He identified the accused as they were local boys. This witness also gave statement before the Magistrate which he proved as exhibit 4 and his signature thereon as exhibit-4/1. He identified the accused on the dock. In cross-examination, he confirmed that he was standing in front of his shop at the time of gun shots. He further confirmed that Jillur was standing just behind Mr Goswami, but he did not see any one else apart from the three accused mentioned above. He was extensively cross-examined on recall by Biplob and deposed that the occurrence could be seen from the Crown Decorator. He claimed that he was still working in the Crown Decorator and he had a card of it (although the card produced by him did not have his name etc. on it). After the occurrence, he went to Shahbag for work wherefrom he was taken to the police station but no statement was recorded and he was released on the next day at 12-00/1-00 O'clock at noon. Subsequently, he was again taken to the police station and was kept for one night. He was then asked whether he saw the occurrence-to which he replied in the affirmative. On the next day he was taken to the court. He denied defence suggestion that as police found no witness, he was taken after 10/12 days of the occurrence to the Police Station and was threatened to make statement. He further deposed that Biplob was a local boy and he saw him moving around.

11. PW 5 (Rifat Akond) deposed as approver. He deposed that in 2002 he sat for the SSC examination but failed. He along with Shuvo, Joni and Arman used to meet (আড্ডা) in front of the mosque at Bhuter Goli and they were gentle. On the other hand, Jillur, Rasel and Jewel were local boys and he heard that those boys committed two murders in front of one Meherunnesa School. Subsequently, as Rasel and Jewel were caught by police and kept in Jail, Jillur became alone. PW 5 and others then developed friendship with Jillur along with Suvo, Arman, Biplob, Apon and they used to commit extortions together. The group was introduced to Shantunu by Apon. Shantunu's father was a government employee and rich man. Apon and Shantunu used to study at Government Laboratory School. Shantunu informed that their teacher Swapan Goswami used to insult him. He failed in the examination of class seven and was

not promoted to Class eight. But as he was attending the session in class eight, he was taken down to Class-Seven by Mr Goswami. They further informed PW 5 that Apon also failed at Class seven and Mr Goswami insulted Apon's mother when she met him. Thereafter, Apon and Shantunu became furious on Swapan Goswami and asked Jillur to kill him in exchange for Taka one lakh, but Jillur demanded one lakh taka and a pistol owned by Shantunu's father, which they agreed. On 24-10-2002, they made a plan to kill Mr Goswami in his house on the pretext of obtaining tuition but this plan did not succeed. On 25-10-2002 at 9-00 AM, they made another plan at Green Corner that Apon, Jillu, Arman, Biplob and three boys from Shahbag including Porash would commit dacoity at Mr Goswami's house and kill him. They, accordingly, went to the house of Mr Goswami but did not succeed as three boys from Shahbag became scared.

12. In the evening 25-10-2002, as PW 5 called Jillur over mobile phone, he asked him to remain present in the following morning at the Bhai-Bhai Hotel with some money. He, accordingly, went there in the following morning and found Jillur. PW 5 then gave him Taka 260 and one packet of Gold Leaf cigarettes. Jillur then told him that Biplob was also present inside the lane and asked him to go there. PW 5 then went there and met Biplob. As Mr Goswami emerged, PW 5 gave him salam whereupon Mr Goswami asked him about his father. PW 5 was already known to Mr Goswami as he took suggestions from Mr Goswami for SSC examination. Biplob then asked PW 5 whether this was Mr Goswami to which PW 5 replied in the affirmative. Thereafter, Biplob and Jillur followed Mr Goswami and they were followed by PW 5 who apprehended that Mr Goswami would be in danger. PW 5 then stood beside a pillar in front of his house. In the meantime, Biplob took a pistol from PW 5 which Biplob gave him in the morning. PW 5 then saw Mr Goswami in front of Sikder Store purchasing cigarette from Monzu (PW 3) when Jillur shot him at the head from behind causing him to fall down. Jillur then shot twice on the right side of Mr Goswami. Biplob also took out a pistol from his waist and shot once. As Jillur and Biplob ran away, PW 5 got into his house. This witness made a confessional statement before the Magistrate after his arrest (PW 17) admitting everything. He, accordingly, proved his confessional statement (exhibit-5) and his signatures there on as exhibits-5/1-5/6. He also identified Jillur, Biplob and Porash on the dock.

13. PW 5 was extensively cross-examined by the defence. In cross-examination by Jillur he deposed that he was standing a little bit away from the place of occurrence and that he heard from local people that Jillur and others already committed two murders in front of one Meherunnesa School. He further deposed that the planning for this killing was started about 1 to $1^1/_2$ months back and those plans were attended by 8/10 people. He deposed that four bullets were shot at Mr Goswami and he heard shots of gun fire. In cross-examination by Porash, he deposed that Green Corner conspiracy was attended by him along with Jillu, Apoon, Biplob and three boys of Shahbag including Porash and Arman-however, Porash was not aware of the plan of killing Mr Goswami. In cross-examination by Biplob, he deposed that Biplob was a student of class ten in the Dhanmondi Boys High School at the time of the occurrence. He deposed that Green Corner was the name of an area and he did not remember whether Biplob was present in the Green Corner planning. He deposed that when Shantunu offered Jillur taka one lakh to kill Mr Goswami, he and Biplob were not present there. He deposed that he did not see Biplob shooting fire but he confirmed that Biplob gave him a pistol while he entered into the lane in the morning of Saturday which Biplob took back again and this fact was mentioned by him in his confessional statement.

14. PW 6 (Md Ahsan Habib) was an employee of Lions Trade Company situated at 2 North Road at the time of occurrence. According to him when he was going to his shop at 9-00 O'clock he found three boys in front of Bhai-Bhai Hotel and identified two of them as Jillu and Rifat. He subsequently heard that the other boy was Biplob. When he opened the shutter of his shop, he saw Mr Goswami in front of Sikder Store when Jillur stood behind Mr Goswami. Jillur then took out a pistol from his pocket and shot Mr Goshami at the back of his head causing him to fall down. This witness then ran into the lane and heard 2/3 gun shots. When he came back, he saw Jillur, Rifat and Biplob running away. This witness saw gun at the hand of Jillur. This witness also gave statement before the Magistrate (PW 17) which he proved as exhibit-6 and his signature thereon as exhibit 6/1. He identified Jillur and Rifat on the dock and deposed that Biplob was not on the dock-but had he been, he would have identified him.

15. PW 7 was a colleague of the deceased. He deposed that on 25-10-2002 he visited the house of Mr Goswami at 10-30 AM. They took a rickshaw and went up to the Farmgate by it and got on a vehicle to visit his nephew's house at Shewrapara. At 4-00 PM, while they were going back by Rickshaw from Shewrapara, Mr Goswami told him that on Thursday three boys of New Model High School came to his house for taking tuition but they did not seem to be students as their behavior was suspicious. On the next day while PW 7 was going to school his wife informed him that Mr Goswami was shot and taken to the Central Hospital. He further deposed that Mr Goswami expelled Apon in class test and did not promote Shantunu from Class-seven to Class-eight. He heard that accused Apon and Shantunu got Mr Goswami killed by professional killers Jillur, Arman and others.

16. PW 8 is another colleague of the deceased. He deposed that on 29-10-2002 police visited the school and seized some papers which included paper sheets of class test. They seized the concerned answer sheet of Apon, a Class-seven (Ka) student, Roll No. 68, through which he was expelled for adopting unfair means. He accordingly proved the seizure list and signatures there on as exhibits-7 and 7/1. He also proved the said answer sheet of Apon (material exhibit-I).

17. PW 9 (Khandaker Gawsuzzaman) is a seizure list witness of the seizure list by which two heads of bullet, one cap of bullet, one aluminium bullet, one under-ware, one blood stained Sando genji (sleeveless T-shirt), one blood stained half shirt and trousers were seized. He accordingly proved the same as material exhibits II, III and IV and the said seizure list as exhibit-8 and his signature there on as exhibit 8/1. In cross-examination, he deposed that there were two bullet holes on the right side of the Sando genji and two corresponding bullet holes on the half shirt.

18. PW 10 (Md Islam) is another colleague of the deceased who signed the inquest report prepared by PW 15 in his presence. He accordingly proved the same (exhibit-2) and his signature there on.

19. PW 11 Hasib Khan is also an inquest witness, who accordingly proved the same and his signature there-on.

20. PW 12 is also a colleague of the deceased. In his presence police seized the concerned answer sheet of Apon which contained endorsement of Mr Goswami expelling Apon. In addition, some photo graphs and one dairy were also seized in his presence and he proved the same accordingly.

21. PW 13 was an employee of Bhai-Bhai Hotel at the time of occurrence. He does not remember the day of occurrence but deposed that the occurrence took place at about 9-00 AM. Upon hearing 3 /4 gun shots, he closed the shutter of the hotel. After 10/15 minutes, he went to the

Sikder Store and found Mr Goswami lying on the floor. He subsequently heard from the employee of Sikder Store that Mr Goswami was killed by Jillur, Biplob and Rifat. He identified Jillur on the dock and Rifat in the court. In cross-examination by Biplob, he deposed that he did not tell the investigating officer about the presence of Biplob. He further deposed that the distance of Sikder Store and Bhai-Bhai Hotel is two shops, one is laundry and the other is doctor's shop, and the area where the occurrence took place was called Vuter Golli. He further deposed that since he did not know Biplob, there was no reason to give false evidence against him.

22. PW 14 (Md Sohag) was also an employee of Bhai-Bhai Hotel. At the relevant time he heard 2/3 gun shots and saw people running here and there. In cross-examination he deposed that the place of occurrence could not be seen from his hotel.

23. PW 15 (Shafiqul Islam), SI of police, prepared the inquest report of Swapan Goswami. He proved the same and his signature thereon and the chalan by which the dead body was sent for the post-mortem (exhibits 2/4, 9, 9/1). He deposed that the deceased was wearing shirt, genji and pant with blood stains. He found four bullet injuries on the dead body, two in the arm pit of right chest, one below the right belly and one behind the back of the head.

24. PW 16 is a police officer, who recorded the FIR and filled up its form. He accordingly proved the same. In cross-examination he deposed that the FIR was lodged after 11 hours of the occurrence.

25. PW 17 (Jagonnath Dash Khokon) is the Magistrate who recorded the confessional statements of the accused and statements of witnesses under section 164 of the Code of Criminal Procedure. He recorded the confessional statement of Rifat on 30-10-2002, Shantunu on 31-10-2002, Apon on 4-11-2002 and Jalal alias Jillur on 21-11-2002. He, accordingly, proved those confessional statements and his signatures thereon and different signatures by the confessing accused (exhibits 5/7-5/16, 11, 11/1-11/4, 11/5-11/12, 12, 12/1-12/6, 12/7-12/16, 14, 14/1-14/6 and 17/7-13/16). According to him, he recorded the confessional statements in compliance with the provisions of section 164 read with section 364 of the Code of Criminal Procedure and High Court Form (M) 84. He also gave memorandum to all the confessional statements and signed the same. In addition, he recorded the statements of witnesses, namely PWs 3, 4 and 6, and proved the same (exhibits-6/2-6/3, 4/2-4/3, and 3/2-3/3). In cross-examination by Jillur, he denied the defence suggestion that at the time of making confession Jillur told him that he was tortured to give the statement and that in response this witness asked Jillur to give the statement as it would be seen later. He further deposed that Jillur was given time 4 (four) hours before his statement was record. He however deposed that in the confessional statement Apon did not mention Porash's name as a participant in the planning at Green Corner.

26. PW 18, (Dr Shahidul Islam), was the lecturer of Forensic Medicine Department of Dhaka Medical College at the relevant time who conducted the post-mortem on the dead body. In the post-mortem he found the following injuries:

"1. Entry wound ($^1/_3$"× $^1/_3$") Present on Rt. upper chest 50" above from Rt. head and 10" Rt. from midline.

2. Entry wound ($^1/_3$"×$^1/_3$") Present on Rt. mid chest 47" above from Rt. hell and 11" Rt. from midline.

3. Entry wound ($^1/_3$"×$^1/_3$") on Rt. abdomen 40" above and 10" Rt. from midline.

4. Entry wound ($^1/_3$"×$^1/_3$") present on occipital area $^1/_2$" above and $^1/_2$" Rt. from external occipital protuberance".

27. Upon dissection, he found haematoma on occipital area. Occipital bone and Rt. 7th rib were fractured. Meninges was torned. Brain matter was lacerated on Rt. occipital and both parietal area. He found subdural and subarrachnoid haemorrage. Both lungs. heart, liver, intestines of the deceased were ruptured. Both thoracic and abdominal cavity contained a huge amount of clotted and liquied blood. He recovered four bullets-one from the Rt. 8th intercostal space, one from Lt. 5th intercostal space, one from Lt. lateral chest wall and one from Lt. parietal lobe of cerebrum. He handed over the said bullets to the police.

28. In his opinion the death was due to the haemorrhage and shock as a result of the above mentioned injuries caused by fire arms which were antemortem and homicidal in nature. Accordingly, this witness proved the post-mortem report (exhibit-14) and his signature thereon (exhibit-14-1). He also proved the chalan by which the dead body was sent. He further deposed that he also signed the inquest report of Mr Goswami which he accordingly proved. In cross-examination he deposed that he found four bullet injuries on the dead body and that the first injury was found on the right side of the upper portion of the chest, second one on the chest below 3" of the first injury, third one was on the right side of the belly and fourth one was on the right part of the back of the head.

29. PW 19 (Md Kabirul Islam Molla) was the first investigating officer of the case. He deposed that on 26-10-2002 he was posted at the Dhanmondi Police Station. After lodging of the FIR on 26-10-2002, he was given the charge of the investigation at about 20:40 hours. He visited the place of occurrence, prepared sketch map and index. He, accordingly, proved the same (exhibits-15, 15/1, 16, and 16/1). He questioned PW 3 and 4 and arrested one Momirul Islam on suspicion. However, on 29-10-2002, he handed over the case docket to PW 20 (2nd IO) of the Detective Branch. In cross-examination, he deposed that he did not record 161 statement of PWs 3 and 4 as they did not disclose anything out of fear.

30. PW 20 (Md Abdul Malik) was the 2nd and final investigating officer of the case. He deposed that on 28-10-2002 he took over the investigation and received case docket on 29-10-2002. He visited the place of occurrence, prepared another sketch map and index. He, accordingly, proved the same (exhibits-17 17/1, 18 and 18/1). He recorded the statements of witnesses under 161 of the Code of Criminal Procedure and seized alamots. He arranged recording of 164 statements of PW 3, 4 and 6 under section 164 of the Code of Criminal Procedure by a Magistrate (PW 17). During investigation, he first interrogated accused Rifat (later became Approver), who admitted his guilt and made confessional statement before the Magistrate. On the basis of the information received from Rifat, PW 20 arrested the accused one after another and arranged recording of confessional statements by a Magistrate as given by Jalal, Apon and Shantunu. He seized the concerned answer sheet of Apon from the Government Laboratory School containing the endorsement of Mr Goswami expelling Apon and some coloured photo-graphs by a seizure list, which he accordingly proved. On the basis of the confessional statement of Shantunu, he visited Shantunu's house, Shantunu's father give him the license of the concerned pistol. PW 20 the seized the said license and 40 rounds of bullets. He also seized short gun and 50 rounds of cartridges and the license of the gun issued in the name of Shantunus father. During investigation, he found that Mr Goswami expelled Apon as he adopted unfair means in the class test. He (Mr Goswami) also did not promote Shantunu from class seven to class eight as he failed in the exam. This two students became angry on him and planned to kill him by professional killers. Accordingly, they engaged Jillu, Biplob, Arman, Shuvo, Rifat Akond (Approver), Moni, Apon and Porash.

Accused Jillu, Biplob and Arman visited the house of Mr Goswami to kill him impersonating themselves as students on 24-10-2002, but failed. They tried to kill him again on 25-10-2002 through committing dacoity at Mr Goswami's house as per another plan but failed. Thereafter, on 26-10-2002 at 9-00 AM, accused Jillur, Biplob and Rifat Akond took position at Bhai-Bhai Hotel and shot and killed Mr Goswami when he reached in front of the Sikder Store. According to him, as in the interest of proving the case accused Rifat was treated as approver with the permission of the court, he submitted two separate charge-sheets-one against Jalal @ Jillu, Biplob, Porash and Arman and the other against SM Sabbir Rahman alias Shantunu, Tanbir Sharif Apon, Mahmudul Hassan Joni, and Shahidul Islam Suvo under sections 302/109/34 of the Penal Code as accused Shantunu, Apon, Joni and Suvo were below the age of 16

31. In cross-examination he deposed that accused Rifat and Shantunu were not taken on remand but accused Apon was taken on remand. He denied defence suggestion that he obtained confessional statement from the accused through torture. He, however, deposed that Jillur was taken on remand on 18-11-2002 and produced before the court on 21-11-2002. He denied defence suggestion that he prepared another sketch-map and index of the place of occurrence because he was not satisfied with the sketch map prepared by the first investigating officer. According to him he prepared the 2nd sketch map and index to explain the place of occurrence more elaborately. He proved the said map and index. He further deposed that on 23-12-2002, Rifat applied from jail under section 337 of the Code of Criminal Procedure to become approver, and subsequently gave under-taking.

32. In cross-examination, defence obtained some contradictions from him in that PW 3 in his statement did not say that accused Jillur and Biplob fired 2/3 more gun shots and PW 3 also did not state that Biplob shot gun fire. Accordingly to him, PW 4 also did not say in his statement that he saw accused Biplob shooting fire. Neither did PW 4 state in his 164 statement that Biplob shot Mr Goswami. Rifat Akond (PW 5) also did not state in his confessional statement that accused Biplob shot fire after taking pistol from his waist. However, PW 6 told this witness that he saw Rifat, Jillur and one unknown person standing at the place of occurrence and PW 6 subsequently told him that the said unknown person was Biplob. However, PW 6 did not tell him that he heard 2/3 gun shots and subsequently when he came back he saw Jillur, Rifat and Biplob running away. PW 13 also did not tell him that he subsequently heard that accused Biplob and others killed Mr Goswami. He deposed that accused Biplob was not a regular student at the time of occurrence and he himself verified the identity of Maksudur Rahaman Biblob.

33. It appears from the evidences on record that though three persons, namely Jalal, Biblob and Rifat, were present at the place of occurrence, Rifat has been made approver pursuant to the provisions of section 337 of the Code of Criminal Procedure and, accordingly, he deposed as State witness (PW 5). Besides, there are four confessional statements made by four accused (including two child-accused) under section 164 of the Code of Criminal Procedure-however, we will not consider the confessional statements of Shantunu and Apon as they were children and tried separately before a Juvenile Court under the provisions of the Children Act 1974. Since they are not before us, we do not want to rely on their confessional statements as it might violate the principles of natural justice and might prejudice their case. On the other hand, before relying on the confessional statements of child-accused, we are obliged to examine whether they were recorded in compliance with the special procedures as made applicable by this court in recording the confessional

statements of children, which we do not want to do in their absence. [See the judgments of this court in the *Bangladesh Legal Aid and Services Trust vs Bangladesh,, 22 BLD 206 = 7 BLC 85* and *Jaibar Ali Fakir vs State, 28 BLD 627* = 61 DLR 208; see also Ali, Justice M Imman, 'Towards a Justice Delivery System for Children in Bangladesh', Unicef (2010), Dhaka, Chapter-6.4.6]

34. Now, let us examine whether the prosecution has been able to prove the charges against three convicts before us, namely Jalal, Biblob and Porash, even without those confessional statements of child-accused.

Zalal @ Zillu

35. Mr Nakib Saiful Islam, the learned advocate appearing on behalf of this condemned prisoner, submits that the prosecution has not been able to prove the charges against Zalal beyond reasonable doubt and, as such, his conviction should not sustain. Alternatively, he submits that even if the charges are found to have been proved beyond reasonable doubt, the sentence of death imposed upon him should be commuted to life imprisonment considering his young age and the fact that he has been on death row for long time. Mr Momtaj Uddin Fakir, learned Addl. AG and Mr M Ejarul Haque, learned DAG, on the other hand, submit that there are enough evidence for the conviction and sentence to sustain and, as such, the same should not be disturbed by this court.

36. Heard the submissions and considered the materials on record.

37. As per the depositions of PW 5 (Approver), he himself was a member of the killing group. According to him, Apon and Shantunu engaged Jalal and others to kill Mr Goswami, a teacher of the Government Loboratory School, Dhaka as the teacher had insulted them concerning matters relating to their promotion from class-seven to class-eight and class test. Jalal agreed to kill in exchange for Taka one lakh and a pistol of Shantunu's father. He was present and took part in the conspiracy at the Green Corner on 25-10-2002, Friday at 9-00 AM to kill Mr Goswami in the course of committing dacoity at his house. According to PW 5, the said plan was not successful because of the fear of Porash and the boys who came from Shahbag. Thereafter, on the instruction of Jalal, PW 5 came to the place of occurrence in the next morning and met Jalal and Biplob there. As Mr Goswami came out of his house, Jalal and Biplob followed him and they were followed by PW 5. He then saw Jalal shooting Mr Goswami at the back of the head in front of Sikder Store causing him to fall down. Jalal then fired two more shots on the right side of Mr Goswami.

38. This eye-witness-version of PW 5 was vividly supported and corroborated by two independent eye-witnesses, namely PW 3 and 4, who, in categorical terms, deposed that they saw Jalal shooting Mr Goswami. Jalal in his confessional statement (exhibit-14) also admitted that he fired three shots at Mr Goswami ("স্যারে পান দোকানে দাঁড়ালে স্যারকে আমি ৩টা গুলি করি। বিপ্লব ১টা গুলি করে। তারপর আমি ও বিপ্লব একলগে (এক সংগে) যাই।"). In his confessional statement, Jalal also corroborated the back ground of the killing of Mr Goswami as deposed by PW 5. The Magistrate (PW 17), who recorded his confessional statement, was extensively cross-examined on his behalf before the Tribunal, but nothing could be extracted which could suggest that his confessional statement was not voluntary or true. Rather, PW 17 in his deposition denied any suggestion of torture on Jalal and deposed that the confessional statements of Jalal and other accused were recorded in compliance with the provisions of sections 164 and 364 of the Code of Criminal Procedure read with the High Court Form (M) 84. Upon examining the confessional statement of Jalal (exhibit-13), we are also satisfied that the same is voluntary and true.

39. Therefore, it is clear that the depositions of PWs 3, 4 and 5 as to the killing of Mr Goswami by Jalal correspond each other and they are supported by the confessional statement of Jalal himself. Although Jalal may be convicted solely on the basis of his confessional statement as the same has been found to be voluntary and true, yet his confessional statement is strongly supported by the depositions of PWs 3, 4, 5 and 6, who are eye-witnesses to the occurrence, leaving no scope of reasonable doubt. In addition, the evidences against him are also corroborated by the post-mortem report (exhibit-14) and the depositions of doctor (PW 18) who conducted the post-mortem on the dead body of Mr Goswami. The four entry injuries as mentioned in the post-mortem report also correspond to the four gun shots fired in the killing of which 3 (three) were caused by the shots fired by Jalal. This evidence is also corroborated by PW 18 in that he recovered four bullets from the dead body (which he handed over to police) and also supported by the inquest report (exhibit-2) as prepared by PW 15.

40. Above evidences are so consistent with each other that we do not find any semblance of reasonable doubt against the position that it was Jalal who was in the killing group and killed Mr Goswami by firing three gun shots. There are also evidences that he participated in the conspiracy to kill Mr Goswami and unsuccessfully tried to kill him on two previous occasions.

41. Considering the above evidences on record, we are of the view that the prosecution has been successful in proving charges against Zalal @ Jillu beyond reasonable doubt and, as such, we do not find any reason at all to interfere with the conviction on him as given by the Tribunal below.

42. Now the sentence of death. It appears from the evidences on record that Zalal was a professional killer and according to the deposition of PW 5 he had reportedly committed murders before ("এই আসামীগন মেহেরুন্নেছা স্কুলের সামনে দুটি হত্যা করে মর্মে শুনেছি।") and used to carry two pistols with him. On the other hand, the killing in question is a preplanned and premeditated one and became successful in the 3rd attempt. Convict Jalal along with others committed this murder in broad daylight in front of several eye-witnesses. Besides, he fired three gun shots one after another on Mr Goswami from a point blank distance, which shows without any doubt that he is a cold-blooded murderer who fired three shots to make sure that his victim did not have any chance to survive. Therefore, considering the above aspect and the material evidences on record, we are of the view that a professional cold blooded killer like Zalal does not deserve any mercy from this court. Therefore, we are not inclined to commute his death sentence to life imprisonment as prayed/ submitted by the learned advocate appearing for him.

43. Thus, since the prosecution has been able to prove the charges against Zalal beyond reasonable doubt and there is no circumstance in the case to commute his sentence, his conviction and sentence of death should sustain. Accordingly, Death Reference No. 103 of 2006 in respect of Zalal @ Jillu is accepted and Criminal Appeal No. 5070 of 2006 and Jail Appeal No. 1080 of 2006 as preferred by him are dismissed.

Maksudur Rahman Biplob

44. Mr Khandokar Mahbub Hossain, learned senior counsel (with Mr Shakhawat Hossain and Mr Sheikh Mohammad Ali, the learned advocates), appearing for this condemned prisoner, took serious objection to the conviction and sentence imposed on Biplob by the Tribunal. Learned advocate submits that there is no evidence on record suggesting that Biplob shot fire on Mr Goswami or that he was present in the alleged conspiracy to kill Mr Goswami. Mr Hossain points out that the only evidences on record are that Biplob was merely present at the place of occurrence, but did not take any part in the killing.

Therefore, his mere presence should not even be treated as an act done in furtherance of common intention to kill Mr Goswami within the meaning of section 34 of the Penal Code. Therefore, he submits, since Biplob's participation in the conspiracy and active part in the killing have not been proved by sufficient evidence, he should be acquitted. He further argues that the identification of Biplob has also remained doubtful, as there were other Biplobs in the concerned locality rendering the conviction on him very unsafe. In support of his submissions, he refers to some decisions of this court, such as *State vs Ershad Ali Sikder 56 DLR 305, Belal Ahmed vs State 40 DLR 154* and *Aminul Islam vs State 12 MLR 21 = 12 BLC 332.*

45. Mr Momtaj Uddin Fakir, learned Addl. AG and Mr M Ejarul Haque, learned DAG, on the other hand, submit that there are enough evidence for the conviction and sentence to sustain and, as such, the same should not be disturbed in any way.

46. Heard the submissions and considered the materials on record.

47. It appears from the depositions of the approver Rifat (PW 5) that he along with Shuva, Arman, Biblob, Apon and Jillu (Jalal) used to commit extortions in the locality. Jillu used to carry pistol and agreed to kill Mr Goswami in exchange for money and a pistol on the proposal given by Apon and Shantunu. In the conspiracy at green corner on 25-10-2002 at 9-00 O'clock, it was decided that Apon, Jillu, Arman, Biblob and three boys from Shahbag would commit dacoity at Swapan Goswami's house and kill him. Accordingly, Jalal, Biplob and others went to Mr Goswami's house on the same day at 10-00 AM, but failed to kill him as the boys from Shahbag including Parosh got scared. Before that there was another plan on 24-10-2002 to kill Mr Goshami on the pretext of taking tuition from him. Zalal in his confessional statement stated that he along with Biplob and others visited the house of Mr Goswami on 24-10-2002 pursuant to the said plan. Biplob along with Arman had talks with Mr Goswami while Jalal was on guard at the gate. This plan failed because a neighbouring people came out.

