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Local Government (Pourashava) Act (LVIII of 2009)

Section 19(2)(Jha)—In order to be a valid candidate for the Pourashava election, the petitioner

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APPELLATE DIVISION
(Civil)

Md Muzammel Hossain CJ
Surendra Kumar Sinha J
MA Wahhab Miah J
Syed Mahmud Hossain J
Siddiqur Rahman Miah J
AHM Shamsuddin Choudhury J

Taposh Malaker.....Petitioner

vs

Government of Bangladesh, Represented by the Secretary, Ministry of (LGRD) and others.....Respondents*

Judgment
May 7th, 2013.

Local Government (Pourashava) Act (LVIII of 2009)
Section 19(2)(Jha)

In order to be a valid candidate for the Pourashava election, the petitioner must not be a defaulter on the date of submission of the nomination paper. The petitioner is a defaulter within the meaning of section 19(2) (Jha) of the Act. .....(9)

Md Khurshid Alam Khan, Advocate, instructed by Md Zahirul Islam Advocate-on-Record—For the Petitioner.

None Represented—For the Respondents.

*Civil Petition for Leave to Appeal No. 186 of 2011.

(From the judgment and order dated 6-1-2011 passed by the High Court Division in Writ Petition No. 10044 of 2010).

Judgment

Syed Mahmud Hossain J: This civil petition for leave to appeal is directed against the order dated 6-1-2011 passed by the High Court Division in Writ Petition No.10044 of 2010 summarily rejecting the Application

2. The facts, leading to the filing of this petition, in brief, are :

The leave petitioner as the writ-petitioner filed Writ Petition No.10044 of 2010 before the High Court Division challenging

Order No.2 dated 22-12-2010 passed by respondent No.2, Deputy Commissioner, Bogra and Appellate Authority, Pourashava Election-10, Bogra dismissing the appeal and affirming the order dated 15-12-2010 passed by respondent No.3, Upazilla Nirbahi Officer and Returning Officer rejecting the nomination paper of the writ-petitioner. His case, in short, is that on 13-12-2010, the writ-petitioner submitted his nomination paper before the Returning Officer for the ensuing Pourashava Election of 2010 for the post of Councillor of Ward No. 8 of Sherpur Pourashava. The Returning Officer rejected his nomination paper on the ground that the writ petitioner was disqualified under the provision of section ১৯(২)(খ) of the Local Government (Pourashava) Ain, 2009.

3. Against the order of Returning Officer, the writ-petitioner filed an appeal being Appeal No. 2 dated 16-12-2010 before the Appellate Authority, Pourashava Election, 2010 and Deputy Commissioner, Bogra, who dismissed the appeal affirming the order of the Returning Officer without assigning any cogent reason.

4. Being aggrieved by, and dissatisfied with the order No.2 dated 22-12-2010 passed by respondent No. 2, Deputy Commissioner, Bogra and Appellate Authority, Pourashava Election-2010, Bogra, the petitioner finding no other alternative and for efficacious remedy, filed Writ Petition No.10044 of 2010 before the High Court Division. The learned Judges of the High Court Division by an order dated 6-1-2011 rejected the writ petition summarily.

5. Feeling aggrieved by, and dissatisfied with, the impugned order dated 6-1-2011, the writ petitioner as the leave petitioner has filed this instant civil petition for leave to appeal.

6. Mr Md Khurshid Alam Khan, learned Advocate, appearing on behalf of the leave petitioner, submits that the High Court Division committed an error of law in rejecting summarily the writ petition filed by the petitioner although the petitioner is not a defaulter within the meaning of Local Government (Pourashava) Act, 2009 and, as such, the impugned judgment should be set-aside. He further submits that the petitioner has been elected Commissioner securing huge number of votes and unless leave is granted he will be thrown out of office and, as such, he prays for granting leave to consider whether the petitioner is at all a defaulter.

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

8. Having considered section 19(2) (Jha)of the Local Government (Pourashava) Act, 2009, the High Court Division came to a finding that the exemption provided for in that section is only in respect of agricultural loan and that loan for the purpose of manufacturing handicrafts does not come within the exemption. This finding of the High Court Division is based on proper appreciation of section 19(2)(Jha) of the Local Government (Pourashava) Act, 2009.

9. Mr Md Khurshid Alam Khan, however, admitted that the petitioner repaid the loan the following day of the submission of the nomination paper and, as such, he was not a defaulter on the date of scrutiny of the nomination paper. The submission of the learned Advocate is erroneous. In order to be a valid candidate for the Pourashava election, the petitioner must not be a defaulter on the date of submission of the nomination paper. Given the facts, we find that the petitioner is a defaulter within the meaning of section 19(2) (Jha) of the Local Government (Pourashava) Act, 2009.

10. The findings arrived at and the decision made by the High Court Division having been made on proper appreciation of law and facts do not call for interference.

Accordingly, the leave petition is dismissed.

Ed.

Appellate Division
(Civil)

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

Government of Bangladesh, represented by the Secretary, Ministry of Education and others.....
.....Petitioners

vs

Md Abul Kalam Azad and others
.....Respondents*

Judgment
August 6th, 2012.

Constitution of Bangladesh, 1972
Articles 103(3) and 140(2)

Judgment of the High Court Division is modified and the writ petitioners claim for absorption in the revenue set up will be considered by the petitioners in the light of the guidelines given by this Division. .....(6)

Civil Petition Leave to Appeal No. 1781 of 2011 = 17 BLC (AD) 91 relied on.

Rajik-al-Jalil DAG instructed by Md Shamsul Alam, Advocate-on-Record—For the Petitioners.

Md Aftab Hossain, Advocate-on-Record—For Respondent Nos.1, 4, 6-7 & 8.

None Represented—For Respondent Nos.2-3, 5 & 9-10.

*Civil Petition for Leave to Appeal No. 1400 of 2011.

(From the judgment and order dated 27-1-2011 passed, by the High Court Division in Writ Petition No. 4008 of 2010.)

Judgment

SK Sinha J : This petition at the instance of the writ respondents is against a judgment of the High Court Division in Writ Petition No.4088 of 2010 directing the petitioners to transfer the service of the writ petitioners against the vacant posts under the revenue set up.

2. Facts relevant for the disposal of this petition are thus; the writ petitioners along with others were appointed as sweepers under 53 Thana Education Project Officers. Initially the project was valid till December 1999 but it was subsequently extended under different names and continued until the year 2007. Since 2007, they have been working without any salary. The Ministry of Education has recommended for absorbing the writ petitioners posts in the revenue budget. From the same project 256 post holders were absorbed in the revenue budget. Ultimately by the impugned memo dated 17th March 2009 the Ministry of Establishment declined to transfer the writ petitioners to the revenue budget. Inspite of that the Ministry of Education requested that the sweepers should be transferred to the revenue budget and by its memo dated 9th September, 2009 the intimated the writ petitioners that in view of the memo of the Ministry of Establishment dated 17th March, 2009 transfer of their posts to the revenue, budget would not be considered. It was contended that in project profile, there was provision for transferring the writ petitioners to the revenue set up after conclusion of the project and that since there were 130 vacant posts of sweepers there was no reason for the petitioners not to absorb them in those vacant posts.

3. It was argued on behalf of the petitioners that though the post of 7 sweepers appeared to have been approved by the Ministry of Education, there was no evidence that they had actually been absorbed in those posts; that the appointment letters of the writ petitioners clearly stated the conditions of service to the

effect that they were temporarily appointed against a project and that as such, they could claim to be absorbed as of right in the revenue set up.

4. The High Court Division upon hearing the parties observed that though there is no direction that the persons appointed under the project would be absorbed in the revenue set up after completion of the project, there is indication from annexure-D that they would be absorbed that in the absence of project profile it is not possible for ascertaining the terms upon which the project document refers to the aspect to the revenue set up; that the Ministry of Education has decided to absorb 7 out of 63 persons appointed as sweepers in the same project and thus the writ petitioners could expect that they would be treated in the same way subject to the availability of the posts. The High Court Division then considered an unreported judgment dated 22nd April, 2010 of the High Court Division in Writ Petition No. 849 of 2009, in which, another Division Bench directed to absorb 20 sweepers out of 63 who were appointed at the same time and observed that the Government should not discriminate the writ petitioners in considering their case of transferring their service to the revenue set up.

5. The learned Deputy Attorney-General has taken us to the writ petition, the annexures, the previous judgment of this Division on the same subject matter and submits that since this Division has settled the point on the question of absorption in the revenue budget, who had been appointed in various development projects after reviewing all previous judgments, the judgment of the High Court Division is apparently inconsistent with the views taken by this Division.

6. Admittedly the writ petitioners were appointed on a development project on temporary basis. They claimed their absorption in the revenue set up on the ground that some other sweepers who stand on the same footing have been absorbed in the revenue set up and that here is also recommendation for their absorption in the revenue set up. This Division after reviewing all previous judgments on the question of absorption has given guide lines for absorption in the revenue set up in *Civil Petition No 1781 of 2011* disposed of with 8 other petitions in which cases, the writ petitioners were also appointed in development projects. We cannot take any contrary view in the absence of cogent ground for taking exception from the said views. In view of the above, the judgment of the High Court Division is modified and the writ petitioner's claim for absorption in the revenue set up will be considered by the petitioners in the light of the guidelines given by this Division in the above judgment which are as under:

(i) Whenever any vacancy in LGED is created in the revenue set up it shall consider for absorption of employees or officers of the development projects within the meaning of section 2(ga) of the Rules, 2005, if the project in which s/he is working is completed subject to the condition that such employee or officer has requisite qualifications for the said post.

(ii) Whenever a vacant post is created in the revenue budget, the LGED shall absorb/transfer an employee or officer from the development project mentioned in clause (1) to fill up that post in accordance with Rules of 1985 and the ECNEC's decision dated 10th January, 2008.

(iii) An officer or employee shall be absorbed if s/he was appointed in the development project within the meaning of rule 2(ka) of Rules, 2005 in accordance with the procedures prescribed for appointment in public employment.

(iv) An officer or employee must have requisite qualifications for the post in which he is seeking absorption.

(v) An officer or employee must have continuity in service in the project in which he is working.

(vi) An officer or employee must have satisfactory service record before his case is considered for regularization in the revenue budget.

(vii) If an officer and employee whose rank and status does not relate to the posts advertised by the impugned notifications on the day of its publications, such officer or employee would not be eligible for consideration for absorption.

(viii) The employees and officers who have been working in the development projects mentioned in clause (1) on monthly pay basis would only be eligible for consideration for absorption in the revenue budget.

(ix) Unless, and until vacancies in revenue budget in the LGED are created, the employees and officers of the development projects mentioned in clause (1) cannot claim as of right to be absorbed in the revenue budget.

(x) while considering and selecting an employee or officer of the development project for absorption on the revenue budget, the appointing authority shall maintain strictly the prevailing quota system for employment in the public employment being followed by the Government.

(xi) The LGED shall consider the cases of those working on master roll basis for absorption in the revenue budget by phases if they have requisite qualifications subject to availability of vacancies according to their seniority.

This petition is disposed of with the above observations.

Ed.

APPELLATE DIVISION
(Criminal)

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

Judgment
December 8th, 2011.

Joaharul Islam (Md)...Petitioner

vs

State and anr...
....Respondents*

Code of Criminal Procedure (V of 1898)
Sections 439 and 561A

An order passed by the Sessions Judge or Additional Sessions Judge, as the case may be, under section 439A of the Code is not amenable to the revisional jurisdiction of the High Court Division under section 439 of the Code.

.....(13 & 14)

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

Md Aftab Hossain, Advocate-on-Record—For Respondent No.2.

None Represented.—For the Respondent No.1.

Judgment

Syed Mahmud Hossain J: This criminal petition for leave to appeal is directed against the judgment and order dated 28-2-2010

*Criminal Petition for Leave to Appeal No. 162 of 2010.

(From the judgment and order dated 28-2-2010 passed by the High Court Division in Criminal Revision No. 1182 of 2009)

passed by a Division Bench of the High Court Division in Criminal Revision No. 1182 of 2009 discharging the Rule and affirming the judgment and order dated 28-6-2009 passed the learned Additional Sessions Judge, Second Court, Tangail in Criminal Revision No.5 of 2009 affirming the order dated 3-12-2008 passed by the learned Judicial Magistrate arising out of Complaint Register Case No. 108 of 2007 now pending before the learned Additional Chief Judicial Magistrate Court, Tangail.

2. The facts, leading to the filing of this petition, in short, are:

3. Complainant-respondent No.2 filed a petition of complaint against the accused-leave petitioner bringing in allegations under sections 420/467/408 of the Penal Code alleging that the complainant was appointed a Director of Central Co-operative Bank Ltd in 2001. The accused is a contractor by profession and was elected the President of Tangail Co-operative Bank Ltd. There was a project for construction of a new market at Choi Ani Bazar for which an allocation of Taka 27,00,000 was made. For execution of the project work there was a condition for publishing a tender notice in two national dailies but the accused with the malafide intention did not make such publication. By restoring to; forgery, he showed a false advertisement alleged to have been published in'The Daily Protham Alo' and obtained the work order in his benami. Consequently, respondent No. 1 filed the petition of complaint.

4. On 10-2-2008, the leave petitioner surrendered before the trial Court and obtained bail. After that, leave-petitioner filed an application for discharging him and learned Magistrate rejected the same on 3-12-2008 and also framed charge against him.

5. Against the order of framing of charge, the leave petitioner filed Criminal Revision No.5 of 2009 before the learned Sessions Judge, SecondCourt, Tangail, who by his judgment and order dated 28-6-2009 rejected the revision affirming the order passed by the learned Magistrate dated 3-2-2008.

6. Being aggrieved by and dissatisfied with the judgment and order passed by the learned Sessions Judge, Second Court, Tangail, the accused filed a criminal revisional application and obtained a Rule in Criminal Revision No. 11 82 of 2009 and also an interim order staying all further proceedings of Complaint Register Case No.108 of 2007 by the order dated 9-8-2009. The learned Judges of the High Court Division by the judgment and order dated 28-2-2010 discharged the Rule.

7. Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the leave petitioner has preferred this criminal petition for leave to appeal before this Division.

8. Mr Md Nurul Islam Bhuiyan, learned Advocate-on-Record, appearing on behalf of the leave petitioner, submits that the case arose out a tender and that the decision of floating the lender was taken by the Board and not the President of Co-operative Bank and, as, such, there is no individual liability with regard to the tender process and that without taking into consideration the above fact the High Court Division mechanically affirmed the judgment and order of the learned Additional Sessions Judge and, as, such, the impugned judgment should be set-aside. He also submits that unless a *prima facie* case is found out by the Criminal Investigation Department (CID) by examining the papers, the learned Magistrate cannot

take cognizance of the offence against the leave petitioner and that the learned Additional Sessions Judge illegally concurred with the order of the learned Judicial Magistrate, who framed charge against the leave petitioner and that the High Court Division affirmed the judgment of the learned Additional Sessions Judge without looking into the relevant provision of law and, as, such, the impugned judgment should be set-aside.

9. Mr Md Aftab Hossain, learned Advocate-on-Rccord, appearing on behalf of respondent No.2, supports the impugned judgment delivered by theHigh Court Division.

10. We have considered the impugned judgment and other papers on record.The High Court Division noticed that the complainant brought some allegations against the petitioner and that those allegations could only be settled on adducing evidence and that the learned Magistrate was competent to do that. The High Court Division found that on consideration of materials on record,the learned Magistrate framed charge against the petitioner rejecting the application for discharging him of the charge and that the learned Magistrate had wide power to frame charge which should not be interfered with. Therefore, the High Court Division concurred with the findings arrived at by the learned Additional Sessions Judge.

11. Admittedly, the leave petitioner filed a criminal revisional application under section 439A of the Code of Criminal Procedure before the Sessions Judge,Tangail resulting in the initiation of Criminal Revision No.5 of 2009, which on transfer was heard by the learned Additional Sessions Judge, Second Court, Tangail, who rejected the revision by the judgment and order dated 28-6-2009. After that, the leave petitioner filed a second revision before the High Court Division under section 439A of the Code of Criminal Procedure.

12. There is no gainsaying the fact that according to sub-section (4) of section 439 of the Code of Criminal Procedure the High Court Division cannot entertain any revisional application under section 439 of the Code of Criminal Procedure with respect to an order made by the learned Sessions Judge under section 439A of the Code of Criminal Procedure. Sub-section (4) of section 439 of the Code of Criminal Procedure is quoted below :

> "(4) Nothing in this section shall be deemed to authorize the High Court Division to convert a finding of acquittal into one of the conviction, or to entertain any proceedings in revision with respect to an order made by the Sessions Judge under section 439A." *(emphasis supplied)*

13. From the above, it is abundantly clear that an order passed by the Sessions Judge or Additional Sessions Judge, as the case may be, under section 439 A of the Code of Criminal Procedure is not amenable to the revisional jurisdiction of the High Court Division under section 439 of the Code of Criminal Procedure.

14. Therefore, the revisional application filed by the leave petitioner before the High Court Division under section 439 of the Code of Criminal Procedure was a misconceived one.

15. In the light of the findings made before, we do not find any substance in this criminal petition for leave to appeal. Accordingly, this petition is dismissed.

Ed.

Appellate Division
(Criminal)

Md Muzammel Hossain CJ
Surendra Kumar Sinha J
Nazmun Ara Sultana J
Syed Mahmud Hossain J
Md Imman Ali J
Md Shamsul Huda J

Judgment
August 1st, 2012.

Yasin Rahman @ Rahman Yasin @ Titu.....Appellant

vs

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

Evidence Act (I of 1872)
Section 8

Absconding—Appellant absconded soon after the murder of Jibran Tayyabi and remained absconding for a long period of several years. Abscondence by itself is not always an incriminating matter, for, even an innocent person sometimes absconds to avoid harassment by police. But in this case the abscondence of appellant, son of a very rich industrialist immediate after the murder of Jibran Tayyabi and his remaining absconding for a long period of about 13 years do not support at all that he absconded and remained absconding for such a long period to avoid harassment by police. *(Per Nazmun Ara Sultana J, majority)* .....(227 & 224)

Evidence Act (I of 1872)
Section 8

Motive—Though motive is not always necessary to prove murder but if it is proved it indicates the high degree of probability and provides a link in the chain to connect the accused with the murder. Motive is not always necessary to prove murder, but it if is established it would be a corroborative circumstance leading to the complicity of the accused in the offence. *(Per Nazmun Ara Sultana J majority)* .....(225)

Evidence Act (I of 1872)
Section 114(g)

The doctrine of benefit of doubt can apply and an inference of guilt can be drawn only if the prove facts are wholly inconsistent with innocence, and consistent only with guilt. *(Per SK Sinha J, minority)* .....(96)

Circumstantial Evidence

Evidence of PWs 33 and 37 along with the exhibit 16 the breakup of mobile phone of appellant have proved that on the date of occurrence appellant had as many as 16 mobile phone calls with another absconding accused. This fact also has corroborated the confessional statement of accused Zahid Hussain @ Kiron who stated in his confessional statement that the accused Alamgir was engaged to keep watch on the movement of deceased Jibran Tayyabi and to give those informations to other accused-persons over mobile phone. *(Per Nazmun Ara Sultana J majority)* .....(226)

Criminal Trail

Accused is presumed to be innocent unless hIs guilt is proved beyond reasonable

*Criminal Appeal No. 33 of 2011.

(From the judgment and order dated 28-3-2007 passed by the High Court Division in Government (Criminal) Appeal No. 34 of 2002 heard along with Government (Criminal) Appeal No.28 of 2002 and Criminal Appeal Nos.3023 of 2002, 2971 of 2002 and 2981 of 2002 and connected Criminal Rule Nos.l98(R) of 2002 and 199(R) of 2002.)

doubt. An accused-person is under no obligation to offer evidence and he is merely on the defensive and owes no duty to anyone but himself. He is at liberty, as to the whole case to rely on the witnesses of the case for the prosecution, and no inference unfavourable to him can properly be drawn because he takes one course rather than the other. *(Per SK Sinha J, minority)* .....(98)

Code of Criminal Procedure (V of 1898)
Section 161

Evidence of an otherwise credit-worthy witness cannot be discarded merely because it was not available in the statement of witness recorded under section 161 of the Code. *(Per SK Sinha J, minority)* .....(103)

Falsus in uno, falsus in omnibus

Testimony of a witness should not be believed if the witness on some material fact omitted by him in his examination-in-chief by showing that the witness has lied as to that fact is closely analogous to, and, in a sense' merely an application of 'impeaching a witness's credit by a previous inconsistent statement. *(Per SK Sinha J, minority)* .....(106)

Evidence Act (I of 1872)
Section 145

Even an illiterate person is not immune from the process of law with regard to the contradiction by a previous statement because section 145 makes not the slightest difference whether the witness is literate or illiterate. *(Per SK Sinha J, minority)* .....(108)

Code of Criminal Procedure (V of 1898)
Section 161(1)

Former statement of a witness to furnish corroboration can be proved only if it was made 'at or about the time' when the fact took place as a means of safeguarding against fabrication of false evidence. If the time for reflection passes between the event and the subsequent statement, the latter is not only useless, it may be really dangerous to allow its admission. *(Per SK Sinha J, minority)* .....(110)

Judicial Committee of the Privy Council in Mirza Akbar vs King Emperor, AIR 1940 PC 176; Bhagwan Swarup Lal vs State of Maharastra, AIR 1965 SC 682; Sardul Singh Caveeshar vs State of Bombay, AIR 1957 SC 747; Baburao Bajirao Patil vs Maharashtra, (1970) 3 SCC 911; Kehar Singh vs State, AIR 1988 SC 1883; State of Gujarat vs Mohammad Atik, AIR 1998 SC 1686; State of Tamil Nadu vs Nalini, AIR 1999 SC 2640; Zulfiqur Ali Bhutto vs State, PLD 1979 SC 53; Maj. Md Bazlur Huda vs State, ADC Vol. VI(A) 1; Shama Rao vs Union Territory of Pondicherry, (1967) 2 SCR 650; Nazir Hussain vs Muhammad Shafi, 17 DLR (SC) 40 and Abul Kalam Azad alias Ripon vs State, 58 DLR (AD) 26. State vs Abdur Rashid Piada alias Abdur Rashid Sarder, 40 DLR (AD) 106, Habib Ullah vs State, 21 DLR SC 88 and GB Patel vs State of Maharashtra, AIR 1979 SC 135; Habib Ullah vs State, 21 DLR SC 88 and GB Patel vs State of Maharashtra, AIR 1979 SC 135. Allah Ditta vs State, 11 DLR (SC) 38; Sharad vs State of Maharashtra, AIR 1984 SC 1622; Ram Gopal vs State of Maharashtra, AIR 1972 SC 656; Shivaji Sahebrao Bobade vs State of Maharashtra, AIR 1973 SC 2622; Deonandan Mishra vs State of Bihar, AIR 1955 SC 801; Charan Singh vs State of UP, AIR 1967 SC 520; Dharam Das vs State of UP, AIR 1975 SC 241; SP Vhatnagar vs State of Maharashtra, AIR 1975 SC

826; Taslimuddin vs State, 44 DLR 136, Keshab Chandra Mistry vs State, 1985 BLD (AD) 301; Allah Ditta (Supra) , 11 DLR (SC) 38; Hasen Ali vs State, 38 DLR 235; Chandmal vs State of Rajasthan, AIR1976 SC 917; Gambhir vs State of Maharashtra, AIR 1982 SC 1157; Kali Ram vs State of HP, AIR 1973 SC 2773; Maqbool Hossain vs State, 12 DLR (SC) 217, State vs Fazu Kazi, 29 DLR (SC) 271; Haroon Haji vs State of Maharashtra, AIR 1968 SC 832; Bhubani Sahu vs King, 2 DLR (PC) 39; Joygun Bibi vs State, 12 DLR (AD)156; Nausher All Sikder vs State, 39 DLR (AD) 194; Mobarak Hussain vs State, 33 DLR 274 ; Fazu Kazi, 29 DLR SC 271; Hussain Umar vs Dilipsinghi, AIR 1970 SC 45; Bhuboni Sahu, 76 Ind App 147; Kashmira Singh vs State of Madhya Pradesh, AIR 1952 SC 159; Lutfun Nahar Begum vs State, 27 DLR (AD) 2; Amir Hossain Howlader vs State, 37 DLR (AD) 139; Gul Hasan vs State, PLD 1969 SC 89 = 21 DLR (SC)109, Md Bashir vs State, SCMR (1970) Vol-3, 351 and Md Rafiq vs State, PLD 1974 SC 65; Mobarak Hossain vs State, 33 DLR 274 and Al-Amin vs State, 51 DLR 75; Matru vs State of UP, AIR 1971 SC 1050; MG Agarwal vs State of Maharashtra, 1963(2) SCR 405; Muslimuddin vs State, 38 DLR (AD) 311; Safder Ali vs Crown, 5 DLR (FC)107; Bihar vs Md Khurshed, AIR 1971 SC 2268 and State of UP vs Iftekhar Khan, (1973) 1 SCC 512. In State of Punjab vs Jagir Singh, AIR 1973 SC 2407; Alamgir vs State, AIR 2003 SC 282; KA Vish vs State of Maharashtra, AIR 1971 SC 2256, Keshak vs State of Maharashtra, AIR 1971 SC 953; Laxman Kalu vs State of Maharashtra, AIR 1968 SC 1390; MG Agarwal vs State of Maharashtra, AIR 1963 SC 200; Swarup vs Emperor, AIR 1934 PC 227 and Nur Mohammad vs Emperor, AIR 1945 PC 151; Nausher All Sarder vs State, 39 DLR (AD) 139; Palvinder Kaur vs State of Panjab, AIR 1952 (SC) 354 and in the case of Nayan Swami vs Emperor, AIR 1939 (PC) 47; Kashmira Singh vs State of Madras Pradesh, AIR 1952 SC 159; Amir Hussain vs State, 37 DLR(AD) 139; Bangladesh (State) vs Paran Chandra Baroi, 6 BCR (AD) 225; Khalil Khan vs State of Madhya Pradesh, AIR 2003 467 and in the case of Nazir Hussain vs Muhammad Shafi, 17 DLR (SC) 40; Alamgir vs State, AIR 2003 (SC) 282; State vs Abdul Hatem, 56 DLR 431; State vs Nurul Haque, 45 DLR 306; Mobarak Hussain vs State, 33 DLR 274; State vs Abdul Hatem, 65 DLR 431; State vs Nurul Haque, 45 DLR 306; Mobarak Hossain vs State, 33 DLR 274 and Nizam Hazari vs State, 53 DLR 475 ref.

Anisul Haque, Senior Advocate (Fazlee Noor-Taposh, Advocate with him) instructed by Bivash Chandra Biswas, Advocate-on-Record—For the Appellant.

MK Rahman, Additional Attorney-General (ASM Nazmul Haque, Assistant Attorney-General and Mohsin Rashid, Advocate with him) instructed by Madhumaloty Chowdhury Barua, Advocate-on-Record—For the Respondent.

Judgment

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

2. Surendra Kumar Sinha J : In this appeal the legality of the conviction of the appellant Yasin Rahman @ Rahman @ Yasin @ Titu Muzibur Rahman (Titu) given by the High Court Division under sections 302/109 and 120B of the Penal Code for the murder Jibran Tayyabi (Jibran) by setting-aside the judgment and order of acquittal passed by the trial Court has been called in question on the ground that there is no legal evidence in support of the charges.

3. Admittedly victim Jibran was murdered on his way home back from office on 9th

June, 1999 at about 5-30 PM. According to the prosecution version, Titu had love affair with one Samanja and when he came to know that Jibran had also an affair with Samanja, Titu confronted Jibran but the latter had denied of having such affair at which Titu threatened him to leave the country otherwise he would cause severe harm to him. It is the claim of the prosecution that Titu planned and organized the killing because of jealousy as Jibran was a thorn in his way by hiring professional killers. Prosecution has examined 45 witnesses, and tendered 5 witnesses, of them, Fazlul Huq (PW 2), Saiful Alam (PW 13), Moloy Kranti Pal (PW 14) are eye-witnesses of the occurrence but they could not identify any accused.

4. The Metropolitan Sessions Judge, Chittagong convicted co-accused Osman alias Md Osman alias Osmannya, Ali Akbar @ Didarul Alam @ Didar, Zillur Rahman @ Zillur, Zahid Hossain @ Kiron and Md Siddique under section 302/34 of the Penal Code and sentenced each of them to imprisonment for life, and found the appellant along with two others not guilty of the charges relying upon their confessional statements and the circumstantial evidence. The trial Court, however, was of the view that the prosecution had failed to prove the charge of criminal conspiracy against all the accused-persons. All the convicted persons preferred appeals and the Government also preferred two appeals one against the inadequacy of sentence of the convicted persons and the other against the judgment and order of acquittal. The High Court Division heard all the appeals analogously and by a common judgment disposed of all the appeals maintaining the conviction and sentence of four convicted persons, acquitted one accused Md Siddique and convicted the appellant under sections 302/109 and 120B of the Penal Code and sentenced him to imprisonment for life with a fine of Taka 5,000 in default to suffer rigorous imprisonment for 1(one) year more. The High Court Division also found other two accused Alamgir and Omar Ali alias Zahangir guilty under sections 302/34 and 120B of the Penal Code and sentenced them also to imprisonment for life with fine.

5. The trial Court believed the time, the place and the manner of occurrence arid also found that the confessional statements of Didarul Alam, Zillur Rahman, Zahid Hossain Kiron, Omar Ali @ Zahangir and Md Siddique are true and voluntary and convicted five confessing accused, but it disbelieved the involvement of the appellant on the reasonings that Aleya Begum (PW 6) is a procured witness who did not say to the investigating officer about the story of bringing soup on one night from a restaurant for serving the same to the appellant and Samanja, when the appellant came to take Samanja for a short tour at night; that she stated to the police that Moly, wife of Zaman and mother of Tasmia Zaman, a friend of Samanja, allured her to depose in the case in exchange of money; that Moly in connivance with police procured her as witness; that she made contradictory statements with her earlier statements and that the learned public prosecutor in course of his argument failed to convince the Court when his attention was drawn regarding her admissions made in course of cross-examination on the question of her being made as witness in the case at the instance of Moly. The trial Court elaborately discussed her conduct, her admission in course of cross-examination that she was deposing in the case at the instance of Moly and came to the conclusion that she never saw Titli and Jibran together.

6. The trial Court also discarded the evidence of Sadhan Chandra Das (PW 7) on the reasoning that he simply stated about the affair between Jibran and Samanja which statement cannot prove or corroborate the charge of conspiracy; that the evidentiary value of Zakir Hossain (PW 16) has to be tested along with the evidence of Hosen Bhanu (PW 20) and Titli Tayebi (PW 32) and also noticed that PW 16 was

declared hostile by the prosecution. The trial Court also disbelieved SM Liakat (PW 19) on the reasonings that though he stated that accused Osman told him while he was consuming heroin in the house of Aleya Begum (PW 5) that an Indian citizen should be given a lesson since he had maintained illicit relationship with Samanja, Titu's girl friend, he did not disclose this fact in his earlier statement made before Magistrate, Exhibit 3. It also disbelieved PW 20, a domestic help of Jibran on the reasoning that though she deposed that Titli did not like Jibran's mixing with Samanja, she did not notice any objectionable behavior between them. In view of the above, the trial Court gave the appellant the benefit of doubt on the reasonings that PW 6 is a procured witness; that PWs 7, 16, 20 and 32 are not: reliable witnesses, inasmuch as, there is no corroborative evidence to support their claim; that the evidence of PW 32 is not supported by PWs 7, 16 and 20, and therefore, no reliance can be attached to PWs 7, 16, 20; that if the story introduced by P W 32 regarding the threat of Jibran by Titu on the alleged birthday party of PW 16 is taken as true, it is quite natural that she (PW 32) would have intimated this fact to the police or to the informant after the assassination of Jibran; that in her letter Exhibit 'ka' written to Jambu Khan, she wished happier life of Samanja which negated the prosecution's claim that PW 32 suspected SamanjaTitu's love affair was the cause for her husband's death and that her statements made in Court implicating Titu are embellishments. The trial Court also discarded Exhibit 16, mobile phone breakup supplied by PW 33 and Exhibit XI as corroborating evidence in support of the charges about the appellant's complicity in the incident. In arriving at such conclusion, the trial Court elaborately assessed their evidence.

7. The trial court held that the prosecution had failed to adduce reliable evidence in support of the charge of conspiracy; that the prosecution had also failed to adduce chain of circumstances to link the appellant to the charge of abetment; that the prosecution had utterly failed to produce any reliable evidence either oral or circumstantial against the appellant; that the fact of the appellant' s absconding is not a ground to corroborate the circumstantial evidence and that since the confessing accused retracted their confessions, the evidentiary value of those confessional statements is very weak for considering the charges against the appellant in the absence of other independent evidence.

8. The appellant was arraigned on two counts, one for criminal conspiracy to commit murder and the other, for the abetment of the offence of murder. The latter one appears to me as an alternative charge in case the prosecution fails to prove the charge of criminal conspiracy. The High Court Division has failed to distinguish the two charges and discussed the entire evidence together in support of both counts, and convicted the appellant on those counts which is absolutely erroneous. The High Court Division ought to have considered the charge of criminal conspiracy first and dissected the evidence in support of the said charge, and if it found that the prosecution had not been able to prove the said charge, it should have considered the evidence in support of the charge of abetment. If it is found that the prosecution had been able to prove the charge of conspiracy, it need not consider the other charge. These two charges are distinct and the essential elements for constituting an offence of criminal conspiracy and those of abetment of an offence of murder are completely different. This wrong approach of the High Court Division in disposing of the charges has reflected in the ultimate decision of the appeal preferred against the appellant.

9. With due respect, my learned sister Nazmun Ara Sultana, J speaking for the majority has totally ignored that aspect of the matter. In the majority opinion, my learned sister pro-

ceeded to dispose of the appeal observing that 'Before entering into the evidence of the prosecution witnesses we like to state the confessional statements of accused-persons for the convenience of our discussion' and then concluded that "other four accused-persons discussed above, evidently, have fully corroborated the prosecution case that this present accused-appellant Yasin Rahman @ Titu being envious of the relation of his girl friend Samanja with deceased Jibran Tayyabi wanted to kill him .....". These observations show that my learned sister has also used the confessional statements of co-accused in support of the charge of criminal conspiracy and also has considered both the charges jointly which is not permissible in law. A confessional statement of accused cannot be used in support of the charge of criminal conspiracy.

10. There is no dispute that a conspirator is an agent of his associates in carrying out the object of the conspiracy and that it has to be established by direct evidence, the accused and other persons whose acts, statements or writings are sought to be given in evidence against him, entered into a formal consultation or agreement to commit the offence. It is also not disputed that direct evidence is seldom available in view of the fact that a conspiracy to commit an offence is hatched up in secrecy. Whenever a charge of criminal conspiracy is brought against an accused, the rules of evidence provided in section 10 of the Evidence Act will come into play. It says that when the Court is satisfied that 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 anyone of them, is a relevant fact against each of the persons believing to be so conspiring. This section is therefore, an exception to the general rule that acts, statements or writings of a person are admissible only against himself and not against others.

11. In view of the language used in section 10 of the Evidence Act, it has been argued by the learned counsel for the appellant that the confessional statements of other four confessing accused cannot be legally used against the appellant in support of the charge of conspiracy. Learned counsel has also referred some decisions in support of his contention. In the majority opinion it was observed that the object of section 10 is to make the statements and acts of one conspirator binding on other co-conspirators, but not to put any bar taking into consideration the confessional statements of an accused against other co-accused which has been specifically and expressly allowed by section 30 of the Evidence Act. Again the above observations have been reaffirmed by observing that the confessional statements are allowed to be taken into consideration against non-confessing accused also under section 30 of the Evidence Act and there is no denial of this legal position from the side of the appellant.

12. In arriving at such conclusion my learned sister has not referred any decision and held that this is the accepted position of law. With due respect, I am unable to endorse her opinion for simple reason that the tenor and purport of what section 10 says do not support her view. Secondly, my learned sister in my humble opinion is not justified in taking section 30 with section 10 of the Evidence in juxtaposition in deciding the question as to whether the confessional statements of co-accused can be legally considered in support of a charge of conspiracy. Sections 10 and 30 of the Evidence Act will be applicable in two distinct purposes. Section 10 introduces the doctrine of agency and if the conditions laid down in it are satisfied, the act done by one is admissible against the co-conspirators. Section 30 will be applicable completely for another purpose. When a person makes a confession, which affects both

himself and another, the fact of self-implication takes the place, at it were, of the sanction of an oath, or, is rather supposed to serve is some guarantee for the truth of accusation against the other. For, when a person admits his guilt and exposes himself to the pains and penalties provided therefore, there is guarantee for his truth. To amount to such a guarantee, the statement must amount to a confession on the part of the maker with respect to the offence with which all are changed. The guarantee, however, is a very weak one, for, the fact of self-inculpation is not, in all cases, a guarantee for the truth of a statement, even as against the person making it, much less is it so against another.

13. The principle behind section 30 is that a confession may be true so far as it implicates the maker, but may be false and concocted through malice and revenge so far as it affect others. While such a confession is obviously evidence of a very weak type. It does not come within the definition of 'evidence' contained in section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. The Legislature has only bestowed discretion upon the court to take into consideration such confession as any other fact. When a Court found an accused-person guilty on a charge of conspiracy in aid of section 10, he would be taken as the principal offender as if; the statement made by co-conspirator was made by him. Any statement made by one conspirator to another indicating in any way the complicity of a third conspirator is a relevant fact and such statement may be admitted. On the other hand, the confession of co-accused cannot be the basis for conviction of another. Further, section 30 cannot be used for convicting an accused on the charge of conspiracy.

14. The High Court Division did not at all consider section 10 of the Evidence Act. In view of the clear language used in section 10, there is no scope for taking into consideration of those confessions to prove the charge of conspiracy. It is only in cases of existence of a conspiracy that section 10 of the Evidence Act applies. So whenever a charge of criminal conspiracy is brought against an accused-person, it is section 10 of the Evidence Act which laid down the rule as to how evidence can be led to prove it. It says, when two or more persons conspire to commit an offence for actionable wrong each makes the rest his agent to carry out the plan into execution. The acts done by any one in reference to the common intention is considered to be the acts of all. So we find, to prove a charge of conspiracy it is required to consider, two circumstances; (a) that the act shall be in reference to their common intention; and (b) in respect of a period after such intention was first entertained by one of them. The object of the section is merely to ensure that one person shall not be made responsible for the acts or deeds of another until it is proved that (a) some bond, in nature of agency, has been established between them; (b) the acts, words or writing, which it is proposed to attribute vicariously to the person charged are in furtherance of the common design, and (c) those acts or deeds done, spoken or written after such design was entertained. The rule of excluding hearsay evidence to prove the charge of criminal conspiracy is not applicable to the statements admissible under this section.

15. This provision introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the co-conspirators. When the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong; that is to say, there should be *prima-facie* evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. As observed above, once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the

said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy then also for proving that the other person was a party to it. According to section 10, the act or declaration must have been done or made in the execution of furtherance of the common purpose, anything said or done, in relation to the common intention, is admissible.

16. Thus, the contents or a letter written by a co-conspirator, giving an account of the conspiracy, is relevant against the other even though not written in support of or in furtherance of it. (Illustration of section 10). Therefore, the existence of a fact of conspiracy must be proved; secondly, there should be *prima-facie* evidence of the existence of the conspiracy; thirdly, a *prima-facie* case cannot be made out by mere proof of intention of two or more persons to do an unlawful act or a lawful act by unlawful means; and finally, after the existence of the conspiracy has been established, the particular accused against whom evidence is sought to be led in must be proved to have been a party to the conspiracy.

17. This agreement to act in concert must be based upon joint acts which are the result of concert and agreement. The acts, declaration, writing by any one of such person need not necessarily be in furtherance of their common intention. They must be in reference of their common intention. The words after the time when such intention was first entertained by any of them' must be construed in accordance with it and are not capable of being widely construed so as to include a statement, made by one conspirator, in the absence of others, with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The 'common intention' signifies a common intention existing at the time when the thing was said, done or written by any one of them. Thing said, done or written while the conspiracy was on is relevant as evidence of common intention, once reasonable ground has been shown to believe in its existence. But, it would be very different matter to hold that any narrative or statement or confession made to a third party, after the common intention or conspiracy was no longer operating and had ceased to exist, is admissible against other party. There is then no common intention of the conspirators to which the statement can have reference.

18. The *Judicial Committee of the Privy Council in Mirza Akbar vs King Emperor, AIR 1940 PC 176* observed:

> "This being the principle, their Lordships think the words of section 10 must be construed in accordance with it and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships' judgment, the words "common intention" signifies a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships' judgment S.10 embodies this principle. That is the construction which has been rightly applied to S.10 in decisions in India, for instance, in 55 Bom 839 and 38 Cal 169. In these cases the distinction was rightly drawn between com-

munications between conspirators while the conspiracy was going on with reference to the carrying out of conspiracy and statements made, after arrest or after the conspiracy has ended, by way of description of events then past."

19. The expression "in reference to their common intention" used in section 10 again came under consideration in the Supreme Court of *India in Bhagwan Swarup Lal vs State of Maharastra, AIR 1965 SC 682.* It was observed, this expression is wider than the words "in furtherance of their common intention" used in section 34 and is very comprehensive and it has been designedly used to give it a wider scope than the words "in furtherance of" in the English Law. Even if it is wider, it is observed, `would its width go beyond the period of conspiracy? It is well neigh settled that section 10 of the Evidence Act is founded on the principle of law of agency by rendering the statement or act of one conspirator binding on the other if it was said during subsistence of the common intention as between the conspirators. If so, once the common intention ceased to exist, any statement made by a former conspirator thereafter cannot be regarded as one made "in referring to their common intention". Therefore, the Supreme Court not only approved the views expressed by the Judicial Committee, but also took the statement of law as settled. In other words, a post arrest statement made by an accused to a police officer, or to a Magistrate whether it is a confession or otherwise, touching to his involvement in the conspiracy, would not fall within the ambit of section 10 of the Evidence Act.

20. The Supreme Court of India in an earlier case was also of the same view in *Sardul Singh Caveeshar vs State of Bombay, AIR 1957 SC 747,* wherein it was observed:

"The principle underlying the reception of evidence under section 10 of the Evidence Act of the statements, acts and writings of one conspirator as against the other is on the theory of agency. The rule in section 10 Evidence Act, confines that principle of agency in criminal matters to the acts of the co-conspirator within the period during which it can be said that the acts were "in reference to their common intention" that is to say, things said, done or written, while the conspiracy was on foot an din carrying out the conspiracy. It would seem to follow that where the charge specified the period of conspiracy, evidence of acts of co-conspirators outside the period is not receivable in evidence".

21. Similar views have been taken by the Supreme Court of India in a latter case in *Baburao Bajirao Patil vs Maharashtra, (1970) 3 SCC 911.* It is observed "under section 10 of the Indian Evidence Act where 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 such persons in reference to their common intention after the time when such intention is first entertained by anyone of them is relevant against each persons believed to be so conspiring for the purpose both proving the existence of the conspiracy and for showing that such persons was a party to it". In that case also the confessional statement was retracted. The Supreme Court then discarded the said confessional statement: against accused No. 13 who had allegedly conspired to commit the offence charged observing "there is really no evidence on which it is possible reasonably to bring his case with section 10. At the stage he may also point out that retracted confessions of some of other accused-persons are equally unhelpful to the prosecution in showing reasonable ground for believing that accused No.13 was a co-conspirator. A retracted confession of a co-accused does not constitute substantive evidence within the meaning of section 3 of Indian Evidence Act. It can only be taken into an account by the Court in arriving

at its conclusions. Its value, however, depends on the facts and circumstances of each case. It has also to be borne in mind that a retracted confession is a weak link against the maker. It must necessarily be more so against a co-accused". Similar views have been expressed in *E vs Omoni Vhushion Chakrabarti, ILR 38 Cal 169* and *Pritam Hariomal vs E, ILR 1939 Karachi 449.*

22. In *Kehar Singh vs State, AIR 1988 SC 1883,* the views taken in *Bhagwan Swarup Lal (AIR 1965 SC 682)* was approved. It was argued by Oza, J as follows:

> "(1) There shall be a *prima facie* evidence affording a reasonable ground for a court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the others; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; (5) it can only be used against a co-conspirator and not in his favour.
>
> In the light of these observations and the analysis of section 10 we will have to examine the evidence led by prosecution in respect of conspiracy."