48. Further, according to PW 5 (approver), Biplob was already present near the place of occurrence in the morning on 26-10-2002 (the date of occurrence). As PW 5 arrived there pursuant to his telephonic conversation with Jalal on the previous night, he found Biplob ("আমি গলির ভিতর যাই ও বিপ্লবের সাথে দেখা করি।"). As Mr Goswami came out, Biplob asked him whether it was Mr Goswami, to which PW 5 replied in the affirmative. Thereafter, Biplob and Jillur followed Mr Goswami and PW 5 also followed them and realized that some danger was imminent on Mr Goswami. PW 5 further confirmed that Biplob had a pistol at the material time of occurrence ("শনিবার সকালে বিপ্লব আমাকে একটি পিস্তল দিয়েছিলো এবং পরবর্তীতে আবার পিস্তলটি নিয়েও যায়।"). This fact of possession of pistol by Biplob is also consistent with the confessional statement of PW 5 (Approver) who deposed before the court that when Jillu fired three bullets Biplob fired one upon taking out a pistol from his waist. Thereafter, they (Jalal and Biplob) fled away and PW 5 got into his house-suggesting that Biplob and Jalal fled away together. This fleeing away by Jalal and Biplob together was also supported by an independent witness (PW 4) as well as the confessional statement of Jalal (exhibit-13). PW 5 though did not state in his confessional statement that he saw Biplob shooting fire, Biplob's active presence in the killing have been supported by his confessional statement (exhibit-15) as well as his deposition in the court and the same is corroborated by the confessional statement of Jalal, who even stated in his confession that Biplob shot one fire after he shot three. ("স্যার পান দোকানে দাঁড়ালে স্যারকে আমি ৩টা গুলি করি। বিপ্লব ১টা গুলি করে। তারপর আমি ও বিপ্লব একলগে (এক সংগে) যাই।")

49. Yes, we are aware of the legal position that Biplob cannot be convicted on the basis of confessional statement of co-accused Jalal, but he may be convicted under section 34 of the Penal Code if it is found that his presence at the place of occurrence was not an innocent one and he was there as a member of the killing group to kill Mr Gowsami-even in the absence of direct evidence to the effect that be shot fire at Mr Gowsami. The eye-witnesses like PWs 3, 4 and 6 proved his such guilty presence. PW 3 deposed that when Mr Goswami fell down after the first fire, he saw Jalal and Biplob firing 2/3 shots and thereafter fled away ("পরবর্তীতে আসামী জিল্লু ও বিপ্লব আরো ২/৩টি গুলি করে। আসামী জিল্লু, বিপ্লব ও রিফাত দৌড়িয়ে চলে যায়।"). Although this witness did not state in his 164 statement before the Magistrate that he saw Biplob shooting fire, the circumstantial evidences and other evidences on record prove his active participation in the killing. PW 3 also identified Biplob in clear terms saying that he used to know Biplob and others before.

50. The evidence of PW 3 is also corroborated by PW 4 (another eye-witness), who deposed that he saw Jalal, Rifat and Biplob standing near the mosque. He saw Jalal shooting at the back of Mr Goswami's neck and saw Rifat, Jalal and Biplob fleeing away. He further confirmed that Biplob and Jillur ran together towards right. In cross-examination by Biplob he, in clear terms, identified Biplob ("আসামী বিপ্লব এলাকার ছেলে তাকে ঘোরা ফিরা করতে দেখেছি"). PW 6, another eye-witness, also supported more or less the eye-witness versions of other witnesses, namely PWs 3, 4 and 5. This active participation of Biplob in the killing was also corroborated by the confessional statement of Jalal and Rifat (exhibits 13 and 5). These being the evidences on record, even if we hold for argument's sake that there is no direct evidence to the fact that Biplob shot fire at Mr Goswami, yet the active participation of Biplob in the killing has been proved beyond reasonable doubt bringing him within the mischief of section-34 of the Penal Code.

51. Further, there are evidences on record that four shots were fired at Mr Goswami, four corresponding entry injuries were found on his dead body and four bullets were recovered from his body. It is also on record that Jalal fired three shots at Mr Goswami. Therefore, the other bullet was shot either by Biplob or Rifat, they were the only persons who were associating Jalal at the relevant time. However, the evidences indicate that although there were three persons in the killing group, Rifat was standing a bit away from Jalal and Biplob. Although Jalal in his confessional statement stated that Biplob shot a fire, that cannot be the basis of his conviction as the same is not a substantive evidence so far as Biplob is concerned. However, the circumstances of the events as unfolded through the depositions of the prosecution witnesses as well as the confessional statements of the accused very strongly indicate that it must have been Biplob who fired the 4th gun shot at Mr Goswami—as he was the only other person who was also carrying a pistol at the relevant time. Thus, even if we hold that there is no direct evidence that Biplob shot the 4th fire, there is ample evidence on record that his presence on the killing scene was not an innocent one. Rather, he was an active member of the killing team from the beginning to the end, in particular at the time of the occurrence. He was standing just behind Zalal and fled away with him and was carrying a pistol. Therefore, there is no doubt that he actively participated in the killing in furtherance of common intention, which is enough to bring him under the preview of section 34 of the Penal Code.

52. The common intention under section 34 was first authoritatively dealt with in Barendra Kumar vs King Emperor (Privy Council) 1925 page-1, wherein the conviction of Barendra Kumar under sections 302 read with section 34 of the Penal Code was upheld by the Privy Council although he did not shoot any fire at the victim. After examining several provisions of the Penal Code, the Privy Council observed as follows:

> "As soon, however, as the other sections of this part of the Code are looked at, it becomes plain that the words of section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By section 33 a criminal act in section 34 includes a series of acts and, further, "act" includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By section 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait".
>
> *(underlines supplied to give emphasis)*

53. Therefore, it is evident from evidences on record that the presence of Biplob was not a mere presence as boldly suggested by Mr Hossain, rather his presence at the relevant time at the place of occurrence was to participate in the killing and, accordingly, he played a role although there is lakh of unambiguous direct evidence that he shot a gun fire. Thus, it is crystal clear that the presence of Biplob at the crime scence with Zalal was not a mere presence but an active participation in the killing to bring him within the mischief of section 34 of the Penal Code.

54. Now, the criminal conspiracy. It appears that although there is no clear evidence that Biplob was present at the place of conspiracy on 24-10-2002 and 25-10-2002, there is ample evidence that he was all along active along with Zalal from the beginning to the end to kill Mr Goswami. Section 10 of the Evidence Act provides that when there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well as for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

55. There is ample evidence that there was a conspiracy by two or more persons to kill Mr Goswami and on two occasions, namely on 24-10-2002 and 25-10-2002, they conspired to kill him. We have already held that Biplob have all along played a roll in the two failed attempts to kill Mr Goswami and in the actual killing pursuant to the said conspiracy. Therefore, those acts leading to the actual killing done by him are enough to bring him within the per view of criminal conspiracy as defined by section 120A of the Penal Code with the help of section 10 of the evidence Act, if both are read together.

56. Conspiracy is done in secret. It is not possible to prove conspiracy by direct evidence. It has to be proved by circumstantial evidences. Considering this aspect, the legislators enacted section 10 of the Evidence Act. Here, there is evidence on record that there was conspiracy to kill Mr Goswami and pursuant to that conspiracy Biplob was actively present in two unsuccessful attempts to kill Mr Goswami and finally he actively participated in the real killing. Therefore, the conspiracy agency under section 10 of the Evidence Act will come into play to prove that there was existence of conspiracy and reasonable ground exists for believing that Biplob joined that conspiracy (see the illustrations to section 10 of the Evidence Act). This being so, we are of the view that the prosecution has also been able to prove the charge of conspiracy as punishable section 120B of the Penal Code against Biplob beyond reasonable doubt.

57. Thus, we hold that the prosecution has been able to prove the charges beyond reasonable

doubt against Biplob and, as such, his conviction under section 302/34 and 120B of the Penal Code should sustain.

58. Now the sentence of death. It appears from the charge-sheet that the age of Biplob was mentioned as 17 and that there was no criminal record against him apart from the instant case. It further appears that though Biplob became a member of the criminal group led by Zalal and got involved in criminal activities like extortions, the present case is the first on his part so far as killing a human being is concerned. Unlike Zalal, since there is no evidence on record that Biplob is a professional killer, rather, there is evidence that he was a youth of tender age at the time of the commission of the offence and has been for long time on death row, we are of the view that his sentence of death should be commuted to the sentence of life imprisonment.

59. Accordingly, the Death Reference No. 103 of 2006 in respect of Maksudur Rahman Biplob is rejected. The Criminal Appeal No. 5103 of 2006 and Jail Appeal No.1020 of 2006 as preferred by him are dismissed with the modification of death sentence on him to the sentence of life imprisonment.

Porash

60. Evidences on record, in particular the deposition of PW 5(approver), shows that Porash was not a privy to the conspiracy concerned or that he did not do any act pursuant to such conspiracy (স্যারকে হত্যা করবে পরিকল্পনার বিষয়ে আসামী পরাশ জানিতো না). On the other hand, one of the attempts to kill Mr Goswami was not successful as because Porash and two others got scared. There is also evidence that only three persons, namely Zalal, Biplob and Rifat, took part in the killing on the day of occurrence. Considering this aspect of evidences on record, we are of the view that the prosecution has not been able to prove the charges against this convict beyond reasonable doubt and, as such, it will be unsafe to convict him. Therefore, we are of the view that convict-Porash should be acquitted of the charges. Accordingly, Criminal Appeal No. 5053 of 2006 as preferred by Porash is allowed and the impugned judgment and order so far as it relates to the conviction and sentence of Porash are hereby set-aside. Thus, Porash is acquitted of the charges labelled against him.

61. With the above finding and analysis of the evidences, we conclude our judgment and order with the following result:

a) Death Reference No.103 of 2006 in respect of Zalal alias Zillu is accepted and Criminal Appeal No. 5070 of 2006 and Jail Appeal No. 1081 of 2006 as preferred by him are dismissed.

b) Death Reference No.103 of 2006 in respect of Maksudur Rahman Biplob is rejected and Criminal Appeal No. 5103 of 2006 and Jail Appeal No. 1020 of 2006 as preferred by him are dismissed with the modification of sentence in that the sentence of death on him be commuted to the sentence of life imprisonment. The concerned jail authority is directed to withdraw Maksudur Rahman Biplob from the condemned cell and keep him in the general prison.

c) Criminal Appeal No. 5053 of 2006 as preferred by Porash is allowed. Accordingly, he is acquitted of the charges. The impugned judgment and order in so far as it relates to the conviction and sentence of Porash is set-aside. Since Porash is already on bail granted by this court, he be released from his bail bond immediately.

62. Let an advance order containing the above result be sent to the concerned jail authority.

Send down the lower court records immediately.

Ed.

HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

ANM Bashir Ullah J

Khulna Zilla Parishad...
.....Plaintiff-Petitioner
vs
Kamol Kumar Chakrabarti and another.....
.....Defendant-Opposite-Parties*

Judgment
May 30th, 2013.

Code of Civil Procedure (V of 1908)
Sections 115(4) and 151

Ends of justice would be best served if the operation of the judgment and decree of the former suit be stayed for a specific period directing the trial Court to dispose of the suit within such period and that will be the best option for both the parties. .....(21)

Shah Mohammad Munir Sharif with AKM Nurul Alam—For the petitioner.

Dr Naim Ahmed—For the Opposite Party No. 1.

Judgment

This Rule, on an application under section 115(4) of the Code of Civil Procedure (in short, the CPC) at the instance of the plaintiff- petitioner was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 24-8-2010 passed by the learned Additional District Judge, 2nd Court, Khulna in Civil Revision No. 9 of 2010 affirming the order dated 18-11-2009 passed by the learned Assistant Judge, 8th Court, Khulna in Title Suit No. 1321 of 2008 shall not be set-aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The facts leading to the issuance of the Rule, in short, is that the present petitioner as plaintiff filed the above numbered suit against the defendant-opposite parties being No. 1321 of 2008 before the learned District Judge, Khulna as part of the central filing system, prevailing at the relevant time though the suit was triable by the Assistant Judge, for declaration that the judgment dated 30-9-1958 and the decree dated 6-11-1958 in Title Suit No. 160 of 1957 passed by the then Subordinate Judge, Khulna is void, illegal and not binding upon the plaintiff.

3. It was averred that the suit land was an acquired property of the plaintiff, the same was correctly recorded in his name who has been possessing the same for the last 80 years by establishing technical school and residence of the Superintend thereof. But Indra Sekhar Chakrabarti, the predecessor of the opposite party No. 1 preferred Title suit No. 160 of 1957 in the Court of Subordinate Judge, Khulna against the plaintiff-petitioner and opposite party No.2 and obtained a fraudulent and collusive decree against them.

4. The said suit was contested by the then Province of East Pakistan who filed a Civil Appeal being No. 57 of 1959 in the High Court of East Pakistan and in the appeal the judgment and decree of Title Suit No. 160 of 1957 was affirmed.

5. The petitioner had no knowledge of the said suit. All on a sudden on 13-6-2007 the process of Title Execution Case No. 5 of 2007 was served upon the plaintiff-petitioner and only then the petitioner for the first time came to know about the suit. Thereafter, the petitioner collecting papers on 13-7-2008 became sure of the said suit, hence the present suit.

6. After filing of the suit, the petitioner filed an application in the trial Court on 27-1-2009 under section 151 of the Code of Civil Procedure for staying the operation of the judgment and decree dated 30-9-1958 and 6-11-1958 of the Title suit No. 160 of 1957. But the trial Court was

*Civil Revision No. 4052 of 2010.

pleased to reject the said application by his order dated 18-11-2009.

7. The petitioner against the said order dated 18-11-2009 preferred Civil Revision No. 9 of 2010 before the learned District Judge, Khulna which has been ultimately heard by the Additional District Judge, 2nd Court, Khulna who by his impugned judgment and order dated 24-8-2010 dismissed the revision affirming that of the order of the trail Court dated 18-11-2009. The petitioner being aggrieved by and dissatisfied with the impugned judgment and order dated 24-8-2010 passed by the learned Additional District Judge, 2nd Court, Khulna moved this Court and obtained the present Rule. The Rule is resisted by the opposite party No. 1.

8. Mr Shah Mohammad Munir Sharif with Mr AKM Nurul Alam, the learned Advocate appearing on behalf of the plaintiff-petitioner supports the Rule. He submits that both the trial Court and the appellate Court below being misconceived of the fact and also on the misconception of law came to a wrong findings and conclusion that the plaintiff-petitioner is to prove that the summons and process of the former suit were served upon him. He also submits that whenever the present plaintiff-petitioner filed the present suit claiming that the summons and process of the former suit have not been served upon him, the onus heavily lies upon the plaintiff of the former suit to prove that the summons and process were duly served upon the defendant (the present petitioner) of that suit. He also submits that a negative fact and matter cannot be proved because the same bears no existence. But who claims something positive on that fact he is to prove the existence of that particular fact and in that view of the matter the plaintiff of the former suit was under duty bound to prove that the summons was served upon the defendant of that suit.

9. He also submits that in fact immediately after filing of a suit it was neither practicable nor desirable for any party of the suit to prove the same fact and the same fact cannot be proved without trial but during the trail, the operation of the judgment of the former suit requires to be stayed. He adds that after almost 19/20 years of the judgment of the impugned suit, the execution case was filed but in view of Article 182 of the Limitation Act read with section 48 of the Code of Civil Procedure, the execution case was not maintainable and the filing of the execution case after such a long gap signifies and indicates about the collusiveness of the decree. So, the Courts below should have stayed the operation of the judgment and decree of the disputed suit till disposal of the present suit and if the operation of the judgment and decree of the disputed suit is not stayed the purpose of filing of the present suit may be frustrated. So, the impugned judgment and order, complained of, in this revisional application may kindly be set-aside staying the operation of the judgment and decree of the former suit being Title Suit No. 160 of 1957.

10. On the other hand, Dr Naim Ahmed, the learned Advocate appearing on behalf of the opposite party No. l opposes the Rule. He submits that Indra Sekhar Chakraborti, the predecessor of the opposite party No. 1 as plaintiff filed the impugned title Suit being No. 160 of 1957 for declaration of title and permanent injunction into 4 bighas of land fully described in the schedule of that suit and in the said suit the then Province of East Pakistan was the defendant No. 1 and District Board, Khulna was defendant No.2 and the suit was decreed on contest by a judgment dated 30-9-1958. Against the said judgment, the Government of the then East Pakistan preferred an Appeal being Title Appeal No. 57 of 1959 before the High Court and the High Court ultimately by its judgment dated 12-12-1978 affirmed the judgment of the trial Court. The opposite party No. l being the legal heirs of the said Indra Sekhar Chakrabarti while was in possession of the suit land all on a sudden on 2-8-2005 the present petitioner, that is

the Khulna Zilla Parishad had entered into the suit land forcibly and started making semi pucca construction and under the said compelling circumstances the opposite party No. 1 filed Execution Proceeding No. 5 of 2007 before the Joint district Judge, 1st Court, Khulna under Order XXI Rule 32 and section 151 of the CPC. He submits that though the District Board, Khulna, that is, the defendant No. 2 of that suit did not contest in the suit but the Government of the then East Pakistan contested the suit. So, the interest of the defendant No.2 has been rightly protected by the defendant No.1. So, the defendant No.2 at this stage cannot file a suit taking the ground of fraud, collusiveness or any other grounds and the suit was filed after almost 50 years of the decree with a *malafide* intention to cause harm to the opposite party No .1 and both the Courts below being convinced of the said fact did not stay the operation of the judgment and decree of the former suit dated 30-9-1958 which was affirmed by the High Court even. So, the Courts below particularly the learned Additional District Judge, 2nd Court, Khulna on due consideration of the facts and circumstances of the case did not commit any error of law by his impugned order occasioning failure of justice to the petitioner. So, the Rule is liable to be discharged with costs,

11. I have considered the above submission of the learned Advocates of both the parties with profound attention and have gone through the materials on record.

12. On going to the materials on record and also on going to the judgment of the former suit being Title Suit No. 160 of 1957 it appears that the present petitioner Khulna Zilla Parishad was the defendant No.2 in the form as District Board, Khulna. There appears a common narration in the judgment of Title Suit No. 160 of 1957 that the suit was decreed on contest. The language of the Court denotes as the suit was contested by all the defendants of that suit. But on meticulous perusal of the judgment of Title Suit No. 160 of 1957 it appears that the suit was contested by the defendant No. 1 of that suit. But that was not correctly articulated in the ordering portion of the judgment of that suit. However, be that as it may, it is fact that the suit was not contested by the defendant No.2 of that suit.

13. The former suit was in fact decreed on contest against the defendant No.1 and exparte against the defendant No. 2 who is the present petitioner in this Rule. The petitioner filed the Title Suit No. 1321 of 2008 on two counts. The first count is that the summon of that suit was suppressed upon him and the second count is that the exparte decree was obtained collusively and fraudulently against him by the plaintiff of that suit.

14. In the case of *10 MLR (AD) 167* it was held by our Apex Court that a defendant may file an independent suit for setting-aside the exparte decree when he alleges that the decree was obtained by practicing fraud, but when he alleges that there was no service of summon upon him, remedy lies in filing a proceeding under order IX of Rule 13 of the CPC on the ground of non-service of summons and in that case no independent suit will lie.

15. In the fact of the present case I find both the grounds are in the luggage of the plaintiff-petitioner as such there appears no *prima facie* bar in filing a regular suit challenging the decree of the former suit. Both the trial Court and the revisional Court below held that onus lies upon the plaintiff-petitioner to prove that no summons and process of the original suit was served upon him. In fact, this sort of findings and decisions of the Courts below is against the spirit of the set principle of law.

16. In the case of *40 DLR (AD) 193* it was held that if the defendant alleges that the summons was not duly served upon him in that case the plaintiff of the original suit will be required to prove that summons was duly served upon the defendant of the original suit. And the same views

have been endorsed by the apex Court in numerous cases including in the case of *1 BLC (AD) 179, 1 MLR (AD) 137=48 DLR (AD) 159* and *9 MLR (AD) 158*. But it is very unfortunate that both the Courts below came to a wrong conclusion that the plaintiff-petitioner could not prove that the summons of the original suit was not served upon him.

17. In the facts and circumstance of the case it is also pertinent to point out that immediate after filing of a suit it is neither practicable nor desirable for any particular party to prove the said fact. It is a fact which can only be addressed at the trial of the said. However, in my consideration the Courts below were not justified in coming to a conclusion at the pre-matured stage of the suit that the plaintiff-petitioner (defendant of the former suit) could not prove the service of summons upon him although the same was the matter of trial.

18. Since the present plaintiff-petitioner occupies the right to file a suit challenging the decree of the former suit and, as such, if the operation of the decree of the former suit is not stayed the purpose of filing of the present suit may be frustrated and in such a case the purpose of the ends of justice would be best served if the operation of the decree is stayed for a limited period enabling the trial Court to dispose of the present suit within the said period. If the operation of the judgment and decree of the former suit are allowed to continue and run during the pendency of the present suit parallely that may create a clash a chaotic situation between the parties.

19. At the time of hearing of this Rule, the learned Advocate for the petitioner seriously raised question as to the maintainability of the execution proceeding being No. 5 of 2007. He referring the provision of Article 182 of the limitation Act as well as section 48 of the CPC submits that almost after 20 years of the original suit, the plaintiff preferred the execution case which ought to have been filed within 3 years and after filing of the execution case though original plaintiff was entitled to maintain his execution case up to 12 years but he did not even come within 12 years. So, the execution case was not at all maintainable.

20. In my consideration whether the execution proceeding is maintainable or not is not the subject matter of the present Rule. But the learned Advocate appearing for the opposite party No.l made his submission that the execution case was not filed under Article 182 of the Limitation Act nor under section 48 of the CPC rather since the original suit was decreed for permanent injunction and since after a long gap the defendant made invasion in the decreetal land of the plaintiff, they had come to the Court seeking relief under Order XXI of Rule 32 of the CPC. As I have already noted it earlier that the maintainability of the execution proceeding is not the subject matter of the present Rule.

21. Since a title suit has been filed by the present plaintiff-petitioner challenging the decree of the former suit being No. 160 of 1957 and since apparently there appears no legal bar in filing of such a suit, so, the present suit and the operation of the decree of former suit cannot run simultaneously and if it is allowed to continue that will create judicial anarchy. So, the ends of justice would be best served if the operation of the judgment and decree of the former suit be stayed for a specific period directing the trial Court below to dispose of the suit within such period and that will be the best option for both the parties.

22. In the result, the Rule is made absolute. The impugned judgment and order dated 24-8-2010 passed by the learned Additional District Judge, 2nd Court, Khulna in Civil Revision No. 9 of 2010 is set-aside and the operation of the judgment and decree of the former Title Suit being No. 160 of 1957 is stayed for l(one) calendar year from the date of receipt of the copy of the judg-

ment and the trial Court below is directed to dispose of the present suit being No. 1321 of 2008 within l(one) year with a further direction that the present plaintiff-petitioner will not get any adjournment in the suit.

Let a copy of this judgment and order be sent to the Court concerned for information and necessary action.

Ed.

HIGH COURT DIVISION
(Civil Appellate Jurisdiction)

Faruque Ahmed J
Md Ruhul Quddus J

Judgment
December 12th, 2011.

AKM Waliullah and others
.....Appellants
vs
Secretary, Ministry of Housing and Public Works and others....Respondents*

Bangladesh Abandoned Building (Supplementary Provisions) Ordinance (LIV of 1985) **Section 10**

Court of Settlement—Abandoned Property—Court of Settlement has a limited jurisdiction only to look into whether a particular property answers to the definition of abandoned property or not. But for that purpose it has jurisdiction also to see whether the applicant has *locus standi* to claim the property in question. .....(20)

Md Jamil vs Improvement Trust, Rawalpindi, 17 DLR (SC) 520; Secretary of State vs Mask and Company, IA Vol. LXVII 222; Anisminic Ltd. vs Foreign Compensation Commission, 2 AC 147; Krishnamoni vs Baser Mondal, 1963 AIR Cal 225; The Province of East Pakistan vs Sirajul Huq Patwari, PLD 1966 Supreme Court 854 = 19 DLR (SC) 281; People's Republic of Bangladesh vs Chairrman, Court of Settlement, 50 DLR (AD) 93 ref.

*First Appeal No. 188 of 2004 with Civil Rule No. 432(F) of 2004.

Md Lutfor Rahman Mandal, Advocate—For the Appellants.

Promila Biswas, DAG—For the Respondents.

Judgment

Md Ruhul Quddus J: This appeal at the instance of the plaintiffs is directed against judgment and decree dated 17-6-2004 passed by the Joint District Judge, Second Court, Dhaka rejecting the plaint in Title Suit No.89 of 2003. The suit was instituted for declaration of title and perpetual injunction for restraining the Government-officials from disturbing the plaintiffs' peaceful possession on the suit property and from transferring it to any other person.

2. Plaintiffs' case, in brief, is that the suit property originally belonged to one Md Ramjan Ali, who being a migrated refugee from India, got it allotted from the Government of erstwhile East Pakistan by an indenture of agreement dated 29-7-1966 followed by another deed of conveyance dated 8-11-1969. After independence of Bangladesh, the said Ramjan Ali owed allegiance to Bangladesh and his name was included in the voter list dated 30-1-1973. He paid remaining installments on 17-4-1978 against the suit property and acquired sole proprietary right over the same.

3. Subsequently the said Ramjan Ali sold the suit property to the plaintiffs' father and predecessor-in-interest Mukhlesuddin Ahmed by a registered sale deed dated 11-5-1978 and handed over possession thereof to him. Even after the said transfer, Ramjan Ali was all along present in Bangladesh. He died in Dhaka on 2-2-1980.

4. Meanwhile the area of Mirpur Police Station was declared as Mirpur Paurashava, and Holding No.372 was created against the suit property. Since then the plaintiffs were paying all taxes and utility charges to the Paurashava against the said holding.

5. Plaintiffs' further case is that the suit property was declared abandoned and published as such in the 'kha' list of abandoned property on 23-9-1986, although in a prior inquiry it was found that the original allottee Ramjan Ali had sold it to Mukhlesuddin Ahmed, who was in possession thereof.

6. Thereafter, Mukhlesuddin Ahmed filed Case No.7 of 2001 (kha) in the First Court of Settlement, Dhaka for release of the said property, which was rejected on 1-12-2001. It is alleged that in rejecting the case, the Tribunal did not examine the thumb impression of the original allottee Ramjan Ali by an expert and illegally arrived at a finding that the sale deed was not executed by him (Ramjan Ali).

7. Challenging the said decision, Mukhlesuddin Ahmed filed Writ Petition No.1238 of 2002. The High Court Division rejected it summarily by its judgment and order dated 17-3-2002. Then he moved in the Appellate Division with Civil Petition No.807 of 2002, which was also rejected in limini.

8. The plaintiffs came to know on 1-4-2003 that the defendant-officials were trying to settle the property elsewhere, thus the cause of action for filing the present suit arose.

9. The Secretary, Ministry of Housing and Public Works as defendant No.1 entered appearance and filed an application under Order VII rule 11 of the Code of Civil Procedure for rejection of the plaint on the grounds that the suit was barred by article 14 of President's Order No.16 of 1972 and also under article 6 (b) of the Ordinance No. XLIV of 1985, and that the abandoned character of the suit property was finally decided up to the Appellate Division.

10. Against the said application for rejection of the plaint, the plaintiffs filed a written objection on the facts and grounds stated therein.

11. Learned Joint District Judge heard the application and allowed the same by his order dated 17-6-2004 and thereby rejected the plaint on the ground that the suit was barred by law. Against the said judgment, the plaintiffs preferred the instant First Appeal and obtained an *ad-interim* order of injunction in the connected Civil Rule.

12. Mr Md Lutfor Rahman Mandal, learned Advocate appearing for the appellants submits that the Court of Settlement had no jurisdiction to decide title of the suit property and, as such, question of title between the parties is still open to be decided by a competent civil Court. Since the present suit is for declaration of title and other consequential relief, the plaint cannot be rejected on the ground of finality of the decision passed by the Court of Settlement. He further submits that the Government did not file any written objection denying the material allegations of the application, still the Court of Settlement rejected the application without proper adjudication of the issues whether the original allottee Ramjan Ali had left Bangladesh leaving the property uncared for; whether he died and was buried in Dhaka, and whether the authority served any statutory notice upon the occupants or did serve any other notice to meet natural justice. Under the facts and circumstances of the present case, the ouster clauses are not applicable and the civil Court is fully competent to adjudicate the issues and decide title of the suit land on that basis.

13. On the jurisdiction of civil Court, Mr Mandal refers to the cases of *Mohammad Jamil vs Improvement Trust, Rawalpindi, 17 DLR (SC) 520; Secretary of State, represented by the Collector of South Arcot vs Mask and Company, Indians Appeals Vol. LXVII 222; Anisminic Ltd. vs Foreign Compensation Commission, 2 AC 147; Sm. Krishnamoni vs Baser Mondal, 1963 AIR Calcutta 225; The Province of East Pakistan vs Sirajul Huq Patwari,* and some other cases in bunch, *PLD 1966 Supreme Court 854= 19 DLR (SC) 281;* and *People's Republic of Bangladesh,*

represented by the Secretary, Ministry of Public Works vs Chairman, Court of Settlement, 50 DLR (AD) 93.

14. On the other hand, Ms Promila Biswas, learned Deputy Attorney-General appearing for the Government-respondents submits that the decision of the Court of Settlement reached finality with dismissal of the civil petition filed by late Mukhlesuddin Ahmed, father of the plaintiffs. Thus the abandoned character of the suit property was finally established and it vested in Government. Now the heirs of the said Mukhlesuddin Ahmed cannot claim any title over the same property against the Government. The suit is clearly barred by law.

15. We have considered the submissions advanced by learned Advocates of both the sides, examined the materials on record and gone through the decisions cited. It appears that the Court of Settlement considered and discussed the evidence both oral and documentary as adduced by the petitioner and observed that "it also appears from the Govt. file No.S- 7/AP-145/85 of the Ministry of Works that a legal notice in page No. 1 of the file N/s 5(Q) was served upon the possessor, petitioner Muklesuddin for surrendering possession'. The Tribunal disbelieved Ramjan Ali's presence in Bangladesh at the relevant time as no citizenship certificate, non-option certificate, voter list or any other document in support of his presence was produced. The Tribunal also disbelieved the sale deed of Mukhlesuddin Ahmed because of non-production of any original vadeed and non-examination of any attesting witness.

16. All the cases cited by Mr Mandal, learned Advocate for the appellants are distinguishable. Of those, only the case of *50 DLR (AD) 93* is related to abandoned property, wherein two claimants were fighting for one property claiming their diverse title. Those claimants filed two separate applications for release of that property and the Court of Settlement allowed both the applications deciding the property not to be abandoned. Challenging the said decision, the Government unsuccessfully moved a writ petition in the High Court Division and thereafter, a civil petition before the Appellate Division. In the leave petition, learned Deputy Attorney-General appearing for Government petitioner submitted that the Court of Settlement was wrong in allowing the applications of two applicants on conflicting claims. Their Lordships of the Appellate Division dismissed the leave petition replying the said point in the following manner:

> "The Court of Settlement was not a Court for determining the title of the rival claimants. It was a Court for determination whether the case property was an abandoned property or not. Since the Court of Settlement and the High Court Division both found that the case property is not an abandoned property it will be for the rival claimants themselves to sort out who is the legal owner thereof and to what extent, if not already determined by a Court of law."

17. In the present case, there is only one claimant, who filed application before the Court of Settlement and claimed the suit property not to be an abandoned property. No dispute over title against any other individual is raised. The Tribunal rejected the application on consideration of the abandoned character of the said property. The genuineness of the petitioner's sale deed was a collateral issue related with the abandoned character of the suit property, which the petitioner Mukhesuddin Ahmed could not prove to rebut the conclusiveness of abandoned character of the property. The case of *50 DLR (AD) 93* is, therefore, not applicable here.

18. The facts regarding to filing of application before the Court of Settlement by the plaintiffs' father Mukhlesuddin Ahmed for exclusion of the suit property from the list of abandoned property,

rejection of the said application by the Tribunal's decision dated 1-12-2001 and its affirmation up to the Appellate Division, have been clearly stated in the plaint.

19. The decision of the Court of Settlement thus reached finality. Its legal consequence is that the property vested in Government, which can own, possess and dispose of it in any lawful manner. The plaintiffs, who are heirs of late Mukhlesuddin Ahmed (applicant before the Court of Settlement) cannot reopen the case raising the question of title in a disguised form. If the present suit is allowed to continue, there will be no end of litigation. It is barred by law and should be buried at the earliest opportunity.

20. This is correct that the Court of Settlement has a limited jurisdiction only to look into whether a particular property answers to the definition of abandoned property or not. But for that purpose it has jurisdiction also to see whether the applicant has *locus standi to* claim the property in question. In the present case the Court of Settlement found the transfer in favour of Mukhlesuddin Ahmed not to be genuine. This is in substance a decision on *locus standi* of the applicant in negative.

21. It is clear that the heirs of late Mukle- suddin Ahmed (applicant before the Court of Settlement) have brought the present suit to continue with their possession over the abandoned property and it is definite that the suit will bring no result for the plaintiffs. In such a suit, the Court can also invoke its inherent power and reject the plaint taking recourse to section 151 of the Code of Civil Procedure, even if it cannot be rejected under Order VII rule 11 of the Code, [reliance placed on *20 BLD (AD) 278 = 53 DLR (AD) 12*].

22. In view of the discussions made above and the decision cited, we do not find any illegality in the impugned order of rejection of the plaint. The appeal merits no consideration and is liable to be dismissed.

23. Accordingly the appeal is dismissed, however, without any order as to cost. The connected Civil Rule is also discharged and the stay granted therein is vacated.

Send down the lower Court's record.

Ed.

HIGH COURT DIVISION
(Special Original Jurisdiction)

Quazi Reza-ul Hoque J
ABM Altaf Hossain J

Judgment
September 8th, 2013.

Durjoy Dev.....
.....Petitioner

vs

Khulna University of Engineering & Technology, Khulna and others
.....Respondents*

Constitution of Bangladesh, 1972
Article 102(2)(a)(ii)

University should have afforded an opportunity to the petitioner to get a copy of inquiry report and showed have afforded him with the opportunity to appear before the inquiry committee to defend himself and/or controvert the allegation as raised by the University. University have seriously failed to maintain the minimum requirement of fairness before such action taken against the petitioner.

It is our concern that when a person's good name, reputation, honour, or dignity is at wager because of what the University is doing to him, the minimum requirement of the law must be satisfied. It hardly need to be said that if a student , as a result of a day's suspension, suffers a blow to his self-esteem or identical psychological harms will flow from many others routine. Before taking any detrimental decision against the petitioner, the authority should have dealt with the mater very sparingly.

.....(21 & 20)

*Writ Petition No. 2252 of 2012.

University of Dhaka vs Zakir Hossain, 16 DLR (SC) 722 and Kanda vs Government of Malaya (1962) AC 322, ref.

Subrata Choudhury with Md Nasim Islam, Advocates—For the Petitioner

Biswojit Roy, DAG with Md Jahangir Alam, AAG and Swarup Kanti Deb, AAG—For the Respondents.

Judgment

ABM Altaf Hossain J: The Rule under adjudication, was issued on 4-3-2012 calling upon the respondents to show cause as to why the impugned decision of the Khulna University Engineering and Technology, Khulna in the 36th Emergency Meeting of its Academic Council held on 22-2-2012 circulated under the signature of its Registrar, respondent No.3, though the notification contained in memo No. খুপ্রবি/২৮০৩/৩৫ dated 23-2-2012 (annexure-E), upholding/ approving the disciplinary action of student Discipline Committee, headed by the Vice-Chancellor, respondent No.2, and issued under the signature of its member- secretary, respondent No.4 vide memo No. খুপ্রবি/ডিএসডিবিউ/২০১২/১১১৬(৪) dated 8-2-2012 (annexure-C), expulsion of the petitioner from the university for a period of one year should not be declared to have been done without lawful authority and of no legal effect and/or pass such other or further order or orders as to this court may seem fit and proper.

The averments figured in the petition are as follows:

The Petitioner is a student of having a good academic background. He passed his School Certificate Examination in 2005 and Higher Secondary Certificate Examination in 2007 from Fauzdarhat Cadet College, Chittagong under the Secondary and Higher Secondary Education Board, Chittagong in Science Group securing grade point average 5,00 out of 5. He took admission into BSc Engineering Course on 7-2-2008 in Electrical and Electronic Engineering Department of the Khulna University of Engineering and Technology Khulna and successfully passed 7 terms obtaining CGPA 3.73 out of 4.00 each comprising 6 months covering 4 years and now he is studying in 4th year (2nd term). He is a student of good culture and is in association with the progressive student movement of the country. Respondent No.4 all on a sudden called explanation of the petitioner on 3-2-2012 on the allegation of unpleasant and undesired incident dated 1-1-2012 and 2-1-2012 in the university premises. The petitioner in response to the said allegations has been given reply to the respondent No.4 on 7-2-2012, denying all the allegations.

3. The Student Disciplinary Committee of the University of Khulna Engineering and Technology Khulna conducted investigations into the allegations, and in the absence of petitioner and without hearing him most arbitrarily arrived at a decision and communicated the decision to the petitioner on 8-2-2012.

4. The petitioner being aggrieved by the punishment, preferred Review Petition before respondent No.2 through Head of the Department, Electrical and Electronic Engineering Department on 13-2-2012 forwarded by the Student Advisers. The academic Council of the said University in an Emergency Meeting dated 22-2-2012 took up the Review Petition of the aggrieved student and accorded decision contained in serial No.6 to 20 that included the petitioner in serial No.10, passed order and communicated the same to the petitioner on 23-2-2012 by the respondent No.3.

5. The Vice Chancellor without consulting the relevant students Disciplinary Committee under section 11(3) of the Khulna University of Engineering and Technology Act, 2003 at his own initiative constituted 5 (five) memb ers committee

making the respondent No.4 as President to investigate into the allegations against the indisciplined students responsible for unpleasant occurrence on 1-1-2012 and 2-1-2012, on the occasion of Annual Dinner at Amar Ekushe Hall in the University causing damage to the residence of the Vice Chancellor and two transport vehicles of the Vice Chancellor creating threatening situation for the family members with the instruction to give report with recommendation.

6. Being aggrieved with and dissatisfied by the order of respondents, the petitioner preferred the instant writ petition and obtained present Rule.

7. M. Subrata Choudhury, the learned Advocate appearing on behalf of the petitioner submits that the impugned awarded punishment has been operating upon the petitioner who is a final year student most harshly and his education career has been closed for 1 year, totaling 2 terms with current term and his future prospects in life has also been sealed off. He also submitted that punishment awarded is quite excessive against offence and decision taken against the petitioner is not covered by the statute and without due process of law and, as such, petitioner deserves protection guaranteed to him under Article 27 and 31 of the Constitution of Bangladesh.

8. Mr Choudhury further submits that there is no consistency between the allegations and charge framed in the show cause notice and allegations against the petitioner shown before the inquiry committee and awarded punishment without any specific allegations against him and, as such, the impugned decision is liable to be declared unlawful.

9. He also submits that the petitioner has been awarded punishment on the basis of Khulna University of Engineering and Technology Rules, 2004, which is a self developed Rules without any support of law and the petitioner has been given punishment without affording him any opportunity to appear before the inquiry committee for self-defence denying natural justice, and, as such, impugned decision is liable to be declared unlawful.

10. He also submits that the Khulna University of Engineering and Technology standing in the capacity of loco parents with the students is not expected to award harsh punishment to its wards that closed promising education career of petitioner for 1 year (2 terms) with current term leading to University; for the rest of life and, as such, impugned decision under is liable to be declared unlawful.

11. He further submits that it is a norm of universal justice system that none should be condemned unheard. The petitioner is not involved in the charge of subversive state of activities or of discipline and he has been awarded punishment keeping the inquiry report secret and without allowing him to appear before the inquiry committee for self-defence denying natural justice and, as such, impugned decision is liable to be declared unlawful and with of no legal effect.

12. None appears for the University.

13. We have heard the learned Counsel for the petitioner, perused the substantive application and other materials of record in order to attain a proper decision.

14. On the basis of the submission of the learned Counsel for the petitioner we were traveled on annexure-"C" to the writ petition. It appears from this annexure that the respondent did not give petitioner any opportunity to present before the disciplinary committee in order to defend himself. Subsequently, the University Authority published notification of the same by issuing annexure-"E". It has become from the annexures that none of the annexure contains evidence of personal hearing of the petitioner.

15. It appears from the impugned letter that

an inquiry had been held without hearing the petitioner. It may be noted that the inquiry report does not disclose before making decision against the petitioner. The action was taken on the basis of inquiry report and answer of the show cause notice. The petitioner was charged in the show cause notice for the occurrence dated 1st January 2012 and 2 January 2012 designing unpleasant and unexpected incident. But the inquiry committee was formed to investigating into the matter concerning an incident of annual dinner at Omor Ekhusay Hall, dated 1st January 2012, and subsequent unpleasant incident on 2 January 2012. There is a divergency between two incidents. It can be said that the petitioner awarded punishment without any specific allegation, so far the impugned order in concerned.

16. The case in hand reminds us of the land mark case of *University of Dhaka vs Zakir Hossain,* reported in *16 DLR (SC) 722,* wherein, it was held that:

> "in all proceedings by whosoever held, whether judicial or administrative the principle of natural justice must be observed if the proceedings might result in consequences affecting" the person or property or other right of the parties concerned". This rule applies even though there may be no positive words in the statute or legal document whereby the power is vested to take such proceeding."

17. It is also further held in the Zakir Hossain's case that:

> "The person, body or authority concerned must act in good faith. But it would appear that it is not bound to treat the matter as if it was a trail or administer oath or examine witnesses in the present of the person accused or give him facility for cross-examining the witnesses against him or ever to serve a formal charge-sheet upon him. Such a person or authority can obtain information in any way it thinks fit, provided it gives a fair opportunity to the person sought to be affected to correct or contradict any relevant statement prejudicial to him."

18. In the case of *Kanda vs Government of Malaya,* reported in *(1962) AC 322,* Lord Denning said that:

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given a fair opportunity to correct or contradict them."

19. It can be said from the above extracted principle that notice and hearing are to be given before the decision is taken in compliance the principle of "audi alteram partem". Fairness demands an opportunity of hearing where the preliminary steps produce immediate legal consequences to the disadvantage of the person proceeded against. It may be argued that the principle of natural justice is the part of the procedural due process granted by Articles 31 and 32 of the Constitution. It is pertinent to be mentioned here that the university has carried out an inquiry, but did not ask the petitioner to appear before the inquiry committee in order to defend himself. It is lucid that the University Authority has utterly failed to follow the trend of principle of natural justice for wanting personal hearing and keeping the inquiry report undisclosed.

20. It is our concern that when a person's good name, reputation, honour, or dignity is at wager because of what the University is doing to him, the minimum requirement of the law must be satisfied. It hardly need to be said that if a student , as a result of a day's suspension, suffers a blow to his self-esteem or identical psychological harms will flow from many others routine. Before taking any detrimental decision against the petitioner, the authority should have dealt with the mater very sparingly.

21. We are not against retaining the set of discipline of the University, however, we are concerned in respect of the proceedings they have carried out against the petitioner. The University should have afforded an opportunity to the petitioner to get a copy of inquiry report and showed have afforded him with the opportunity to appear before the inquiry committee to defend himself and/or controvert the allegation as raised by the University. It is apparent that both the inquiry committee and the review committee concealed the inquiry report and also did not feel bothered to follow the principle of natural justice. Therefore, we are of the view that the University have seriously failed to maintain the minimum requirement of fairness before such action taken against the petitioner. The reasons stated above the Rule deserve to be made absolute.

22. In the result, the Rule is made absolute.

23. Hence, the impugned decision of the Khulna University Engineering and Technology, Khulna passed in the 36th Emergency Meeting of its Academic Council held on 22-2-2012 circulated under the signature of its Registrar, respondent No.3, though the notification containing memo No. খুপ্রবি/২৮০৩/৩৫ dated. 23-2-2012 (annexure-E), upholding/approving the disciplinary action of student Discipline Committee, headed by the Vice-Chancellor, respondent No.2, and issued under the signature of its member- secretary, respondent No.4 vide memo No. খুপ্রবি/ডিএসডবিউ/২০১২/১১১৬(৪) dated 8-2-2012 (Annexure-C), expulsion of the petitioner from the university for a period of one year be declared to have been done without lawful authority and to be of no legal effect.

There is no order as to costs.

Ed.

HIGH COURT DIVISION
(Special Original Jurisdiction)

Quazi Reza-ul-Hoque J
ABM Altaf Hossain J

Judgment
May, 16th, 2013.

Moon Construction Company Limited.....
.....Petitioner

vs

Government of Bangladesh and others.....
.....Respondents*

Constitution of Bangladesh, 1972
Article 31

A person may be destructively treated not only by action, but also by inaction and inaction may contravene the Article, when it is arbitrary and unreasonable. .....(17)

Novva Ads vs Department of Municipal Administration (2008) 8 SCC 42; AKM Kawsar Ahmed vs Bangladesh, 65 DLR 277; DG, BWDB vs BJ Geo Textile, 57 DLR (AD) 1; WASA vs Superior Builders, 51 DLR (AD) 199 and BTMC vs Nasiruddin Chowdhury cited in 5 BLC (AD) 144 ref.

Md Oziullah, Advocate—For the Petitioner.

Sarwar Ahmed, Advocate—For the Respondent Nos.1 and 2.

None Appears—For Respondent Nos. 3-8.

Judgment

ABM Altaf Hossain J: The Rule under adjudication issued, on 7-5-2012, was in the following terms:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why they should not be directed to refund the retention money/security deposit to the petitioner deducted from the bill of the works of package Nos. W-092N-CMMU and W-093N-

*Writ Petition No. 3746 of 2012.

CMMU pursuant to the work order Nos. MOHFW/CMMU/HNPSP/NC/Ctg, Khulna/ Tender-09/2005/52 dated 26-6-2006 and MOHFW/CMMU/HNPSP/NC/ctg.Khulna/ Tender-596/2005/53 dated 26-6-2006 respectively issued by respondent No.2 (Annexure-H and H(1) and/or such other or further order or orders passed as to this Court may seem fit and proper".

2. The averments figured in the petition, in generating factual instruments are as follows:

The petitioner is a company, involved with construction work including roads, buildings, structures and other development works in the country. The petitioner participated in a bid tender against the tender notice published by the respondents for completion of the construction work of Institute of Health Technology of Khulna under the package No.W-092-N-CMMU-and W-093-CMMU, (in brief "the packages") and obtained work order for the same on 26-6-2006.

3. Accordingly, necessary papers and documents were handed over to the petitioner by the respondent Nos.7 and 8 and other concerned authorities on 11-1-2007. After taking the possession of the site, the petitioner had to evict some illegal occupants from the site. For the reason of evict of illegal occupants and enhancing the market value of the construction materials, petitioner prayed for extension of time, and accordingly the time was extended up to 30-6-2010. Further to that on 5-5-2011, the petitioner applied to the respondents for extending further time. Subsequently, a recommendation was made by the Superintendent Engineer by his letter dated 16-5-2001 for extension of time up to 31-8-2011 on the basis of the recommendation of the Executive Engineer and Assistant Engineer. However, without considering the said recommendations and application of the petitioner, respondent No.2 cancelled the work order of the petitioner by his Memo dated 30-10-2011. Thereafter, a measurement was made by the parties in respect of the completed work till cancellation of work order. In view of that, the running bill of Taka 68,18,854,18 was prepared by respondent Nos.7 and 8 on the basis of the completed work for the packages and forwarded the same to the respondent No.2 for payment in the month of October, 2011.

4. On 1-3-2012, the petitioner submitted an application to the respondent No.2, praying for refunding his retention money/security deposit of the Package Nos. 92 and 93. But the respondents did not pay the said retention money of the petitioner without assigning any reason. Having failed to get back the said retention money from the respondents on 18-3-2011, the petitioner sent a notice demanding justice to the respondent No.2 through his lawyer, praying for said retention/ security for the packages, which was duly received by him on 18-3-2011, but the respondent did not heed to pay the demand as prayed for. The petitioner being aggrieved with and dissatisfied by inaction of the respondents preferred the instant writ petition and obtained the present Rule.

5. Mr Md Oziullah, the learned Advocate appearing on behalf of the petitioner submits that the bill was prepared and submitted by the respondent No.7 and 8 and other concerned authorities on the basis of completed work done by the petitioner, in which inaction of the respondents are illegal and *mala fide*. Further to that Mr Oziullah submits that the bill of the petitioner is admitted, there is no disputed question of fact involved in the instant writ petition, and, as such, the writ petition is maintainable.

6. Mr Md Sarwar Ahmed, learned Advocate appearing on behalf of the respondent Nos. 1 and 2 without filing any affidavit in opposition submits that the respondents did not refuse to pay the bill of the petitioner, the same is kept for review and decision, and that will be paid after completion of review.

7. We have considered the submission of the learned Advocates for both the parties, perused the substantive application and other materials on record in order to attain a proper decision.

8. It is incredibly correct that the disputed question of fact cannot be determined by invoking writ jurisdiction. It is apparent from the Annexure-"H" to the writ petition that after cancellation of the work order, the running bill was prepared by the respondent Nos. 7 and 8, and subsequently it was forwarded to the respondent No.2 in the month of October 2011. It has become obvious from Annexure-"G" to the writ petition that before preparing the bill, a measurement was undertaken by the parties. Thereafter, an amount of Taka 29,92,864.27 and 50,84,643.56 were deducted from the bill of the petitioner from package Nos.92 and 93 as retention money. It is pertinent to mention here that none of the contention has been refuted by the respondent, either by filling an affidavit-in-opposition or even by making submission before us. However, an oral submission made by the learned Counsel for the respondents that the respondents will review the bill and the retention money of the petitioner in due course of time. Mainly, the demands of the petitioner are waiting for the final approval of the respondent No.2. Therefore, we can conclude that the issues of the instant writ petition are not disputed. Even the contract between the parties already has concluded. Therefore, the submission of the learned Counsel for the respondent has no leg on stands, so far relates to disputed question of fact is concerned.

9. It is admitted that the contract has concluded and bill was prepared by the respondent Nos. 7 & 8. It is evident from Annexure-"H" to the writ petition that the respondent No. 2 is kept silent to approve the file of the petitioner in respect of the running bill and retention money since October, 2011.

10. The issue as to whether holding an administrative file by the administrative authority is an abuse of power and/or misuse of its discretion.

11. The constitution of the People's Republic of Bangladesh has granted power and has imposed duties upon the public authorities. Our Constitution does not allow any administrative authority to misuse its discretion and/or power. Discretion conferred by the statute has to be exercised honestly and fairly as conferred by the statute having regard to the purpose of the statute conferring it. In this regard, we may refer a case of *Novva Ads vs Department of Municipal Administration* reported in *(2008) 8 SCC 42,* wherein it is held that:

> "there cannot be any presumption that the power so confirmed will be misused ".

12. It is pertinent to be mentioned here that when a statute provides guidelines and/rules and/or regulations having been framed for exercise of the discretionary power, the exercise of such discretionary power should be in accordance with the guideline, rule or regulations. The duties imposed must be performed by the person on whom it is imposed and that person has no option. We must maintain that when a power is conferred, and the person upon whom it is conferred has no discretion/option to either exercise its or not to exercise it, unless the discretion is coupled with such power. The duty in which cash upon the designated person must exercise it diligently and cannot sit idle and/or stay inactive, he must respond to it.

13. In the present case, it is apparent that the respondent No.2 has kept silent to finalize the bill and/or the retention money/deposit of the petitioner since October, 2011. We have noted that the respondent No. 2 did not take any step to finalize the bill and the retention money without any reason, except informed the respondent No. 2 by his letter dated 20-3-2012 that a meeting will be held on 25-3-2012. Surprisingly, the respondent No. 2 did not take any appropriate decision on the file of

the petitioner in respect of the prepared admitted bill for the retention money until today (date of hearing). As we already have mentioned above that the contract is over and at this stage the instant writ petition is not merely based on contractual issue. We maintain that once the bill of the petitioner has been duly prepared by the respondent Nos. 7 and 8, the petitioner has created a legitimate expectation. The petitioner's bill should have dealt with fairly and reasonably.

14. In the case of *AKM Kawsar Ahmed vs Bangladesh,* cited in *65 DLR 277,* wherein it was held that:

> "the doctrine of legitimate expectation provides that the statements of policy or intention of the Government or its Department in administering its affairs should be without abuse or discretion".

15. In the case of *DG, BWDB vs BJ Geo Textile, 57 DLR (AD) 1* (the Appellate Division relied upon *WASA vs Superior Builders,* reported in *51 DLR (AD) 199, page No. 15),* wherein it is held that:

> "45..... when a contract is concluded the contractor has a legitimate expectation that he will be dealt with fairly".
>
> "46 In such event, the cancellation of the contract unilaterally without regard to the subsequent development is a high feat of arbitrariness which rightly attracts the writ petition".

16. In the case of *BTMC vs Nasiruddin Chowdhury* cited in *5 BLC (AD) 144,* the Apex Court in a detailed discussion accepted the position that a legitimate expectation cannot be defeated by the executive action unless public interest clearly requires negation of such an expectation can be given effect to by the Court only when the facts of the case clearly and unambiguously give rise to such a expectation.

17. Further to that we must come across the provision of Article 31 of the Constitution. Article 31 of the Constitution, envisages a concept of due process and demands reasonable and non-arbitrary laws and procedure. A person may be destructively treated not only by action, but also by inaction and inaction may contravene the Article, when it is arbitrary and unreasonable.