23. While concurring with the above views Shetty J observed, section 10 will come into play only 'when the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence. There should be, in other words, a *prima facie* evidence that the person was a party to the conspiracy before his acts can be used against his co-conspirator'. In *State of Gujarat vs Mohammad Atik, AIR 1998 SC 1686* similar views have been expressed. KT Thomas, J while approving the dictum of the Privy Council in Mirza Akbar argued:

> "Thus the principle is no longer *res integra* that any statement made by an accused after his arrest, whether as confession or otherwise cannot fall within the ambit of section 10 of the Evidence Act. The corollary of it is that the confessional statement of 4th respondent (Abdul Latif Abdul Wahab Sheikh) who is no more alive now thus vanishes from the ken of evidentiary use".

24. In a later case in *State of Tamil Nadu vs Nalini, AIR 1999 SC 2640,* KT Thomas, J approved the above views that the evidence of 'reasonable ground to believe' that the conspirators have conspired together will have to be satisfied even when there is some *prima-facie* evidence to show that there was such a criminal conspiracy. Learned Judge elaborated his arguments as under:

> "But the contention that any statement of a conspirator, whatever be the extent of time, would gain admissibility under section 10 if it was made "in reference" to the common intention, is too broad a proposition for acceptance. We cannot overlook that the basic principle which underlies in section 10 of the Evidence Act is the theory of agency. Every conspirator is an agent of his associate in carrying out the object of the conspiracy. Section 10, which is an exception to the general rule, while permitting the statement wade by one conspirator to be admissible as against another conspirator restricts it, is to the statement made during the period when the agency subsisted. Once it is shown that a person became snapped out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators under section 10.
>
> Whether a particular accused had ceased to be a conspirator or not, at any

point of time, is a matter which can be decided on the facts of that particular case. Normally a conspirator's connection with the conspiracy would get snapped after he is nabbed by the police and kept in the custody because he would thereby cease to be the agent of the other conspirators. Of course we are not unmindful of rare cases in which a conspirator would continue no confabulate with the other conspirators and persists with the conspiracy even after his arrest. That is precisely the reason why we said that it may not be possible to lay down a proposition of law that one conspirator's connection with the conspiracy would necessarily be cut off with this arrest."

25. The Supreme Court of Pakistan in *Zulfiqur Ali Bhutto vs State, PLD 1979 SC 53* approved the said view. Anwarul Huq, J speaking for the Court argued:f

"The expressions "in reference to their common intention" used in section 10 of the Evidence Act implies that the act intended is in the future and the section makes relevant statements made by a conspirator with reference to the future. This expression means in reference to what, at the time of statement, was intended in the future. Narratives coming from the conspirators as to their past acts cannot be said to have a reference to their common intention. It is thus clear that after the common intention of conspiracy was no longer operating and had ceased to exist, is admissible against other party. Section 10 of 'the Evidence Act will come in to play only when' the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a *prima-facie* evidence that a person was a party to be conspiracy before his act can be used against his conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said act is limited by two circumstances, namely, that the act shall be in reference to their common intention and in respect of a period after such period was entertained by any one of them".

26. The above views have been approved by this Division in *Major Md Bazlur Huda vs State, ADC Vol. VI (A) page 1* in which two of us (Md Muzammel Hossain CJ and myself were members in the Bench. We can review our earlier opinions if the circumstances require such reconsideration, that is to say, such previous decision appears to be obviously erroneous or is contrary to law or is against public interest. In the majority opinion it has not been said that the previous decisions are not sound or not in conformity with law that require reconsideration. The doctrine of precedents has become a part of our law. And precedents are given a constitutional sanction by Article 111. The binding nature of judicial decisions is derived from statutes or conventions. It is observed by Shelat, J in *Shama Rao vs Union Territory of Pondicherry, (1967) 2 SCR 650:* "A decision is binding not because of its conclusion but in regard to its ratio and the principle laid down therein". The expression `ratio' is the rule or principle acted on by the Court. Goodheart in Essays in Jurisprudence and Common Law, (1931)1 defines the *ratio decidendi* as the material facts of the case plus the decision therein. It is the `principle' which is binding. The grounds for review of its previous decision by the apex court are:(a) if some aspects of the question remained unnoticed; or (b) if the attention of the Court was not drawn to any relevant and material statutory provisions; or (c) if any previous decision of the Court hearing on the point was not noticed; or

(d) if the decision was clearly erroneous; or (e) if the decision would have a lawful effect on the general interest of the public; or (f) if it is inconsistent with the legal philosophy of our Constitution.

27. Judicial interpretations of law should be a means of obtaining an end, not of seeking a set of rule of regularity. A Judge's function was merely to find a preexisting law and apply it to the case at hand. Judging involves a process not of discovery but of creation. Judges rely on four methods; 'philosophy' which involves drawing logical analogies from prior decisions; "evolution' which requires examining the historical development of relevant legal doctrines; 'tradition' which means studying the prevailing customs of the community in the pertinent area; `directive forces', which is the method of sociology that reflects a Judge's outlook on `justice, morals, and social welfare, the more of the day. The Judges are not free, to set-aside existing rules at their pleasure. They have discretion only where gaps exists in those rules for, judges must and do legislate, 'but they do so only interstitially' (Oliver Wendell Holmes Jr.). The Judge, even when he is free, is not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. .....He is not to yield to spasmodic sentiment, to vague and unregulated benevolence.' (Benjamin N Cardozo, The Nature of the Judicial Process page 69, 140-41).

28. It is hoped that Judges should cite scholarly works to support their conclusions. It is a pride on digging up the treasures buried in the law reviews to look at the growth of the law. The philosophy of law dealt with how law comes into being, how it grows, and whither it tends. A Judge's philosophy is frequently decisive in shaping a decision. Nothing can destroy the prosecution more quickly than its failure to observe formalities and procedure or more, its failure to collect legal evidence. The ignoble shortcut to conviction left open to the state tends to destroy the entire system of criminal jurisprudence on which the liberties of the citizen rest.

29. In the High Court Division's opinion as well as in the majority opinion, the statement of law argued by the Judicial Committee of the Privy Council which have been approved by the apex Courts of India, Pakistan and Bangladesh have totally been ignored and considered the confessions of co-accused in support of the charge conspiracy. The settled law is that where the object of the conspiracy had been carried out and the conspiracy had come to an end, any subsequent statement or confession made by an accused after the arrest cannot be said to have reference to the common intention of the conspirators. Such confession may, however, be taken into consideration against co-accused under section 30 of the Evidence Act.

30. The Judicial Committee observed that the words written or spoken, may be a declaration accompanying an act, and indicating the quality of the act, as being an act in the course of conspiracy; or, the words, written or spoken, may, in themselves, be acts done in course of the conspiracy. This being the position, the words of section 10 of the Evidence Act must be construed in accordance with it, and not capable of being widely' construed, so as to include a statement made by one conspirator, in the absence of the other, with reference to the past acts done in the actual course of carrying out the conspiracy, after it had been completed. The common intention is not in the past. The 'common intention' means common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. Therefore, it is difficult to hold that any statement or confession made

to a third party after the common intention or conspiracy was no longer in operation, and has ceased to exist, is admissible against the other party. There is, then, no common intention of the conspirators to which the statement or confession can have reference.

31 Therefore, unless the *prima-facie* evidence of the existence of a conspiracy is given and accepted, the evidence or statement or confession made by one conspirator in reference to the common object becomes inadmissible against all. Similarly, statements made by an accused-person during a trial can hardly be regarded as statements by him as a conspirator in reference to the common intention of the persons who were members of the conspiracy; they are therefore, not admissible under section 10 of the Evidence Act. The views that the common intention used in section 10 as between the conspirators ceased to exists whenever a co-conspirator made any statements after he was arrested by the police and such statement cannot be regarded as one made "in reference to their common intention" are in conformity with section 10 and I find no reason to take contrary view. The learned Additional Attorney-General had failed to address this point despite his attention was drawn on repeated occasions and ignored the query made by the court. In view of the above, in my humble opinion, the High Court Division and my learned sister have not legally taken the confessional statements of the aforesaid four accused-persons as corroborative piece of evidence in convicting the appellant on the charge of criminal conspiracy treating him as the principal conspirator.

32. It is true that a conspiracy is hatched up in secrecy and therefore, it is difficult to bring direct evidence in support of the charge. It is for this reason; the prosecution may rely upon circumstantial evidence if direct evidence is not available. The circumstantial evidence is the acts of all persons charged with the offence to infer that they were done in reference to their common intention but not the one considered by the High Court Division. Nor even the discussions of co-conspirators there must be presence of concert of action. It is not sufficient if the prosecution proves the agreement to co-operate. It must be proved beyond doubt that the accused charged with are independently pursuing to the same end, that is to say, they have come together to the pursuit of the unlawful object. Section 120A has been brought by way of amendment in line with the English" Law by making the overt act unessential when the conspiracy is to commit any offence. Before such introduction, the provisions of the Penal Code which directly dealt with the subject of conspiracy were those contained in Chapter-V and section 121. It was a mere species of abetment where an act or illegal omission took place in pursuance of conspiracy and amounted to a distinct offence. A criminal conspiracy is a plan to commit a crime; the elements of such conspiracy are an agreement between two or more persons to do an illegal act or to do a legal act by illegal means. The scope of criminal conspiracy is to be determined by the agreement of the conspirators. Russell on Crime (12th edn, Vol-1, page-220) explained what acts constitute a criminal conspiracy:

> "The gist of the offence of conspiracy then lies, not in doing the act, or affecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge or even discussion of the plan is not, *per se*, enough',
>
> *(emphasis supplied)*

33. In this connection it is relevant to quote a proposition with an illustration given by Glanville Williams in the Criminal Law (Second Edn. P-382) as under:

> "The question arose in an Iowa case, hut it was discussed in terms of conspiracy

rather than of accessory-ship. D who had a grievance against P, told E that if he would whip P some one would pay his fine. E replied that he did not want anyone to pay his fine, that he had a grievance of his own against P and that he would whip at the first opportunity. E whipped P. D was acquitted of conspiracy because there was no agreement for 'concert of action', no agreement to 'co-operate.'"

34. Shetty, J in *Kehar Singh (Supra)* after considering some English and New Zealand decisions which were decided in the context of English Law formulated the elements of conspiracy as under:

> "I share this opinion, but hasten to add that the relative acts or conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence. The innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict. We must thus be strictly on our guard". *(emphasis supplied)*

35. This is the correct statement of law argued by Shetty, J on the concept of criminal conspiracy and any deviation from this view would not only bring disastrous consequence but also negate the law. If we exclude the confessions, then there remains only the circumstantial evidence.

36. If the prosecution banks upon a charge of criminal conspiracy, the conspiracy being the sheet anchor of the incident, which was hatched up first and in pursuance of this conspiracy the murder was caused, it is the fundamental principle to consider whether the prosecution has been able to prove the charge of conspiracy. So, 1 would like to proceed to consider the said charge first and then the charge of abetment. Besides the confessional statements of 5 co-accused Zillur Rahman @ Zillur, Zahid Hossain @ Kiron, Ali Akbar @ Didarul Alam @ Didar, Omar Ali and Jahangir @ Jahangir Kashai, the prosecution has relied upon the evidence of Aleya Begum (PW 16), Sadhan Chandra Das (PW 7), Zakir Hossain (PW 16), SM Liakat @ Mukul (PW 19), Hosen Banu (PW 20), and Titli Tayyabi (PW 32), and the circumstantial evidence. In support of the other charge, it has relied upon the confessional statements, the circumstantial evidence adduced by PWs 6, 19, 32, the documentary evidence, Exhibit 16 said to have been proved by SM Jahangir Chowdhury (PW 33), the break-up of mobile phone No. 0183313283 and 018311175, Exhibit X-1, a letter said to have been written by one Mr Joydeb Mojumder of the Indian High Commission produced by SN Kader Khan (PW 48) in pursuance of a request made by Jibran for making arrangement for his security on the plea that he was threatened to death. Other convicts did not challenge their conviction and sentence and therefore, though the High Court Division had elaborately discussed the evidence regarding the time, the place, the manner of occurrence and the involvement of four confessing accused and believed the prosecution case and also maintained their conviction, the appellant Titu having not challenged the time, the place and the manner of occurrence, it is not necessary for the disposal of this appeal to address those points.

37. The High Court Division convicted the appellant of the charge of criminal conspiracy relying upon the confessions of four co-accused and the evidence of Aleya Begum (PW 5), Aleya Begum @ Aloo (PW 6), Sadhan Chandra Das (PW 7), Ahmed Rad Nizam (PW 8), Zakir Hossain (PW 16), SM Liakat @ Mukul (PW 19), Salman Ispahani (PW 21), Syed Abu Mortuza (PW 23), Ratan Kumar Mali (PW 24), Md Moinul Hoque (PW 39), Md Delwar Hossain (PW 47) and SN Kader Khan (PW 48), the documentary evidence, Exhibits 16 and X-l. The High Court Division after evaluating the evi-

dence of PWs 6 and 16 held that 'Titu had closeness or deep friendship with Samanja' and that after scanning the evidence of PW 32 and Exhibit X-l held that 'a sort of animosity grew in between Titu and Jibran and Titu became desperate to get Samanja and he thought Jibran a thorn in his way to get Samanja and in fact he also threatened him to kill and the matter was informed to the police commissioner by the then Assistant Indian High Commissioner in Chittagong Mr Joydeb Majumder by a letter written by him vide exhibit X-1, though the name of Titu was not mentioned there'; 'therefore, we have no hesitation in our mind to say that it is only Yasin Rahman Titu who in order to clear his thorn to get Samanja in collaboration with Didar came in contact with a hard core criminal and entered into an illegal agreement to kill Jibran and ultimately succeeded to kill him through all accused except from Md Siddique".

38. The High Court Division further observed the confessional statements of other accused as well as evidence of PWs 5 and 19 also revealed that Osman along with his companions went out of the room of Aleya on receiving a phone call, so Alamgir's involvement with the criminal conspiracy through Titu, his cousin in killing Jibran is apparent'. Confessional statements of other accused as well as the evidence of PWs 5 and 19 also revealed that Osman along with his companions went out of the room of Aleya on receiving a phone call, so Alamgir's involvement with the criminal conspiracy through Titu, his cousin in killing Jibran is apparent. From telephone breakup/breakdown (some PWs said breakup some PWs said breakdown) of the two mobile phone being No.018311175 and 01750895 vide exhibit 16 and the evidence of PW 33, the area manager, TM International, Chittagong it appeared that Titu and Alamgir talked many a times over telephone in their respective mobile phone on the date of the occurrence"the evidence of PW 33 shows that Titu monitored everything of the plan to kill Jibran over telephone with the help of Alamgir his cousin, the elder brother of Didar. The above facts also show how smartly and shrewdly everything was planned to execute and implement the criminal conspiracy to kill Jibran"

39. The learned Additional Attorney-General, however, after scanning the evidence of those witnesses finds it difficult to support all the findings of the High Court Division and submitted in his written argument that only PWs 6, 19 and 32 corroborated the confessional statements in support of the charge of criminal conspiracy. The relevant portion reads thus: "Section 120(B) *(sic)* of the Penal Code is fully established by reading together the entire evidence of PWs 6, 19 and 32 along with the confessional statement of Didar and other accused-persons particularly Kiron. The said evidence read with confessions is a reasonable ground to believe that Tito hatched a conspiracy to murder Jibran with Didar (confessional statement) and Osman and this fact is so probable that any man of prudence would believe that conspiracy to murder Jibran was done and made by only Tito and Tito". So the learned Additional Attorney-General has given a go bye to the evidence PWs 5, 7 and 20 relied upon by the High Court Division. In the majority opinion my learned sister has also observed that PWs 5, 6, 7, 16, 17, 19, 20, 32, 33 and 37 have supported the prosecution case, of them, it has been observed that PW 5 has also supported the confessional statement. We due respect, this observation is inconsistent with the submissions made by the learned Additional Attorney-General, as quoted above.

40. Now let us examine whether the High Court Division was justified in relying upon the evidence of PWs 5, 6, 7, 19, 23 and 32 and Exhibits 16 and X-l in support of the charge as corroborative evidence.

41. PW 5 stated nothing against the appellant and she has made some allegations against

Osman and his associates as noticed when they were consuming heroin in her home. PW 48 in course of cross-examination stated that PW 6 was examined on 23rd August, 1999 and that "আলেয়া বেগমের ১৬১ ধারার জবানবন্দি এই কথা নাই যে, রাত ১০টায় টিটু আসিয়া বলে সামানজাকে দাও, আমি একটু ঘুরিয়া আসি।" The High Court Division ought to have considered her evidence in cross as well while evaluating her evidence. She did not state to the investigating officer that Titu came at 10-00 PM and asked her to allow Samanja to go out for a while with him, a material fact from which she wanted to show the intimacy between Titu and Samanja. She also did not say anything regarding criminal conspiracy. She has stated about Samanja's love affair with Jibran and Titu. The High Court Division failed to consider the delayed examination of this witness and believed her relying upon her evidence in chief. She was examined by the police more than one year after the occurrence and no explanation was given for her delayed examination. Therefore, her evidence was rightly disbelieved by the trial court not only on the ground of her inconsistent statements but also on the ground of her delayed examination.

42. Sadhan Chandra Das (PW 7) is an employee of the victim, who stated nothing regarding the alleged story of criminal conspiracy. He simply stated that he saw Jambu Khan's daughter Samanja at Jibran's residence. SM Liaquat @ Mukul (PW 19) stated that while he was visiting the house of Aleya for sniffing heroin, one day he met Osman at her house when he told him that he had to do something and on query, Osman told after 2/1 days that "টিটুর বান্ধবীর সাথে ভারতীয় এক নাগরিকের অবৈধ সম্পর্ক আছে। ঐ বান্ধবীর নাম সামানজা। ভারতীয় নাগরিককে শায়েস্ত করিতে হইবে। টিটুর সাথে সামানজার ভালবাসার সম্পর্ক ছিল। আমি ওসমানকে বলি, আমি ব্যবসা বাণিজ্য করি। আমার দ্বারা ঐসব হবে না। তুমিও ঐসব করিও না।' He was making statement of what Osman told to him. This statement is hearsay and legally not admissible into evidence. Hosen Banu (PW 20) is a domestic help of Jibran. She only stated that there was misunderstanding between Jibran and his wife over a woman named, Samanja. So she also said nothing regarding criminal conspiracy. Syed Ziad Rahman (PW 23) stated nothing regarding the criminal conspiracy other than that he had acquaintance with Jibran, PW 32 and the family of Jambu Khan and that he heard the death news of Jibran.

43. PW 32 stated regarding the love affair of Jibran and Titu with Samanja and then she stated that on a birthday party of PW16 'এক পর্যায়ে টিটু আমার স্বামীর সাথে সামানজাকে নিয়া confront করে। আমার স্বামী সম্পূর্ণ ব্যাপারটা অস্বীকার করিলে টিটু বলে আমি বলছি তুমি বাংলাদেশ ছাড়িয়া চলিয়া যাও। তুমি না গেলে I will cause severe harm to you ঐখান অনেক লোকের সামনে ঝামেলা হইবে মনে করিয়া আমি আমর স্বামীকে নিয়া চলিয়া যাই' In course of cross-examination, 48 admitted that PW 32 did not make such statement to him and that she did not tell him that her husband was threatened over telephone. Thereafter by way of the explanation, he stated, "তবে তিতলী বিভিন্ন হুমকি বা বাংলাদেশ হইতে চলিয়া যাওয়ার কথা আমার কাছে বলিয়াছিল।" In his explanation he did not clarify what nature of threat and who gave such threat. What's more, PW 32 did not corroborate him, inasmuch as; she stated that Titu threatened Jibran once on the birthday party of PW 16. She did not state that the appellant Titu threatened him on many occasions. In the majority opinion, my learned sister noticed the inconsistent statements of PWs 5, 6, 7, 17 but observed that those are minor omissions. With due respect, I am unable to agree with her opinion in view of the fact that they did no say the incriminating statements to the investigating officer. Similarly, in respect of PW 32 she did not stated the incriminating statements which could have entangled the appellant to the investigating officer. The observations that PW 32 stated to PW 8 about several threats to her husband including the threats to leave Bangladesh which show that Yasin Rahman @ Titu threatened Jibran Tayyabi several times concerning that girl, are not minor discrepancies in view of the fact that these discrepancies being the incriminating fact involv-

ing the appellant's complicity in the murder on circumstantial evidence be treated as major contradictions and on this score, no reliance could be attached upon her so far as it relates to the story of threat.

44. When a witness 'is contradicted with his earlier statement recorded by the police in course of investigation, the only effect that it can have is to reduce the evidentiary value of his testimony in court and make the witness unreliable on the point on which he is so contradicted. The credit of a witness is impeached by proof of former statement with any part of his evidence which is liable to be contradicted. When a witness contradicts his previous statement on a material point the evidentiary value of that statement is destroyed and court shall discard the evidence of that witness so far as it relates to that statement. The High Court Division has totally ignored the suggestions given to PWs 5, 6, 7, 17 and 32 and the admission of PW 48 on those points, and took the evidence of PWs 5, 6, 7, 17 and 32 in chief as the uncontroverted evidence. Reference in this connection may be made the cases of *Nazir Hussain vs Muhammad Shafi, 17 DLR (SC) 40* and *Abul Kalam Azad alias Ripon vs State, 58 DLR (AD) 26.*

45. Similarly, if there is delay in examining a witness by the investigating officer it would be putting a premium on fabricated evidence. In *State vs Abdur Rashid Piada alias Abdur Rashid Sarder, 40 DLR (AD) 106,* the High Court Division disbelieved PWs 9 and 12, two vital witnesses on the ground that they were examined by the police at a belated stage. This Division maintained the judgment observing that their evidence was rejected as 'doubtful' by the appellate court. as they did not disclose this story to anybody including the investigating officer until 20 days of the incident". The Supreme Courts of Pakistan and India took similar views in *Habib Ullah vs State, 21 DLR SC 88* and *GB Patel vs State of Maharashtra, AIR 1979 SC 135.*

46. The High Court Division has committed a fundamental error in considering the evidence of PWs 5, 6, 7, 16, 19, 20 and 32 in support of the charge of conspiracy in failing to notice that even if it is assumed that they did not make any contradictory statements, their evidence could not be used in support of the charge of criminal conspiracy, inasmuch as, they said nothing in support of the charge. Or, in the alternative, the elements which constitute criminal conspiracy are absent in their testimonies. Their evidence can be used as circumstantial evidence in support of the charge of abetment of murder inasmuch as, some of them deposed regarding Samanja's love affair with Titu and Jibran, some them deposed about the love affair between Samanja and Jibran, one of them (PW 19) stated that Osman told him that Jibran would be given a lesson for keeping love affair with Samanja who is the girl friend to Titu, and that PW 32 disclosed about Samanja's love affair with her husband and Titu adding that the appellant had confronted Jibran on the birth day party arranged by PW 16 and threatened him to death unless he left the country which she did not state to the police. The facts stated by them cannot constitute an offence of criminal conspiracy within the meaning of section 120A of the Penal Code.

47. The learned Additional Attorney-General submitted that the confessional statements are sufficient to come to the conclusion that the appellant is the principal conspirator at whose instance the brutal murder was materialized and therefore, the High Court Division was justified in forming the opinion that the appellant is the main architect of the murder. On the other hand, Mr Anisul Hoque argued that these confessional statements could not be considered in support of the charge of conspiracy; that the prosecution had failed to adduce any legal evidence in support of the charge of conspiracy, and that these confessions could only be used as corroborative evidence in sup-

port of the charge of abetment of murder provided that there are independent evidence either direct or circumstantia1 to corroborate those confessional statements to prove the said charge.

48. The High Court Division is totally misconceived in convicting the appellant on the charge of conspiracy, inasmuch as, while convicting him on the charge, it has reproduced section 120A of the Penal Code, which defines criminal conspiracy, and then it formulated a point for consideration as to whether Yasin Rahman @ Titu had any acquaintance or relationship with Samanja' and then it considered the evidence of PWs 6, 16 and then posed a question for consideration such as; "Therefore as of necessity we have to see whether Yasin Rahman had any reason or cause to have prior intention/motive to come to an agreement with Osman a hard core criminal to cause the death of Jibran or to punish him and if so, why?" The High Court Division then considered the evidence of PWs 7, 21, 32 and 47 and concluded that 'the testimony of PWs 6 and 7 *prima facie* proved that some intimacy grew between Samanja and deceased Jibran'. And then it considered the alleged threat to Jibran as stated by PW 32, and then considered Exhibit X-l, a letter written by one Mr Joydeb Majumder, the evidence of PWs 7, 20, 32, 33 and the break-up of mobile phones, Exhibit 16, the confessional statements and the fact of absconding of the appellant, and came to the conclusion that `a compact chain of very strong circumstance is established which suggests as to the fact of Criminal conspiracy to kill Jibran within the meaning of section 120A of the penal Code being muster Mined by Titu...'

49. The conclusion arrived at by the High Court Division is erroneous for, it had illegally taken the confessions of co-accused in support of the charge of conspiracy. Besides, the other evidence considered by it did not contain the elements of conspiracy. Moreso, Exhibits 16 and X-l were illegally admitted into evidence. None of the above witness deposed that the appellant entered into an agreement with other convicted accused to kill Jibran. Exhibits 16 and X-l also did not indicate any such element.

50. Mr Anisul Huq submitted that the circumstantial evidence relied by the prosecution are not conclusive in nature and some of them are inadmissible. He argued that the circumstantial evidence so far as it relates to the break up of mobile phone No.017750815, which was issued in the name of one Alamgir Chowdhury and not in favour of accused Alamgir as would be evident from the evidence of PW 48. This witness while admitting the said fact, gave an explanation that though the said phone was issued in the name of Alamgir Chowdhury but in fact, he was the absconding accused Alamgir. He, however, did not produce any reliable evidence in support of his claim or the basis of forming such opinion. No documentary or oral evidence was produced to corroborate his claim. So, his explanation is based on hypothesis.

51. More so, this accused Alamgir did not make any confession admitting any sort of connection with the appellant. What's more, accused Zillur Rahman, Didarul Alam, Md Zahid Hossain and Osman stated nothing with regard to the telephonic conversations between Alamgir and Titu by which it could be presumed that the latter gave direction through phone for implementing the killing. Accused Md Omar Ali @ Jahangir and Md `Siddique disclosed the name of Alamgir but they did not say anything regarding telephonic talk between the appellant and accused Alamgir. Further, none of the prosecution witnesses said anything against accused Alamgir and therefore, there is no corroborative evidence in support of the story introduced by PW 48 that there was telephonic: talk between the appellant Titu, and convict Alamgir with mobile phones 017750815 and 018311175. In view of such admitted posi-

tion, I failed to understand how the High Court Division believed the story of telephonic talk between the appellant and Alamgir on the day of occurrence through which Titu monitored the killing. More so, even if it is assumed that there was telephonic communication between the appellant and accused Alamgir, there is nothing on record to suggest that the alleged communication made through mobile phone was relating to the killing of Jibran. The prosecution failed to prove the words allegedly exchanged between Titu and accused Alamgir or the fateful day.

52. PW 48 stated that in course of investigation he seized `break down' call list of mobile phones 018313284, 018311175 and 017750895 and found that the owner of phone No. 018311175 was Yasin Rahman Titu but he wrongly mentioned the number as 018313284 and that Alamgir Chowdhury is the owner of Phone No.017750895 whose real name is Alamgir. He further stated that during trial of the case he collected through Interpol Phone Nos.00441273667635, 00447712670768 and 00447712187297 of London, the holders of those phones are relatives of Samanja. Even if it is assumed that the appellant used cell phone No.018311175, nothing can be inferred from the evidence of PWs 33 and 48 that the appellant had talked with accused Alamgir on the day of occurrence or that the appellant gave instruction to accused Alamgir to execute the killing. There is no also legal evidence to come to the conclusion that accused Alamgir used phone No. 01750895.

53. It is not the prosecution case that PW 48 or any one intercepted the calls from which it was detected that the communication was for the purpose of implementing the killing through Alamgir who is turn gave direction to the confessing accused. PW 48 did not disclose the source where from he had ascertained that the appellant and accused Alamgir talked many a times prior to the date of occurrence and also on the date of occurrence over mobile phone. He did not furnish any documentary evidence to corroborate his claim. His statement is inadmissible since PW 33 who supplied the mobile phone break-up, Exhibit 16, did not support his statement. He did not explain how he had ascertained that the user of mobile phone No.017750815 was accused Alamgir. There is also no legal evidence in support of his claim. The High Court Division misread the evidence of PW 33 and held that the testimony of PW 33 showed that Titu monitored the plan of killing Jibran by giving telephonic direction to Alamgir.

54. The claim of PW 33 is unbelievable in view of his admission that "কেহ টেলিফোন নিতে ইচ্ছুক ব্যক্তি বা প্রতিষ্ঠানের পক্ষে ব্যবহারকারীর বরাবরে লাইন দিয়া থাকি। তাহারা আমাদের প্রদত্ত নির্দিষ্ট ফরমের কলাম সমূহ পূরণ করিয়া যথারীতি টাকা জমা দিলে আমরা লাইন দিয়া থাকি" In course of cross-examination this witness stated "প্রঃ ১৬ এর বিষয়বস্তু সম্পর্কে আমার কোন ব্যক্তিগত জ্ঞান নাই। আমি কম্পিউটার হইতে প্রাপ্ত তথ্য সমূহ Forwarding মূলে আই,ও, সাহেবকে দিয়াছি। Computer গুলি অপারেটররা পরিচালনা করে।..... .....গ্রাহকদের সাথে আমাদের একটি চুক্তিপত্র থাকে। সংশ্লিষ্ট চুক্তিপত্র পুলিশ সিজ করে নাই।" From the above statements, there is no doubt that PW 33 has no idea about Exhibit 16 arid that the computer operator who issued Exhibit l6 was the competent witness to prove the fact stated therein but the investigating officer for reasons not known did not cite him as witness. Further, it is clear from his evidence that the identity of the user of a particular mobile phone can be ascertained from the contract form where the particulars of the user of the mobile phone are required to be furnished but the investigating officer has not seized the same. In the contract form the signature of the user of the mobile phone will be available and from the admission of PW 33, it is apparent that any person or organization can get mobile phone connection subject to payment of fees and by filing duly filled up form. So, there is possibility of taking mobile phone connection by using a fake name by any person. It is not the prosecution case that from the pho-

tographs furnished with the contract form or from the signature of the user, it was ascertained that the users of those mobile phones were Titu and accused Alamgir.

55. PW 33 stated that the said phone was allotted to and used by the appellant and that 16 calls were recorded with mobile phone No.017750895. My learned sister believed the prosecution's claim that the appellant monitored the incident on the date of occurrence through accused Alamgir over mobile phone although she noticed that in Exhibit 16, the name of one 'Alamgir Chowdhury' was mentioned. With due respect, I am unable to agree with her views that since accused Yasin Rahman @ Titu talked with that Alamgir Chowdhury as many as 16 times on the date of occurrence he could have told who was actually that Alamgir Chowdhury and that neither before the trial Court nor the appellate Court nor before this Division nothing could be told from the side of the accused-appellant disclosing the identity of Alamgir Chowdhury.....

56. So, my learned sister has shifted the onus of this fact upon the defence. It is totally against the principles of criminal jurisprudence to shift the onus upon the accused in respect of a fact sought to be proved by the prosecution. This can be done only when the defence has accepted a fact by giving suggestion to the prosecution witnesses or by adducing evidence. If the above view is accepted, there will create anarchy in the administration of criminal justice. We cannot make such observation sitting in the highest Court of the country ignoring the established norms, principles and practice.

57. Admittedly the Grameen Phone number was issued in the name of Alamgir Chowdhury but PW 48 stated that it was issued to accused Alamgir. It is the GrameenPhone authority or official who is connected with the matter is the competent person to prove the fact. This fact proved that any one can get mobile phone connection in the name of any other person. Therefore Exhibit 16, cannot be used by the prosecution as corroborating evidence, since it has not been legally proved and even if it is legally admitted, it cannot be used against the appellant as corroborative evidence. These facts are not consistent, conclusive and sufficient to find the appellant's guilty of the charge. So, there are lot of infirmities and absurdities in the evidence regarding the users of mobile phones relied upon by the prosecution. If that being the position, then there is no evidentiary value of the statement of PW 48 that he ascertained that the appellant talked with Alamgir on the day of occurrence.

58. Now turning to Exhibit XI, a letter said to have written by Mr Joydeb Mojumder to the Police Commissioner which is used as another circumstantial evidence. In course of cross-examination, PW 48 admitted that in the letter Titu's name was not mentioned. PW 32 also admitted that Titu's name was not mentioned in that letter. She, however, gave an explanation that 'ঐ চিঠিতে জয়দেব বাবু টিটুর নামটা এই কারনে লিখেন নাই যে টিটু বিখ্যাত শিল্পপতির ছেলে বিধায় তাহার নাম লিখিলে ভবিষ্যতে ঝামেল হইতে পারে।' This explanation can only be given by Mr Joydeb and not by PW 32. What prompted Mr Joydeb in not mentioning Titu's name could only be explained by him. She being not the author of the letter is not legally entitled to give explanation on behalf of the author of the letter. Besides, this is a lame excuse because if Jibran was apprehensive of his life and sought help from the then Assistant High Commissioner for bringing the matter to the higher police authority, the natural presumption is that he had furnished the name of the person who had threatened him to death and there was no reason on the part of Mr Joydeb not to mention the name of Titu when he had written letter to a Police Commissioner for taking security measures for Jibran. During the relevant time there was none other than Titu who allegedly threatened him as disclosed in the evidence. So apparently the explanation furnished by PW 32 cannot be accepted.

Further, this letter does not reveal that there is *prima-facie* evidence affording reasonable ground to believe that the appellant and other convicts have conspired to kill Jibran .

59. The High Court Division failed to notice that the defence objected to the reception of the photo copy of a letter, Exhibit X-l, filed by PW 48 and it illegally took it into consideration. It was said, one Mr Joydeb Mojumder wrote a letter to the Police Commissioner who did not come forward or any body from the High Commission Office to prove it and the prosecution did not give any explanation for withholding him. It also did not explain the reason for not filing the original copy. Where the contents of any document are in question, either as a fact in issue or a sub-alternate principal fact, the document is the proper evidence of its own contents, and all derivate proof is rejected until its absence is accounted for. If objection to the admission of secondary evidence is taken at the time of its production, it may be within the power of the party tendering the evidence to correct the irregularity and prove the original, or to show that the secondary evidence is really admissible in the circumstances of the case.

60. There is nothing to come to the conclusion from Exhibit X-I that neither the appellant had 'said' anything to accused Alamgir or any other accused from which it might be inferred that he was in agreement which he conceived in his mind, which he then passed from a secret intention to the stage of mutual consultation and concert, which is sufficient to come to the conclusion that as Jibran was not rectified despite threat, the appellant materialised the killing through other accused. In order to prove a case on circumstantial evidence, each circumstance must have link with other circumstance and the credible testimony may form a strong chain of sure guilt binding the accused. The statements of PW 33 or PW 48 delink one fact with the other.

61. It must not only to prove the consistent circumstances but also it must be proved that the link from one fact with another should be so consistent that no inference other than the guilt of the accused. These documentary evidences do not conclusively prove that the Titu has conspired with the other convicted accused to kill Jibran. Exhibit X-1 also conflicts with the prosecution case, inasmuch as, according to prosecution version, the appellant has hired Osman through convict Didarul Alam but Exhibit X-1 discloses a fact of threat to Jibran by some unknown persons. There is no reliable evidence that the appellant is the user of mobile phone No.018311175 and accused Alamgir was the user of phone No.01750895 and, the High Court Division has illegally taken Exhibits 16 and X-1 into consideration which were not legally admitted and proved by the prosecution.

62. The observation of the High Court Division that the appellant 'in order to clear his thorn to get Samanja in collaboration with Didar came in contract with a hard core criminal...' is, therefore, based on no reliable evidence. This conclusion is perverse in that a criminal goes free, if he must, but it is the law that sets him free. The other circumstance relied upon by the High Court Division is that affair between Jibran and Samanja angered Titu who threatened Jibran to leave the country for avoiding any consequence but the latter did not respond. As discussed above, there is absolutely no legal evidence in support of this claim. The other circumstance considered by it is that the appellant hired Osman through Didarul for implementing the desired killing. The hiring of Osman by the appellant having been disclosed in the confession of Didarul, which was retracted later, there must be independent evidence in support of the allegation but the prosecution failed to adduce any other evidence to corroborate the said fact.

63. In a case based on circumstantial evidence, there must be a probative link of each

circumstance and must be made out with certainty. There must also be link after link to be forged firmly by credible testimony which may form a strong chain of guilt of the accused. Where various links in a chain are in themselves incomplete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using additional link it must be proved that all links in the chain is complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacunas in the prosecution case the same could be cured or supplied by a false defence or a plea which is not accepted by a court. The circumstances from which the conclusion of guilt to be drawn in the first instance be fully established and all facts established should be consistent only. The circumstances should be of a conclusive nature and they should be such as to exclude every hypothesis but the proposed to be proved.

64. To say in other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that in all human probability, the act must have been done by the accused and accused alone. References in this connection are the cases of *Allah Ditta vs State, 11 DLR (SC) 38, Sharad vs State of Maharashtra, AIR 1984 SC 1622, Ram Gopal vs State of Maharashtra, AIR 1972 SC 656, Shivaji Sahebrao Bobade vs State of Maharashtra, AIR 1973 SC 2622, Deonandan Mishra vs State of Bihar, AIR 1955 SC 801, Charan Singh vs State of UP, AIR 1967 SC 520, Dharam Das vs State of UP, AIR 1975 SC 241 and SP Vhatnagar vs State of Maharashtra, AIR 1975 SC 826.*

65. Leaned Additional Attorney-General has referred to the cases of *Taslimuddin vs State, 44 DLR 136, Keshab Chandra Mistry vs State, 1985 BLD (AD) 301, Allah Ditta (Supra) , 11 DLR (SC) 38, Hasen Ali vs State, 38 DLR 235, Chandmal vs State of Rajasthan, AIR1976 SC 917 and Gambhir vs State of Maharashtra, AIR 1982 SC 1157.* I fail to understand why the learned Additional Attorney-General has referred these cases which support the case of the appellant. In *Kali Ram vs State of HP, AIR 1973 SC 2773* Khanna, J. argued, 'Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable; it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations. There is, therefore, no reliable circumstantial evidence to prove the charge of criminal conspiracy and the High Court Division has illegally convicted the appellant under section 302 read with section 120B of the Penal Code. In the majority opinion also, my learned sister has totally ignored the discrepancy in the facts sought to be proved to connect the appellant in the incident with circumstantial evidence and concurred with the High Court Division.

66. The next question that requires to be considered is whether the appellant has abetted

the offence of murder since it is found that the prosecution has failed to prove the charge of criminal conspiracy against the appellant. Abetment defined in section 107 means; a person who instigates another to do a thing or engages or instigates another to do a crime is regarded as abetment. Second clause of section 107 of the Penal Code says, a person abets the doing of a thing, who engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, in order to the doing of that thing. This shows that in order to constitute the offence of abetment by conspiracy, it must be proved that two or more persons combined together in a conspiracy; secondly, an act or illegal omission must have taken place in pursuance of that conspiracy, and in order to the doing of that thing. It should be remembered that a mere conspiracy or a combination of two or more persons for the doing of a thing does not amount to an abetment of the offence. Something more is necessary that is to say, an act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing for which the conspiracy was made. Where an agreement is to commit an illegal act, the agreement itself becomes the offence of criminal conspiracy; the agreement is to do an illegal act which is not an offence or an act which is not illegal by illegal means in case of an offence of abetment.

67. The distinction between the two offences, say, the offence of abetment by conspiracy and the offence of criminal conspiracy, so far as the agreement to commit the offence is concerned, is that for abetment by conspiracy mere agreement is not enough, an act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for but in the offence of criminal conspiracy the very agreement or plot is an act in itself and is the gist of offence.

68. To put it briefly, in order to bring an offence of abetment by conspiracy a mere combination of persons or agreement between them is not enough. By the amendment the legislature made conspiracy itself punishable as distinct offence, apart from the object of conspiracy with, if carried out, would itself amount to an offence. The punishments for two categories of offences under sections 109 and 120B are different. Section 109 speaks only with the punishment of abetment of for which no express provision is made under the Penal Code. For punishment of a charge of abetment should be along with some other substantive offence committed. The offence of criminal conspiracy is an independent offence which is punishable under section 120B. Therefore, for punishment of a charge of conspiracy, no charge of abetment is necessary.

69. Thus, the conviction of. the appellant under sections 302/109 and 120B of the Penal Code is erroneous and untenable. In the majority opinion his point has totally been ignored. The High Court Division itself was confused as to the culpability of the appellant in the incident and accordingly, convicted him under those two counts. If the High Court Division was convinced from the materials on record that the appellant had master minded the killing and that he was the main conspirator, his conviction would have been under section 302 read with section 120B of the Penal Code. If it disbelieved the criminal conspiracy, but found from the materials on record that the appellant had abetted the offence of murder, his conviction would have been one under sections 302/109 but there cannot be a conviction on those two counts for the murder of one person, namely Jibran. There are full of confusions and contradictions in the judgment which cannot be legally maintained.

70. Let us now consider the incriminating part of confessional statements of co-accused in support of the charge of abetment . Convict Didarul Stated "শুক্রবার দিন আমার খালত ভাই ইয়াসিন রহমান

প্রকাশ টিটু আমাদের গ্রামে যায় ও তাহার মায়ের কবর জিয়ারত করে আমাদের বাড়ীতে যায়। আমার মাকে কদমবুছি করে। সে আমাকে ঘরের বাইরে এনে বলে যে আমার সাথে কোন সন্ত্রাসীর পরিচয় আছে কিনা। আমি কারণ জিজ্ঞেস করিলে সে বলে যে একজনকে শায়েস্তা করতে হবে। আমি বলি যে খুজি দেখব.....আমার ভাই ইয়াসিন রহমান কিছুক্ষণ পর গাড়ী নিয়ে সেখানে যায়। তখন ইয়াসিন রহমান আমাকে দুরে যেতে বলে এবং ওসমানকে তাহার গাড়ীতে বসিয়া তাহারা কথা বলে..... রাস্তায় আমি জিজ্ঞেস করি যে কি আলাপ হল। তখন ওসমান জানায় যে শিপিংয়ে চাকুরী করে একজন লোককে শায়েস্তা করার জন্য আমার ভাই বলেছে এবং এর বিনিময়ে ৪/৫ লক্ষ টাকা দিবে বলে।" The statement that the appellant wanted from Didarul about a terrorist for the purpose of giving a lesson to a person can be used against the appellant subject to the condition that there are other independent evidence to corroborate the said statement. The latter part of the statement so far as it relates to what Osman told to him is completely inadmissible, inasmuch as, whatever he stated was the version of Osman and Osman did not make any concession corroborating the said statement. Secondly, this statement was not made in presence of Titu. Unless Osman corroborates the statement, it cannot be used against the appellant.

71. Zillur Rahman did not say that this appellant stated to him for giving a lesson to Jib ran and whatever statement he made against the appellant was the version of Didar. He stated that "ঘটনার কয়েকদিন আগে ঐ বাসায় আমি, ওসমান, দিদার এবং কিরণ এসে হেরোইন খাই। তখন ওসমান আমাদের সবাইকে বলে, দিদারের খালাত ভাই ইয়াছিন রহমান টিটু খলিল সাহেবের ছেলে তাকে এবং তার Girl Friend কে Shipping Companyর এক ম্যানেজার insult করেছে ঐ Girl Friend ঐ Manager rape করার চেষ্টা করেছে অথবা rape করেছে। টিটু আমাকে লোকটাকে শায়েস্তা করার জন্য দিদারের মাধ্যমে বলেছে। ১০,০০,০০০ টাকা দিবে কাজটা করতে পারলে। তোমরা আমাকে সাহায্য করবে। টাকা পয়সার অভাব হবে না। কখন, কিভাবে ঐ লোকটাকে হত্যা করবে তা নিয়ে ওসমান ও দিদার পরামর্শ করে। দিদার ওসমানকে বলে টিটু তোমাকে ঐ লোকটাকে চিনায়ে দিয়াছে কিনা। তখন ওসমান বলে আমাকে লোকটাকে, লোকটার অফিস এবং ফেরার পথ এবং লোকটার গাড়ী সবকিছু দেখায়ে দিয়াছে ওসমান আমার সাহায্য চাইলে আমি নীরবে তা পালন করিব। There is sharp contradiction between the statements of Didar and Zillur. Didar did not say that the appellant told him through Didar to give a lesson to Jibran and that Didar also did not claim that the appellant showed the victim's office, identified his vehicle and his way of movement . Therefore, either Didar was telling the truth or Zillur was telling truth but their statements cannot go together so far as it relates to the appellant.