18. It appears from the different official correspondence that the respondent No. 2 utterly failed to show any fairness in order to dealing with the file of the petitioner. If the respondent No. 2 have any dispute and/or question on the demand of the petitioner, he could have raise dispute and/or make any implication on it. But he cannot keep silent without any reason to take decision about the file of the petitioner. The aforesaid expectation and/or prepared admitted bill of the petitioner cannot be termed or being based on sporadic or casual or random acts of the respondents, or as an unreasonable or illogical or invalid expectation.

19. Having regards to the discussion made in above, we are of the view that the respondents have taken the shelter of abuse of power by exercising of their discretion, which should not be longer.

20. Hence, the instant Rule deservers to be made absolute.

21. In the result, the Rule is made absolute and the respondents are hereby directed to refund the retention money/security deposit to the petitioner deducted from the bill of the works of package Nos. W-092N-CMMU and W-093N-CMMU pursuant to the work order Nos. MOHFW/CMMU/HNPSP/NC/Ctg,Khulna/Tender-9/2005/52 dated 26-6-2006 and MOHFW/ CMMU/HNPSP/NC/Ctg, Khulna/Tender-596/ 2005/53 dated 26-6-2006 respectively issued by respondent No.2 (Annexure-H and H(1) within 3 (three) months from the date of receipt of the judgment.

Office is directed to communicate the copy of this judgment forthwith.

Ed.

HIGH COURT DIVISION
(Special Original Jurisdiction)

Md Ashfaqul Islam J
Md Ashraful Kamal J

Judgment
June, 3rd 2013.

Abhimunnyo Singha.....
.....Petitioner

vs

Shauli Shumon .....
..Respondent-Contemner*

Constitution of Bangladesh, 1972
Article 108

One should not forget that the hands of the Courts are long enough to catch hold of wrong doers wherever they hide. This is an unfettered and inbuilt right attached to this Court.

Contempt Petition has an epitome of its own. It has been found that in the month of August by filing-affidavit-in-opposition the Contemner made her first appearance in the case and there she tendered unconditional apology for her conduct and assured that she was willing to comply with the further direction of this Division. But even thereafter she did not carry out the repeated directions of this court for implementing the decision in the writ petition. This act of deliberate disobedience is absolutely audacious, outrageous and highly contemptuous which cannot be viewed with impunity. Undoubtedly by her conducts she has committed Contempt of Court. *(Per Ashfaqul Islam, J)* .....(33 & 32)

Unconditional Apology

Simply begging unconditional apology by itself does not purge an action of contempt. *(Per Ashfaqul Islam, J)* .....(31)

*Contempt Petition No. 216 of 2012.

Constitution of Bangladesh, 1972
Article 112

Under Article 112 of the Constitution all authorities, executives and judicial, in the Republic shall act in aid of the Supreme Court. *(Per Md Ashraful Kamal , J)* .....(55)

Contempt of Court

If such an apology were to be accepted, as a Rule, and not as an exception, we would in fact be virtually issuing a 'licence' to commit contempt of court with impunity. *(Per Md Ashraful Kamal , J)* .....(58)

Contempt of Court

Since this is her First Offence and she has solemnly promised never to do any act of omission in defiance of or in disobedience to any order/direction of this Court or any other Court of law we have taken a view and seriously censor and warn her for her conduct and if she repeat such kind of act in future she will be severely dealt with. *(Per Md Ashraful Kamal , J)* .....(67)

Moazzem Hossain, DAG vs State 35 DLR (AD) 290; M Jain vs AT Gifta, AIR 1983 SC 1151; LD Jaikwal vs State of UP, AIR 1984 SC 1374; Crown vs Moulvi Abdur Rashid Tarkabagish, 1 DLR 177; Abdul Karim vs State 38 DLR (AD) 188 and Shamsur Rahman vs Tahera Nargis, 44 DLR (AD) 237 ref.

Manzill Murshid, Advocate—For the Petitioner.

SM Rezaul Karim with Sk. Golam Hafiz & Md Abdur Razzaq, Advocates—For the Respondent-Contemner.

Judgment

Md Ashfaqul Islam J: At the instance of the petitioner, Abhimunnyo Singha, this Rule Nisi was issued calling upon the Contemner-respon-

dent Shauli Shumon to show cause as to why the Proceeding for contempt of Court shall not be drawn against her for willful disobedience and deliberate disregard of the Judgment and order dated 21-6-2012 passed by this Division in writ petition No3961 of 2012.

2. This case is another epitome of willful disregard and disobedience of High Courts directive tantamounting to Contempt of Court. Factual matrixes forming the background of the contempt Rule are as under:-

3. The contempt-petitioner Abhimunnyo Singha filed writ petition No.3961 of 2012 before this Division challenging the illegal malafide and arbitrary fixation of combined gradation list of Feeder post holders prepared on 6-3-2012 for promotion to the post of Assistant Director (1st Class) of Directorate of Government Accommodation as per schedule of the Gazetted Officers (Directorate of Government of Accommodation) Recruitment Rules 1984 (amended 1985) and Memo No. সআপ/প্রশাঃ/ব্যন-১/৩৮/০৫ অংশ-২/২০১২/৩৪৬ (১) dated 21-3-2012 issued by the respondent No.5 the Deputy Director (Administration) Ministry of Public Works intimating the approval of the said gradation list. Whereupon Rule was issued on 18-4-2012 by a Division Bench and the promotion to the post of Assistant Director, Government Accommodation Directorate, Ministry of Public Works was also stayed for a period of 3 (three) months.

4. Owing to the said Rule and order of Stay the contemner-respondent herein who is the Director, Directorate of Government Accommodation, Ministry of Public Works got annoyed and by defying the order of stay on the promotion to the post of Assistant Director, took initiative for the promotion on 10-6-2012 by sending a letter to the Secretary Ministry of Public Works. Against which the petitioner filed another Contempt Petition being Contempt Petition No.208 of 2012 on 21-6-2012 wherein Rule Nisi was issued upon the Contemner-respondent by another Division Bench.

5. As it has been stated that because of filing of the writ petition the Contemner became annoyed, she filed a departmental case against the petitioner being Departmental Case No.3 of 2012 dated 11-6-2012 to take revenge Notice of the case was accordingly served upon the petitioner and the petitioner was asked to show cause within 3 days why he should not be proceeded against in pursuance of the departmental case. Then on 21-6-2012 upon an application filed by the contempt-petitioner in writ petition No.3961 of 2012 a Division Bench presided over by Justice Naima Haider stayed the operation of the said departmental case No.03/2012 for a period of 6 months.

6. Meanwhile the Supreme Court went on vacation from 26-2-2012 to 7-7-2012 and on. The learned Advocate of the petitioner Mr Manzil Murshid on 21-6-2012 issued certificate intimating about the order of staying the operation of the departmental case No.3 of 2012 which was communicated to the Contemner for taking necessary steps. The said lawyer's certificate was received by the Contemner on 24-6-2012 but after receiving the lawyers certificate dated 21-6-2012 she discharged the petitioner from the service on the next date i.e. 25-6-2012 showing absolute disobedience, disrespect and audacious attitude towards the order of this Division which is clearly a contemptuous act on the part of the Contemner for which she is liable to be punished in accordance with law.

7. Even thereafter, the petitioner on 5-7-2012 sent a legal notice upon the Contemner requesting her to withdraw the order of discharge dated 25-6-2012 but she did not pay any heed to it. It is at this stage the contempt-petitioner being aggrieved moved this Division and obtained the present Rule on 10-7-2012.

8. At the time of issuing Rule this Division directed for personal appearance of the Contem-

nor Shauli Sumon on 19-7-2012 to clarify her position under the circumstances but on that date as she was in abroad could not appear personally. On 14-8-2012 she personally appeared with an application for dispensation of her personal appearance which was not allowed by this court and the case was adjourned till 30-9-2012 with a further direction for her personal appearance on that date. After that she appeared before this Court time and again and this Court directed her to implement the decision of writ petition No. 3961 of 2012. Likewise when finally the said order on 16-1-2013 being not implemented, the date of final adjudication of the case was fixed on 23-1-2013.

9. This is the factual aspect of the case. Now, we need to clarify some important dates considered to be pertinent for the proper adjudication of the case.

(a) Rule in writ petition No.3961 of 2012 was issued on 18-4-2012 with an order of stay.

(b) Departmental case No.3 of 2012 dated 11-6-2012 was initiated against the petitioner.

(c) Departmental case No.3 of 2012 was stayed on 21-6-2012 for a period of 6 months.

(d) The letter dated 21-6-2012 issued by the learned Advocate for the petitioner Mr. Manzil Murshid informing about the stay of said departmental case was received by the Contemner on 24-7-2012.

(e) The Contemner discharged the petitioner on 25-6-2012 in departmental case No.3 of 2012.

(f) By Order dated 24-7-2012 the order of discharge dated 25-6-2012 passed in Departmental case was stayed by a Division Bench presided over by Mr Justice Mamnun Rahman till disposal of the Rule.

10. It is to be noted that the Contemner by swearing affidavit-in-opposition and by another separate application prayed for dispensation of personal appearance in the month of August 2012. In both the affidavit-in-opposition as well as application for dispensation of personal appearance it has been stated clearly that the Contemner regrets for her conduct and begs unconditional apology for her conduct and undertakes that she will not do the similar act in future. She also stated that she is a ready and willing to do any other act as per direction of this Division if so given.

(Emphasis added)

11. Two letters have been brought to our notice one is Annexure 1 dated 4-7-2012 and another one is Annexure l(a) dated 12-8-2012. Both the letters were addressed to the Ministry of Works, former requesting to stop all further proceeding in pursuance of letter dated 10-6-2012 and by the later the operation of the Memo dated 25-6-2012 by which the petitioner was discharged from his service was stayed.

12. Another face of the case is that the Contemner filed Civil Petition for Leave to Appeal No. 2237 of 2012 before the Appellate Division for staying operation of the impugned order dated 18-4-2012 , 21-6-2012 passed in Writ Petition No. 3961 of 2012 and the Appellate Division allowed the prayer staying those orders till 17-2-2013 which subsequently on 4-10-2012 was extended for a further period of 2 (two) months and finally the Appellate Division on 15-10-2012 while disposing of the Civil Miscellaneous Petition No. 980 of 2012 filed by the present Contemner against an *ad-interim* order dated 10-7-2012 passed in this Contempt Petition modified the order passed by the Judge in Chamber directing for disposal of the instant Contempt Petition on merit once for all.

13. Mr Manzil Murshid, the learned Advocate appearing for the petitioner submits that even after series of directions of this Division the

Contemner did not implement the order of this Court in its true spirit and for the sole reason she should be held liable for committing contempt of Court.

14. In elaborating his argument Mr Manzil Murshid vehemently contends that the Contemner has no respect or regards to this Court and repeatedly she has ignored the direction of this Court. She filed affidavits with statement that she regretted for her conduct and begged unconditional apology and also gave undertaking not to do the similar act in future but after obtaining time she disobeyed the order of the Court. The behavior of the Contemner is absolutely contemptuous for which she is liable to be punished as per Article 108 of the Constitution.

15. Further Mr Murshid Contends that the Contemner Ms Shauli Shumon in order to delay the hearing time and again engaged new lawyer one after another which is a cunning technique only to delay the case even when the case was finally ready for hearing. Accordingly at first she engaged Advocate Abdul Nur Dulal on 19-7-2012, then on 13-9-2012 Advocate Nahid Yasmin, on 12-11-2012 Advocate Nurul Islam Sujon and finally she appointed Advocate SM Razaul Karim at the time when this Court fixed the case on 23-1-2013 for final order.

16. That being so the only question that calls for consideration in this case is whether the entire gamut of the factual aspect as depicted above portrays a high handed attitude of the Contemner so to say that by her conducts whether she has willfully and deliberately flouted the order of this Division passed in Contempt Petition and also the orders passed in sequel in writ petition No.3961 of 2012 committing Contempt of Court.

17. Law on the contempt of Court earlier did not define what constitutes Contempt of Court. In the decision of *Moazzem Hossain, Deputy Attorney General vs State 35 DLR (AD) 290,* Justice Shahabuddin Ahmed made an attempt to define it in the following manner:—

> "Contempt of Court' has nowhere been defined in statutes. It has been conveniently described by referring to its ingredients and citing examples, 'Contempt' may be constituted by any conduct that brings authority of the Court into disrespect or disregard or undermines its dignity, and prestige. Scandalizing the Court is a worst kind of contempt. Making imputations touching on the impartiality and integrity of a Judge or making sarcastic remarks about his judicial competence is also contempt. Conduct or action causing obstruction or interfering with the course of justice is contempt. To prejudice the general public against a party to an action before it is heard is another form of contempt"

18. But with the enactment of new Contempt of Courts Act, 2013 which came into force on 22-2-2012 the definition of 'contempt' in the category of civil and criminal has been introduced. Section 2 of the new Act has given definition of 'contempt'. Section 2(6) and (8) of the Act respectively defines civil and criminal contempt in the following words:—

> ৬। "দেওয়ানী অবমাননা" অর্থ ইচ্ছাকৃতভাবে কোন আদালতের রায়, ডিক্রী, নির্দেশনা, আদেশ, রীট, বা কার্যক্রম অবমাননা অথবা আদালতের নিকট প্রদত্ত কোন অংগীকারনামা ভংগ করা;
>
> ৮। "ফৌজদারী অবমাননা" অর্থ মৌখিক বা লিখিত কোন শব্দ বা চিহ্ন দ্বারা, বা প্রদর্শনযোগ্য কোন কিছুর মাধ্যমে এমন কোন কিছু প্রকাশ করা অথবা এমন কোন কার্য করা যাহাতে–
>
> (ক) কোন আদালতের কর্তৃত্বকে হেয় প্রতিপন্ন করা হয় বা হেয় প্রতিপন্ন করিবার অভিপ্রায় থাকে অথবা উহার কর্তৃত্ব সম্পর্কে অপপ্রচার করা হয় বা অপপ্রচার করা হইয়াছে বা অপপ্রচার অভিপ্রায় থাকে;
>
> (খ) কোন বিচারিক কার্যধারা ক্ষুণ্ন করা হয় অথবা উহাতে হস্তক্ষেপ করা হয় বা হস্তক্ষেপের অভিপ্রায় থাকে; বা

(গ) অন্য কোনভাবে চলমান কার্যধারার স্বাভাবিক গতিধারাকে বাধ্যগ্রস্ত করে বা হস্তক্ষেপ করে বা বাধাগ্রস্ত করিবার বা হস্তক্ষেপ করিবার অভিপ্রায় থাকে;

19. From now on it cannot be said since there is no specific definition of contempt in the Act (as contempt was not defined in the earlier Act) disposal of a case of Contempt of Court with clarity and perfection cannot be done. The new law on the subject now clearly defines what constitutes 'contempt' of Court.

20. In the case in hand we have found that the Contemner even after receiving the letter (lawyer's certificate dated 21-6-2012) on 24-6-2012 discharged the petitioner from his service by order dated 25-6-2012 pursuant to departmental case which was a flagrant disobedience of the order of this Division and indeed tantamounts to contempt of Court.

21. It has been taken into account the proximity of the events that took place on different dates as mentioned earlier. Admittedly a Division Bench on 24-7-2012 stayed the order passed by Contemner on 25-6-2012 discharging the petitioner from service. Here we would like to mention that on receiving the lawyer's certificate dated 21-6-2012 on 24-6-2012 the Contemner without paying any heed to it discharged the petitioner on the next date i.e. 25-6-2012 which squarely tantamounts to willful disregard and disobedience of the order of this Division and certainly a contemptuous act.

22. Let us now digress and consider the question of unconditional apology that has been tendered by the contemner.

23. Unless the contempt is of a very gross nature, the court is inclined to accept apology from the contemnor. An apology usually mitigates the offence of contempt of court and when it is unqualified the court may accept it. An apology is not a weapon of defence forged to purge the guilt of the offender, nor it is intended to operate as panacea. It is intended to be evidence of real contriteness, the mainly consciousness of a wrong done, of an injury inflicted, and the earnest desire to make such reparation as lies in the wrongdoer's power. Such an apology to be acceptable must be sincere, unqualified and should be tendered at the earliest opportunity. However, On some occasions the court accepted the apology even though tendered at the belated stage.

24. In *MA Faiz vs Bangladesh* the Appellate Division observed—

> "Insofar as the expression of apology or tendering of regrets by the appellants are concerned, had they offered such apology before the High Court Division and also tendered regrets for the contempt they had committed, even at a late stage, (though we are not unmindful of the law requiring such apology to be made at the earliest opportunity) there might have been some scope for considering the merit of the submissions of the learned counsel ...It is true this Court will neither be vindictive and proceed to punish the contemnors whom unconditional apology will be offered in the manner permissible under law nor can it afford to be so generous as to condone the guilt committed by the contemnors who instead of offering apology at the earliest opportunity and still persisting in disobeying the orders of the Court, wait till the end and then, finding no way of escape from the punishment, offer such apology."

25. In the case of *Asharam M Jain vs AT Gifta, AIR 1983 SC 1151* the Indian Supreme Court has, while, considering whether unqualified apology tendered by the contemner should be accepted or not, referred to a few principles for guidance of the Court. While it is necessary to remember that in dealing with a contemner, the Judges should not be hypersensitive where distortions and criticisms overstep the limits, it is at the same time equally important to deflate vulgar denunciation by digni-

fied bearing, condescending indifference and repudiation by judicial rectitude. In stating the predicament in which the Judges function and conduct themselves in discharging the high duties of office.

26. In the case of *LD Jaikwal vs State of UP, AIR 1984 SC 1374,* the Indian Supreme Court observed that "this was a 'paper' apology and the expression of sorrow came from the pen, not form his heart. For, it is one thing to 'say' sorry-it is another to 'feel' sorry". The learned Judge who delivered the judgment observed " We are sorry to say we cannot subscribe to the 'slap-say sorry and forget' school of thought in administration of contempt jurisprudence."

27. He further observed:

"Saying 'sorry' does not make the slapper poorer. Nor does the cheek which has taken the slap smart less upon the said hypocritical word being uttered through the very lips which not long ago slandered a judicial officer without the slightest compunction."

28. In the earliest reported decision of this Court on law of Contempt-The *Crown vs Moulvi Abdur Rashid Tarkabagish (1949) 1 DLR 177* in refusing to accept the apology of the contemner Ellis J maintained:—

"To accept it, would inevitably create the impression that contempt of this kind, however much they may be condemned in theory, can in practice be purged by an expression of regret. Such an impression would be indeed disastrous and would do nothing to deter others in the position of the Moulvi Sahib from interfering with the course of justice. From our part we are determined to see that such interference shall be visited with a prompt and deterrent punishment."

29. In the case of *Abdul Karim vs State* reported in *38 DLR (AD) 188* where it has been held that:—

"Reference was made to an earlier case decided by it self where the Court had observed that "in considering whether the apology should be accepted or not, a few facts should be taken into consideration." These facts, as mentioned by the court, are:

"(i) As to whether the appellant appreciated that his act was within the mischief of contempt;

(ii) Whether he regretted it;

(iii) Whether his regret was sincere;

(iv) Whether it was accompanied with expression of the resolution never to repeat again; and

(v) Whether he made humble submission to the authority of the Court."

30. It was pointed out in *Shamsur Rahman vs Tahera Nargis, 44 DLR (AD) 237.*

"Apology is an act of contrition. It tendered it may not be necessarily accepted and the contemnor purged of his contempt. When a contemnor tenders apology as an act of contrition the Court must weigh that apology tendered by the contemnor. It the apology is found to be a real act of contrition, no action need be taken and a word or warning may be enough but if the apology is qualified, hesitant and sough to be used as a device to escape the consequences of the contemnor's action it must be rejected."

31. We respectfully agree with the settled proposition that simply begging unconditional apology by itself does not purge an action of contempt. Something more is required to be done as it has been decided in several cases.

32. At the outset it has been mentioned that this Contempt Petition has an epitome of its own. It has been found that in the month of August by filing affidavit-in-opposition the Contemner made her first appearance in the case and there she tendered unconditional apology for her conduct and

assured that she was willing to comply with the further direction of this Division. But even thereafter she did not carry out the repeated directions of this court for implementing the decision in the Writ Petition No.3961 of 2012. This act of deliberate disobedience is absolutely audacious, outrageous and highly contemptuous which cannot be viewed with impunity. Undoubtedly by her conducts she has committed Contempt of Court. Mr Manzil Murshed's submission in this respects menits substance and deserves all the kudos.

33. The trivia and tradition of this Court are well identified and preserved. One should not forget that the hands of the Courts are long enough to catch hold of wrong doers wherever they hide. This is an unfettered and inbuilt right attached to this Court.

34. The conclusion therefore, would be since the Contemner Ms Shauli Sumon has tendered unqualified and unconditional apology at her first appearance and also assured that in future she will never repeat this sort of obnoxious act, the ends of justice would be best served if with a note of caution to that effect she be exonerated from the liability of the instant contempt proceeding against her. But she should remember and must not forget that we are not placating her but strongly warning. It is only in our discretion and magnanimity that we are exonerating her from the charge of contempt of Court and nothing else.

35. By recording this reprimand with observations the contempt petition is disposed of. The Contemner Ms Shauli Shumon has been exonerated from the charge of committing Contempt of Court. Communicate to the concerned authority at once.

Md Ashraful Kamal J: I have had the privilege of hearing the judgment just delivered by my learned brother Md Ashfaqul Islam, J with great respect to his deliberation I concur in the proposed order and giving my reasons in support of the said order.

37. This Rule was issued calling upon the contemnor respondent. Shauli Sumon to show cause as to why the proceeding for contempt of Court shall not be drawn for her willful transgression and afore thought brush-off the order dated 21-6-2012 passed by this Division in Writ Petition No. 3961 of 2012.

38. Brief facts, necessary for the disposal of this Rule, are follows:—

At the instance of the petitioner Abhimunnyo Singha, this Division on 18-4-2012 issued a Rule Nisi and stay in Writ Petition No. 3961 of 2012 in the following terms;

> "Let a Rule Nisi be issued, calling upon the respondents to show cause as to why the combined gradation list of Feeder post holders prepared on 6-3-2012 for promotion to the post of Assistant Director of Directorate of Government Accommodation as per schedule of the Gazetted Officer (Directorate of Government Accommodation) Recruitment Rule's 1984 (amended 1985) and Memo No. সআপ/প্রশাঃ/ব্যন-১/৩৮/০৫ (অংশ-২)/২০১২/৩৪৬(১) dated 21-3-2012 issued by the respondent No.5 intimating the approval of the said gradation list (Annexure-A and A-l) should not be declared to have been made 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.
>
> The Rule is made returnable within three weeks from date.
>
> Pending hearing of the Rule, let further promotion to the post of Assistant Director, Government Accommodation Directorate, Ministry of Public Works be stayed for a period of three months from dated.

39. Having receipt of the aforesaid order of Rule and stay, the contemnor respondent became utterly illogical. Then, to take revenge, she filed a departmental case being No. 306 of 2012

against the petitioner under section 3(A) of Government Servant Special Rule, 1979.

40. Against the proceeding of the aforesaid departmental case, the petitioner filed an application in the writ petition No. 3961 of 2012 for staying the proceeding of the departmental case till disposal of the Rule. After hearing the petitioner and considering the facts and circumstances of the case, this Division on 21-6-2012 stayed all further proceeding of the departmental Case being No. 3 of 2012 dated 11-6-2012 for a period of 6(six) months.

41. Thereafter, this Court went on vacation from 26-6-2012 to 7-7-2012. Since the Court went on vacation, Mr Manzil Murshid, the learned Advocate for the petitioner issued a certificate on 21-6-2012 to that effect. The petitioner submitted the said lawyer certificate before the contemnor, which she received on 24-6-2012.

42. On 24-6-2012, though the contemnor respondent received this Division's order dated 21-6-2012 through lawyer certificate, but, on the next date on 25-6-2012, discharged the petitioner from his service violating this Division's order.

43. Thereafter, on 5-7-2012, the petitioner sent a legal notice to the contemnor respondent to withdraw the said order of discharge but in vain. Then, the petitioner filed the present contempt petition before this Division and obtained the present Rule and direction dated 10-7-2012. In the direction order, this Division directed the contemnor respondent to appear personally before this Division on 19-7-2012.

44. But the contemnor respondent did not appear on the date fixed by this Division on 19-7-2012. Then, this Division further directed to appear the contemnor respondent on 14-8-2012 without any fail.

45. On 14-8-2012, the contemnor respondent appeared before this Division and filed an application for dispensation of her personal appearance. In paragraph 2(two) she stated that

> "The contemner-respondent sworn an Affidavit-in-opposition regretting for her conduct and begs unconditional apology before Your Lordships for her conduct and undertakes that the Contemnor-Respondent will not do the similar act in future. The Contemnor-Respondent, in the mean-time, showing respect and regard to the Hon'ble Court and it's order wrote a letter to the Secretary, Ministry of Housing and Public Works in Memo No. সআপ/প্রশাঃ-২সহঃপরিঃ/পদোন্নতি/২০০৫/৩৮২৫ dated 10-6-2012.The Contemner-Respondent showing respect and regard to the Hon'ble Court and its order also issued letter in Memo No. পিএফ-৩১৯/প্রশাসন/৮৭ (অংশ-২)/২(২) dated 12-8-2012 staying operation of letter in Memo No.পিএফ-৩১৯/প্রশাসন/৮৭ (অংশ-২)/৯৫৭ dated 25-6-2012. The Contemner -respondent is also ready and willing to do any other act as per direction of Your Lordships "and accordingly prayed for dispensation of personal appearance.

46. Though, the contemnor in her application for "dispensation of personal appearance" dated 13-8-2013 clearly admit her offence and begs unconditional apology, but suppressing the full fact she went to the Appellate Division and obtained a stay order dated 11-9-2012.

47. The petitioner, then filed an application for vacating the said order of stay. Upon hearing the said application, the Appellate Division modified the order of stay and directed to dispose of the Rule on merit as early as possible within 6-12-2012. Thereafter, the present case was fixed for hearing by this Division on 5-12-2012.

48. On 5-12-12 this Division passed the following order:—

> "The matter is taken up for hearing. It appears from the application of the contemnor respondent for dispensation of her per-

sonal appearance that she is ready to do any other act for complying with the direction of this Division in writ petition No. 3961 of 2012 if it is so directed the contemnor-respondent to implement the order passed by this Division in writ petition No. 3961 of 2012 without any fail. " The next date was fixed on 16-1-2013 for further order.

49. Then, on 16-1-2013 after hearing the parties this Division passed the following order:—

"Mr Manzil Murshid, the learned advocate apprised this Division even after order dated 5-12-12, the contemnor respondent Ms. Shauli Summon has not complied with the direction of writ petition No. 3961 of 2012. This baffles us, why even after repeated directives of this Division the contemnor-respondent has been flouting our orders. That being the situation we fix the matter for final adjudication on 23-1-2013 at the top of the list subject to part heard."

50. The case came up in the list for hearing on 23-1-2013, but the contemnor respondent prayed for time and accordingly this Division fixed the next date on 28-1-2013.