72. Zahid Hossain Kiron stated 'অসময় কাজ আছে বলে আমাকে রুখার ২/৩ দিন পরে আমি জিলুর ও দিদারের সামনে ওসমানকে কি কাজে আমাকে রেখেছো তা জিজ্ঞাসা করি। তাতে ওসমান বলে কাজটা হলো দিদারের খালাতো ভাই টিটুর কাজ। আমি কি কাজ জিজ্ঞাসা করলে ওরা বলে জিবরান নামে একজন ভারতীয় নাগরিক তাকে মারতে হবে। আমি কেন মারতে যাবো জানতে চাইলে ওরা টিটুর গার্ল ফ্রেনড জাম্বো সাহেবের মেয়েকে রেপ করার চেষ্টা করেছে জিবরান সাহেব তার অফিসে। সে কারণে টিটু জিবরানকে মারাবে। টিটু বলেছে জিবরানকে মারতে পারলে সে দশ লক্ষ টাকা দিবে। তখন জানতে চাইলে ওরা জানায় টিটু কে,ডি,এস,এর মালিকের ছেলে। ওসমানের কথা মতো আমি চিটাগাং এ তার বাসায় থেকে যাই। ওসমান জিবরানকে মারার জন্য দিদার, জিললুর, জাহাঙ্গীর ছাড়াও সাহেব খালীর ৪ জনকে ঠিক করে।.....টিটু তার পূর্বে ওসমান ও দিদারকে জিবরানের অফিসে নিয়ে যেয়ে জিবরানকে দিয়ে ছিল। আলমগীর অফিসের সামনে থাকতো। ওসমান থেকে মোবাইল ফোনে ওসমানের কাছে খবর পাঠাতো.....। He did not say that he met the appellant at any point of time and talked with him about the plan for killing Jibran. He stated that Osman told him in presence of Zillur and Didar that one Indian citizen would have to be killed. Neither Zillur nor Didar corroborated the said statement.

73. Of the statements of Md Omar Ali alias Jahangir and Md Siddique, the High court Division discarded the statement of Md Siddique on the reasoning that his statement is exculpatory in nature. Jahangir stated that Zillur told him that one person would be given a lesson as he had misbehaved with the girl friend of Didar's cousin Titu. He did not make any other statement implicating the appellant. This statement cannot be used against the appellant since Zillur did not corroborate him. Zillur did not state that he told Jahangir to give a lesson to Jibran for misbehaving Titu's girl friend, rather he stated that when he along with Osman, Didar and Kiron was consuming hero-

in, Osman told them to give a lesson to Jibran and that Osman and Didar discussed when and how the killing of Jibran would be materialised. So he totally contradicted the statement of Zillur.

74. Neither Zillur nor Didar claimed that the Osman told them that one Indian citizen namely Jibran would have to be killed in presence of all but Kiron stated that he told about the killing in front of Zillur and Didar. Again, he stated that the appellant took Osman and Didar in the office of Jibran for identification. Didar did not state that the appellant located or identified the office of Jibran. Apart from that, Kiran stated about what he had heard from Osman. There are contractory versions regarding the appellant's complicity in the confessional statements and therefore, it is difficult to rely upon and use them against the appellant. Secondly, suppose, those confessing persons deposed as witnesses and made similar statements, would their statements be admissible in evidence and used against the appellant? The answer to the query is in negative. If the evidence of the nature are not admissible as they are hearsay, how then the confessional statements of co-accused narrating versions of a third person would get special latitude and be admissible under section 30 or under any other provisions of the Evidence Act is not clear to me?

75. Upon analyzing the confessional statements of Didarul Alam, my learned sister came to the conclusion that the statements show that Didarul being very much aware of the fact that accused Osman and others assembled with fire arms with the object of killing a person willfully joined that unlawful assembly and continued in that assembly till the murder of Jibran. Similar conclusion has been reached after analyzing the confession of Zillur Rahman. It was also held that the confession of those two and Omar All are inculpatory in nature. It is very difficult on my part to agree with the said views. First, no charge for commission of unlawful assembly was framed against the accused-persons and no evidence was also adduced in support of the same. Second, there can be an unlawful assembly, the common object of which is one of those specified in section 141 of the Penal Code without anything for the being done in carrying out that common object. This can only be proved by evidence. The court cannot draw inference of formation of unlawful assembly by taking into consideration of confessional statement of the accused because, the confessional statements are not evidence at all.

76. Convict Alamgir is the full brother of convict Didar. According to Kiron, Osman engaged Alamgir for locating Jibran's office. He then stated, prior to that the appellant, took Osman and Didar to Jibran's office for recognizing Jibran. Didar did not say that the appellant took him along with Osman to Jibran's Office for recognizing him. Secondly, if the appellant had taken Didar and Osman to get Jibran recognized, there was no reason on the part of Osman to engage Alamgir for 1ocating Jibran's office since Osman had already located Jibran's office through the appellant. There are full of inconsistencies and infirmities in the confessions relied upon by the prosecution against Titu. Learned Additional Attorney-General has failed to clarify these inconsistencies.

77. Learned Additional Attorney-General has avoided the Court's query regarding the admissibility of hearsay statements made by co-accused in their confessions and submitted that all the statements revealed the complicity of the appellant. When, his attention was again drawn about the retraction of confessions apart from the above contradictions, the learned Additional Attorney-General relented and then submitted that he would meet the point later on but concluded his argument without meeting the Court's query.

78. Oral or written statements made by

persons not called as witness are inadmissible to prove the truth of the matters stated except when such statements become relevant under some sections of the Evidence Act as exceptions to the rule against hearsay, (Phipson, Evidence, 7th Edition, Page 212), that it to say, sections 18, 21, 30 and 80 of the Evidence Act. Therefore, Evidence Act does not authorize to admit a hearsay evidence or statement. Section 60 states, the fact to be deposed to, whether it is a fact in issue or relevant fact, must be deposed to by person who has heard it if it is a fact which .could be heard. My learned sister in her opinion observed in this connection that but it is not hearsay and admissible when it is proposed to establish by the evidence not the truth of statement, but the fact that it was made'. With due respect, I fail to understand why the statement of Didarul is not hearsay statement because Didarul stated what the appellant told to him and secondly, what Osman told to him thereafter. Neither the appellant Titu nor Osman corroborated Didarul. Is it not that the prosecution is establishing fact of what the appellant or Osman told to Didarul regarding the said fact?

79. Thus, there is no gainsaying the fact that apart from the statement of Didarul Alam that the appellant wanted to know from him on whether he had any link with a terrorist for giving a lesson of a person and that he had introduced Osman with him after some days at the sea beach area, there is no other corroborative evidence in support of the said story and to connect the appellant in the incident of murder. More so, there is no independent evidence to corroborate the statement of Didarul or the statements of other three confessing accused. The High Court Division on perusal of the confessional statements arrived at the conclusion that "confessional statements of accused Zillur also revealed as to how he became a friend of Osman and his taking of heroin at a residence at Mistripara and his acquaintance with other accused, namely, Kiron, Didar and the deliberations between Osman and Didar as to how the man would be killed, the fact of prior identification of Jibran by Titu to Osman and as to how the car of Jibran was stopped. The confessional statements of five accused mentioned above clearly show their involvement (except Md Siddique) with the killing of deceased under the leadership of Osman and that PWs 5, 13, 14 and 19 corroborated the confessional statements and those can very much be used against him and in fact it is Osman who was the leader of the operation resulting the brutal killing of the deceased".

80. It must be proved first that the appellant had engaged Osman or other convicts in the conspiracy in pursuance of which the murder of Jibran was materialised. The statement of Didarul that "সে (appellant) আমাকে ঘরের বাইরে এনে বলে যে আমার সাথে কোন সন্ত্রাসীর পরিচয় আছে কি না। আমি কারন জিজ্ঞেস করলে সে বলে যে একজনকে শায়েস্তা করতে হবে। আমি বলি যে খুজি দেখব।" does not amount to an offence of abetment by conspiracy within the meaning of section 107 of the Penal Code. Further, there is no other corroborating evidence to corroborate the said statement for using the same against the appellant. There is no legal evidence in support of the prosecution version that the appellant engaged Osman for implementing the killing other than the above statement of Didarul, which is not evidence within the meaning of section 3 of the Evidence Act.

81. Therefore, the High Court Division has illegally taken the confessional statements of four convicted persons as corroborative evidence under section 30 of the Evidence Act in support of the charges. Their statements cannot be used in any manner against the appellant without corroboration by Osman and then also, there must be other independent evidence to corroborate those statements. What's more, the High Court Division has totally ignored the retraction of the confessions despite the fact that the trial Court noticed those facts and disbelieved the appellant's complicity relying upon them. The principle underlying the use of

confessional statement even if retracted against the maker and the co-accused is not the same.

82. Mr Anisul Haque argued that in view of the retraction by the confessing accused, the evidentiary value to use those confessions against the appellant is practically nil . Learned counsel argued that the use of retracted confessional statement of accused as against the maker and the co-accused is not same. According to him, against the maker, the Court can act upon the confession after discarding the retraction if it found that the confession was true and voluntary but the same principle will not be applicable against co-accused. In support of his contention, the learned counsel has referred the cases of *Maqbool Hossain vs State, 12 DLR (SC) 217, State vs Fazu Kazi, 29 DLR (SC) 271. Haroon Haji vs State of Maharashtra, AIR 1968 SC 832 and Bhubani Sahu vs King, 2 DLR (PC) 39.* In the majority opinion, my learned sister though noticed that the confessing accused retracted the confessions refuted the argument of the learned counsel observing 'a retraction of a confession has nothing to do with the question of its being of a voluntary nature and true and, as such, cannot be ruled out of consideration merely on the ground of its being retracted'. In arriving at such conclusion my learned sister has referred the cases of *Joygun Bibi vs State, 12 DLR (AD)156* and *Nausher All Sikder vs State, 39 DLR (AD) 1 94* and *Mobarak Hussain vs State, 33 DLR 274* . We due respect, my learned sister has failed to appreciate the *ratio decidendi* in those case.

83. In Joygun Bibi, Cornelieus CJ argued, 'the retraction of the confession was wholly immaterial once it was found that it was voluntary as well as true, that being the case, no reason whatsoever can be found for the inability felt by the learned Judges in taking the confession into consideration against the co-accused. It is true that if there is no other evidence against Joygun Bibi except the confession of Abdul 'Majid, then, the confession by itself being merely a matter to be taken into consideration, and not having the quality of evidence against Joygun Bibi, it could rightly be held in law that her conviction could not be sustained on the confession alone.' But in the present case, Abdul Majid's confession is by no means the only material in the case to be taken into consideration against Joygun Bibi'. The case of Nausher Ali Sarder is quite distinguishable for, in that case, the question of retraction of confession by Nausher Ali Sarder and use of his confession against co-accused does not arise. Therefore, I am unable to endorse the above views so far as it relates to co-accused. The opinion expressed above is applicable against the maker but not applicable against co-accused. In expressing the above opinion, my learned sister has totally ignored the previous opinions expressed by this Division and the decisions cited by the learned counsel .

84. In Maqbool Hossain (supra) it was observed, 'The persuasive efficacy of such confessional statements (retracted confessions) would be further weakened by the circumstance that their makers had themselves resiled from them.' In *Fazu Kazi, (29 DLR SC 271)* the above views have been reaffirmed observing "It may, however, be noted that a retracted confession has very little probative value against a co-accused. Retracted confession may be taken into consideration against a co-accused and may form the basis of conviction if there is substantial and credible independent evidence rendering corroboration both as to the crime and criminal, because by itself a confession whether retracted or not is a very slight evidence against co-accused'. In Haroon Haji, (Supra) Hidayatullah, J observed, 'A retracted confession is a weak link against the maker and more so against co-accused'. In *Hussain Umar vs Dilipsinghi, AIR 1970 SC 45,* Bachawat, J argued "On February 11, 1959 Bello made a confession implicating Mukherjee. At the trial he retracted the confession. Under section 30 the Court can take into consideration this retracted confession

against Mukherjee. But this confession can be used only in support of other evidence and cannot be made the foundation of a conviction, see *Bhuboni Sahu's case 76 Ind App 147 at p. 156 (AIR 1949 PC 257 at p. 260).* It cannot be used to support the evidence of the other accomplices".

85. In Bhubani Sahu, the Judicial Committee of the Privy Council taking section 30 of the Evidence Act was of the opinion that a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of evidence contained in section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of these infirmities. "Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, make it evidence on which the Court may act; but the section does not say that confession is amount to proof. Clearly there must be other evidence. The confession is .only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence".

86. In *Kashmira Singh vs State of Madhya Pradesh, AIR 1952 SC 159,* the Supreme Court of India observed in paragraph 9 as under:

> "In our opinion, the matter was put succinctly by Sir Lawrence Jenkins in Emperor vs Lalit Mohan, 38 Cal. 559 at p.588 where he said that such a confession can only be used to "lend assurance to other evidence against a co-accused" or to put it' in another way as Reilly, J did in In re Periyaswami Moopan, 54 Mad. 75 at 77.

"the provision goes no further than this where there is evidence against the co-accused, sufficient, if believed, to support his conviction, then the kind of confession described in S.30 may be thrown into the scale as an additional reason for believing that evidence" .

87. Similar views have been taken by this Division in *Lutfun Nahar Begum vs State, 27 DLR (AD) 29.* This Division observed, the confession of an accused cannot be treated as substantive evidence against another accused but it can only be used to give assurance of other evidence. In *Amir Hossain Howlader vs State, 37 DLR (AD) 139,* this Division again reaffirmed the views of the Judicial Committee on the Privy Council in Bhubani Sahu and the Supreme Court of Pakistan in *Joygun Bibi and Maqbool Hossain (Supra),* observing that section 30 of the Evidence Act makes the confession of a co-accused a relevant fact; in other words, the confessional statement of co-accused is admissible against other accused-persons in the sense that it may be taken into consideration against them along with other evidence. But the confessional statement of co-accused is inadmissible in evidence against another in view of section 3 of the Evidence Act. The statements of co-accused do not fall within the definition of evidence defined in section 3 of the Evidence Act. This is for the simple reason that it is not made on oath, that it is not made in presence of the other accused and that its veracity is not tested by cross-examination. It is further argued that in case of confession which has been retracted, the evidentiary value of it is practically nil against a co-accused and in absence of strong independent evidence it is totally useless'. *(emphasis supplied).* In view of the above consistent views of the superior courts on the question I feel it not proper to consider the High Court Divisions case referred by my learned sister. In case of co-accused, the persuasive value of such statement is almost nil and minus the confessions of co-accused, there is practically no legal evidence to connect the appellant in the killing of Jibran and the High Court Division has overlooked this aspect of the matter.

88. I find no reason to depart from the

views taken in the case of Amir Hossain. As observed above, independent to the confessional statements, there is practically no other legal evidence to connect the appellant to the murder of Jibran. The High Court Division and in the majority opinion, this settled statement of law argued by the superior Courts was ignored and convicted the appellant relying upon the confessional statements along with the evidence of PWs 6, 7, 16, 20, 32, 33 and Exhibits X-l and 16, although those oral or the documentary evidence did not disclose the complicity of the appellant in any manner and thus, they could not be used as corroborative evidence. The principle of law being followed by the superior courts of the sub-continent are that even after re tract ion, if the court finds a confessional statement true and voluntarily, it can convict the maker basing upon such confession on rejecting the retracted confession. This principle is not similarly applicable to a co-accused while considering such confession for using it as corroborative evidence.

89. It is not the argument of Mr Anisul Hoque that the confessional statements of Zillur Rahman, Didarul Alam and Omar Ali are not confessions at all or that in these confessional statements they did not state anything implicating themselves in the murder or that these confessions are not inculpatory in nature as observed in the majority opinion. His argument is that these confessions cannot be used by the prosecution in support of the charge of criminal conspiracy and that since the confessing accused have retracted their confessions, the evidentiary value of the same against the appellant Titu is practically nil. Though this point has been correctly noted down in the majority opinion, in her concluding part, my learned sister without addressing the point used the confessional statements as corroborating evidence.

90. The High Court Division has given much weight to the fact of absconding of the appellant observing that "accused Titu and Alamgir also went into hiding immediately after the occurrence and inspite of the fact that warrant of arrest and other legally process were resorted to their arrest could not be secured and the trial proceed in their absence. The fact of absconding can be considered in case where the accused is an FIR name person who after committing the offence absconded. So in view of the provisions of section 8 of the Evidence Act their involvement of the occurrence can very much presume". Mr Anisul Hoque submits that the appellant was not an FIR named accused and after the submission of police report, his passport was cancelled on the prayer of the prosecution for which he could not face the trial. The prosecution admitted that the appellant' s passport was cancelled on the prayer of the prosecution. At any event, the fact of absconding itself alone is not a legal ground for taking it as corroborative evidence for proving circumstantial evidence.

91. In Amir Hossain Howlader (supra) similar question arose as to whether a fact of absconding of an accused can be taken as corroborative evidence and in that case, on behalf of the prosecution, the cases of *Gul Hasan vs State, PLD 1969 SC 89 = 21 DLR (SC)109, Md Bashir vs State, SCMR (1970) Vol-3, 351 and Md Rafiq vs State, PLD 1974 SC 65* were referred to in support of circumstantial evidence. This Division after considering the above cases concurred with the views taken by the Supreme Court of Pakistan and distinguished the cases in which absconding of an accused may or may not be taken as corroborative evidence. This Division noticed that in those cases the accused-persons shot the victims to death and then absconded and concurred the views taken therein that the facts of absconding were rightly considered as corroborative evidence.

92. After evaluating the cases this Division was of the view that Amir Hossain' s absconding should not be taken as corroborative evi-

dence. The facts are that the dead body of Rahim Farazi, brother-in-law of Sattar Mir was found hanging on a tree near the house of Amir Hossain who is a neighbour of Sattar Mir. The latter lodged an FIR stating that the victim committed suicide. A police officer rushed to the place, examined the dead body and suspected foul play in the matter. A Salish was held in the village in which Sattar Mir made a confessional statement stating that he took Rahim Farazi to the house of Amir Hossain on the night following the incident where a proposal was' made that Rahim Farazi would marry Monjura Bibi; widow of Delwar Hossain who is the brother of Amir Hossain. Rahim Farazi accepted the proposal but Amir Hossain demanded from the victim $1^1/_2$ kanis of land as gift to be given to Monjura Bibi and produced a proper for his signature. Rahim Farazi refused to gift the land, at this, Amir Hossain and his relatives assaulted victim and killed him. On the basis of such confession, the police officer lodged an FIR against Amir Hossain, Sattar Mir and other relations of Amir Hossain. Amir Hossain absconded in course of the trial and he was convicted. The prosecution relied upon the fact of absconding of Amir Hossain as the corroborative evidence of confessional statement. This Division held that the fact of absconding of Amir Hossain cannot be taken as corroborating evidence against him observing that "I fail to understand why these cases have been cited by the learned Deputy Attorney-General seeking corroboration in this case of the confessional statement of Sattar Mir so as to implicate thereby these appellants who absconded but against whom there is no evidence except co-accused Sattar's confession".

93. Learned Additional Attorney-General, on the other hand, has referred the cases of *Mobarak Hossain vs State, 33 DLR 274 and Al-Amin vs State, 51 DLR 75.* In Mobarak Hossain, the High Court Division itself observed, 'It is true that mere fact of absconding is of little importance if there is nothing beyond that. Importance of the fact of absconding of accused will depend on the facts of each particular case.' In Al-Amin, the High Court Division observed `Abscondence of the accused-persons furnished corroboration of the prosecution case and evidence'. In that case all convicted persons assaulted PWs 1, 2, 3 and then raped the victims, got the incident recorded by hiring a cameraman, and then they absconded. Therefore, this case is distinguishable from other cases on the principles discussed in Amir Hossain. In Abdul Khaleque (Supra), it was observed by the High Court Division that 'It is true mere absconsion of the accused after the occurrence is not sufficient to hold him guilty of the offence. But since the victim died in the house of the accused as a result of injuries who was none but the wife of the accused, the High Court Division rightly drew adverse presumption against the accused as he fled away from the house immediate after the occurrence.

94. Similar views have been taken by Dua, J. in *Matru vs State of UP, AIR 1971 SC 1050.* 'Now mere absconding by itself does not necessarily lead to a firm conclusion of guilt mind. Even an innocent person may feel panicky and try to evade arrest when wrongly suspected of a grave crime; such is the instinct self-preservation. The act oil absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. .Normally the courts are disinclined to attach much importance to the act if absconding, treating it as a very, small item in the evidence for sustaining conviction".

95. In this case in hand, the appellant was not an FIR named accused and he was implicated by co-accused in the confessional statements. Naturally the appellant might feel panicky when he was wrongly suspected as the conspirator, left the country for evading arrest. The facts of the case justify that the appellant in order to avoid police arrest or for any other rea-

son left the country which is not a legal ground to consider the fact of his absconding as a corroborating evidence. In view of the statements of law settled by this Division and the superior Courts of India and Pakistan, I am not prepared to give much importance to the fact of appellant's absconding as a corroborative evidence particularly when there is no other strong circumstantial evidence. Prosecution failed to prove that the appellant told Osman to kill victim. The prosecution also failed to prove that the appellant arranged for the identification of Jibran to other accused, his office, his vehicle and the movement road from his office. The prosecution also failed to prove that the appellant threatened Jibran to leave the country because of his jealousy regarding love affair with Samanja when he came to know that Jibran and Samanja had secret love affair. The prosecution also failed to prove that there was link between appellant and Osman or between the appellant and accused Alamgir for implementing the killing of Jibran or that he hired Osman for the purpose. There are gaps and inconsistencies between one fact and the other fact and those facts are such as are not compatible with the guilt of the appellant.