51. Mr Manzil Murshid, the learned Advocate appearing for the petitioner submits that the contemnor-respondent has no respect or regards to this Division and repeatedly she has ignored the direction of this Division. Firstly, the contemnor-respondent filed affidavit with statement that she regretted for her conduct and begs unconditional apology and also undertakes not to do the similar act in future but after obtaining time she disobeyed the order of this Division. The behavior of the contemnor-respondent is fully contemptuous. She has committed an offence of contempt of court and is liable to be punished as per Article 108 of the Constitution of Bangladesh. Mr Manzil further submits that during the hearing, the contemnor-respondent in order to delay the hearing adopted a technique by changing the lawyer one after another when the matter was taken up for hearing. First she engaged Advocate Abdul Nur Dulal on 19-7-2012 and subsequently Advocate Nahid Yasmin on 30-9-2012, Advocate Nurul Islam Sujan on 12-11-2012 and Advocate SM Rejaul Karim on 23-1-2013.

52. Mr SM Rezaul Karim alongwith Mr Sheikh Golam Hafiz and Mr Md Abdur Razzaq, the learned Advocates for the contemnor-respondent submitted that in view of unqualified and unconditional apology tendered by the appellant she may be exonerated.

53. The core question is whether unqualified apology tendered by the contemnor should be accepted or not.

54. Here it is necessary to quote the Article 112 'the constitution of the People's Republic of Bangladesh which runs thus:—

"112. All authorities, executives and Judicial, in the Republic shall act in aid of the Supreme Court."

55. So, it is crystal clear that under Article 112 of the constitution all authorities, executives and judicial, in the Republic shall act in aid of the Supreme Court.

56. Therefore, any order passed by the Supreme Court is to be treated as an order from the highest authority of the country. Only expectation is, if the order passed by the High Court Division, then Appellate Division can set-aside the said order none else. No other authority can delay, stay or set it aside.

57. In the present case the appellant committed contempt of Court by her several acts mentioned hereinabove. She ought to have thrown herself at the mercy of the Court as soon as the Rule for contempt was served upon her with a direction to appear before this Division on 19-7-2012. But the contemnor willfully transgressed this Division's order by not appearing before this

Division on 19-7-2012. In view of the circumstances as mentioned above, we find ourselves unable to condone her action which is not only humiliating to this Division's authority it also amounts to clear defiance of the majesty of law.

58. If such an apology were to be accepted, as a Rule, and not as an exception, we would in fact be virtually issuing a 'licence' to commit contempt of court with impunity.

59. We firmly believe that considerations regarding maintenance of the independence of the judiciary, we do not allow the contemnor escape with impunity on the mere tendering of an apology which in any case does not wipe out the mischief.

60. The *Crown vs Moulvi Abdul Rashid Tarkabagish MLA of Serajgonj* reported in *1 DLR (1949) 177.* Ellis, J in delivering the judgment observed:

> "In dealing with such contempt at the present time is has been well said elsewhere that "it is all the more necessary to deal with contempts firmly for it is now that the pattern will be set for the future development of the institutions of this country and it is of fundamental importance that the foundation be laid straight and solid, that the structure erected shall be stable. Any mistake made now, an easy tolerance for what is wrong may do incalculable future harm."

These words are equally germane today.

61. In refusing to accept the apology of the contemner Ellis, J observed in the above case—

> "To accept it, would inevitably create the impression that contempt of this kind, however much they may be condemned in theory, can in practice be purged by an expression of regret. Such an impression would be indeed disastrous and would do nothing to deter others in the position of the Moulvi Sahib from interfering with the course of justice. From our part we are determined to see that such interference shall be visited with a prompt any deterrent punishment."

62. In the facts and circumstances as analysed above violation of the order is found to be deliberate and intentional. It is not a single act or omission for which the respondent has been charged. There is a series of acts of the respondent, which are involved in the allegation of contempt.

63. It is not the case of the respondent that she misunderstood our order or there is ambiguity therein. Because, in her affidavit-in-opposition she did not say a single word that the court's order was unclear and ambiguous, rather it is the petitioner who tried to complicate the matter.

64. Had she any genuine intention to act according to courts order she could have sought clarification during this period.

65. In the circumstances there is hardly any scope for holding that the violations were committed unintentionally or due to misunderstanding of the court's order. Therefore, we are determined, as we are constitution bound and oath bound, to hold high the Authority, Dignity, Majesty and the Excellence of this August Institute, which is Guardian of the Constitution, upon which the duty to protect the right and interest of the people, is vested.

66. After considering the back ground of the case we find Ms. Shauli Shumon guilty of gross contempt of the court for her willful transgression and afore thought brush-off of this Division order dated 21-6-2012, therefore, we do not accept her unqualified apology.

67. Since this is her First Offence and she has solemnly promised never to do any act of omission in defiance of or in disobedience to any order/ direction of this Court or any other Court of law we have taken a view and seriously censor

and warn her for her conduct and if she repeat such kind of act in future she will be severely dealt with.

Accordingly, this Rule is disposed of.

Ed.

HIGH COURT DIVISION
(Special Original Jurisdiction)

Sheikh Hassan Arif J
Mustafa Zaman Islam J

Judgment
June, 3rd 2013.

ABM Liton .....
.....Petitioner
vs
Bangladesh and others
.....Respondents*

Artha Rin Adalat Ain (VIII of 2003)
Section 34(9)

Since the Bank and the Adalat proceeded against the petitioner before exhausting all the processes against the main borrower, the orders of arrest as well as the refusal of bail should not sustain in the eye of law. .....(6)

Helal Uddin Mollah, Advocate—For the Petitioner

AZM Mohiuddin, Advocate—For the Respondent No.3.

Judgment

Sheikh Hassan Arif J : The Rule was issued calling upon the respondent to show cause as to why the impugned Order dated 1-8-2012 passed by the Artha Rin Adalat No-3, Dhaka (respondent No. 4) in Artha Jari Case No. 86 of 2012, arising out of Artha Rin Suit No.145 of 2011, issuing warrant of arrest against petitioner (Annexure-E), and the order of rejection of bail of the petitioner dated 27-9-2012, passed by the same Adalat (Annexure-B), should not be declared to be without lawful authority and are of no legal effect. Short facts, relevant for the disposal of the Rule, are that the Eastern Bank United, Head Office, 10 Dilkusha Commercial Area, Jiban Bima Bhaban (2nd Floor), Dhaka-1000 (respondent No. 3), as plaintiff, filed Artha Rin Suit No. 145 of 2011 before the Artha Rin Adalat No. 3, Dhaka against the petitioner and others for realization of loan of 45,83,628.47 as on 31-3-2011. The petitioner was impleaded in the said suit as defendant No. 3. Since no defendants entered appearance, the suit was decreed ex-parte by the judgment and decree dated 5-11-2012. Respondent No. 3 Bank then filed Artha Jari Case No. 86 of 2012 for execution of the said decree. After service of notice of execution case through newspapers, the decree holder-Bank filed an application before the Adalat under section 34(1) read with section 57 of the Artha Rin Adalat, 2003 ("the said Ain") for civil detention of all the judgment-debtors including the petitioner, whereupon, the Adalat, by first impugned order dated 1-8-212, passed the order of civil detention and issued warrant of arrest against the petitioner and others. In execution of the said warrant of arrest, the petitioner was arrested on 20-9-2012 and was forwarded before the Adalat below. Thereupon, when the petitioner prayed for bail, the same was rejected by the Adalat vide second impugned order dated 20-9-2012 (though in the Rule, the date is mentioned as 27-9-2010). Being aggrieved by these orders, the petitioner moved this Court and obtained the aforesaid Rule. At the time of issuance of the Rule on 7-10-2012, this Court also enlarged the petitioner on bail.

2. The Rule is opposed by the respondent No 3-Bank through Mr AZM Mohiuddin, learned advocate, who has filed, an Affidavit-in-Opposition. Mr Md Helal Uddin Mollah, learned advocate appearing for the petitioner, submits that the respondent-Bank as well as the Adalat committed illegality in issuing the warrant of arrest against the petitioner in view of the fact that the petition-

*Writ Petition No. 12766 of 2012.

er was admittedly not the main borrower, but a third party guarantor, and, as such, in view of the provisions under section 6(5) of the said Ain, he may be proceeded against only after exhausting entire processes against the main borrower for realization of loan, if it is found that the main borrower has failed to repay the loan. Learned Advocate further submits that it is apparent from the plaint that even the Bank did not issue any legal notice on the petitioner, rather the legal notice demanding repayment of loan was issued only against defendant No. 1, who was admittedly the main borrower. Mr AZM Mohiuddin, learned advocate appearing for the respondent No. 3 Bank, on the other hand, submits that since no property was mortgaged in favour of the Bank, the Bank had no option but to proceed under section 34(1) of the said Ain for an order of civil detention of all the judgment-debtors. Mr. Mohiuddin further submits that the Bank having failed to find any property of the petitioner or others, it filed applications seeking civil detention of the petitioner.

3. Considered the submissions of the learned advocates, perused the writ petition as well as the Affidavit-in-Opposition and the materials on record. Artha Rin Adalat Ain, 2003 is a special law solely enacted for the purpose of realization of loan from the defaulter-borrowers of Bank or financial institutions. Stringent and harsh provisions have been made in the said Ain so that the Bank or financial institutions can realize the said loan in a smooth and expeditious way. Very minimum protection or advantages have been provided in the said Ain to the defendants in a case filed by the Bank or financial institutions. One of such few protections is provided by the first proviso to sub-section (5) of section 6 which provides that while a decree passed by the Artha Rin Adalat is to be executed through execution process, the Adalat will first attract the properties of the main borrower and then will attract properties of the third party mortgagor and the third party guarantor. Although this first proviso speaks of the property and not of the body, but the intention of the legislature is clear, which is that any action to be taken through the execution process, the first person to be attracted is the main borrower, and if the main borrower fails to repay the said loan or it becomes impossible to realize the loan from the properties of the main borrower, only then the Adalat will proceed against the third party mortgagor and the third party guarantor. The very essence of the Contract of Guarantee as envisaged under section 126 of the Contract Act, 1872 is also compatible with that.

4. It appears from the Plaint of the Artha Rin Suit No.145 of 2011 (Annexure-A), in particular from paragraph Nos. 2, 4, 6 and 7 of the same, that the petitioner has been mentioned therein as a third party guarantor, who executed letter of guarantee in favour of the Bank. This means, the petitioner agreed to repay the loan only when the main borrower, defendant No.1, failed to repay the same or it became impossible to realize the said amount from the main borrower. Therefore, this Court is of the view that every provision of the said Ain including the provisions under, section 34 has to be read with the said first proviso to sub-section (5) of section 6. But, in the instant case, the Bank filed application seeking civil detention and warrant of arrest against all the defendants at the same time. In the said application, the Bank mentioned that since there was no property mortgaged in favour of the Bank, it could not take any steps for auction sale of the same in view of section 33 of the said Ain. However, the application did not mention a single word as to whether or not the Bank conducted any search for any other property of defendant No. 1. It also did not mention as to why it needed to proceed for issuance of warrant of arrest against the petitioner who was admittedly the defendant No. 3 and third party guarantor. Apart from that, when the Bank was seeking warrant of arrest against the defendant No 1, the defendant No.3 might only become

liable if and when defendant No.1 failed to repay the said decreetal amount. There is nothing in the said application as to whether or not the Bank conducted any search as regards the availability of any property of the petitioner and whether it was possible on the part of the Bank to at first attract the said property through attachment and take steps for selling of the same on auction and then to proceed against his body for realization of the decreetal amount.

5. The body of a human being is the most valuable thing in his life. Even the Artha Rin Adalat Ain, 2003 has recognized that and, accordingly, made provisions under sub-section (9) of section 34 requiring at least one attempt for selling of property before issuance of warrant of arrest or before passing any order of civil detention. However, in the instant case, both the Bank and the Adalat proceeded against the body of the petitioner without making any search as to whether or not the main borrower did have any property available for attachment or the petitioner at least did have any property for such attachment.

6. Considering the above discussions on law and facts, we are of the view that since the Adalat as well as the Bank proceeded against the body of all the defendants including the petitioner before proceeding against their properties, and since the Bank and the Adalat proceeded against the petitioner before exhausting all the processes against the main borrower, the impugned orders of arrest as well as the refusal of bail should not sustain in the eye of law. This being so, this Rule should succeed.

7. In the result, the Rule is made absolute. According, the impugned orders of arrest as well as the refusal of bail are set-aside in so far as the petitioner is concerned.

Communicate this order.

Ed.

HIGH COURT DIVISION
(Civil Appellate Jurisdiction)

Md Nuruzzaman J
Farid Ahmed J

Judgment
May 5th, 2013.

Moklesuddin Ahmed and another.....Appellants
vs
Rezia Khatun and others...
.....Opposite Parties*

Code of Civil Procedure (V of 1908)
Section 151

If the appeal is not re-admitted to its original file and number the appellants will suffer irreparable loss and also would be deprived from substantive justice which should not be happened in the case in hand.

We are of the view that the instant Appeal was dismissed for non-prosecution on the prayer of the learned Advocate for the appellants with a bona fide intention that his property was listed in the gazette of Vested Property. However, after perusal of the Gazette it is detected that the client has given wrong instruction due to his own volition. Thereafter without any delay the appellant again communicated to his learned Advocate that he inadvertently earlier informed him that the property was enlisted in the Gazette of the list of vested property. Though the Khatian has been listed but not his Plot was listed in the Gazette Notification. Therefore, he rushed to his learned Advocate and requested him to file an application for re-admission of the instant appeal. .....(4 & 5)

Shabitribala vs Rohinikanta Mondal 4 DLR 11 and AIR 1965 (Madhya Pradesh) 21 ref.

PC Guha, Advocate—For the Appellant-Petitioners.

Judgment

This application has been filed by the appellant petitioners for re-admission of the instant appeal, which was dismissed for non-prosecution on 28-1-2013.

*First Appeal No.684 of 2001.

2. The relevant facts as has been stated in the instant application, in short, are that the appellant-petitioners as plaintiffs instituted a suit being Title Suit No.21 of 1999 in the Court of the Subordinate Judge, now Joint District Judge, 1st Court, Manikganj for declaration of title in the suit property and for further declaration that the RS record of the suit property in the name of the defendant No.9 and the predecessor of defendant Nos.1-8 are illegal, collusive and not binding upon the plaintiffs. On 3-5-2001 the suit was dismissed *ex parte* by the trial Court against the defendant respondents. Against which the plaintiffs as appellants preferred First Appeal being First Appeal No.684 of 2001 before this Division and the same was pending upto 28-1-2013. On that date at the instruction of his client Mr PC Guha, the learned Advocate apprised the Court that he has instruction from his client Moklesuddin Ahmed by a letter dated 22-01-2013 not to proceed with the appeal and accordingly the same was dismissed for non-prosecution. Mr Guha in support of his contention in the application for re-admission, the said letter was reproduced in paragraph No.5 of the instant application. However, after passing the order of dismissal of the appeal for non-prosecution his client, said Moklesuddin Ahmed, again wrote a letter dated 17-2-2013 to his learned Advocate Mr PC Guha stating that due to unintentional mistake he was instructed Mr Guha as such and the said letter is also reproduced in paragraph No.6 of the instant application for re-admission.

3. Now Mr PC Guha, the learned Advocate appearing for the appellant-petitioners submitted that due to the bona fide mistake his client instructed him not to proceed with the instant First Appeal and he informed the appellants that the appeal was already dismissed for non-prosecution. Appellant Moklesuddin Ahmed in his second letter dated 17-2-2013 wrote to Mr Guha stating that due to his old age he has committed such mistake. It has also been stated in paragraph No.6 of the instant application he is about 80 years old and a patient of heard diseases and has wrongly written that his Khatian No.2012 was enlisted in the list of vested Property. However, after obtaining the dismissal order of the appeal for non-prosecution and while he was taking preparation to file an application before the Tribunal then he found that his Plot number was not in the gazette notification as vested property. Then he wrote a letter to his learned Advocate Mr Guha to file an application for re-admission of the instant appeal. Mr Guha very candidly submitted that if the appeal is not re-admitted to its original file and number the appellant-petitioners will suffer irreparable loss and injury and also to be non-suited against his right to the property and will deprive from the substantive justice. Therefore, he simply prayed for re-admission of the instant appeal. In support of his contention Mr Guha referred various precedent specially *AIR 1965 (Madhya Pradesh) 21*, wherein their Lordships after discussing many cases came to a conclusion that the Court is not powerless to give the substantive justice. The facts of the case as narrated in *AIR 1965 (Madhya Pradesh) 21* and the facts of the instant case seems to us are similar. However, on discussions of that decision there are so many cases which are distinguished from the present case. On perusal of another decision of our jurisdiction in the case of *Shabitribala vs Rohinikanta Mondal,* reported in *4 DLR 11,* wherein their Lordships held that:

> "The provisions of the Code of Civil Procedure are not applicable to an appeal pending before the High Court which was dismissed for non-compliance with the order of the Court, to put in requisites with the time granted by the Court inasmuch as the dismissal was under the rules framed by the High Court and, therefore, an application for re-admission of the appeal dismissed by a Bench of the High Court is not governed by

any Articles of the Limitation Act." Further it was held. "In view of the fact that there is no provision in the rules of the High Court for re-admission of an appeal dismissed under its rules, the High Court is not powerless to grant relief sought for in proper circumstances and can do so in the exercise of its inherent powers under section 151 of the Code of Civil Procedure."

4. On the foregoing discussions and the facts as has been stated in the above, we are of the view that the instant Appeal was dismissed for non-prosecution on the prayer of the learned Advocate for the appellants with a bona fide intention that his property was listed in the gazette of Vested Property. However, after perusal of the gazette it is detected that the client has given wrong instruction due to his own volition. Thereafter without any delay the appellant again communicated to his learned Advocate that he inadvertently has informed him earlier that the property was enlisted in the Gazette of the list of vested property. Though the Khatian has been listed but not his Plot was listed in the Gazette Notification. Therefore, he rushed to his learned Advocate and requested him to file an application for re-admission of the instant appeal.

5. In view of the above facts and circumstances of the case and the discussions made above, we are of the view that it is a fit case where this Court should apply its discretion in the form of inherent power. Furthermore, we are satisfied that if the instant appeal is not re-admitted to its original file and number the appellants will suffer irreparable loss and also would be deprived from substantive justice which should not be happened in the case in hand. Therefore, we are inclined to re-admit the instant appeal to its original file and number. Therefore, the order of dismissal of the appeal for non-prosecution dated 28-1-2013 is hereby recalled and vacated and the appeal be re-admitted to its original file and number.

The office is directed to do the needful accordingly.

Ed.

HIGH COURT DIVISION
(Special Original Jurisdiction)

Nazmun Ara Sultana J
Sheikh Hasan Arif J

Judgment
April 21st, 2013

Abdul Mukid (Md).....
.....Petitioner

vs

Artha Rin Adalat, Khulna and another.....
.....Respondents*

Artha Rin Adalat Ain (VIII of 2003)
Section 5

Since the Adalat in question did not have jurisdiction to entertain or to proceed with the application the whole proceeding before the Adalat were entertained and continued before the Adalat without jurisdiction and, as such, the same are nullity in the eye of law. .....(4)

Supreme Court of Bangladesh vs Md Sufi Uddin, 6 BLC (AD) 241; Bangladesh House Building Finance Corporation vs Jahanara Akter, 16 BLD (AD) 231 = 49 DLR (AD) 80; Essex Incorporated Congregrational Church Union vs Essex CC, [1963] AC 808 and Mahmudul Basque vs Shamsul Alam, 36 DLR (AD) 179 ref.

Ahmed Nowshed Jamil, Advocate—For the Petitioner.

Judgment

Sheikh Hassan Arif J: Rule was issued calling upon the respondents to show cause as to why the registration of the application under Article 27

*Writ Petition No. 4303 of 2009.

of the President's Order No.7 of 1973 as Miscellaneous Case No. 148 of 1991 passed by the Artha Rin Adalat, 2nd Court, Khulna being Order No. 1 dated 19-6-1991 and Order No.15 dated 31-5-1992 passed by the said court allowing the Miscellaneous Case (Annexure-B to the Writ Petition) and Order of registration of the execution application as Artha Rin Execution Case No.34 of 1993 passed by Artha Rin Adalat, 2nd Court, Khulna being Order No. 1 dated 28-7-1993 (Annexure-D to the Writ Petition) should not be declared to have been passed without lawful authority and is of no legal effect.

2. Shorts facts, relevant for the disposal of the rule are that; Respondent No.2, Bangladesh House Building Finance Corporation, Zonal Office, 2 Sir Iqbal Road, Khulna is a Corporation established under the Bangladesh House Building Finance Corporation Order, 1973 (PO No. 7 of 1973). Respondent No. 2 filed an application under Article 27 of the President Order No. 7 of 1973 against the father of the petitioner before the Artha Rin Adalat, 2nd Court, Khulna for realization of loan of Taka 11,32,972.25. Accordingly, the Artha Rin Adalat registered the same as Miscellaneous Case No. 148 of 1991 by order dated 19-6-1991, and subsequently, by *ex parte* Order dated 31-5-1992 allowed the Miscellaneous Case and again by order dated 7-6-1992 passed decree in favour of the Respondent No.2. Respondent No.2 then put the said decree into execution by filing an application on 28-7-1993 before the same Artha Rin Adalat, whereupon the Adalat registered the same as Title Execution No. 34 of 1993 by order dated 28-7-1993. In the meantime, the father of the petitioner having died, the petitioner entered appearance before the execution court and executed a solenama with respondent No. 2 resulting in a solenama-decree on 15-2-1995 in terms of the said solenama. However, the petitioner having failed to repay the loan as per the terms of the Solenama decree, Adalat by order dated 17-2-1998 recommenced the execution proceeding at the instance of respondent No. 2. In the process of said execution, the Adalat issued warrant of delivery of possession in favour of respondent No.2 in respect of the mortgaged property of the petitioner's father. The petitioner then filed an application for recalling the said warrant of possession, whereupon the Adalat, after hearing the parties, by order dated 9-4-2009, rejected the same. The petitioner then moved this court and obtained the Rule.

3. Mr Ahmed Nowshed Jamil, the learned Advocate for the petitioner centres his arguments mainly on the contention that the Artha Rin Adalat constituted under Artha Rin Adalat Ain did not have jurisdiction to entertain the miscellaneous case filed by respondent No. 2 under Article 27 of President Order No.7 of 1973. He submits that Artha Rin Adalat only entertain Suit (মামলা) filed by the financial institutions upon payment of ad valorem Court fee. However, in the present case the Artha Rin Adalat having entertained the application filed under Article-27 of the President Order 7 of 1973 and passed decree and different orders in the process of execution of the said decree, the Adalat acted beyond its jurisdiction and, as such, the whole proceeding before the Artha Rin Adalat in question was without lawful authority being *quorum non judice.* He contends that although the petitioner and his father did not raise any objection before the Artha Rin Adalat regarding its lack of jurisdiction, yet, he submits, jurisdiction of a court cannot be conferred by consent of parties and, as such, the principle of estoppel, waiver & acquiescence will not apply against him in the present case. In support of his contention he refers to a decision of our Appex Court in Registrar, *Supreme Court of Bangladesh vs Md Sufi Uddin* reported in *6 BLC (AD) 241,* wherein their Lordships held that consent or waiver cannot give jurisdiction where there is inherent lack or absence of it. He further submits that it is now settled by our Supreme Court that Bangladesh House Building Finance Corporation cannot file any

application under Article 27 of President Order No. 1973 before the Artha Rin Adalat for the simple reason that the application under Article 27 does not come within the preview of suit. In this regard, he refers to another decision of our Appellate Division in *Bangladesh House Building Finance Corporation vs Jahanara Akter* reported *16 BLD (AD) 231 = 49 DLR (AD) 80.*

4. Perused the Writ Petition and considered the submissions made by the learned Advocate for the petitioner, while none appeared for respondents to contest the rule. It is now well settled that a court acquires jurisdiction only from the statute or the law which has constituted the court and no parties to any litigation can confer such jurisdiction on the court by consent. It is also well settled that even the consenting party cannot be estopped from subsequently maintaining that the court or tribunal had acted without jurisdiction. The cases cited by the learned Advocate for the petitioner and some others like *Essex Incorporated Congregational Church Union vs Essex CC, [1963] AC 808* and *Mahmudul Haque vs Shamsul Alam, 36 DLR (AD) 179* have reinforced this principle of law again and again. Further, our Appellate Division made it clear that a financial institution like Bangladesh House Building Finance Corporation has two options to realize the loan from the defaulter-borrower, one is an application before the District Judge under Article 27 of the President Order 7 of 1973 by depositing a very nominal court fee applicable to applications and the other is by filing regular suit before the Artha Rin Adalat upon depositing ad valorem court fee. The Artha Rin Adalat will only have jurisdiction in such a case if the concerned financial institution has filed a Suit before it upon depositing ad valorem court fee for realization of loan, and this position of law having already been settled by this court in various decisions, we are not inclined to elaborate any further on this point. The records before us, namely the order of the Artha Rin Adalat passed in Miscellaneous Case No. 148 of 1991 and Title Execution Case No. 34 of 1993, categorically show that the Adalat entertained an application filed by respondent No. 2 under Article 27 of President Order 7 of 1973 and registered the same as Miscellaneous Case No. 148 of 1991 for which the Adalat did not have jurisdiction. Further, it shows that the Adalat continued the proceeding of the said Miscellaneous Case and passed decree and commenced or recommenced Execution Case for which it did not have such jurisdiction under the law. Therefore, in the facts and circumstances of the case we are of the view that the submissions made by the learned Advocate for the petitioner have substance. We hold that since the Artha Rin Adalat in question did not have jurisdiction to entertain or to. Proceed with the application filed by respondent No. 2 under Article 27, the whole proceeding before the Artha Rin Adalat namely the proceeding in Miscellaneous case No. 148 of 1991 and Title Execution case No. 34 of 1993 were entertained and continued before the Adalat without jurisdiction and, as such, the same are nullity in the eye of law. However, we are of the view that the respondent No.2, the Bangladesh House Building Finance Corporation, can still proceed afresh for realization of its loan before the proper forum in accordance with law.

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

6. It is declared that the proceedings before Artha Rin Adalat, 2nd Court, Khulna in Miscellaneous Case 148 of 1991 and in Title Execution Case No 34 of 1993 now pending before Artha Rin Adalat, 2nd Court, Khulna have been entertained and proceeded without lawful authority and of no legal effect. Consequently, any order passed or certificates issued by the said Artha Rin Adalat also resulted in nullity.

Ed.

HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Bhabani Prashad Singha J

Judgment
July 21st, 2013.

Ismail Hossain .....
.....Petitioner
vs
Hanif Mia and others .....
.....Opposite parties*

Transfer of Property Act (IV of 1882)
Section 52

During pendency of a case no property can be transferred as per the provision of section 52 of the Act and that reconveyance made during pendency of a pre-emption proceeding cannot take away the right of pre-emption by the co-sharer. .....(15)

Golam Rabbani, Advocate—For the Petitioner.

Khalilur Rahman, Advocate—For the Opposite-Parties.

Judgment

This Rule was issued calling upon the opposite-party No.l to show cause as to why the impugned judgment and order dated 20-11-2008 passed by the learned Joint District Judge, 2nd Court, Lalmonirhat in Miscellaneous Appeal No. 15 of 2007 affirming the judgment and order dated 20-2-2007 passed by the learned Assistant Judge, Patgram, Lalmonirhat in Miscellaneous Case No. 9 of 2005 for preemption should not be set-aside and/or pass such other or further order or orders as to this court may seem fit and proper.

2. The facts relevant for the purpose of disposal of this Civil Revision Case are as follows:

3. The pre-emptor-opposite party No.l filed Miscellaneous Case No.9 of 2005 for preemption of the case land.

4. The case of the pre-emptor is that the case land belonged originally to Pashar Uddin, Soleman Ali, Fashor Uddin and that SA record was prepared in their name and that Pashar Uddin died leaving behind the pre-emptor and the predecessor of the opposite party Nos. 3-10 namely, Fatima Khatun and thus the pre-emptor has become co-sharer by inheritance in the case holding and that the pre-emptor also purchased some land of the holding from some co-sharers on various dates and thus, he is also co-sharer by purchase in the case holding. The seller opposite party No. 3 sold out the case land in favour of the pre-emptee by the case kabala dated 7-1-2004. No notice was served to the pre-emptor in respect of the sale and that the pre-emptee purchaser took possession of the land on 8-6-2005. On that date the pre-emptor came to know about the case transfer and got certified copy of the case kabala on 26-4-2005 and filed the case under section 96 of the State Acquisition and Tenancy Act, 1950.

5. The opposite party No.3 contested the case by filing suit written objection.

6. The case of the opposite-party No. 3 is that the case land originally belonged to Kashor Uddin, Soleman, Mozammel Haque and Khoder Uddin. Kashem Uddin died leaving behind 2 sons, the pre-emptor and the opposite party No. 3 and 3 daughters, the opposite party Nos. 4-6. Thus the opposite party No.3 has become a co-sharer by inheritance in the case holding. By opening separate holding he has been possessing the case land. The opposite party Nos.1 and 2 took mortgage of the case land at a consideration of Taka 6,500. But he executed a kabala deed on 23-6-2004. There was an agreement that the suit land would be returned when the same would be demanded by the opposite party No.3 and accordingly, the opposite party Nos. 2 and 3 returned the mortgage money on 20-6-2005. So, the opposite party Nos. 2 and 3 returned the case land by the kabala dated 28-6-2005. There is no cause of action of the pre-emption case. The case is liable to be dismissed.

7. After trial, the trial court allowed the Pre-emption Miscellaneous Case No.09 of 2005 of 2006

*Civil Revision Mo. 718 of 2009.

by his judgment and order dated 25-4-2007 against which the opposite party No.3 preferred Miscellaneous Appeal No. 15 of 2007 which was disallowed vide judgment and order dated 20-11-2000.

8. Being aggrieved by and dissatisfied with the impugned judgment and order passed in Miscellaneous Appeal No.12 of 2007, the petitioner took this Civil Revision Case.

9. Advocate Mr Md Golam Rabbani representing the pre-emptee-petitioner submits that the courts below committed error of law resulting in an error in not finding that the case land has already gone back to its original owner; that both the courts below committed error of law resulting in an error in the decision failure of justice in not finding that the case deed was not a sale deed, rather, a mortgage deed and that by passing the impugned judgment and order, the appellate court below committed error of law resulting in an error in the decision occasioning failure of justice.

10. Advocate Mr Md Khalilur Rahman representing the pre-emptor-opposite party No.l submits that the appellate court below rightly passed the impugned judgment and order; that there is no merit in the Civil Revision Case; that the impugned judgment and order warrants no interference by this court and that the Rule is liable to be discharged.

11. The only point to be decided in this case is whether the impugned judgment and order is tenable in the eye of law.

12. Heard the submissions of the learned Advocates and perused the record and materials on record.

13. In this Revision Case, the matters with regard to defect of parties and limitation are not required to be discussed inasmuch as these points are not agitated by the parties.

14. In this case, the main contention of the opposite party No. 3 of the Miscellaneous Case No. 9 of 2005 for pre-emption in the way of the pre-emptor in getting the case land by way of pre-emption is the case kabala No.3533 dated 23-6-2004 is not a sale deed, rather, it is a mortgage deed; that vide kabala No.3889 dated 28-6-2005, the opposite party No.l transferred the case land to the seller, the opposite party No. 3 and, as such, the pre-emptor cannot get the case land by way of pre-emption as per the provision of the section 96 of the State acquisition and Tenancy Act. On perusal of the case kabala, it transpires that no where in the said Kabala it is stated that it is a mortgage deed. It is also not mentioned therein about returning the case land to the seller on receipt of the consideration money by the seller from the purchaser. The consideration money of the case kabala is Tk 6,500 whereas, the consideration money of the kabala dated 28-6-2005 is Taka 9,000. Had the kabala dated 28-6-2005 was executed in view of any mortgage, the consideration money thereof definitely would have been same as in the case kabala. In the said kabala as well nothing has been mentioned with regard to any mortgage. The OPW 1 says in his cross that when the talks about mortgage took place in the house of the OPW 2 Md Noor Islam (Beai); that he cannot recollect as to on which date talks of mortgage took place; that nothing about mortgage has been stated in the case deed; that he cannot recollect as to on which date he returned Taka 6,500; that the return kabala was executed at a consideration money of Tk 6,500. The statement of the OPW 2 as to the consideration money of the kabala dated 28-6-2005 is not correct in view of the fact that the consideration money of the said kabala is Taka 9, 000. If the case kabala as per the claim of the opposite party No.3 was a mortgage deed, its consideration money and that of the kabala dated 28-6-2005 would have been same. The OPW 2 Md Noor Islam says in his cross that at the time of giving proposal for mortgage he was not present which falsifies the statement of the OPW 1 that in the house of the OPW 2 the discussion as regards mortgage took place. In his evidence the PW 1, the preemptor categorically denies that case kabala dated 23-6-2004 is a mortgage deed. The PW

2 Md Abdul Mannan categorically says in his evidence that the opposite party Nos.1 and 2 possess the case land; that the opposite party No. 3 does not possess the case land. If as per the kabala dated 28-6-2005, the case land was reconveyed to the opposite party No. 3, he would have possessed the case land but he does not.

15. In this case the kabala dated 28-6-2005 was created after filing of Miscellaneous Case No.9 of 2005 for pre-emption. It is the established principle of law that during pendency of a case no property can be transferred as per the provision of section 52 of the Transfer of Property Act and that reconveyance made during pendency of a pre-emption proceeding cannot take away the right of pre-emption by the co-sharer (References: *13 BLT (AD) at page 20).*

16. In view of the discussion made here above, this court finds that the case kabala is an out and out sale deed and that the kabala dated 28-6-2005 is nothing but a colourable transaction created for the purpose of frustrating the pre-emption right of pre-emption.

17. Admittedly, the pre-emptor is a co-sharer by inheritance in respect of the case holding. The opposite party No.3 contends that the case holding being separated by mutation, the pre-emptor is no more a co-sharer in the case holding. But in respect of said mutation, the pre-emptee-opposite party filed no document which makes the claim of the opposite party No.3 baseless.

18. In the light of discussion made here above, the irresistible bindings of this Court is that the appellate court below rightly passed the impugned judgment and order and is tenable in the eye of law and the aforesaid judgment and order, the appellate court below has not committed any error of law resulting in any error in the said judgment and order occasioning any failure of justice which warrants no interference by this Court.

19. In the result, the Rule is discharged without any order as to costs.

20. The impugned judgment and order dated 20-11-2008 passed by the learned Joint District Judge, 2nd Court, Lalmonirhat in Miscellaneous Appeal No. 15 of 2007 is hereby upheld and confirmed.

Let the lower Court's records along with a copy of this judgment be sent down at once.

Ed.

HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

AFM Ali Asgar J	Begum Mariam..... .....Plaintiff Petitioner vs
Judgment August 24th, 2005.	Sk. Lal Mohammad..... ...Defendant Opposite Party*

Evidence Act (I of 1872)
Section 106

If any incident or circumstance is particularly within the special knowledge of any party to the case, in accordance with section 106 of the Act the burden to prove that particular incident or circumstance lies on the party who raises it. Since the defence raise the plea of alibi, the onus was on them to prove it either by leading evidence or from other evidence on record. But they clearly failed to discharge the said onus. .....(24)

Motiul Hoque vs DIT, 43 DLR 407; Alauddin vs Md Idrish Miah, 22 DLR 664; Azahar Baperi vs Abdul Aziz, 22 DLR (Dac) 36; Haji Kabir Uddin Ahamed vs Md Salam Kabir, 3 BLD (AD) 53 = 34 DLR (AD) 271; Md Shahadat Hossain vs Kafiluddin, 37 DLR 126; Chunal Bahadur and Co. vs Abdul Gani, AIR 1953 (Asain) 206 and Sudhangshu Kumar Chowdhory vs Md Ali Hossain (Md), 46 DLR (AD) 151 ref.

*Civil Revision No. 3070 of 2000.

যাহার মাধ্যমে কোন ব্যক্তি তাহার পক্ষে উক্ত দলিলে বর্ণিত কার্য-সম্পাদনের জন্য আইনানুগভাবে অন্য কোন ব্যক্তির নিকট ক্ষমতা অর্পণ করেন;

(২) "পণ মূল্য" অর্থ কোন ভূমি উন্নয়নের নিমিত্ত অপ্রত্যাহারযোগ্য পাওয়ার গ্রহীতা যে অংশ বিক্রয় বা হস্তান্তরের ক্ষমতাপ্রাপ্ত হন উহার বাজার মূল্য ও পাওয়ার দাতা কর্তৃক গৃহীত কোন অর্থ, যদি থাকে, যাহা দলিলের মূল্য হিসাবে গণ্য হয়;

(৩) "ব্যক্তি" অর্থে যে কোন ব্যক্তি, অংশীদারী কারবার, সমিতি, কোম্পানী, সংবিধিবদ্ধ সংস্থা এবং সমবায় সমিতিও উহার অন্তর্ভুক্ত হইবে;

(৪) "অপ্রত্যাহারযোগ্য পাওয়ার অব অ্যাটর্নি" অর্থ স্থাবর সম্পত্তি বিক্রয়ের উদ্দেশ্যে, বিক্রয় চুক্তি সম্পাদনের বা ঋণ গ্রহণের বিপরীতে স্থাবর সম্পত্তির বন্ধক প্রদানের জন্য প্রদত্ত কোন পাওয়ার অব অ্যাটর্নি অথবা স্থাবর সম্পত্তির বিপরীতে পণ মূল্য গ্রহণের বিনিময়ে ভূমি উন্নয়নসহ উক্ত দলিল সম্পাদনের ক্ষমতা প্রদান সম্পর্কিত কোন পাওয়ার অব অ্যাটর্নি;

(৫) "বিধি" অর্থ এই আইনের অধীন প্রণীত কোন বিধি;

(৬) "ভূমি উন্নয়ন" অর্থ ব্যবস্থাপনা ও বিক্রয়ের নিমিত্ত আবাসিক বা বাণিজ্যিক প্লট প্রস্তুত, অথবা এপার্টমেন্ট বা মিশ্র ফ্লোর স্পেস বা ফ্ল্যাট নির্মাণের মাধ্যমে কোন প্লট বা ভূমির উন্নয়ন;

(৭) "সাধারণ পাওয়ার অব অ্যাটর্নি" অর্থ দফা (৪) এ উল্লিখিত বিষয়ে সম্পাদিত অপ্রত্যাহারযোগ্য পাওয়ার অব অ্যাটর্নি ব্যতীত অন্য কোন বিষয়ে সম্পাদিত পাওয়ার অব অ্যাটর্নি;

(৮) "রেজিস্ট্রেশন আইন" অর্থ Registration Act, 1908 (Act XVI of 1908)।

৩। **অন্যান্য আইনের প্রয়োগ।**—এই আইনে বর্ণিত হয় নাই কিন্তু অন্য কোন আইনে বর্ণিত পাওয়ার অব অ্যাটর্নি সংক্রান্ত কোন বিধান, এই আইনের সহিত সামঞ্জস্যপূর্ণ হওয়া সাপেক্ষে, প্রয়োগযোগ্য হইবে।

৪। **অপ্রত্যাহারযোগ্য পাওয়ার অব অ্যাটর্নির মাধ্যমে ক্ষমতা অর্পণ, ইত্যাদি।**—(১) পণ মূল্য গ্রহণের বিনিময়ে ভূমি উন্নয়ন সংক্রান্ত অপ্রত্যাহারযোগ্য প্রতিটি পাওয়ার অব অ্যাটর্নির একটি নির্দিষ্ট মেয়াদ থাকিবে এবং উক্ত মেয়াদে উহা অপ্রত্যাহারযোগ্য শর্তে বহাল থাকিবে।

(২) উপ-ধারা (১) এ যাহা কিছুই থাকুক না কেন, ভূমি উন্নয়ন সংক্রান্ত পাওয়ার অব অ্যাটর্নির মেয়াদ অতিক্রান্ত হইবার পরও পাওয়ার গ্রহীতার অংশের বিক্রয়, বিক্রয় চুক্তি সম্পাদন বা ঋণ গ্রহণের বিপরীতে বন্ধকী দলিল সম্পাদনের ক্ষমতা বাধাগ্রস্ত হইবে না এবং উক্ত ক্ষমতা প্রয়োগ না হওয়া পর্যন্ত সংশ্লিষ্ট পাওয়ার অব অ্যাটর্নি বহাল আছে মর্মে গণ্য হইবে।

(৩) উপ-ধারা (১) ও (২) এর বিধান সত্ত্বেও, পাওয়ার অব অ্যাটর্নির উদ্দেশ্য বা শর্ত ব্যাহত বা কোন পক্ষ ক্ষতির সম্মুখীন হইলে রেজিস্টার্ড ডাকের মাধ্যমে পাওয়ার দাতা বা গ্রহীতা ৩০ (ত্রিশ) দিনের নোটিশ প্রদানপূর্বক উক্ত দলিলে প্রদত্ত ক্ষমতার অবসান ঘটাইতে পারিবেন এবং উক্ত নোটিশের একটি কপি সংশ্লিষ্ট সাব-রেজিস্ট্রি অফিসে নথিভুক্তকরণের নিমিত্ত প্রেরণ করিতে হইবে;

তবে শর্ত থাকে যে, ধারা ১৩ এর বিধান মোতাবেক কোন পদক্ষেপ গৃহীত হইলে উহা চূড়ান্ত নিষ্পত্তি না হওয়া পর্যন্ত উক্ত দলিলে প্রদত্ত ক্ষমতার অবসান ঘটানো যাইবে না।

(৪) উপ-ধারা (৩) এর অধীন প্রদত্ত নোটিশ জারীর সঙ্গে সঙ্গে ধারা ১৩ এর বিধান মোতাবেক চূড়ান্ত নিষ্পত্তি না হওয়া পর্যন্ত উক্ত পাওয়ার অব অ্যাটর্নির কার্যকরতা স্থগিত হইয়া থাকিবে।

(৫) পাওয়ার অব অ্যাটর্নির মেয়াদ শেষ হইবার পূর্বে পাওয়ারদাতা ও পাওয়ারগ্রহীতা সম্মতির ভিত্তিতে রেজিস্ট্রিকৃত চুক্তি সম্পাদনের মাধ্যমে উহার মেয়াদ বর্ধিত করিতে পারিবেন।

(৬) অপ্রত্যাহারযোগ্য পাওয়ার অব অ্যাটর্নির মেয়াদ অবসান হইবার পূর্বে পাওয়ারদাতা বা পাওয়ারগ্রহীতার মৃত্যু হইলে বা তাহারা আইনগতভাবে দলিল সম্পাদনে অক্ষম হইলে উক্ত মৃত বা অক্ষম ব্যক্তির বৈধ ওয়ারিশ বা স্থলবর্তীর উপর দলিল হইতে উদ্ভূত দায় বা অধিকার স্বয়ংক্রিয়ভাবে অর্পিত হইবে:

তবে শর্ত থাকে যে, ধারা ৯ এর বিধান সাপেক্ষে, একক গ্রহীতার ক্ষেত্রে এ বিধান প্রযোজ্য হইবে না।

৫। **নোটিশ জারী, ইত্যাদি।**—(১) এই আইনের অধীন কোন নোটিশ কোন পক্ষ বা ব্যক্তির উপর জারী করা প্রয়োজন হইলে এবং জারীর বিষয়ে পক্ষগণ ভিন্নভাবে সম্মত না হইলে, উক্ত নোটিশ সেই পক্ষ বা ব্যক্তির উপর জারী হইয়াছে বলিয়া গণ্য হইবে, যদি—

(ক) উহা তাহাকে ব্যক্তিগতভাবে বা তাহার ব্যবসায়িক ঠিকানা বা তাহার স্বাভাবিক বাসস্থান বা অন্য কোনভাবে তাহার চিঠির ঠিকানায় সরবরাহ করা হইয়া থাকে; এবং

(খ) দফা (ক) তে উল্লিখিত কোন জায়গায় স্বাভাবিক অনুসন্ধানের পরও তাহাকে না পাওয়া যায় তাহা হইলে সর্বশেষ জ্ঞাত ব্যবসায়িক, বাসস্থান বা চিঠির ঠিকানায় রেজিস্ট্রিকৃত ডাকযোগে, কুরিয়ার সার্ভিসের মাধ্যমে বা অন্য কোন পদ্ধতিতে প্রেরিত হয় এবং উহাতে উক্তরূপে প্রেরণের প্রমাণ লিপিবদ্ধ থাকে।

(২) নোটিশ যে তারিখে, ক্ষেত্রমত, সরবরাহ বা প্রেরণ করা হইবে সেই তারিখে প্রাপ্ত হইয়াছে মর্মে গণ্য হইবে।

৬। পাওয়ার অব অ্যাটর্নি সম্পাদন।—(১) রেজিস্ট্রেশন আইনে যাহা কিছুই থাকুক না কেন, এই আইনের অধীন সম্পাদিত অপ্রত্যাহারযোগ্য পাওয়ার অব অ্যাটর্নির রেজিস্ট্রেশন বাধ্যতামূলক এবং রেজিস্ট্রেশন আইনের seciton 52A এর বিধানাবলী প্রযোজ্য হইবে।

(২) উপ-ধারা (১) এর অধীন সম্পাদিতব্য পাওয়ার অব অ্যাটর্নি দলিলে অবশ্যই পাওয়ারদাতার উদ্দেশ্য এবং পাওয়ার-গ্রহীতার দায়িত্ব, ক্ষমতা ও কার্যাবলীর সুস্পষ্ট বিবরণ থাকিতে হইবে।

(৩) উপ-ধারা (১) এর অধীন সম্পাদিতব্য পাওয়ার অব অ্যাটর্নি দলিলে পাওয়ারদাতা ও পাওয়ারগ্রহীতার ১ (এক) কপি করিয়া ছবি স্থায়ীভাবে সংযুক্ত এবং জাতীয় পরিচয়পত্রের অনুলিপি সংযুক্ত করিতে হইবে।

(৪) উপ-ধারা (৩) এ যাহা কিছুই থাকুক না কেন, বাংলাদেশের বাহিরে বসবাসরত পাওয়ার দাতার ক্ষেত্রে, উপ-ধারা (৫) এর বিধান সাপেক্ষে, রেজিস্ট্রেশন আইনের section 33 এর sub-section (1)(c) এর বিধান প্রযোজ্য হইবে।

(৫) পাওয়ারদাতা বাংলাদেশের বাহিরে বসবাস করিলে, পাওয়ার অব অ্যাটর্নি দলিল সম্পাদনের সময় পাওয়ারদাতা উপ-ধারা (৩) এর অধীন সংযুক্তকৃত পাওয়ার গ্রহীতার ছবি, স্বাক্ষরপূর্বক সনাক্ত করিবেন।

(৬) বিদেশে সম্পাদিত অপ্রত্যাহারযোগ্য পাওয়ার অব অ্যাটর্নি দলিল বাংলাদেশে প্রথম প্রবেশের পর পররাষ্ট্র মন্ত্রণালয় কর্তৃক প্রমাণীকরণ (Authentication) অন্তেঃ উহা Stamp Act, 1899 (Act II of 1899) এর section 18 অনুযায়ী সংশ্লিষ্ট কালেক্টর কর্তৃক প্রয়োজনীয়রূপে স্ট্যাম্পযুক্ত করিতে হইবে।

(৭) উপ-ধারা (৬) এর অধীন পাওয়ার অব অ্যাটর্নি স্ট্যাম্পযুক্ত হওয়ার পর উহার একটি কপি কালেক্টর কর্তৃক সংশ্লিষ্ট সাব-রেজিস্ট্রারের নিকট প্রেরণ করিতে হইবে, এবং উক্তরূপে কোন কপি প্রেরণ করা হইলে উহা, রেজিস্ট্রেশন আইনের section 89 এ যাহা কিছুই থাকুক না কেন, সংশ্লিষ্ট সাব-রেজিস্ট্রার ১ নং বহিতে নথিভুক্ত করিয়া সংরক্ষণের ব্যবস্থা গ্রহণ করিবেন।

৭। পাওয়ারগ্রহীতা কর্তৃক সম্পাদিত কর্মের আইনগত ফলাফল।—পাওয়ারগ্রহীতা কর্তৃক সম্পাদিত বা কৃত বা উহার ফলপ্রসূত কোন বাধ্যবাধকতা এমনভাবে বলবৎ হইবে যেন স্বয়ং পাওয়ারদাতা উক্ত কার্য সম্পাদন করিয়াছেন।

৮। যৌথদাতার একজনের মৃত্যুর পরিণাম।—অপ্রত্যাহারযোগ্য পাওয়ারদাতা একাধিক হইলে উক্ত পাওয়ার অব অ্যাটর্নির উদ্দেশ্য বাস্তবায়িত হইবার পূর্বে কোন পাওয়ারদাতার মৃত্যুতে তাহার ওয়ারিশগণ এমনভাবে মৃত পাওয়ারদাতার স্থলাভিষিক্ত হইবেন এবং কার্য-সম্পাদন করিবেন যেন পাওয়ারদাতার মৃত্যু হয় নাই।

৯। যৌথগ্রহীতার একজনের মৃত্যুর পরিণাম।—অপ্রত্যাহারযোগ্য পাওয়ারগ্রহীতা একাধিক হইলে, উহাদের কোন একজনের মৃত্যুতে, উক্ত পাওয়ার অব অ্যাটর্নি বাতিল হইবে না বরং উহা অবশিষ্ট জীবিত পাওয়ারগ্রহীতাদের ক্ষেত্রে অক্ষুণ্ন ও বলবৎ থাকিবে।

১০। মৃত্যু, ইত্যাদি সম্পর্কে অবগতি ব্যতীত পাওয়ার অব অ্যাটর্নির অধীন অর্থ প্রদান।—পাওয়ার অব অ্যাটর্নি দাতার মৃত্যু, মস্তিষ্ক বিকৃতি, দেউলিয়াত্ব, অসচ্ছলতা বা পাওয়ার অব অ্যাটর্নির অবসান সম্পর্কে অবগত না থাকিয়া কেহ সরল বিশ্বাসে কোন অর্থ প্রদান বা কার্য করিলে, উক্ত ব্যক্তি পাওয়ারদাতার নিকট হইতে যে প্রতিকার লাভ করিত পাওয়ারগ্রহীতার নিকট হইতেও অনুরূপ প্রতিকার লাভ করিবে।

১১। পাওয়ার অব অ্যাটর্নির অবসান।—(১) নিম্নবর্ণিত ক্ষেত্রে পাওয়ার অব অ্যাটর্নির অবসান ঘটিবে, যথা ঃ—

(ক) কোন নির্দিষ্ট কার্য-সম্পাদনের উদ্দেশ্যে পাওয়ার অব অ্যাটর্নি সম্পাদিত হইলে উক্ত কার্য সম্পাদিত হইবার পর বা কোন বিশেষ উদ্দেশ্য সাধনের জন্য উহা

সম্পাদিত হইলে উক্ত বিশেষ উদ্দেশ্য অর্জিত বা হাসিল হইবার পর;

(খ) ধারা ৪ এর উপ-ধারা (১) এর বিধান সাপেক্ষে, কোন নির্দিষ্ট মেয়াদের জন্য পাওয়ার অব অ্যাটর্নি সম্পাদিত হইলে, উক্ত মেয়াদ অতিক্রান্ত হইবার পর;

(গ) যে বিষয়বস্তুর উপর পাওয়ার অব অ্যাটর্নি সম্পাদন করা হয় সেই বিষয়বস্তুর বিনাশ বা অস্তিত্বের বিলোপ ঘটিলে;

(ঘ) অপ্রত্যাহারযোগ্য পাওয়ার অব অ্যাটর্নি ব্যতীত অন্যান্য পাওয়ার অব অ্যাটর্নির ক্ষেত্রে পাওয়ারদাতা দেউলিয়া বা অপ্রকৃতিস্থ হইলে বা মৃত্যুবরণ করিলে বা পাওয়ারদাতার আইনী স্বত্বা (legal entity) বিলুপ্ত হইলে।

(২) সাধারণ পাওয়ার অব অ্যাটর্নি দাতা উক্ত পাওয়ার অব অ্যাটর্নির মাধ্যমে পাওয়ারগ্রহীতাকে রেজিস্টার্ড ডাকের মাধ্যমে ৩০ (ত্রিশ) দিনের নোটিশ প্রদানপূর্বক, প্রদত্ত ক্ষমতার অবসান ঘটাইতে পারিবেন;

তবে শর্ত থাকে যে, এইরূপে অবসান ঘটাইবার নোটিশ জারীর পূর্ব পর্যন্ত উক্ত পাওয়ার অব অ্যাটর্নি বলে কৃত সকল কার্যাদি বৈধ বলিয়া গণ্য হইবে।

(৩) পাওয়ারগ্রহীতা উপ-ধারা (২) এর অনুরূপভাবে পাওয়ারদাতাকে রেজিস্টার্ড ডাকের মাধ্যমে ৩০ (ত্রিশ) দিনের নোটিশ প্রদানপূর্বক পাওয়ার অব অ্যাটর্নির দায়িত্ব পরিত্যাগ করিতে পারিবেন।

১২। রেজিস্ট্রেশন ফি, ইত্যাদি।—এই আইনের অধীন সম্পাদিত অপ্রত্যাহারযোগ্য পাওয়ার অব অ্যাটর্নির ফি রেজিস্ট্রেশন আইনের section 78 অনুযায়ী নির্ধারিত হইবে।

১৩। বিরোধ নিষ্পত্তি।—(১) রেজিস্ট্রেশন আইনের অধীন রেজিস্ট্রিকৃত পাওয়ার অব অ্যাটর্নি হইতে উদ্ভূত যে কোন বিরোধ পক্ষগণ প্রথমে নিজেদের মধ্যে আপস মীমাংসার মাধ্যমে নিষ্পত্তির চেষ্টা করিবেন।

(২) উপ-ধারা (১) অনুযায়ী আপস মীমাংসার পদক্ষেপ গ্রহণের পর যদি কোন পক্ষের অসহযোগিতার কারণে উহা ব্যর্থ হয়, তাহা হইলে অপরপক্ষ বিবাদমান বিষয়টি একজন নিরপেক্ষ মধ্যস্থতাকারীর মাধ্যমে নিষ্পত্তির জন্য অপরপক্ষকে নোটিশ প্রদান করিবেন।