96. It is now settled that a conviction can reasonably be founded on circumstantial evidence if it is wholly inconsistent with the innocence of the accused and consistent only with his guilt. If the circumstances proved are consistent either with innocence or guilt, the accused-person is entitled to get the benefit of doubt. But in applying this principle a distinction must be made between primary facts which have to be proved in the ordinary way and the inference of guilt to be drawn therefrom. It is in this connection with latter aspect of the problem that the doctrine of benefit of doubt can apply and an inference of guilt can be drawn, only if the prove facts are wholly inconsistent with innocence, and consistent only with guilt. See *MG Agarwal vs State of Maharashtra, 1963(2) SCR 405.*

97. The High Court Division observed, 'the defense could not bring on record either by cross-examining the prosecution witnesses by bringing any other material in other manner showing any involvement of Jibran or his connection with any person having any bad reputation or connection with any illegal business or trading including smuggling so that he might have developed any sort of animosity with others who might have been behind the killing' . The High Court Division lost sight of the fact that the defence need not prove how and why Jibran was assassinated? There might be thousand and one causes for the death and the defence is under no obligation to explain the cause of death. This is against the established principle of criminal jurisprudence prevailing in the administration of justice. I fail to understand why the High Court Division has made this observation and drawn adverse presumption against the defence only because Jibran was said to have been a man of good character. This finding is also inconsistent with its earlier findings. The High Court Division noticed that Jibran and Samanja were having secret love affair. This relationship with a young unmarried girl despite the fact that Jibran had an educated cultured wife proved that Jibran did not lead a decent life. If the evidence of PWs 6 and 32 are taken to be true, he was a man of ignominious character.

98. A presumption is a rule of law that courts shall draw a particular inference from a particular fact or from particular evidence unless the truth of such inference is disproved. One of the cardinal principles of our criminal jurisprudence is that an accused is presumed to be innocent unless his guilt is proved beyond reasonable doubt. An accused-person is under no obligation to offer evidence and he is merely on the defensive and owes no duty to anyone but himself. He is at liberty, as to the whole case to rely on the witnesses of the case for the pros-

ecution, and no inference unfavourable to him can properly be drawn because he takes one course rather than the other.

99. In *Muslimuddin vs State, 38 DLR (AD) 311* this Division argued:

> "The fundamental of a criminal trial is that the accused shall be presumed innocent and that he is not required to adduce evidence to prove his innocence, but the entire burden of proof of his guilt lies on the prosecution alone and till that time the presumption of innocence, whether the case is before the trial court or at higher forums.....In a criminal trial determination of a disputed fact is the main task before the court and such determination is dependent upon consideration of answers given by the prosecution in their cross-examination. Cross-examination is therefore indispensably necessary to bring out desirable facts of a case modifying the examination-in-chief or establishing the cross-examiner's own case. The object of cross-examination is two fold, to bring out desirable facts of a case modifying the examination-in-chief on establishing the cross- examiner' s own case.

100. In that case, this Division reaffirmed the dictum laid down in *Safder Ali vs Crown, 5 DLR (FC)107* as under:

> "In a criminal case, it is the duty of the Court to review the entire evidence that has been produced by the prosecution and the defence. If after examination of the whole evidence the Court is of the opinion that the defence put forward by the accused might be true, it is clear that such a view react on the what prosecution case. In these circumstances, the accused is entitled to benefit of doubt, not as matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt."

101. Similar views have been taken in state of *Bihar vs Md Khurshed, AIR 1971 SC 2268 and State of UP vs Iftekhar Khan, (1973) 1 SCC 512. In State of Punjab vs Jagir Singh, AIR 1973 SC 2407* it was observed, a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.

102. Another aspect which the High Court Division has failed to notice is that the occurrence took place at 5-00 PM and the FIR was lodged on the following day at 10-55 AM. There is a gap of about 19 hours and PW 32 was at Chittagong at the time of lodging FIR. If she had suspected about the appellant's complicity because of his alleged animosity towards Jibran over Samanja's secret love affair, this fact could have been alleged in the FIR, because the informant had enough time to lodge it after collecting all informations regarding persons who were inimical to Jibran from PW 32 and her near ones. If there was any previous incident as narrated by PW 32 in course of the trial, she could have told the informant or the police about that incident of threat so that the police could have gotten clue for the murder. In view of the above, there is no doubt that this story of threat is an embellishment by the prosecution which is not believable one. This threat to life over the secret affair of Jibran with Samanja

being the sheet anchor of the incident as alleged by the prosecution having not been disclosed in the earliest point of time, the High Court Division has committed a fundamental error in believing this story.

103. The High Court Division has ignored another vital aspect that the witnesses relied upon by the prosecution did not state the incriminating facts relating to the complicity of the appellant in the killing in their earlier statements. These inconsistencies have been brought on record by bringing to the notice of PWs 47 and 48 with the earlier statements of those witnesses in course of cross-examination. Thus the evidentiary value of PWs 6, 19 and 32 have been shaken so far as it relates to their statements implicating the appellant. In the majority opinion though my learned sister noticed the contradictory statements of PWs 5, 6, 7,17 and 32 with their earlier statements made to the police, she was of the opinion that the omission of one or two of these sentences only in their 161 statements cannot make their whole evidence before Court not credit-worthy. Evidence of an otherwise credit-worthy witness cannot be discarded merely because it was not available in the statement of witness recorded under section 161 of the Code of Criminal Procedure.

104. My learned sister has relied up the case of *Alamgir vs State, AIR 2003 SC 282.* With due respect, I am unable to agree with my learned sister in view of the fact that these witnesses were examined to prove circumstantial evidence and in their earlier statements to police, they did not state the incriminating portion relating to different links, such as, the appellant's love affair with Samanja, the introduction of Osman in the house of Aleya, the presence of Samanja in the office of Jibran and the threat to Jibran by the appellant. These are taken as circumstances to link the appellant in the murder. The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that the offence was committed by the accused and none else. If those statements are excluded, there will remain nothing to connect the appellant Titu which is evident in the preceding paragraph of her judgment. The case relied upon by my learned sister has no application in this case, inasmuch as, in that case the evidence of PW 6 Shamim Banu was challenged on the ground that she did not state in her earlier statement to police that she is the sister of Habina. The Supreme Court was of the view that this omission is minor in nature that does not take away the nature and character of her evidence.

105. The object of cross-examination of a witness by the defence is (a) to bring out desirable facts of the case modifying the examination-in-chief or establishing cross-examiner's own case, and (b) to impeach the credit of the witness. It is not the purpose to clarify a statement by way of explanation when the credit of a witness with regard to the previous statement is impeached. That is why, Wigmore in his Law of Evidence in section 1367 stated, cross-examination is 'the greatest legal engine ever invented for the discovery of truth.' While examining-in-chief a witness discloses only a part of the necessary facts, not merely because the witness is frequently a partisan of the party calling him but also, his evidence is given only by way of answers to specific questions, and the lawyer. examining him usually calls for nothing but the facts favourable to his party.

106. A party calling a witness will naturally question him on matters which do to support the other party's case and, therefore, it is the purpose for which this system has been introduced that the opponent side's lawyer to elicit facts favourable for the defence in the cross-examination of the witness. There can be nothing more destructive of a witness's credibility than the fact, if properly proved that the witness has on a previous occasion made an inconsistent statement with regard to the same mat-

ter. The right to attack a witness's trustworthiness in this manner is recognised by sections 145 and 155(3) of the Evidence Act and the Cross-examiner should never let go an opportunity of impeaching the credit of a witness in this manner. The maxim falsus in uno, falsus in omnibus' that is, testimony of a witness should not be believed if the witness on some material fact omitted by him in his examination-in-chief by showing that the witness has lied as to that fact is closely analogous to, and, in a sense' merely an application of 'impeaching a witness's credit by a previous inconsistent statement.

107. Therefore, the learned sessions Judge has rightly disbelieved PWs 6, 19 and 32 but the High Court Division without adverting to the reasons assigned by the learned Session Judge illegally believed them as reliable witnesses. The High Court Division after considering the evidence of PWs 32, 47 and 48 held that PW 32 was not examined by the police on 10th June, 1999 and therefore, the learned Sessions Judge illegally disbelieved PW 32 that she did not state to the police that the appellant threatened Jibran to kill him. This finding is self contradictory, inasmuch as, the High Court Division after noticing her contradictory statement observed "the defence was happy or satisfied by taking contradictions from PW 47 about the omission of PW 32 in not stating in her statements allegedly given by her to the investigating officer on 10-6-1999 and even from PW 48 contradictions were taken about the statements allegedly given by her on 10-6-1999 without caring that in fact PW 32 made no statement to PW 47 on 10-6-99". When PW 32 herself admitted that she was examined on 10th June, 1999, and when the High Court Division has quoted her statement that she was examined on that day, it erroneously disbelieved the defence contention. The conclusions arrived at by the High Court Division that PW 32 was not examined by the police on 10th September, 1999 was based on piecemeal consideration of her evidence who admitted that 'আমি ১০-৬-১৯৯৯ইং তারিখে পুলিশের কাছে জবানবন্দী দিয়াছি। আমার মানসিক অবস্থা তখন খারাপ ছিল। তখন পুলিশের কাছে কি বলিয়াছি মনে নাই'

108. The High Court Division failed to consider that if anything comes from the lips of the prosecution witnesses which are favourable to the defence, the benefit will go in its favour. Learned Judge disbelieved the claim of the defence that PW 32 was examined by PW 47 on 10th June, 1999 on the reasoning that he got the charge of investigation on the following day without considering her admission. The claim of PW 47 is a misstatement of fact, which is pure and simple. The findings of the High Court Division that her explanation was most natural and quite corroborative with the confessional statements of the accused and the other evidence on record particularly of PW 6 are therefore perverse. I fail to understand how PW 32 corroborates the confessional statements? She deposed regarding the trilateral love affair of Samanja with her husband Jibran and the appellant. She did not state to the police regarding the appellant's alleged thereat to the victim. She is an educated woman with an honours degree in English from Kolkata University as evident from her testimony. If special latitude is given to this witness because of the above explanation, then the purpose for which a witness is cross-examined under section 145 will be frustrated. Even an illiterate person is not immune from the process of law with regard to the contradiction by a previous statement because section 145 makes not the slightest difference whether the witness is literate or illiterate.

109. There is another aspect which has been ignored by the High Court Division. Except on 10th June 1999, PW 32 was not legally examined by the investigating Officer (PW 48) in accordance with section 161 of the Code of Criminal Procedure. She admitted that she was examined over telephone by PW 48. I fail to understand why this investigating officer did

not examine her orally in person and chose to examine her over telephone while she was staying in Kolkata. Learned Additional Attorney-General submitted that since PW 32 was in Kolkata when PW 48 received the case diary for investigation, he could not compel her to appear for recording her statement. In this connection he has referred to section 160 of the Code of Criminal Procedure, which according to him, empowers the police officer to issue notice for attendance of any person 'within the 1imits of his own or any adjoining station ....'

110. This submission is devoid of substance, inasmuch as, there was no bar on his part to go to Kolkata for recording her statement if he was of the view that she was required to be examined further for ascertaining certain facts. The expressions 'examine orally' used in section 161(1) do not include examine over phone. The word 'oral' according to the Chambers Dictionary means 'relating to mouth near the mouth uttered by mouth. In the absence of her statement being recorded in accordance with law, her statements cannot be said 'at or about the time the fact took place'. This is necessary because the former statement of a witness to furnish corroboration can be proved only if it was made 'at or about the time' when the fact took place as a means of safeguarding against fabrication of false evidence. If the time for reflection passes between the event and the subsequent statement, the latter is not on1y useless, it may be really dangerous to allow its admission.

111. The High Court Division failed to consider another vital fact that in reversing an order of acquittal on review of the evidence, it should consider all matters including trial court's reasons for acquittal and the aspects favourable to the accused and should not act on the conjectures and inferences not arising on evidence. In *KA Vish vs State of Maharashtra, AIR 1971 SC 2256*, it was observed "though the High Court has power on a review of the evidence to reverse the order of acquittal, yet in doing so it should not only consider all matters on record including the reasons given by the trial court in respect of the order of acquittal, particularly consider those aspects which are in favour of the accused and ought not also to act on conjectures or surmises nor on inference which do not arise on the evidence in the case." Similar views have been expressed in *Keshak vs State of Maharashtra, AIR 1971 SC 953*. It is observed, in appeal against acquittal while the powers of the High Court are no different from its powers in ordinary appeal against conviction, the High Court has to consider all the matters which weighed with the trial Court and the reasons given by it for disbelieving witnesses whose demeanor it had opportunity to observe". In *Laxman Kalu vs State of Maharashtra, AIR 1968 SC 1390*, it was observed:

> "We may say here that it is now the settled law that the powers of the High Court in an appeal against the acquittal are not different from the powers of the same Court in hearing an appeal against a conviction. The High Court in dealing with such an appea1 can go into all questions of fact and law and reach its own conclusions on evidence provided 11 pays due regard to the fact that the matter had been before the Court of Session and the Sessions Judge had the chance and opportunity of seeing the witnesses depose to the facts. Further the High Court in reversing the judgment of the Sessions Judge must pay due regard to all the reasons given by the Sessions Judge for disbelieving a particular witness and must attempt to dispel those reasons effectively before taking a contrary view of the matter. It may also be pointed out that an accused starts with a presumption of innocence when he is put up for trial and his acquittal in no sense weakens that presumption, and this presumption must also receive adequate consideration from the High Court".

112. The presumption of innocence is strengthened whenever an accused is acquitted. So, the High Court Division should keep in mind when it deals with an appeal against acquittal, the benefit of doubt be given in favour of the accused, not in favour of the prosecution and it will be slow in disturbing a finding of fact arrived at by the trial court particularly when the finding is based on proper appreciation of the evidence. This is because the trial Court has the advantage of evaluating the demeanour of the witnesses. It has been observed in *MG Agarwal vs State of Maharashtra, AIR 1963 SC 200,* that "though the powers of the High Court in dealing with an appeal against acquittal are as wide as those which it has in dealing with an appeal against conviction, in dealing with former class of appeals, its approach is governed by the overriding consideration frowning from the presumption of innocence. Sometimes the width of the power is emphasized, while on the other occasions , the necessity to adopt a cautions approach in dealing with appeals against acquittals is emphasized, and the emphasis is expressed in different words or phrases used from time to time".

113. The above views have been taken with approval of the opinions expressed by the Judicial Committee of the Privy Council in Sheo *Swarup vs Emperor, AIR 1934 PC 227* and *Nur Mohammad vs Emperor, AIR 1945 PC 151.* The principle that only reasonable doubts belong to the accused has been accepted by superior courts with a few exceptions where administration of justice is different. Otherwise any practical systems of justice will then break down and lose credibility with the community. The onus to prove the different ingredients of the offence is on the prosecution and unless it discharges that onus, the prosecution cannot succeed. I have noticed on perusal of the impugned judgment, the High Court Division has ignored this established principle in this particular case and given the benefit and presumption in favour of the prosecution.

114. Learned Additional Attorney-General stressed upon the motive of murder and submitted that the appellant was benefited due to the murder of Jibran as he had animosity towards Jibran. In this case, according to him, there is no reason for coming to the . conclusion about the motive for the murder other than the secret love affair of Jibran with Samanja which angered Titu to implement the killing through hired professional killers due to jealousy. In this connection, he has relied upon the evidence of PWs 6, 7, 16, 19 and 32, and the case of *Nausher Ali Sarder vs State, 39 DLR (AD) 139.* I have discussed the evidence of the said witnesses and concurred with the views taken by the trial Court that it had rightly disbelieved them regarding their statements on the point of Samanja's secret love affair with Jibran. More so, these witnesses stated nothing regarding the appellant's motive to kill Jibran. PWs 6 and 32 stated about the love affair of Samanja with the appellant and Jibran. PW 7 stated nothing against the appellant. As regards PWs 16, 19 and 32. I have exhaustively discussed their evidence and discarded them on the reasonings that they are not reliable witnesses and deposed nothing against the appellant so far his complicity in the killing of Jibran is concerned.

115. In the case referred above, Nausher Ali Sarder was one of the assailants of the deceased Sk. Elias, who was detained within a few minutes of the occurrence and he made a confessional statement. The motive for murder, according to the prosecution, was that, there was strained relationship between the deceased Elias and his first wife Laily Begum and as a result, Elias took a second wife. Laily was residing separately and at one stage she fell in love with her cousin Jalil for which, Elias wanted to divorce Laily and as a result, Laily's near ones became furious and killed him. Besides the confession, PW 5 was an eye-witness and the defence could not bring any material by cross-examining him and other witnesses from which any reasonable doubt could be inferred that the

deceased was killed by any one other than the accused-persons. In the context of the matter, this Division observed 'The motive of the murder which originated from the bitter relation between Elias and Laily who administered poison in his food a year before this incident has been substantiated by strong evidence, both oral and documentary.....'

116. In the above case the motive for killing was rightly inferred by this Division but the facts of this case are quite distinguishable. The appellant did not make any confession and there is no eye-witness to implicate him in the incident. His complicity has been revealed in the confessional statements of co-accused. The case, so far the appellant is concerned, is entirely rests upon circumstantial evidence, the motive undoubtedly plays an important part in order to tilt the scale against the appellant. The appellant can be convicted on circumstantial evidence only when his guilt is established excluding all other reasonable hypothesis and the circumstances are wholly inconsistent with his innocence. The prosecution has clearly fallen short of proving this fact against the appellant. The evidence to justify a conviction of an offence of murder which involves the forfeiture of life, must be, best kind obtainable, that is to say, circumstances must be consistent and consistent only with the guilt of the appellant. If the evidence is consistent with any other rational explanation, then there is an element of doubt of which, the benefit must be given in favour of the appellant.

117. I am rally disappointed on reading the judgment of the High Court Division for, it's opinion appears as a belletristic essay, which gave the scantiest consideration to profoundly unimportant facts and inadmissible evidence. It has reproduced the confessional statements and those of the witnesses on repeated occasions and discussed them without looking at which are admissible and which are not into evidence. It has not cited any legal treatises.'

118. In view of the above, I am not the view that the prosecution has failed to prove the charges against the appellant beyond reasonable doubt and that the High Court Division has convicted the appellant on hypothesis. The judgment of the High Court Division is, liable to be interfered with so far as it relates to the conviction of the appellant Titu alone. The appellant is acquitted of the charges and he be set at to liberty at once, it not wanted in connection with any other case.

119. Nazmun Ara Sultana J : This criminal appeal, under article 103(2)(b) of the Constitution of the People's Republic of Bangladesh has been filed by the convict Yasin Rahman @ Rahman Yasin @ Titu challenging the judgment and order of his conviction and sentence under sections 302/109 and 120B of the Penal Code passed by the High Court Division on 28-3-2007 in Government (Criminal) Appeal No.34 of 2002 heard along with Government (Criminal) Appeal No.28 of 2002 and Criminal Appeal Nos.3023 of 2002, 2971 of 2002 and 2981 of 2002 and connected Criminal Rule Nos. l98(R) of 2002 and 199(R) of 2002. The above Government (Criminal) appeals and the Criminal appeals arose out of the judgment and order dated 12-8-2002 passed by the learned Metropolitan Sessions Judge, Chittagong in Sessions Case No.82 of 2000.

120. In that Session Case No.82 of 2000 the prosecution story, in short, was that on 10-6-1999 one James Roy, Operation Manager, Centras Maritime (BD) Ltd, 69 Agrabad Commercial Area, Chittagong lodged a first information report with Double Mooring PS District-Chittagong stating that on 9-6-1999 at 5-30 PM their Company's Principal Representative Mr Jibran Tayyabi, aged about 30 years, after completing his office work, was returning alone to his residence at South Khulshi driving his private car bearing No. Chatta Metro-Ga-11-1093 by himself. When he reached in front of Chung King Restaurant/Band Box at Sheikh Mujib

Road, Agrabad, Chittagong some unknown person/persons injured him by gun shot. Some passers-by took injured Jibran Tayyabi to the Chittagong Medical College Hospital for treatment where the doctor on duty declared him dead. That knowing about that occurrence the informant hurriedly went to the Chittagong Medical College Hospital and found the dead body of Jibran Tayyabi with marks of bullet injuries. On the basis of the said FIR Double mooring PS Case No.20 dated 10-6-1999 was started. CID, Chittagong Zone took up investigation of that case. In course of investigation the police arrested the accused Omar All @ Zahangir, Zillur Rahman, All Akbar @ Didarul Alam, Zahid Hossain @ Kiron, Osman and Siddique. Except accused Osman all of these 'arrested accused-persons made confessional statements before Magistrate, First Class which he recorded under section 164 of the Code of Criminal Procedure. The witnesses Sadhan Chandra Das, SM Liaquat @ Mukul, Aleya Begum @ Alo wife of Ahmed Meah and another Aleya Begum wife of Zahedur Rahman also made statements which were recorded under section 164 of the Code of Criminal Procedure by a Magistrate, First Class. Many other witnesses also were examined by the IO under section 161 of the Code of Criminal Procedure. That from these confessional statements of the accused-persons, the evidence of witnesses and other facts and circumstances it was revealed that Samanja Khan, a school going daughter of AK Shamsuddin Khan @ Jambu Khan of AK Khan family of Chittagong had some relationship with the deceased Jibran Tayyabi and she also maintained love affairs with accused Yasin Rahman @ Titu and that when accused Yasin Rahman @ Titu came to know that Samanja Khan had some relation with Jibran Tayyabi he, being envious, threatened Jibran Tayyabi to leave Bangladesh telling that otherwise he would have to face dire consequences. But since Jibran Tayyabi continued his relation with Samanja after that also accused Yasin Rahman @ Titu decided to kill Jibran Tayyabi and made accused Osman agree to kill Jibran Tayyabi for a consideration of Taka10 (ten) lakhs and as per that agreement accused Osman, with the help of other accused-persons murdered Jibran Tayyabi on 9-6-1999 at 5-30 PM in front of Chung King Restaurant/Band Box at Sheikh Mujib Road, Agrabad, Chittagong by shooting him in his private car while he was returning home from office by driving that private car.

121. After completion of investigation the investigating officer submitted charge-sheet against the present accused-appellant Yasin Rahman @ Rahman Yasin @ Titu and accused Osman @ Md Osman @ Osmannya, accused Ali Akbar @ Didarul Alam @ Didar, accused Zillur Rahman @ Zillur, accused Zahid Hossain @ Kiron, accused Md Siddique, accused Omar Ali @ Jahangir @ Jahangir Kashai and accused Alamgir under sections 302/34/109/120B of the Penal Code. The case, after being ready for trial, was transferred to the court of Metropolitan Sessions Judge, Chittagong and was registered as Session Case No.82 of 2000. The Metropolitan Sessions Judge, Chittagong held trial of the case after framing formal charges under sections 302/109 and 120B of the Penal Code against the present accused-appellant Yasin Rahman @ Titu who was absconding and under sections 302/34/120B of the Penal Code against the other seven accused-persons. The charges so framed were read over and explained to the accused-persons on dock who pleaded not guilty and claimed to be tried in accordance with law. This present accused-appellant Yasin Rahman @ Titu and accused Alamgir being absconding the charges framed against them could not be read over to them. However, a State defence lawyer was engaged in due time to defend absconding accused. During trial as many as 49 witnesses were adduced by the prosecution in order to prove the charges against the accused-persons. No witness was examined from the side of any of the accused-persons. However, the prosecution

witnesses were cross-examined on behalf of all the accused-persons at length. After closure of the prosecution evidence, the accused-persons present on dock were examined under section 342 of the Code of Criminal Procedure. At this stage also the accused-persons who faced trial pleaded not guilty and submitted some written statements pleading their innocence and denying the allegations against them and denying also the voluntariness and trueness of the confessional statements.

122. The defence case, as it transpires from the trend of cross-examination of the prosecution witnesses as well as from the examination of the accused-persons under section 342 of the Code of Criminal procedure and the written statements submitted by them, was that the accused-persons were innocent and they were not involved in the murder of deceased Jibran Tayyabi in any way and that they made no conspiracy for the murder of the deceased; that the so-called confessional statements were extracted from them under torture and those were not voluntary and true. It was also the defence case of the accused that Jibran Tayyabi was not killed in the manner as alleged by the prosecution and that the investigating officer falsely implicated the accused-persons in this case setting up a false story of triangular love among the accused Yasin Rahman @ Titu, Samanja and Jibran Tayyabi facilitating the real offenders to escape. Further defence case was that Jibran Tayyabi was murdered by PWs 3, 4 and 10 along with others somewhere else and thereafter they, in order to conceal their said act, boarded the dead body in a car and by keeping the car behind a truck took the dead body to hospital to make it a case of accident; that PW Rony Khan developed love affairs with Titli-wife of deceased and it was he who got the deceased killed by hired killers. It was also the defence case that Jibran Tayyabi was involved with international smugglers group and out of enmity over booty he was killed by the smugglers.

123. However, the trial court, on consideration of the confessional statements of the accused-persons and the other evidence adduced by the prosecution found accused Osman @ Md Osman @ Osmannya, Ali Akbar @ Didarul Alam @ Didar, Zillur Rahman @ Zillur, Zahid Hossain @ Kiron and Md Siddique guilty of the charges under sections 302/34 of the Penal Code and sentenced all of them to imprisonment for life and to pay a fine of Taka 5,000 each, in default, to suffer rigorous imprisonment for one year more. The trial court found the present accused-appellant Yasin Rahman @ Rahman "Yasin @ Titu and accused Alamgir and accused Omar Ali @ Jahangir @ Jahangir Kashai not guilty of the charges levelled against them and acquitted them by the judgment and order dated 12-8-2002.

124. Against that judgment and order of the trial court the State filed two appeals being Government Criminal Appeal No.34 of 2002 and Government Criminal Appeal No.28 of 2002 as mentioned above and the convicted accused-person also filed three criminal appeals as mentioned above. The Government Criminal Appeal No.34 of 2002 was filed challenging the acquittal of the accused Yasin Rahman @ Titu, accused Alamgir and accused Omar Ali @ Jahangir @ Jahangir Kashai and Government Criminal Appeal No.28 of 2002 was filed challenging the adequacy of the sentence of imprisonment for life instead of death sentence awarded against accused Osman @ Md Osman @ Osmannya and the four other convicted accused-persons. Criminal Appeal No.3023 of 2002 was filed by convicted accused Zillur Rahman. Criminal Appeal No. 2971 of 2002 was filed by the convicted accused Didarul Alam @ Didar, Zahid Hossain @ Kiran and Md Siddique and Criminal Appeal No.2981 of 2002 was filed by convicted accused Osman @ Md Osman @ Osmannya. By the impugned judgment and order the High Court Division allowed Criminal Appeal No.34 of 2002 and convicted the accused Yasin Rahman

@ Rahman Yasin @ Titu (the present appellant), under sections 302/109 and 120B of the Penal Code and accused Alamgir and accused Omar Ali @ Jahangir @ Jahangir Kashai under sections 302/34 and 120B of the Penal Code and sentenced all of them to suffer imprisonment for life and also to pay a fine of Taka 5,000 (five thousand) each, in default, to suffer rigorous imprisonment for one year more.

125. The High Court Division dismissed the other Government Criminal Appeal No.28 of 2002 and discharged the connected Criminal Rule being No.199(R) of 2002. The High Court Division dismissed the Criminal Appeal Nos. 3023 of 2002 and 2981 of 2002 affirming the conviction and sentence of the convict appellants. The High Court Division allowed Criminal Appeal No.2971 of 2002 in part setting-aside the conviction and sentence of convict appellant Md Siddique and acquitting him from the charges under sections 302/34 and 120B of the Penal Code. The conviction and sentences of the other two accused-appellants of this Criminal Appeal No.2971 of 2002 were upheld by the High Court Division by the impugned judgment and order dated 28-3-2007.

126. More than $4^1/_2$ years after passing of this impugned judgment and order by the High Court Division the convict appellant Yasin Rahman @ Rahman Yasin @ Titu surrendered before the court of Metropolitan Sessions Judge, Chittagong on 10-10-2011 and thereafter filed the Criminal Petition for Leave to Appeal No.466 of 2011 before this Division whereupon the present criminal appeal was registered.

127. This appeal is founded on the contention that the confessional statements and the evidence which the prosecution adduced before the court for proving the charges against this accused-appellant were not at all reliable, dependable and acceptable and that the High Court Division has committed a serious error of law causing great injustice in convicting the accused-appellant relying on these confessional statements and evidence disregarding the fact that those were not credit worthy at all.

128. In this appeal, however, no question has been raised as to the murder of deceased Jibran Tayyabi and also as to the time, place and manner of this murder as alleged by the prosecution. So we need not discuss in detail the evidence which the prosecution adduced before the trial court to prove the murder and also the time, place and manner of murder of Jibran Tayyabi. We shall discuss in detail those evidence only which were adduced by the prosecution to prove the other part of its case that the accused Yasin Rahman @ Titu being envious of the relation between his girl-friend Samanja and Jibran Tayyabi made conspiracy with the accused Osman to kill Jibran Tayyabi and accordingly accused Osman with the help of the other accused-persons murdered Jibran Tayyabi.

129. It has already been mentioned above that in this case the prosecution adduced as many as 49 witnesses before the trial court of whom 44 were charge sheeted witnesses and the remaining 5 were other than charge sheeted witnesses. Besides these PWs the prosecution has relied on the confessional statements of five accused-persons also to prove its case. Before entering into the evidence of the prosecution witnesses we like to state the confessional statements of the accused-persons for the convenience of our discussion.

130. In this case five accused-persons made confessional statements under section 164 of the Code of Criminal Procedure before Magistrates, 1st class. Accused Didarul. Alam made the confessional statement on 21-7-1999, accused Zillur Rahman made the confessional statement on 22-7-1999, accused Zahid Hossain @ Kiron made the confessional statement on 25-7-1999, accused Md Omar All @ Jahangir @ Jahangir Kashai made the confessional statement on 29-7-1999 and accused Md Siddique made the confessional statement on 01-10-1999.

131. The material portion of the confessional statement of accused Didarul Alam is to the effect that accused Yasin Rahman @ Titu was his own "Khalato Bhai"; that the grave of the mother of accused Yasin Rahman @ Titu was near their village home and accused Yasin Rahman @ Titu and h i s brother Salim Rahman used to go to their village often for visiting. their mother' s grave. That in the first part of last May, Friday accused Yasin Rahman @ Titu went to their village and after offering prayer at his mother's grave he went to the house of accused Didarul and at that time accused Yasin Rahman @ Titu asked accused Didarul whether he knew any terrorist and also told that he had to punish some one. That accused Didarul at that time told accused Yasin Rahman @ Titu that he would look for a terrorist. In his confessional statement accused Didarul Alam stated further that he got addicted on hero an after quitting service in January, 1999 and used to go to the "heroin addakhana" of Jahangir of Rajakhali very often and there he was introduced to terrorist Osman and some of his associates and thereafter he told his "Khalato Bhai" accused Yasin Rahman Titu about that terrorist Osman. Accused Yasin Rahman @ Titu then told him to bring Osman to the sea beach and accordingly one day between 10 to 12 of May, after evening, he took Osman to the sea beach where accused Yasin Rahman @ Titu also went after a while by his car; that Yasin Rahman @ Titu talked with Osman sitting inside his car. Thereafter accused Yasin Rahman Titu went away and he and Osman came back by a baby-taxi; that on their way back accused Osman, on his asking, told that accused Yasin Rahman @ Titu told him to punish one man serving in "shipping" and told also that he would pay 4/5 lacs taka for that. That thereafter on 09-6-1999, Wednesday the day of occurrence, he went to the "heroin addakhana" of Jahangir as usual and saw Osman there. That Osman then told him to go with him to his "addakhana" and also started for his "addakhana" with him by a motorcycle, but on the way, getting an urgent mobile call from his brother Jahangir, he got down on the road telling Osman that he would come later. Subsequently in the afternoon at 4-30/4-45 PM he went to the "heroin addakhana" of Osman which was near the "Hati Company" and there he saw accused Osman, Kiron, Zillur and 4/5 other unknown boys. That as soon as he reached there accused Osman got a mobile call and then accused Osman told them to go out. That Osman took a "kata rifle" in his waist and gave 4 LGs to four of those other boys. Thereafter they all came out and went to Sheikh Mujib Road in front of "Mistripara" and thereafter within a while a white coloured private car came there and Osman told them to attack that car. Then Kiron broke the front glass of that car with a brick bat and accused Osman and others encircled that car and Osman then shot the driver of that car; thereafter Osman along with accused Didarul Alam went away by motorcycle and came to the house of Osman at "Bou Bazar". That the other persons also went away by taxi. That accused Zillur and Kiron also came to the house of Osman within a short time and thereafter, in that very night he along with accused Kiron, Zillur and Osman went to Dhaka and stayed in Hotel Al-Salam at Fokirapool, but on the next day seeing a news in newspaper that one man was shot dead by Osman they changed that hotel and went to Hotel Golden International. 3 days after accused Zillur was sent to Chittagong and they three stayed in Dhaka or 5/6 days more and thereafter Osman and he went to Azmir Sharif by procuring two passports. Kiron went away to his house. That 6/7 days before they came back to Chittagong and then he was admitted to "Diganto Clinic" for treatment of heroin addiction and from there police arrested him on 18-7-1999.

132. The material part of the statements made by accused Zillur Rahman in his confessional statement is that he was a student of LLB but could not appear in the examination as he

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

High Court Division
(Criminal Appellate Jurisdiction)

Moyeenul Islam Chowdhury J
Kazi Md Ejarul Haque Akondo J

Judgment
October 6th, 2013.

Basiratun Naher.....
.....Petitioner

vs

State and other .....
....Opposite-Parties*

Code of Criminal Procedure (V of 1898)
Section 241A

The Court is not required to assign any reason at the time of framing any charge against an accused in a case. But the Court is mandated by law to assign reasons at the time of discharging him from the case. .....(15)

Code of Criminal Procedure (V of 1898)
Section 439
Penal Code (XLV of 1860)
Section 109

Question of 'mens rea' of an accused cannot be gone into in a criminal revision under section 439 of the Code. That is essentially a matter of evidence and trial.

*Criminal Revision No. 1259 of 2012.

It is admitted that the principal accused Abdus Salam Khan did not implicate her in the commission of the offence in his judicial confession made under Section 164 of the Code of Criminal Procedure. It is further admitted that at the relevant time, she was a *probationary officer* at Janata Bank, Purana Paltan Branch, Dhaka. Undeniably she signed the seized documents. It is her submission that she signed the documents *bonafide* and under instructions from her superior officers and, as such, she had no *'mens rea'*. It is a settled proposition of law that the question of 'mens rea' of an accused cannot be gone into in a Criminal Revision under Section 439 of the Code of Criminal Procedure. That is essentially a matter of evidence and trial. If we, for the sake of argument, accept this submission of the accused-petitioner right now, that will amount to begging the question. Her alleged *bonafides* can only be proved during the trial of the case. At this stage, we cannot presuppose her alleged *bonafides* or innocence. .....(12)

Abdul Quader Chowdhury vs State, 28 DLR (AD) 38; Ali Akkas vs Enayet Hossain, 17 BLD (AD) 44 = 2 BLC (AD) 16 and Sher Ali vs State, 46 DLR (AD) 67 ref.

Abdul Baset Majumdar with Md Kamrul Huda, Advocates—For the Petitioner.

Md Khurshedul Alam, DAG with Mahmuda Parveen, AAG and Md Abdul Bari, AAG —For the State-Opposite-Party No. 1 .

Md Khurshid Alam Khan Advocate—For the Anti-Corruption Commission—Added Opposite-Party No. 2.

Judgment

Moyeenul Islam Chowdhury J: On an application under Section 435 read with Section 439 of the Code of Criminal Procedure, 1898 filed by the petitioner, a Rule was issued calling upon the opposite-parties to show cause as to why the impugned order dated 7-8-2012 passed by the learned Metropolitan Senior Special Judge, Dhaka in Metropolitan Special Case No. 63 of 2012 arising out of ACC GR Case No. 100 of 2010 corresponding to Motijheel Police Station Case No. 60 dated 29-11-2010 under sections 409/420/467/471/109 of the Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947 should not be set-aside and why the petitioner should not be discharged from the case and/or such other or further order or orders passed as to this Court may seem fit and proper. By the impugned order dated 7-8-2012, the learned Metropolitan Senior Special Judge, Dhaka charged the accused-petitioner along with others under Sections 409/420/467/471/109 of the Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947 and rejected the application for discharge of the accused-petitioner from the case.

2. Facts relevant for the purpose of disposal of the Rule may be, briefly, stated as follows:

On 29-11-2010, one Md Monirul Hayder Khan, Deputy Director (Accounts) of Bangladesh Inland Water Transport Authority (BIWTA) lodged an ejahar with Motijheel Police Station, Dhaka Metropolitan Police, Dhaka against the accused Abdus Salam Khan, Assistant Accounts Officer, Accounts Division, BIWTA, Dhaka on the allegations, *inter alia*, that upon scrutiny of the Current Bank Account No. 001024193 of the BIWTA Workers' Union, it transpired that some unusual transactions took place by forging the signatures of the authorized President and Treasurer of the Trustee Board of the Workers' Group Insurance Scheme of the BIWTA and the accused Abdus Salam Khan withdrew a huge amount of Taka 3,50,00,000 in collusion with the concerned bank officials. After the commencement of the investigation of the case pursuant to the lodgment of the ejahar, the accused Abdus Salam Khan made a confessional statement before a Metropolitan Magistrate on 12-1-2011 wherein he confessed that he had withdrawn a prodigious sum of money by 30/32 cheques/pay orders from 2008 to October, 2010 and embezzled the same. During investigation, a *prima facie* case was made out against the said accused Abdus Salam Khan and others including the present accused-petitioner. During investigation, it transpired from the seized records that through Janata Bank, Purana Paltan Branch, Dhaka, the present accused-petitioner abetted the alleged offence of misappropriation of money committed by the accused Abdus Salam Khan. In due course, the learned Metropolitan Senior Special Judge, Dhaka took cognizance against the accused-petitioner and others and charged them under Sections 409/420/467/471/109 of the Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947 by the impugned order dated 7-8-2012.

3. Mr Md Kamrul Huda, learned Advocate appearing on behalf of the accused-petitioner, submits that it is an admitted fact that the accused-petitioner was a probationary executive officer of Janata Bank, Purana Paltan Branch, Dhaka at the time of the commission of the alleged offence and it appears that the petitioner signed the relevant documents under instructions from her superior officers *bonafide* and since she was a novice probationary officer at the material time, she had no 'mens rea' and in that view of the matter, she ought to have been discharged from the case by the learned Metropolitan Senior Special Judge, Dhaka.

4. Mr Abdul Baset Majumdar, another learned Advocate appearing on behalf of the accused-petitioner, submits that a departmental inquiry committee found the accused-petitioner innocent and she signed the relevant documents under instructions from her superior officers *bonafide* and as she was found innocent by the departmental inquiry committee, she cannot be prosecuted for the alleged abetment of the offence committed by the principal accused Abdus Salam Khan and given this scenario, the learned trial Judge ought to have discharged the petitioner from the case.

5. On the other hand, Mr Md Khurshid Alam Khan, learned Advocate appearing on behalf of the Anti-Corruption Commission-opposite-party no. 2, submits that in view of the seized documents, it is palpably clear that the accused-petitioner signed those documents; but her alleged *bonafides* in the matter of signing the documents is a matter of evidence and trial and that cannot be gone into in this Criminal Revision under section 439 of the Code of Criminal Procedure.

6. Mr Md Khurshid Alam Khan also submits that in the face of the averments made in the charge-sheet vis-a-vis the accused-petitioner, her *prima facie* criminal liability is apparent on the face of the record.

7. We have heard the submissions of the learned Advocates Mr Md Kamrul Huda and Mr Abdul Baset Majumdar and the counter-submissions of the learned Advocate Mr. Md. Khurshid Alam Khan and perused the application and relevant Annexures annexed thereto.

8. Section 561A of the Code of Criminal Procedure contemplates that nothing in this Code shall be deemed to limit or affect the inherent power of the High Court Division to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. So it appears that the scope of Section 561A of the Code is very limited.

9. In this regard, in the decision in the case of *Abdul Quader Chowdhury vs The State* reported in *28 DLR (AD) 38*, the Appellate Division has clearly spelt out the categories of cases where the High Court Division should interfere under Section 561A of the Code of Criminal Procedure. In that decision, the Appellate Division has observed as follows:

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

(b) Where institution or continuance of criminal proceedings against an accused-person may amount to an abuse of the process of the Court or when the quashing of the impugned proceedings would secure the ends of justice;

(c) Where there is a legal bar against institution or continuance of a criminal case against an accused-person;

(d) In a case where the allegations in the First Information Report or the complaint, even if they are taken at their

face value and accepted in their entirety, do not constitute the offence alleged and in such cases, no question of weighing and appreciating evidence arises; and

(e) The allegations made against the accused-person do constitute an offence alleged, but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge.

10. The above-mentioned categories of cases as spelt out by our Appellate Division in the decision reported in *28 DLR (AD) 38* have been subsequently followed in the case of *Ali Akkas vs Enayet Hossain* reported in *17 BLD (AD) 44 = 2 BLC (AD) 16* .

11. In the case of Sher Ali (Md) and others vs The State reported in 46 DLR (AD) 67, the Appellate Division has held that the inherent power may be invoked independent of powers conferred by any other provisions of the Code of Criminal Procedure and this power may be exercised to quash a proceeding or even a conviction on conclusion of a trial if the Court concerned had no jurisdiction to hold the said trial or the facts alleged against the accused do not constitute any criminal offence, or the conviction has been based on 'no evidence' or otherwise to secure the ends of justice.

12. Reverting to the case in hand, indisputably the accused-petitioner is not FIR-named. It is admitted that the principal accused Abdus Salam Khan did not implicate her in the commission of the offence in his judicial confession made under section 164 of the Code of Criminal Procedure. It is further admitted that at the relevant time, she was a probationary officer at Janata Bank, Purana Paltan Branch, Dhaka. Undeniably she signed the seized documents. It is her submission that she signed the documents *bonafide* and under instructions from her superior officers and, as such, she had no 'mens rea'. It is a settled proposition of law that the question of 'mens rea' of an accused cannot be gone into in a Criminal Revision under section 439 of the Code of Criminal Procedure. That is essentially a matter of evidence and trial. If we, for the sake of argument, accept this submission of the accused-petitioner right now, that will amount to begging the question. Her alleged *bonafides* can only be proved during the trial of the case. At this stage, we cannot presuppose her alleged *bonafides* or innocence.