(৩) উপ-ধারা (২) এর অধীন নোটিশ প্রাপক উক্ত নোটিশ প্রাপ্তির ৩০ (ত্রিশ) দিনের মধ্যে নোটিশ প্রেরকের সহিত যৌথভাবে মধ্যস্থতাকারী নিয়োগ করিবেন।

(৪) পক্ষগণ কর্তৃক নিয়োগকৃত মধ্যস্থতাকারীর সিদ্ধান্ত পক্ষগণসহ তাহাদের মাধ্যমে বা অধীনে দাবীদার যে কোন ব্যক্তির উপর বাধ্যকর হইবে এবং উহার বিরুদ্ধে কোন আদালতে কোন পক্ষের আপত্তি উত্থাপনের অধিকার থাকিবে না।

(৫) উপ-ধারা (৩) মোতাবেক পক্ষগণ মধ্যস্থাতাকারী নিয়োগে ব্যর্থ হইলে যে কোন পক্ষ বিবাদমান বিষয়টি নিষ্পত্তির জন্য কোন উপযুক্ত আদালতে মামলা দায়ের করিতে পারিবেন।

১৪। বিধি প্রণয়নের ক্ষমতা।—সরকার, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, এই আইনের উদ্দেশ্যপূরণকল্পে, বিধি প্রণয়ন করিতে পারিবে।

১৫। আইনের ইংরেজী অনূদিত পাঠ।—(১) এই আইন কার্যকর হইবার পর সরকার, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, এই আইনের ইংরেজিতে অনূদিত একটি নির্ভরযোগ্য পাঠ (Authentic English Text) প্রকাশ করিতে পারিবে।

(২) বাংলা পাঠ ও ইংরেজি পাঠের মধ্যে বিরোধের ক্ষেত্রে বাংলা পাঠ প্রাধান্য পাইবে।

১৬। রহিতকরণ ও হেফাজত।—(১) Powers-of-Attorney Act, 1882 (Act VII of 1882) এতদ্দ্বারা রহিত করা হইল।

(২) উপ-ধারা (১) এর অধীন রহিতকরণ সত্ত্বেও, রহিত আইনের অধীনকৃত কাজকর্ম বা গৃহীত ব্যবস্থা এই আইনের অধীনকৃত বা গৃহীত হইয়াছে বলিয়া গণ্য হইবে।

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Code of Civil Procedure, 1908 এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে Code of Civil Procedure, 1908 (Act V of 1908) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্দ্বারা নিম্নরূপ আইন করা হইল ঃ—

১। **সংক্ষিপ্ত শিরোনাম ও প্রবর্তন**।—(১) এই আইন Code of Civil Procedure (Amendment) Act, 2012 নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। **Act V of 1908 এর section 89A এর সংশোধন**।—Code of Civil Procedure, 1908 (Act V of 1908), অতঃপর উক্ত Code বলিয়া উল্লিখিত, এর section 89A এর—

(ক) sub-section (1) এর—

(অ) "Artha Rin Adalat Ain, 1990 (Act No. 4 of 1990)" শব্দগুলি, কমা, সংখ্যাগুলি ও বন্ধনীর পরিবর্তে "Artha Rin Adalat Ain, 2003 (Act No. 8 of 2003)" শব্দগুলি, কমা, সংখ্যাগুলি ও বন্ধনী প্রতিস্থাপিত হইবে;

(আ) "the Court may" শব্দগুলির পরিবর্তে "the Court shall" শব্দগুলি প্রতিস্থাপিত হইবে; এবং

(ই) প্রান্তস্থিত কোলন এর পরিবর্তে ফুলস্টপ প্রতিস্থাপিত হইবে এবং শর্ত বিলুপ্ত হইবে;

(খ) sub-section (3) এর পরিবর্তে নিম্নরূপ sub-section (3) প্রতিস্থাপিত হইবে, যথা ঃ—

"(3) While referring a dispute or disputes in the suit for mediation under sub-section (1), it shall be for the pleaders, their respective clients and the mediator to mutually agree on and determine the fees and the procedure to be followed for the purpose of settlement through mediation; and when the Court shall mediate, it shall determine the procedure to be followed, and shall not charge any fee for mediation :

Provided that if the pleaders, their respective clients and the mediator fail to determine the fees, the Court shall fix the fees and the fees so fixed shall be binding upon the parties.";

(গ) sub-section (4) এর পরিবর্তে নিম্নরূপ sub-section (4) প্রতিস্থাপিত হইবে, যথা ঃ—

"(4) Within ten days from the date of reference under sub-section (1), the parties shall inform the Court in writing whom they have appointed as mediator, and if the parties fail to appoint the mediator during this time, the Court shall, within seven days, appoint a mediator from the panel as mentioned in sub-section (10) and the mediation under this section shall be concluded within 60 (sixty) days from the day on which the Court is so informed, or a mediator is appointed by the Court, as the case may be, unless the Court of its own motion or upon a joint prayer of the parties, extends the time for a further period of not exceeding 30 (thirty) days,";

(ঘ) Sub-section (5) এর পরিবর্তে নিম্নরূপ Sub-section (5) প্রতিস্থাপিত হইবে যথা ঃ—

"(5) The mediator shall, without violating the confidentiality of the parties to the mediation proceedings, submit to the court a report of result of the mediation proceedings; and if the result its of compromise of the dispute or disputes in the

suit, the terms of such compromise shall be reduced into writing in the form of an agreement, bearing signatures or left thumb impressons of the parties as executants, and signatures of the pleaders, if any, and the mediator as witnesses; and the court shall, within seven days from receiving the said report, pass an order or a decree in accordance with relevant provisions of order XXIII of the Code.";

(ঙ) sub-section (6) এর "make a report and passed order in a manner similar" শব্দগুলির পরিবর্তে "prepare a report and pass an order in the manner" শব্দগুলি প্রতিস্থাপিত হইবে।

৩। **Act V of 1908 এর section 89C এর সংশোধন।**—উক্ত Code এর section 89C এর—

(ক) Sub-section (1) এর "may" শব্দের পরিবর্তে "shall" শব্দ প্রতিস্থাপিত হইবে;

(খ) Sub-section (2) এর পরিবর্তে নিম্নরূপ Sub-section (2) প্রতিস্থাপিত হইবে, যথা ঃ—

"(2) In mediation under sub-section (1), the provisions of section 89A shall be followed with necessary changes (mutatis mutandis) as may be expedient."।

৪। **Act V of 1908 এর নূতন section 89D এবং section 89E এর সন্নিবেশ।**—উক্ত Code এর section 89C এর পর নিম্নরূপ নূতন section 89D এবং section 89E সন্নিবেশিত হইবে যথা ঃ—

"89D. Special provisions for mediation—The Contesting parties to a suit or of an appeal, pending in any Court before the commencement of the Code of Civil Procedure (Amendment) Act, 2012, may be filing an application stating their willingness to settle the dispute through mediation, such suit or appeal shall be disposed of in accordance with the provision of section 89A or 89C.

89E. Application and commencement of the provisions of sections 89A and 89C—(1) The provisions of section 89A or 89C shall be, applied to such area, and commenced on such date, as the government may, by notification in the official Gazette, fix.

(2) Where any mediation process for settlement of dispute in respect of any suit or appeal is pending udner section 89A or 89C before the commencement of the Code of Civil Procedure (Amendment) Act, 2012, such mediation shall continue as if the provision of section 89A or 89C were not amended by the Code of Civil Procedure (Amendment) Act, 2012."।

৫। **Act V of 1908 এর Order V এর সংশোধন।**—উক্ত Code এর Order V এর—

(ক) rule 1 এর sub-rule (1) এর পরিবর্তে নিম্নরূপ sub-rule (1) প্রতিস্থাপিত হইবে, যথা ঃ—

(1) Summons.—When a suit has been duly instituted a summons shall be issued by the officer of the Court appointed in this behalf to the defendant within five working days from the date of filing the suit to appear and answer the claim on a day to be therein specified:

Provided that if the officer of the Court fails to issue the summons within the said period of time, he shall be liable for misconduct:

Provided further that no such summons shall be issued when the defendant has appeared at the presentation of the plaint

and admitted the plaintiff's claim.";

(খ) rule 9 এর পরিবর্তে নিম্নরূপ rule 9 এবং rule 9A প্রতিস্থাপিত হইবে, যথা ঃ—

"9 Delivery or transmission of summons for service.—(1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or through courier service enlisted by the District Judge under sub-rule (4).

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such manner as the Court may direct.

(3) The Court may, in addition to the service of summons under sub-rule (1), on the application of the plaintiff for the issue of a summons for the appearance of the defendant, also direct the summons to be served by means of transmission of documents through fax massage or electronic mail service by the plaintiff at his own cost.

(4) The District Judge shall prepare a list of courier services (to be updated from time to time) for the purposes of sub-rule (1), and shall inform all the Civil Courts under his administrative jurisdiction about the list.

(5) When a summons is sent to the proper officer or the courier service, he or it shall serve the summons within thirty days from the date of receipt of summons and shall inform the Court in this regard:

Provided that, if the proper officer or the courier service fails to serve the summons within th said period of time, that officer shall be liable for misconduct and in the case of courier service, the District Judge shall exclude it from the list prepared under sub-rule (4).

9A. Summons given to the Plaintiff for service:—(1) The Court may, in addition to the service of summons under rule 9, on the application of the plaintiff for the issue of summons for the appearance of the defendant, permit such plaintiff to effect service of such summons on such defendant and shall, in such a case, deliver the summons to such plaintiff for service.

(2) The service of such summons shall be effected by or on behalf of such plaintiff by delivering or tendering to the defendant personally a copy thereof signed by the Judge or such officer of the Court-as he may appoint in this behalf and sealed with the seal of the Court.

(3) The provisions of rules 16 and 18 shall apply to a summons personally served under this rule as if the person effecting the service were a serving officer and the plaintiff shall submit a report to the Court accompanied by an affidavit.

(4) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or for any reason such summons cannot be

served personally, the Court shall, on the application of the plaintiff, re-issue such summons to be served by the Court in the same manner as a summons to a defendant.";

(গ) rule 15 এর—

(অ) উপান্তটীকার "male member" শব্দগুলির পরিবর্তে "adult member" শব্দগুলি প্রতিস্থাপিত হইবে; এবং

(আ) "adult male member" শব্দগুলির পরিবর্তে "adult member" শব্দগুলি প্রতিস্থাপিত হইবে;

(ঘ) rule 20 Fr sub-rule (1) এর পর নিম্নরূপ sub-rule (1A) সন্নিবেশিত হইবে, যথা ঃ—

"(1A) Where the Court under sub-rule (1) pass an order to service the summons by an advertisement in a newspaper, the newspaper shall be a daily newspaper which has circulation in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.";

(ঙ) rule 21 এর "by post" শব্দগুলির পর "or through courier service as mentioned in sub-rule (4) of rule 9" শব্দগুলি সন্নিবেশিত হইবে;

(চ) rule 24 এর "by post" শব্দগুলির পর "or through courier service as mentioned in sub-rule (4) of rule 9" শব্দগুলি সন্নিবেশিত হইবে;

(ছ) rule 25 এর পরিবর্তে নিম্নরূপ rule 25 প্রতিস্থাপিত হইবে, যথা ঃ—

"25. Service where defendant resides out of Bangladesh and has no agent.—(1) Where the defendant resides out of Bangladesh and has no agent in Bangladesh empowered to accept service, the summons shall be adderssed to the defendant at the place where he is residing and sent to him by post or through courier service as mentioned in sub-rule (4) of rule 9, if there is postal communication between such place and the place where the Court is situate.

(2) The Court may, in addition to the service of summons under sub-rule (1), on the application of the plaintiff for the issue of a summons for the appearance of the defendant, also direct the summons to be served by means of transmission of documents through fax massage or electronic mail service by the plaintiff at his own cost.";

(জ) rule 26A বিলুপ্ত হইবে;

(ঝ) rule 30 এর পর নিম্নরূপ rule 31 সংযোজিত হইবে, যথা ঃ—

"31. Service of summons when completed.—If the Court is satisfied that the summons has been served by any of the modes as is mentioned in this Order, if shall be deemed that the summons has been duly served." ।

৬। **Act V of 1908 এর Order VI এর সংশোধন।**—উক্ত Code এর Order VI এর rule 17 এর প্রান্তস্থিত ফুলস্টপ এর পরিবর্তে কোলন প্রতিস্থাপিত হইবে এবং অতঃপর নিম্নরূপ শর্তাংশ সংযোজিত হইবে, যথা ঃ—

"Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court is of opinion that in spite of due diligence, the party could not have raised the matter before the commencement of trial:

Provided further that if an application for

amendment is made after the trial has commenced and the Court is of opinion that the application is made to delay the proceedings, the Court shall make an order for the payment to the objector such cost by way of compensation as if thinks fit."।

৭। **Act V of 1908 এর Order VIII এর সংশোধন।** —উক্ত Code এর Order VIII এর rule 1 এর sub-rule (1) এর পরিবর্তে নিম্নরূপ sub-rule (1) প্রতিস্থাপিত হইবে, যথা ঃ—

"(1) The defendant shall, within thirty working days from the date of service of summons upon him, save as provided in the proviso to sub-section (2) of section 80, present a written statement of his defence:

Provided that where the defendant fails, for reasonable grounds, to file the written statement within the said period of thirty working days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not exceed sixty working days from the date of service of summons;

Provided further that if the defendant fails to file the written statement within the said period of sixty working days, the Court shall dispose of the suit ex parte."।

৮। **Act V of 1908 এর Order IX এর সংশোধন।** —উক্ত Code এর Order IX এর rule 5 এর—

(ক) উপান্তটীকার "three months" শব্দগুলির পরিবর্তে "one month" শব্দগুলি প্রতিস্থাপিত হইবে; এবং

(খ) sub-rule (1) এর "three months" শব্দগুলির পরিবর্তে "one month" শব্দগুলি প্রতিস্থাপিত হইবে।

৯। **Act V of 1908 এর Order XI এর সংশোধন।**— উক্ত Code এর Order XI এর Rule 2 এর "shall be submitted to the Court" শব্দগুলির পরিবর্তে "Shall be submitted to the Court and that Court shall decide within fourteen days from the date of filing of the said application" শব্দগুলি প্রতিস্থাপিত হইবে।

১০। **Act V of 1908 এর Order XII এর সংশোধন।** —উক্ত Code এর Order XII এর rule 2 এর "to admit any document" শব্দগুলির পরিবর্তে "to admit, within fifteen days from the date of service of notice, any document" শব্দগুলি ও কমাগুলি প্রতিস্থাপিত হইবে।

১১। **Act V of 1908 এর Order XIV এর সংশোধন।** —উক্ত Code এর Order XIV এর rule 4 এর "may adjourn the framing of the issues to a future day" শব্দগুলির পরিবর্তে "may adjourn the framing of the issues to a day not later than fifteen days" শব্দগুলি প্রতিস্থাপিত হইবে।

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Code of Criminal Procedure, 1898 এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্য পূরণকল্পে Code of Criminal Procedure, 1898 (Act No. V of 1898) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্বারা নিম্নরূপ আইন করা হইল ঃ

১। **সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।**—(১) এই আইন Code of Criminal Procedure, (Amendment) Act, 2012 নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। **Act No. V of 1898 এর section 11 এর সংশোধন।**—Code of Criminal Procedure, 1898 (Act No. V of 1898) এর section 11 এর sub-section (2) এর পর নিম্নরূপ sub-section (2A) সন্নিবেশিত হইবে, যথা ঃ—

"(2A) The Government may, by general or special order in the official Gazette, direct at what place or places the Court of Chief Judicial Magistrate, Additional Chief Judicial Magistrate and other Judicial Magistrates shall hold its sitting."।

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The Members of the Bangladesh Public Service Commission (Terms and Conditions of Service) Act, 1974 এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে The Members of the Bangladesh Public Service Commission (Terms and Conditions of Service) Act, 1974 (Act No. XXI of 1974) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্‌দ্বারা নিম্নরূপ আইন করা হইল ঃ—

১। **সংক্ষিপ্ত শিরোনাম।**—এই আইন The Members of the Bangladesh Public Service Commissioen (Terms and Conditions of Service) (Amendment) Act, 2012 নামে অভিহিত হইবে।

২। **Act No. XXI of 1974 এর section 3 এর সংশোধন।**— The Members of the Bangladesh Public Service Commission (Terms and Conditions of Service) Act, 1974 (Act No. XXI of 1974), অতঃপর উক্ত Act বলিয়া উল্লিখিত, এর section 3 এর sub-section (1) এর পরিবর্তে নিম্নরূপ sub-section (1) প্রতিস্থাপিত হইবে, যথা ঃ—

"(1) Subject to sub-section (2), there shall be paid per mensem—

(a) to the Chairman such salary as is admissible to the cabinet secretary; and

(b) to a Member such salary as is admissible to the secretary to the Government"।

৩। **Act No. XXI of 1974 এর section 3A এর প্রতিস্থাপন।**—উক্ত Act এর section 3A এর পরিবর্তে নিম্নরূপ section 3A প্রতিস্থাপিত হইবে, যথা ঃ—

"3A.Allowances other than house allowance and other benefits—

The allowances other than house allowance and other benefits of the chairman shall be the same as are admissible to the cabinet secretary and a member shall be the same as are admissible to the secretary to the Government"।

৪। **Act No. XXI of 1974 এর section 6A এর বিলুপ্তি।**—উক্ত Act এর section 6A বিলুপ্ত হইবে।

৫। **Act No. XXI of 1974 এর section 6AA এর বিলুপ্তি।**—উক্ত Act এর section 6AA বিলুপ্ত হইবে।

৬। **Act No. XXI of 1974 এর section 6B এর বিলুপ্তি।**—উক্ত Act এর section 6B বিলুপ্ত হইবে।

৭। **বিশেষ বিধান।**—যে সকল সদস্য জাতীয় বেতন স্কেল, ২০০৫ এর ভিত্তিতে বেতন-ভাতাদি গ্রহণ করিয়াছেন, তাঁহারা ১-৭-২০০৯ তারিখ হইতে এই আইন কার্যকর হইবার পূর্বদিন পর্যন্ত

জাতীয় বেতন স্কেল, ২০০৯ এর Corresponding স্কেলে বেতন-ভাতাদি প্রাপ্য হইবেন।

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অর্পিত সম্পত্তি প্রত্যর্পণ আইন, ২০০১ এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে অর্পিত সম্পত্তি প্রত্যর্পণ আইন, ২০০১ (২০০১ সনের ১৬ নং আইন) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্বারা নিম্নরূপ আইন করা হইল ঃ—

১। সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।—(১) এই আইন অর্পিত সম্পত্তি প্রত্যর্পণ (দ্বিতীয় সংশোধন) আইন, ২০১২ নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। ২০০১ সনের ১৬ নং আইনের ধারা ২ এর সংশোধন।—অর্পিত সম্পত্তি প্রত্যর্পণ আইন, ২০০১ (২০০১ সনের ১৬ নং আইন), অতঃপর উক্ত আইন বলিয়া উল্লিখিত, এর ধারা ২ এর—

(ক) দফা (ত) ও দফা (থ) এর পরিবর্তে নিম্নরূপ দফা (ত) ও দফা (থ) প্রতিস্থাপিত হইবে, যথা ঃ—

"(ত) "ক তফসিল" অর্থ এই ধারার দফা (ঞ) তে বর্ণিত সম্পত্তি;

(থ) "খ তফসিল" অর্থ এই ধারার দফা (ক) তে বর্ণিত সম্পত্তি এবং কোন তালিকামূলে অর্পিত সম্পত্তি হিসেবে ঘোষিত হইয়াছে বা তালিকায় অন্তর্ভুক্ত হইয়াছে বা ছূড়ান্তভাবে প্রকাশিত জরিপে অর্পিত সম্পত্তি হিসেবে রেকর্ডভুক্ত হইয়াছে কিন্তু 'ক' তফসিলের অন্তর্ভুক্ত নয় এইরূপ সম্পত্তি;"; এবং

(খ) দফা (থ) এর পর নিম্নরূপ নূতন দফা (দ) সংযোজিত হইবে, যথা ঃ—

"(দ) "তফসিল" অর্থ এই আইনের অধীন সরকারি গেজেটে প্রজ্ঞাপন দ্বারা প্রকাশিত 'ক' ও 'খ' তফসিলে বর্ণিত সম্পত্তি তালিকা।"।

৩। ২০০১ সনের ১৬ নং আইনের ধারা ৯ এর সংশোধন।—উক্ত আইনের ধারা ৯ এর—

(ক) উপ-ধারা (১) এ উল্লিখিত "মৌজা ভিত্তিক" শব্দের পর "উপজেলা বা থানা বা" শব্দগুলি সন্নিবেশিত হইবে;

(খ) উপ-ধারা (১) এর প্রান্তস্থিত দাড়ির পরিবর্তে কোলন প্রতিস্থাপিত হইবে, এবং অতঃপর নিম্নরূপ শর্তাংশ সন্নিবেশিত হইবে, যথা ঃ—

"তবে শর্ত থাকে যে, উক্ত ৩০০ (তিনশত) দিনের মধ্যে তালিকা প্রস্তুত করিয়া সরকারি গেজেটে প্রজ্ঞাপন প্রকাশ করা সম্ভব না হইলে, সরকার সুনির্দিষ্ট কারণ লিপিবদ্ধ করিয়া অতিরিক্ত ৯০ (নব্বই) দিনের মধ্যে তালিকা প্রস্তুত করিয়া সরকারি গেজেটে প্রজ্ঞাপন প্রকাশ করিবে।"।

৪। ২০০১ সনের ১৬ নং আইনের ধারা ৯ক এর সংশোধন।—উক্ত আইনের ধারা ৯ক এর—

(ক) উপ-ধারা (১) এ উল্লিখিত "১২০ (একশত বিশ)" সংখ্যা, বন্ধনী ও শব্দগুলির পরিবর্তে "৩০০ (তিনশত)" সংখ্যা, বন্ধনী ও শব্দ প্রতিস্থাপিত হইবে;

(খ) উপ-ধারা (২) এর—

(অ) "১২০ (একশত বিশ)" সংখ্যা, বন্ধনী ও শব্দগুলির পরিবর্তে "৩০০ (তিনশত)" "সংখ্যা, বন্ধনী ও শব্দ প্রতিস্থাপিত হইবে;

(আ) "মতামত ও সুপারিশসমূহ" শব্দগুলির পরিবর্তে "সিদ্ধান্ত" শব্দটি প্রতিস্থাপিত হইবে; এবং

(ই) প্রান্তস্থিত দাড়ির পরিবর্তে কোলন প্রতিস্থাপিত হইবে, এবং অতঃপর নিম্নরূপ শর্তাংশ সন্নিবেশিত হইবে, যথা ঃ—

"তবে শর্ত থাকে যে, উক্ত ৩০০ (তিনশত) দিনের মধ্যে আবেদনসমূহ যাচাই-বাছাইপূর্বক

সিদ্ধান্ত প্রদান করা সম্ভব না হইলে, জেলা কমিটি কারণ লিপিবদ্ধ করিয়া অতিরিক্ত ৯০ (নব্বই) দিনের মধ্যে আবেদনসমূহ যাচাই-বাছাইপূর্বক সিদ্ধান্ত প্রদান করিবে এবং তৎসম্পর্কে সরকারকে লিখিতভাবে অবহিত করিবেঃ

আরও শর্ত থাকে যে, উক্ত বর্ধিত ৯০ (নব্বই) দিনের মধ্যেও যদি আবেদনসমূহ যাচাই-বাছাইপূর্বক সিদ্ধান্ত প্রদান করা সম্ভব না হয়, তাহা হইলে জেলা কমিটি উহার কারণ লিপিবদ্ধ করিয়া আবেদনসমূহ যাচাই-বাছাইপূর্বক সিদ্ধান্ত প্রদানের জন্য সর্বশেষ আরো ৬০ (ষাট) দিন সময় বর্ধিত করিতে পারিবে এবং এইরূপ সময় বর্ধিতকরণ সম্পর্কে সরকারকে লিখিতভাবে অবহিত করিবে।";

(গ) উপ-ধারা (৩) এর পরিবর্তে নিম্নরূপ উপ-ধারা (৩) প্রতিস্থাপিত হইবে, যথা ঃ—

"(৩) জেলা কমিটি কর্তৃক প্রদত্ত সিদ্ধান্ত প্রাপ্তির তারিখ হইতে ৩০ (ত্রিশ) দিনের মধ্যে উহা বাস্তবায়নের জন্য জেলা প্রশাসক সংশ্লিষ্ট সকলকে প্রয়োজনীয় নির্দেশনা প্রদান করিবেন।";

(ঘ) উপ-ধারা (৪) এ উল্লিখিত "মতামত/সুপারিশে" শব্দগুলি ও চিহ্নের পরিবর্তে "সিদ্ধান্তে" শব্দটি প্রতিস্থাপিত হইবে;

(ঙ) উপ-ধারা (৫) এর—

(অ) "১২০ (একশত বিশ)" সংখ্যা, বন্ধনী ও শব্দগুলির পরিবর্তে "৩০০ (তিনশত)" সংখ্যা, বন্ধনী ও শব্দ প্রতিস্থাপিত হইবে; এবং

(আ)প্রান্তস্থিত দাড়ির পরিবর্তে কোলন প্রতিস্থাপিত হইবে, এবং অতঃপর নিম্নরূপ শর্তাংশ সন্নিবেশিত হইবে, যথা ঃ

"তবে শর্ত থাকে যে, উক্ত ৩০০ (তিনশত) দিনের মধ্যে আবদেনসমূহ শুনানীপূর্বক সিদ্ধান্ত প্রদান করা সম্ভব না হইলে, কেন্দ্রীয় কমিটি কারণ লিপিবদ্ধ করিয়া অতিরিক্ত ৬০ (ষাট) দিনের মধ্যে আবেদনসমূহ শুনানীপূর্বক সিদ্ধান্ত প্রদান করিবে এবং তৎসম্পর্কে সরকারকে লিখিতভাবে অবহিত করিবেঃ

আরও শর্ত থাকে যে, উক্ত বর্ধিত ৬০ (ষাট) দিনের মধ্যে যদি শুনানীপূর্বক সিদ্ধান্ত প্রদান করা সম্ভব না হয়, তাহা হইলে কেন্দ্রীয় কমিটি উহার কারণ লিপিবদ্ধ করিয়া আবেদনসমূহ শুনানীপূর্বক সিদ্ধান্ত প্রদানের জন্য সর্বশেষ আরো ৩০ (ত্রিশ) দিন সময় বর্ধিত করিতে পারিবে এবং এইরূপ সময় বর্ধিতকরণ সম্পর্কে সরকারকে লিখিতভাবে অবহিত করিবে।";

(চ) উপ-ধারা (৬) এর পর নিম্নরূপ নূতন উপ-ধারা (৭) সংযোজিত হইবে, যথা ঃ—

"(৭) ধারা ৬ এ উল্লিখিত কোন সম্পত্তি খ তফসিলে অন্তর্ভুক্ত হইয়া থাকিলে সংশ্লিষ্ট স্বার্থবান ব্যক্তি জেলা কমিটি বা ট্রাইব্যুনালের নিকট উক্ত সম্পত্তি অর্পিত সম্পত্তির তালিকা হইতে অবমুক্তির জন্য তাহার দাবির সমর্থনে সকল কাগজপত্র আবেদনের সহিত সংযুক্ত করিয়া উক্তরূপ অন্তর্ভুক্তির ৩০০ (তিনশত) দিনের মধ্যে আবেদন করিতে পারিবেন।"

৫। ২০০১ সনের ১৬ নং আইনের ধারা ১০ এর সংশোধন।—উক্ত আইনের ধারা ১০ এর—

(ক) উপান্তটীকায় "প্রত্যর্পণযোগ্য" শব্দটির পরিবর্তে "অর্পিত" শব্দটি প্রতিস্থাপিত হইবে;

(খ) উপ-ধারা (১) এ উল্লিখিত—

(অ) "প্রত্যর্পণযোগ্য" শব্দটির পরিবর্তে "ধারা ৯ এর অধীন গেজেটে প্রকাশিত ক তফসিলভুক্ত অর্পিত" শব্দগুলি ও সংখ্যা প্রতিস্থাপিত হইবে;

(আ) "১২০ (একশত বিশ)" সংখ্যা, বন্ধনী ও শব্দগুলির পরিবর্তে "৩০০ (তিনশত)" সংখ্যা, বন্ধনী ও শব্দ প্রতিস্থাপিত হইবে;

(গ) উপ-ধারা (৭) এর পরিবর্তে নিম্নরূপ উপ-ধারা (৭) প্রতিস্থাপিত হইবে, যথা ঃ—

"(৭) এই আইনের অধীনে কোন আবেদন প্রাপ্তির ৩০০ (তিনশত) দিনের মধ্যে ট্রাইব্যুনাল উহার রায় প্রদান করিবেঃ

তবে শর্ত থাকে যে, কোন অনিবার্য কারণে উক্ত মেয়াদের মধ্যে কোন আবেদন নিষ্পত্তি করা সম্ভব

না হইলে, ট্রাইব্যুনাল কারণ লিপিবদ্ধ করিয়া অতিরিক্ত ৬০ (ষাট) দিনের মধ্যে আবেদন নিষ্পত্তি করিতে পারিবে এবং তৎসম্পর্কে সুপ্রীম কোর্টকে লিখিতভাবে অবহিত করিবে, যাহার একটি অনুলিপি সরকারের নিকট প্রেরণ করিতে হইবে;

আরো শর্ত থাকে যে, উল্লিখিত বর্ধিত সময়ের মধ্যেও যদি যুক্তিসঙ্গত কোন কারণে কোন আবেদন নিষ্পত্তি করা সম্ভব না হয়, তাহা হইলে ট্রাইব্যুনাল উহার কারণ লিপিবদ্ধ করিয়া আবেদনটি নিষ্পত্তির জন্য সর্বশেষ আরো ৩০ (ত্রিশ) দিন সময় বর্ধিত করিতে পারিবে এবং এইরূপ সময় বর্ধিতকরণ সম্পর্কে সুপ্রীম কোর্টকে লিখিতভাবে অবহিত করিবে, যাহার একটি অনুলিপি সরকারের নিকট প্রেরণ করিতে হইবে।";

(ঘ) উপ-ধারা (১০) এর—

(অ) দফা (ক) তে উল্লিখিত "৭ (সাত)" সংখ্যা, বন্ধনী ও শব্দের পরিবর্তে "৩০ (ত্রিশ)" সংখ্যা, বন্ধনী ও শব্দ এবং "১৫ (পনের)" সংখ্যা, বন্ধনী ও শব্দের পরিবর্তে "৩০ ত্রিশ)" সংখ্যা, বন্ধনী ও শব্দ প্রতিস্থাপিত হইবে; এবং

(আ) দফা (খ) তে উল্লিখিত "১৫ (পনের)" সংখ্যা, বন্ধনী ও শব্দের পরিবর্তে "৩০ (ত্রিশ)" সংখ্যা বন্ধনী ও শব্দ প্রতিস্থাপিত হইবে।

৬। ২০০১ সনের ১৬ নং আইনের ধারা ১৫ এর সংশোধন।—উক্ত আইনের ধারা ১৫ এর উপ-ধারা (১) এ উল্লিখিত "১৮০ (একশত আশি)" সংখ্যা, বন্ধনী ও শব্দগুলির পরিবর্তে "৩০০ (তিনশত)" সংখ্যা বন্ধনী ও শব্দ প্রতিস্থাপিত হইবে।

৭। ২০০১ সনের ১৬ নং আইনের ধারা ১৭ এর সংশোধন।—উক্ত আইনের ধারা ১৭ এর দফা (ক) তে উল্লিখিত "ধারা ১০ এর" শব্দ ও সংখ্যাগুলির পরিবর্তে "ধারা ৯ক এর উপ-ধারা (১) বা ধারা ১০ এর" শব্দগুলি, সংখ্যাগুলি ও বন্ধনীসমূহ প্রতিস্থাপিত হইবে।

৮। ২০০১ সনের ১৬ নং আইনের ধারা ১৮ এর—

(ক) উপ-ধারা (২) এর—

(অ) দফা (ক) তে উল্লিখিত "ধারা ১০" শব্দ ও সংখ্যার পরিবর্তে "ধারা ৯ক এর উপ-ধারা (১) বা ধারা ১০" শব্দগুলি, সংখ্যাগুলি ও বন্ধনী প্রতিস্থাপিত হইবে।

(আ) দফা (গ) তে উল্লিখিত "ধারা ১০(৩)" এর পরিবর্তে "ধারা ৯ক এর উপ-ধারা (১) বা ধারা ১০(৩)" শব্দগুলি, সংখ্যাগুলি ও বন্ধনীগুলি প্রতিস্থাপিত হইবে; এবং

(খ) উপ-ধারা (৫) এর পরিবর্তে নিম্নরূপ উপ-ধারা (৫) প্রতিস্থাপিত হইবে, যথা ঃ—

"(৫) আপীল ট্রাইব্যুনাল উভয় পক্ষকে শুনানীর সুযোগ প্রদানপূর্বক আপীল দায়েরের ৩০০ (তিনশত) দিনের মধ্যে উহার রায় প্রদান করিবেঃ

তবে শর্ত থাকে যে, কোন অনিবার্য কারণে উক্ত মেয়াদের মধ্যে কোন আপীল নিষ্পত্তি করা সম্ভব না হইলে, আপীল ট্রাইব্যুনাল কারণ লিপিবদ্ধ করিয়া অতিরিক্ত ৬০ (ষাট) দিনের মধ্যে আপীল নিষ্পত্তি করিতে পারিবে এবং তৎসম্পর্কে সুপ্রীম কোর্টকে লিখিতভাবে অবহিত করিবে, যাহার একটি অনুলিপি সরকারের নিকট প্রেরণ করিতে হইবেঃ

আরো শর্ত থাকে যে, উল্লিখিত বর্ধিত সময়ের মধ্যেও যদি যুক্তিসঙ্গত কোন কারণে কোন আপীল নিষ্পত্তি করা সম্ভব না হয়, তাহা হইলে আপীল ট্রাইব্যুনাল উহার কারণ লিপিবদ্ধ করিয়া আবেদনটি নিষ্পত্তির জন্য সর্বশেষ আরো ৩০ (ত্রিশ) দিন সময় বর্ধিত করিতে পারিবে এবং এইরূপ সময় বর্ধিত করণ সম্পর্কে সুপ্রীম কোর্টকে লিখিতভাবে অবহিত করিবে, যাহার একটি অনুলিপি সরকারের নিকট প্রেরণ করিতে হইবে।"।

৯। ২০০১ সনের ১৬ নং আইনের ধারা ২৩ এর সংশোধন।—উক্ত আইনের ধারা ২৩ এর উপ-ধারা (৩) এ উল্লিখিত "ধারা ১০" শব্দ ও সংখ্যার পরিবর্তে "ধারা ৯ক এর উপ-ধারা (১) বা ধারা ১০ এর" শব্দগুলি, সংখ্যাগুলি ও বন্ধনী প্রতিস্থাপিত হইবে।

১০। ২০০১ সনের ১৬ নং আইনের ধারা ২৬ এর সংশোধন।—উক্ত আইনের ধারা ২৬ এর উপ-ধারা (১) এর পরিবর্তে নিম্নরূপ উপ-ধারা (১) প্রতিস্থাপিত হইবে, যথা ঃ—

"(১) এই আইনের অধীন আবেদনের জন্য নির্ধারিত সময়সীমার মধ্যে আবেদন করা না হইলে বা নির্ধারিত সময়ের মধ্যে আপীল দায়ের করা না হইলে বা আপীলে দাবী প্রমাণিত না হইলে সংশ্লিষ্ট অর্পিত সম্পত্তি সরকারি সম্পত্তি হিসেবে গণ্য হইবে।"।

১১। ২০০১ সনের ১৬ নং আইনের ধারা ৩২ এর সংশোধন।—উক্ত আইনের ধারা ৩২ এর—

(ক) দফা (ক) তে উল্লিখিত "ট্রাইব্যুনাল" শব্দের পূর্বে "জেলা কমিটি, কেন্দ্রীয় কমিটি," শব্দগুলি ও কমাগুলি সন্নিবেশিত হইবে;

(খ) দফা (খ) তে উল্লিখিত "ইচ্ছাকৃতভাবে" শব্দের পর "জেলা কমিটি, কেন্দ্রীয় কমিটি," শব্দগুলি ও কমাগুলি সন্নিবেশিত হইবে; এবং

(গ) দফা (গ) তে উল্লিখিত "ট্রাইব্যুনাল" শব্দের পূর্বে "জেলা কমিটি, কেন্দ্রীয় কমিটি," শব্দগুলি ও কমাগুলি সন্নিবেশিত হইবে।

১২। রহিতকরণ ও হেফাজত।—(১) অর্পিত সম্পত্তি প্রত্যর্পণ (দ্বিতীয় সংশোধন) অধ্যাদেশ, ২০১২ (২০১২ সনের ০৭ নং অধ্যাদেশ) এতদ্দ্বারা রহিত করা হইল।

(২) উক্তরূপ রহিতকরণ সত্ত্বেও রহিত অধ্যাদেশের অধীন কৃত কোন কার্যক্রম বা গৃহীত কোন ব্যবস্থা এই আইনের অধীন কৃত বা গৃহীত হইয়াছে বলিয়া গণ্য হইবে।

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হিন্দু ধর্মাবলম্বীদের শাস্ত্রীয় বিবাহের দালিলিক প্রমাণ সুরক্ষার লক্ষ্যে হিন্দু বিবাহ নিবন্ধন সম্পর্কিত বিধানাবলী প্রণয়নের উদ্দেশ্যে প্রণীত আইন

যেহেতু হিন্দু ধর্মাবলম্বীদের শাস্ত্রীয় বিবাহের দালিলিক প্রমাণ সুরক্ষার লক্ষ্যে হিন্দু বিবাহ নিবন্ধন সম্পর্কিত বিধানাবলী প্রণয়ন করা সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্দ্বারা নিম্নরূপ আইন করা হইল ঃ—

১। সংক্ষিপ্ত শিরোনাম, প্রয়োগ ও প্রবর্তন।—(১) এই আইন হিন্দু বিবাহ নিবন্ধন আইন, ২০১২ নামে অভিহিত হইবে।

(২) ইহা নাগরিকত্ব নির্বিশেষে বাংলাদেশে বসবাসরত সকল হিন্দু ধর্মাবলম্বীর জন্য প্রযোজ্য হইবে।

(৩) সরকার, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, যে তারিখ নির্ধারণ করিবে সেই তারিখে ইহা কার্যকর হইবে।

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

(ক) "হিন্দু" অর্থ বাংলাদেশের হিন্দু ধর্মাবলম্বী কোন নাগরিক;

(খ) "হিন্দু বিবাহ নিবন্ধক" অর্থ ধারা ৪ এর অধীন নিয়োগপ্রাপ্ত হিন্দু বিবাহ নিবন্ধক;

(গ) "হিন্দু বিবাহ" অর্থ হিন্দু ধর্মাবলম্বীদের মধ্যে সম্পন্ন ও হিন্দু শাস্ত্র মোতাবেক প্রচলিত প্রথা ও রীতি অনুযায়ী অনুমোদিত বিবাহ;

(ঘ) "নির্ধারিত" অর্থ বিধি দ্বারা নির্ধারিত;

(ঙ) "বিধি" অর্থ এই আইনের অধীন প্রণীত বিধি;

(চ) "জেলা রেজিস্ট্রার" অর্থ Registration Act, 1908 এর অধীন নিযুক্ত রেজিস্ট্রার বা তদ্‌কর্তৃক ক্ষমতাপ্রাপ্ত কোন কর্মকর্তা।

৩। হিন্দু বিবাহ নিবন্ধন।—(১) অন্য কোন আইন, প্রথা ও রীতি-নীতিতে যাহা কিছুই থাকুক না কেন, হিন্দু বিবাহের দালিলিক প্রমাণ সুরক্ষার উদ্দেশ্যে হিন্দু বিবাহ, বিধি দ্বারা নির্ধারিত পদ্ধতিতে, নিবন্ধন করা যাইবে।

(২) উপ-ধারা (১) এ যাহা কিছুই থাকুক না কেন, কোন হিন্দু বিবাহ এই আইনের অধীন নিবন্ধিত না হইলেও উহার কারণে কোন হিন্দু শাস্ত্র অনুযায়ী সম্পন্ন বিবাহের বৈধতা ক্ষুণ্ন হইবে না।

৪। বিবাহ নিবন্ধক নিয়োগ।—(১) এই আইনের অধীন

হিন্দু বিবাহ নিবন্ধনের উদ্দেশ্যে, সরকার, সিটি কর্পোরেশন এলাকার ক্ষেত্রে তদ্‌কর্তৃক সময় সময় নির্ধারিত এলাকা, এবং সিটি কর্পোরেশন বহির্ভূত এলাকার ক্ষেত্রে প্রতিটি উপজেলা এলাকায় একজন ব্যক্তিকে হিন্দু বিবাহ নিবন্ধক হিসেবে নিয়োগ প্রদান করিবে।

(২) উপ-ধারা (১) এর অধীন নিয়োগপ্রাপ্ত কোন ব্যক্তি এই আইনের উদ্দেশ্য পূরণকল্পে, হিন্দু বিবাহ নিবন্ধক হিসাবে অভিহিত হইবেন।

(৩) হিন্দু বিবাহ নিবন্ধক হিসেবে নিয়োগ প্রাপ্তির যোগ্যতা, অধিক্ষেত্র, হিন্দু বিবাহ নিবন্ধক কর্তৃক আদায়যোগ্য ফিস এবং তৎসংশ্লিষ্ট অন্যান্য বিষয়াদি বিধি দ্বারা নির্ধারিত হইবে।

৫। **হিন্দু বিবাহ নিবন্ধনের ক্ষেত্রে বিধি-নিষেধ।**—অন্য কোন আইনে যাহা কিছুই থাকুক না কেন, ২১ (একুশ) বৎসরের কম বয়স্ক কোন হিন্দু পুরুষ বা ১৮ (আঠার) বৎসরের কম বয়স্ক কোন হিন্দু নারী বিবাহ বন্ধনে আবদ্ধ হইলে উহা এই আইনের অধীন নিবন্ধনযোগ্য হইবে না।

৬। **বিবাহ নিবন্ধিকরণ পদ্ধতি।**—(১) হিন্দু ধর্ম, রীতি-নীতি ও আচার-অনুষ্ঠান অনুযায়ী হিন্দু বিবাহ সম্পন্ন হওয়ার পর উক্ত বিবাহের দালিলিক প্রমাণ সুরক্ষার উদ্দেশ্যে, বিবাহের যে কোন পক্ষের, নির্ধারিত পদ্ধতিতে, আবেদনের প্রেক্ষিতে হিন্দু বিবাহ নিবন্ধক, নির্ধারিত পদ্ধতিতে বিবাহ নিবন্ধন করিবেন।

(২) এই আইন কার্যকর হইবার পূর্বে হিন্দু ধর্ম, রীতি-নীতি ও আচার-অনুষ্ঠান অনুযায়ী সম্পন্নকৃত কোন বিবাহের যে কোন পক্ষের, নির্ধারিত পদ্ধতিতে, আবেদনের প্রেক্ষিতে এই আইনের বিধান অনুসরণক্রমে নিবন্ধন করা যাইবে।

৭। **বিবাহ নিবন্ধন ফিস, ইত্যাদি।**—সরকার, সময় সময়, বিধি দ্বারা, হিন্দু বিবাহ নিবন্ধন ফিস, নিবন্ধন বহি পরিদর্শন ফিস এবং প্রতিলিপি সরবরাহের নিমিত্ত প্রয়োজনীয় ফিস নির্ধারণ করিতে পারিবে।

৮। **বিবাহ নিবন্ধকের দায়িত্ব পালন সরকারি চাকুরী নহে।**—ধারা ৪ এর অধীন হিন্দু বিবাহ নিবন্ধক হিসেবে নিয়োগ প্রাপ্তি বা হিন্দু বিবাহ নিবন্ধকের দায়িত্ব পালন সরকারি চাকরি হিসেবে গণ্য হইবে না।

৯। **সবেতনে চাকরি গ্রহণের ক্ষেত্রে বাধা-নিষেধ।**—কোন হিন্দু বিবাহ নিবন্ধক তাহাকে যে এলাকার জন্য নিয়োগ প্রদান করা হইয়াছে সেই এলাকার বিধি দ্বারা নির্ধারিত প্রতিষ্ঠান ব্যতীত অন্য কোথাও সবেতনে চাকরি করিতে পারিবেন না।

১০। **নিবন্ধন বহিসমূহ পরিদর্শন।**—কোন ব্যক্তি নির্ধারিত ফিস পরিশোধ সাপেক্ষে হিন্দু বিবাহ নিবন্ধন বহি পরিদর্শন বা উহাতে অন্তর্ভুক্ত কোন বিবাহ নিবন্ধনের প্রতিলিপি সংগ্রহ করিতে পারিবেন।

১১। **নিবন্ধন বহি সংরক্ষণ, ইত্যাদি।**—(১) প্রত্যেক হিন্দু বিবাহ নিবন্ধক নির্ধারিত ফরম ও পদ্ধতিতে নিবন্ধন বহি সংরক্ষণ করিবেন।

(২) প্রত্যেক হিন্দু বিবাহ নিবন্ধক প্রত্যেক বৎসরের শুরুতে উপ-ধারা (১) এ উল্লিখিত নিবন্ধন বহিতে নতুন ক্রমিক নম্বর উল্লেখপূর্বক বিবাহ নিবন্ধন করিবেন।

(৩) প্রত্যেক হিন্দু বিবাহ নিবন্ধক তদ্‌কর্তৃক রক্ষিত নিবন্ধন বহি লেখা শেষ না হওয়া পর্যন্ত নিরাপদ স্থানে সংরক্ষণ করিবেন এবং তিনি স্বীয় এলাকা ত্যাগ করিলে, তাহার নিয়োগ বাতিল বা স্থগিত করা হইলে তাৎক্ষণিকভাবে উক্ত নিবন্ধন বহি ও অন্যান্য কাগজপত্র, নিরাপত্তা হেফাজতের জন্য, সংশ্লিষ্ট জেলা রেজিস্ট্রারের নিকট জমা প্রদান করিবেন।

১২। **বিবাহ নিবন্ধনের প্রতিলিপি প্রদান।**—(১) এই আইনের অধীন হিন্দু বিবাহ নিবন্ধনের ক্ষেত্রে বিবাহের পক্ষদ্বয় বা তদ্‌কর্তৃক মনোনীত প্রতিনিধি কর্তৃক আবেদনের প্রেক্ষিতে হিন্দু বিবাহ নিবন্ধক বিধি দ্বারা নির্ধারিত সময়ের মধ্যে উক্ত বিবাহ নিবন্ধনের প্রতিলিপি সরবরাহ করিবেন।

(২) উপ-ধারা (১) এর অধীন বিবাহ নিবন্ধনের প্রতিলিপি গ্রহণের জন্য নির্ধারিত ফিস প্রদেয় হইবে।

১৩। **তত্ত্বাবধান, নিয়ন্ত্রণ, ইত্যাদি।**—(১) প্রত্যেক হিন্দু বিবাহ নিবন্ধক সংশ্লিষ্ট জেলার জেলা রেজিস্ট্রারের তত্ত্বাবধান ও নিয়ন্ত্রণে থাকিয়া তাহার দাপ্তরিক ও অর্পিত দায়িত্ব সম্পন্ন করিবেন।

(২) হিন্দু বিবাহ নিবন্ধকগণের উপর মহাপরিদর্শক, নিবন্ধন এর সাধারণ তত্ত্বাবধানের ক্ষমতা থাকিবে।

(৩) জেলা রেজিস্ট্রার তাহার স্থানীয় অধিক্ষেত্র এলাকায় যে কোন সময় যে কোন হিন্দু বিবাহ নিবন্ধকের কার্যালয় পরিদর্শন করিতে পারিবেন।

ব্যাখ্যাঃ এই ধারার উদ্দেশ্য পূরণকল্পে "মহাপরিদর্শক" অর্থ

Registration Act, 1908 এর অধীন নিযুক্ত মহাপরিদর্শক নিবন্ধন, বা তদকর্তৃক ক্ষমতাপ্রাপ্ত কোন কর্মকর্তা।

১৪। নিয়োগ স্থগিত বা বাতিলকরণ।—সরকারের নিকট যদি সন্তোষজনকভাবে এই মর্মে প্রতীয়মান হয় যে, কোন হিন্দু বিবাহ নিবন্ধক তাহার দায়িত্ব পালনে কোন অসদাচরণের জন্য দায়ী অথবা তাহার কর্তব্য পালনে অসমর্থ বা শারীরিকভাবে অক্ষম, তাহা হইলে, সরকার লিখিত আদেশ দ্বারা, তাহার নিয়োগ অনধিক দুই বৎসরের জন্য স্থগিত বা বাতিল করিতে পারিবেঃ

তবে শর্ত থাকে, হিন্দু বিবাহ নিবন্ধককে যথাযথ কারণ দর্শানোর সুযোগ প্রদান না করিয়া অনুরূপ কোন আদেশ প্রদান করা যাইবে না।

১৫। বিধি প্রণয়নের ক্ষমতা।—এই আইনের উদ্দেশ্য পূরণকল্পে, সরকার সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, বিধি প্রণয়ন করিতে পারিবে।

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Registration Act, 1908 এর অধিকতর সংশোধকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে Registration Act, 1908 (Act No. XVI of 1908) এর অধিকতর সংশোধন করা সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্দ্বারা নিম্নরূপ আইন করা হইল ঃ—

১। সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।—(১) এই আইন Registration (Amendment) Act, 2012 নামে অভিহিত হইবে।

(২) সরকার, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, যে তারিখ নির্ধারণ করিবে সেই তারিখে এই আইন কার্যকর হইবে।

২। Act No. XVI of 1908 এর section 17 এর sub-section (1) এ নূতন clause (aaa) এর সন্নিবেশ।—Registration Act, 1908 (Act No. XVI of 1908), অতঃপর উক্ত Act বলিয়া উল্লিখিত, এর section 17 এর sub-section (1) এর clause (aa) এর পর নিম্নরূপ নূতন clause (aaa) সন্নিবেশিত হইবে, যথাঃ—

"(aaa) declaration of gift under the Hindu, Christian and Buddhist Personal Law;"।

৩। Act No. XVI of 1908 এর section 78A এ নূতন clause (bb) এর সন্নিবেশ।— উক্ত Act এর section 78A এর clause (b) এর পর নিম্নরূপ clause (bb) সন্নিবেশিত হইবে, যথা ঃ—

"(bb) registration fee payable for registration of a declaration of gift of any immovable property made under the Hindu, Christian and Buddhist Personal Law, if such gift is permitted by their Personal Law, shall be one hundred taka irrespective of the value of the property, provided such gift is made between spouses, parents and children, grand parents and grand children, full brothers, full sisters and, full brothers and full sisters;"।

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Grameen Bank Ordinance, 1983 (Ordinance No. XLVI of 1983) এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে Grameen Bank Ordinance, 1983 (Ordinance No. XLVI of 1983) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্বারা নিম্নরূপ আইন করা হইল ঃ—

১। সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।—(১) এই আইন Grameen Bank (Amendment) Act, 2012 নামে অভিহিত ইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। **Ordinance No. XLVI of 1983 এর section 14 এর সংশোধন।**—Grameen Bank Ordinance, 1983 (Ordinance No. XLVI of 1983) এর section 14 এর sub-section (1), (2) ও (3) এর পরিবর্তে নিম্নরূপ sub-section (1),(2) ও (3) প্রতিস্থাপিত হইবে, যথা ঃ—

"(1) There shall be a Managing Director of the Bank who shall be appointed by the Board with the prior approval of Bangladesh Bank from the panel of the three candidates as recommended by the Selection Committee in accordance with the provisions of sub-sections (2) and (3).

(2) The Chairman in consultation with the Board shall constitute a Selection Committee of not less than three and not more than five members for the purpose of selecting a candidate for appointment as Managing Director.

(3) The Selection Committee shall recommend a panel of three candidates for appointment as Managing Director and preference shall be given to persons having knowledge and experience in rural economy and finance or in the field of microfinance."

৩। **রহিতকরণ ও হেফাজতকরণ।**—(১) Grameen Bank (Amendment) Ordinance, 2012 (অধ্যাদেশ নং ০৬, ২০১২), এতদ্বারা রহিত করা হইল।

(২) উক্তরূপ রহিত হওয়া সত্ত্বেও রহিত অধ্যাদেশের অধীন গৃহীত কোন কার্যক্রম, দায়েরকৃত কোন মামলা বা গৃহীত কোন কার্যধারা অনিষ্পন্ন থাকিলে উহা এইরূপে নিষ্পন্ন হইবে যেন উহা এই আইনের অধীন দায়েরকৃত বা গ্রহীত হইয়াছে।

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International Crimes (Tribunals) Act, 1973 এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে International Crimes (Tribunals) act, 1973 (Act No. XIX of 1973) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্দ্বারা নিম্নরূপ আইন করা হইল ঃ—

১। **সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।**—(১) এই আইন International Crimes (Tribunals) (Second Amendment) act, 2012 নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। **Act No. XIX of 1973 section 10A এর সন্নিবেশ।**—International Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973), অতঃপর উক্ত Act বলিয়া উল্লিখিত, এর section 10 এর পর নিম্নরূপ নূতন section 10A সন্নিবেশিত হইবে, যথা ঃ—

"10A. Trial in absentia—(1) Where a proceeding is commenced under sub-section (1) of section 9, the tribunal, before fixing the date for the trial under sub-section (2) of the said section, has reason to believe that the accused person has absconded or concealed himself so that he cannot be producted for trial, may hold the trial in his absence following the procedure as laid down in the Rules of Procedure made under section 22 for such trial.

(2) Where the accused person is tried under sub-section (1), the Tribunal may direct that a Counsel shall be engaged at the expense of the Government to defend the accused person and may also determine the fees to be paid to such Counsel."।