13. The relevant portion of the charge-sheet against the accused-petitioner runs as follows:

"জনতা ব্যাংক লিঃ, পুরানা পল্টন শাখা, ঢাকার ম্যানেজার মোঃ জাহাঙ্গীর হোসেন মোল্যার নির্দেশে এসিস্ট্যান্ট এক্সিকিউটিভ অফিসার আলাউদ্দিন আহমেদ চেক নং-সিডিএ ১২৫৮৭৩২ তাং-১৫-১১-২০১০ খিঃ পাশ করে পে-অর্ডার ইস্যুর জন্য রেমিট্যান্স শাখায় প্রেরণ করেন। চেকটির অপর পৃষ্ঠায় মোঃ শফিক উল্লাহ, সিনিয়র এক্সিকিউটিভ অফিসার স্বাক্ষর করেছেন। রেমিট্যান্স শাখার মোঃ রুহুল আমিন-২, এসিস্ট্যান্ট অফিসার (গ্রেড-১) এবং মোছাঃ বছিরাতুন নাহার, এক্সিকিউটিভ অফিসার BIWTA A/C 844, SIBL নামে ৩.৫০ কোটি টাকার পে-অর্ডার (POA 0426282, date 15-11-2010) ইস্যু করেন। উক্ত দুই কর্মকর্তার পে-অর্ডার ইস্যু বা পে-অর্ডারে স্বাক্ষর করার ক্ষমতা ছিল না।বর্ণিত পে-অর্ডারটি ইস্যুর কয়েকদিন পর অর্থাৎ গত ২১-১১-২০১০ খিঃ তারিখে উক্ত দুই কর্মকর্তা আসামী মোঃ আবদুস সালাম খানকে অর্থ আত্মসাতে সহায়তার উদ্দেশ্যে পে-অর্ডারে প্রাপকের নাম BIWTA কর্তন করে BCBL এবং SIBL কর্তন করে Khilgaon Branch লিখে কর্তনের জায়গায় অনুস্বাক্ষর করে পুনরায় পে-অর্ডারটি মোঃ আবদুস সালাম খানের নিকট হস্তান্তরর করেন। আসামী মোঃ আবদুস সালাম খান পে-অর্ডারটি বাংলাদেশ কমার্স ব্যাংক লিঃ, খিলগাঁও শাখা, ঢাকায় তার নিজস্ব ব্যবসায়িক প্রতিষ্ঠান এয়ার প্লাস ট্রাভেল এজেন্ট এর হিসাব নং-৮৪৪ তে জমার উদ্দেশ্যে দাখিল করেন। বাংলাদেশ কর্মাস ব্যাংক লিঃ, খিলগাঁও শাখা, ঢাকার ক্লিয়ারিং ইনচার্জ

মোছাঃ শুলনার আখতার, ফার্স্ট এক্সিকিউটিভ অফিসার পে-অর্ডারটি ক্লিয়ারিং এর মাধ্যমে কালেকশন করে হিসাব নং-৮৪৪ (এয়ার প্লাস ট্রাভেল এজেন্ট, প্রোঃ মোঃ আবদুস সালাম খান) তে জমা করেন। জনতা ব্যাংক লিঃ, পুরানা পল্টন শাখা, ঢাকার (১) আলাউদ্দিন আহমেদ, এসিস্ট্যান্ট এক্সিকিউটিভ অফিসার, (২) মোঃ রুহুল আমিন-২, এসিস্ট্যান্ট অফিসার (গ্রেড-১), (৩) মোছাঃ বছিরাতুন নাহার, এক্সিকিউটিভ অফিসার, (৪) মোঃ শফিক উল্লাহ, সিনিয়র এক্সিকিউটিভ অফিসার এবং (৫) মোঃ জাহাঙ্গীর হোসেন মোল্যা, ম্যানেজার প্রমুখ মিলে ক্ষমতার অপব্যবহারের মাধ্যমে আসামী মোঃ আবদুস সালাম খানকে উক্ত ৩.৫০ কোটি টাকা আত্মসাতে সহায়তা করে দন্ড বিধির ১০৯ ধারায় এবং ১৯৪৭ সনের দুর্নীতি প্রতিরোধ আইনের ৫(২) ধারায় শাস্তিযোগ্য অপরাধ করেছেন।"

14. From the above averments made in the charge-sheet, we have no hesitation in holding that the accused-petitioner cannot eschew her *prima facie* criminal liability.

15. It is a settled proposition of law that the Court is not required to assign any reason at the time of framing any charge against an accused in a case. But the Court is mandated by law to assign reasons at the time of discharging him from the case. As the accused-petitioner was charged under sections 409/ 420/ 467/ 471/109 of the Penal Code, 1860 read with section 5(2) of the Prevention of Corruption Act, 1947, the learned Metropolitan Senior Special Judge was not required to assign any reason. That being so, he did not commit any illegality,impropriety or incorrectness in passing the impugned order. In other words, the learned trial Judge legally, properly and correctly framed charge against the accused-petitioner. Against this backdrop, we do not find any merit in the Rule. The Rule, therefore, fails.

16. Accordingly, the Rule is discharged.

17. The Court below is, however, directed to proceed with the trial of the case in accordance with law.

Let a copy of this judgment be immediately transmitted to the Court below.

Ed.

High Court Division
(Criminal Miscellaneous Jurisdiction)

Md Anwarul Hoque J
Md Mozibur Rahman J } Shajahan Chowdhury (Md).....
...Accused-Petitioner

Judgment
November 22nd, 2011. } vs

State and another.....
.....Opposite-Parties*

Code of Criminal Procedure (V of 1898)
Section 164

Penal Code (XLV of 1860)
Section 406 *read with* 420

Since it is a case of business transaction and no initial deception to pay the amount is found the same is to be considered as a case of civil nature which cannot be allowed to bring within the criminal jurisdiction causing abuse of the process of the court. .....(10)

Md Islam vs Amal Chandra, 45 DLR (AD) 27; Syed Ali Mir vs Syed Omar Ali, 42 DLR (AD) 241; Abu Baker Siddique vs State, 18 BLD (AD) 289;

MA Hannan, Advocate—For the Accused-Petitioner.

Monsurul Haque Chowdhury with MG Mahmud Shaheen, Advocate—For the Opposite-Party No.2.

Zahirul Hoque Zahir DAG—For the State.

Judgment

Md Anwarul Haque J: This Rule under section 561A of the Code of Criminal Procedure was issued on 28-4-2010 calling upon the opposite- parties to show cause as to why the

*Criminal Miscellaneous Case No. 10984 of 2010.

impugned criminal proceeding of CR Case No. 1589 of 2009 punishable under sections 406/420/422/109 of the Penal code pending in the Court of Additional Chief Metropolitan Magistrate, Cognizance Court No.l, Chittagong shall not be quashed and /or such other or further order or orders passed as to this Court may seem fit and proper.

2. In short, the case of the prosecution for the purpose of disposal of the Rule is as follows:

> "Complaint-opposite party No.2 is complainant whereas accused-petitioner is a proprietor of M/s Shajahan Traders, accused No.4 is his Manager.

3. It is stated in the petition that there was a long standing business relationships 'between the complainant and the accused-petitioner and out of such relationship the accused-petitioner used to pay the amount some time in cash and some time in bearer cheque on behalf of the M/s Shajahan Traders signed by the Manager, accused No.4 but during such transaction good number of cheques are found to have been issued as mentioned in the complaint-petition. Subsequently on failure to pay balance amount arising out of their business transaction there was an agreement affording an opportunity to pay such amount within a prescribed time but accused-petitioner did not turn up and deny to pay such amount in order to misappropriate the same and thereby accused-persons have committed the offence punishable under sections 406/420/422/109 of the Penal Code.

4. On the basis of such complaint-petition the learned Magistrate, on holding an inquiry under section 202 of the Code of Criminal Procedure, took cognizance of the offence punishable under section 406/420 of the Penal Code though 40% of dues are found to have been realized by the complainant through arbitration which has been endorsed by the trial court. However, ultimately court below has taken cognizance and issued process securing the presence of the accused-petitioner to face trial. The accused-petitioner, making his appearance obtained bail there and filed this application under section 561A of the Code of Criminal Procedure in order to quash the proceeding, as no criminal offence has been made in the complainant petition rather it stands for a business transaction which docs not come within the mischief of section 406/420 of the Penal Code. If any amount is found due to the accused-petitioner the same to be realized through the civil court on proper accounting of their business transaction.

5. During the course of hearing Mr MA Hannan, the learned advocate appearing on behalf of the accused-petitioner, has drawn the attention of the court about the death of the accused-petitioner No. 2; as such the case against him will stand abated leaving the petitioner No. 1 to contest it.

6. The learned advocate appearing on behalf of the petitioner submits that the recital of the complaint-petition and the order of the court passed on 5- 11-2009 and 17-11-2009 clearly stand for business relationship between the accused-petitioner and the complainant; as such the matter does not come within the mischief of section 406 and 420 of the Penal Code because question of breach of trust and cheating does not, at all, arise in case of failure to pay any balance amount due to the other parties. In support of his contention he has referred a decision of a case Islam Ali Mia alias *Md Islam vs Amal Chandra Mondal and another* reported in *45 DLR (AD) 27* and also a decision of a case *Syed Ali Mir and another vs Syed Omar Ali* reported in *42 DLR (AD) 241* where their lordships of our Apex court have clearly made the on between the complainant and the accused for a long period and failure to pay any balance amount to complainant does not come within the mischief of section 406/420 of the Penal Code."

7. On the other hand, Mr Monsurul Haque Chowdhury has opposed the Rule alleging *inter alia* that part payment of the balance amount will not go to the absolve the liability of the accused-petitioner for committing the offence punishable under sections 406/420 of the Penal Code. Mr Hoque has candidly argued that in the instant case by refusing to pay the balance amount accused-petitioner has committed the offence of criminal breach of trust an cheating, punishable under section 406/420 of the Penal Code. In support of his contention he has referred a decision of a case *Abu Baker Siddique vs State* reported in *18 BLD (AD) 289* where their lordships have made an observation that if initially intention to deceive the complainant and misappropriates the money; the same cannot be considered as a case of civil nature and therefore it is to be brought within the criminal jurisdiction to secure the punishment of the offender.

8. On such submission we have gone through the recital of the compliant-petition as well the order passed by the learned Chief Metropolitan Magistrate and found that it was absolutely a case of business transaction and squarely come within the decision given in a case of *Islam Mia vs Amal Chandra Mondal* reported in *45 DLR (AD) 27* one *Sayed Ali Mir vs Sayed Omar Ali* reported in *42 DLR (AD) 241.*

9. Having due regard to those above decision we are of opinion that the decision, referred by the learned advocate on behalf of the opposite-party has no manner of application in this case as has been made out by the opposite-party in a petition of compliant.

10. Now we arc inclined to say that since it is a case of business transaction and no initial deception to pay the amount is found the same is to be considered as a case of civil nature which cannot be allowed to bring within the criminal jurisdiction causing abuse of the process of the court.

11. In the light of the above observation, we find substance in the Rule and accordingly the Rule is liable to be made absolute.

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

13. Let the impugned proceeding of CR Case No.1589 of 2009 arising out of Petition Case No. 177 of 2009 punishable the Court of Additional Chief Metropolitan Magistrate, Cognizance Court No. 1, Chittagong is hereby quashed.

Let a copy of the judgment and order be sent to the court below at once for information and necessary action.

Ed.

High Court Division
(Special Original Jurisdiction

Mirza Hussain Haider J
Md Khurshid Alam Sarkar J

Judgment
June 6th, 2013.

Abdul Malek (Md).....
.....Petitioner
[In WP No. 9524 of 2010]

vs

Government of the People's Republic of Bangladesh and others
.....Respondents*
[In all the Writ Petitions]

Constitution of Bangladesh, 1972
Article 102(2)

Entertaining writ petitions the High Court Division would assume the functions of the Labour Court upon gratuitously extending the jurisdiction of the High Court Division causing congestion in this Division which is already overwhelmingly overburdened with

*Writ Petition Nos. 9524 of 2010 with 6159, 6225, 6230, 2959, 4799, 2574, 1265, 9325, 3913, 8129, 8282, 7753, 7754, 1907 of 2011, 1456 of 2012, 5538, 5539 of 2010 and 3221 of 2011.

huge backlog of cases although there is a statutory forum to seek remedy, given the exceptional scenario of these cases, writ is maintainable. .....(47)

Service Benefits

Petitioners who have already completed 60 years of their age during the pendency of these Rules, shall get all their back salaries and other service benefits as per law. .....(49)

Bangladesh Gas Fields Co. Ltd vs Md Farid-uddin, 5 ADC 324; MA Hai vs Trading Corporation of Bangladesh, 40 DLR (AD) 207; Adamjee Jute Mills Ltd vs The Chairman, 3rd Labour Court, 42 DLR 275; BADC vs Md Shamsul Haque Mazumder, 60 DLR (AD) 152, ref.

Mahbubul Haque with Md Abdul Hye Bhuiyan, Advocates—For the Petitioner (In writ petition Nos. 9524 of 2010, 6159 of 2011, 2959 of 2011, 4791 of 2011, 9325 of 2011, 8129 of 2011, 8282 of 2011, 1907 of 2011, 1456 of 2012, 2574 of 2011, 6225 of 2011, 6230 of 2011, 3913 of 2011, 7753 of 2011, 7754 of 2011).

Tushar Kanti Roy, Advocate—For the Petitioner (In Writ Petition No. 1265 of 2011).

AKM Nurul Alam, Advocate—For the Petitioner (In Writ Petition Nos. 5538 of 2010, 5539 of 2010, 3221 of 2011).

Tufailur Rahman with Gazi Md Mohsin, Advocates —For the Respondents Nos. 1-4 (In Writ Petition Nos. 9325 of 2011, 8129 of 2011, 8282 of 2011, 1907 of 2011, 1456 of 2012 3913 of 2011,7753 and 7754 of 2011).

Mohd. Ashrafuddin Bhuiyan, Advocate—For the Respondents Nos. 1-4 (In Writ Petition No. 9524 of 2011).

Quamrun Nessa, Advocate—For the Respondents Nos. 2 & 3 (In Writ Petition Nos. 6159 of 2011, 6225 of 2011, 6230 of 2011).

Molla Kismot Habib, Advocate—For the Respondents Nos. 2-5 (In Writ Petition No. 2959 of 2011, 2574 of 2011, 1265 of 2011).

Judgment

Md Khurshid Alam Sarkar J : Since in all these Writ Petitions involve common questions of law and fact, they are taken up together for hearing and disposed of by this single judgment.

2. In Writ Petition No. 9524 of 2010, the name of the petitioner is Md Abdul Malek and while the petitioner was working as Office Assistant-cum Computer Operator in Petro-Bangla, by annexure-C to the writ petition dated 8-2-2010, he was placed on retirement with effect from 31-12-2010 on the completion of 57 year of his age.

3. In Writ Petition No. 6159 of 2011, the name of the petitioner is Md Momtaz Ali and while the petitioner was working as a Driver in WASA, by annexure-A to the writ petition dated 31-5-2011, he was placed on retirement with effect from 19-5-2011 on the completion of 57 years of his age.

4. In Writ Petition No. 6225 of 2011, the name of the petitioner is Md Shamsul Huq and while the petitioner was working as Swear Cleaner in WASA, by annexure-A to the writ petition dated 30-5-2011, the petitioner was placed on retirement with effect from 28-4-2011 on the completion of 57 years of his age.

5. In Writ Petition No. 6230 of 2011, the name of the petitioner is Md Sekander Mia and while the petitioner was working as Swear Inspector in WASA, by annexure-A to the writ petition dated 28-3-2011, the petitioner was placed on retirement with effect from 24-2-2011 on the completion of 57 years of his age.

6. In Writ Petition No. 2959 of 2011, the name of the petitioner is Md Seraj Mia and while the petitioner was working as a Record Keeper in National Tubes Limited, by annexure-A to the writ petition dated 15-1-2011, he was placed on retirement with effect from 30-4-2011 on the completion of 57 years of his age.

7. In Writ Petition No. 4799 of 2011, the name of the petitioner is Joynal Abedin and while the petitioner was working as Office Assistant in Progoti Industries Limited, an Enterprise of BSEC, by annexure-A to the writ petition dated 28-3-2011, he was placed on retirement with effect from 24-6-2011 on the completion of 57 years of his age.

8. In Writ Petition No. 2574 of 2011, the name of the petitioner is Md Abul Kashem and while the petitioner was working as an Office Assistant in Bangladesh Steel and Engineering Corporation, by annexure-A to the writ petition dated 22-3-2010, the petitioner was placed on retirement with effect from 31-5-2010 on the completion of 57 years of his age.

9. In Writ Petition No. 1265 of 2011, the name of the petitioner is Md Shamsuddin Chowdhury and while the petitioner was working as Gestatener Operator in Bangladesh Steel and Engineering Corporation, by annexure-B to the writ petition dated 5-1-2011, the petitioner was placed on retirement with effect from 10-3-2011 on the completion of 57 years of his age.

10. In Writ Petition No. 9325 of 2011, the name of the petitioner is Md Jahangir Bhuiyan and while the petitioner was working as Pharmacist in Chittagong Urea Fertilizer Company Limited, an Enterprise of BCIC, by annexure-A to the writ petition dated 8-6-2011, he was placed on retirement with effect from 26-10-2011 on the completion of 57 years of his age.

11. In Writ Petition No. 3913 of 2011, the name of the petitioner is Subol Mali and while the petitioner was working as Sweeper in Karnofuly Paper Mills Limited, an enterprise of BCIC by annexure-A to the writ petition dated 13-11-2010, the petitioner was placed on retirement with effect from 1-1-2011 on the completion of 57 years of his age.

12. In Writ Petition No. 8129 of 2011, the name of the petitioner is Md Asgar Ali and while the petitioner was working as Security Guard in Ashuganj Fertilizer and Chemical Company Limited, an Enterprise of BCIC, by annexure-A to the writ petition dated 26-12-2010, the petitioner was placed on retirement with effect from 15-2-2011 on the completion of 57 years of his age.

13. In Writ Petition No. 8282 of 2011, the name of the petitioner is Md Abdur Rahman and while the petitioner was working as Fire Squardun Leader in Ashuganj Fertilizer and Chemical Company Limited, an Enterprise of BCIC, by annexure-A to the writ petition dated 9-1-2011, the petitioner was placed on retirement with effect from 2-3-2011 on the completion of 57 years of his age.

14. In Writ Petition No. 7753 of 2011, the name of the petitioner is Md Harun-or-Rashid and while the petitioner was working as Office Assistant in Ashugonj Fertilizer and Chemical Company Limited, an Enterprise of BCIC, by annexure-A to the writ petition dated 27-10-2010, the petitioner was placed on retirement with effect from 30-12-2010 on the completion of 57 years of his age.

15. In Writ Petition No. 7754 of 2011, the name of the petitioner is Snehamaya Barua and while the petitioner was working as Laboratory Technician in Ashugonj Fertilizer and Chemical Company Limited, an Enterprise of BCIC, by annexure-A to the writ petition dated 3-8-2010, the petitioner was placed on retirement with effect from 10-10-2010 on the completion of 57 years of his age.

16. In Writ Petition No. 1907 of 2011, the name of the petitioner is Md Abdul Alim and while the petitioner was working as LDA-cum-typist in Jamuna Fertilizer Company Limited, an Enterprise of BCIC, by annexure-A to the writ petition dated 27-9-2010, the petitioner was placed on retirement with effect from 31-

12-2010 on the completion of 57 years of his age.

17. In Writ Petition No. 1456 of 2012, the name of the petitioner is Md Joynal Abdin and while the petitioner was working as Record Sorter in Jamuna Fertilizer Company Limited, an Enterprise of BCIC, by annexure-A to the writ petition dated 1-1-2011, the petitioner was placed on retirement with effect from 14-3-2011 on the completion of 57 years of his age.

18. In Writ Petition No. 5538 of 2010, the name of the petitioner is Md Motiul Islam Mozumder and while the petitioner was working as Time Keeper in Latif Bawany Jute Mills Limited, an enterprise of BJMC by annexure-A to the writ petition dated 18-5-2010, the petitioner was placed on retirement with effect from 31-7-2010 on the completion of 57 years of his age.

19. In Writ Petition No. 5539 of 2010, the name of the petitioner is Md Selim Reza and while the petitioner was working as Senior Clerk (Time Keeper) in Latif Bawany Jute Mills Limited, an enterprise of BJMC, by annexure-A to the writ petition dated 18-5-2010, the petitioner was placed on retirement with effect from 4-7-2010 on the completion of 57 years of his age.

20. In Writ Petition No. 3221 of 2011, the name of the petitioner is Md Muzibur Rahman and while the petitioner was working as LDA in Latif Bawany Jute Mills Limited, an enterprise of BJMC, by annexure-A to the writ petition dated 5-4-2011, the petitioner was placed on retirement with effect from 29-5-2011 on the completion of 57 years of his age.

21. The common case of all the petitioners are that they do not perform any duty of supervisory or administrative nature and, as such, they should be treated as "worker" under the Bangladesh Labour Act, 2006, or Public Corporation (Management Coordination) Ordinance, 1986 and, therefore, they are entitled to be in their respective employments till completion of 60 years of their respective ages as provided in the aforesaid laws.

22. In all the cases, the respondents contested the Rules by filing affidavits-in-opposition. It is their common contention that the petitioners are the workers of public Enterprise or Corporation and their services are regulated by the Service Rules of their respective corporation/enterprise and, accordingly, they were sent on retirement as per the provisions of relevant Service Rules. The contentions of the petitioners as to their non-engagement in the supervisory or administrative functions have not been denied by the respondents, neither by making any categorical statement as to the nature of the petitioners' jobs in the affidavits-in-opposition nor by producing, any document containing their job descriptions.

23. The learned advocates, appearing on behalf of their respective petitioners in all these 19 writ petitions at the very outset of making their submissions, place before the Court Section 2(65) of Bangladesh Labour Act, 2006 and Section 2(e) of Public Corporation (management and Co-ordination) Ordinance, 1986 and submit that all the petitioners do clearly fall within the definition of the 'worker' as provided in both the laws. Then, they place the 'Proviso' of the Section 3(1) of the Labour Act, 2006 before us and submit that no provision of any Law/Rule which is less favourable than the provisions provided in Bangladesh Labour Act, 2006 will apply in case of a worker and, as such, if the Service Rules of the Corporation or Enterprise where the petitioners are working contains any less favourable service condition, in that event, instead of application of the said service Rules, the provisions of Labour Act, 2006 shall be applicable. Moreover, if any other Act or Rule incorporates better and more favourable facilities for the workers than that of the Labour Act, 2006, in that case the said

Act/Rule with better provisions will apply to such worker by superseding the provisions of the Bangladesh Labour Act, 2006. They submit that Section 336 of the Bangladesh Labour Act, 2006 makes it clear that even after the enactment of the Labour Act, 2006 workers are entitled to continue to enjoy the better provisions of any other law of the land, which is conducive and more beneficial to them.

24. They then drew our attention to the schedule of the Public Corporation (Management Co-Ordination) Ordinance, 1986 and submit that Bangladesh Chemical Industries Corporation is placed at serial No. 1, Bangladesh Steel Engineering Corporation is placed at serial No. 2, Bangladesh Jute Mills Corporation is placed at serial No, 8, Bangladesh Oil, Gas and Mineral Corporation (Petrobangla) is placed at serial No. 22 and WASA is placed at serial No. 27 of the Schedule of the said Ordinance and all the petitioners are serving in the aforesaid scheduled corporations directly or under any of the enterprise/unit of the aforesaid scheduled corporations and, as such, services of all of the writ petitioners are governed either by the Public Corporation (Management Co-ordination Ordinance) Ordinance, 1986 or by the Labour Act, 2006, whichever is more advantageous and suitable for the workers.

25. The learned advocates for the petitioners took us through Sections 2(e) and 14A of the Public Corporation (Management Co-Ordination) Ordinance, 1986 as well as Sections 2(1), 2(65), 3(1), 28, 336 and some other relevant Sections of the Bangladesh Labour Act, 2006, 2 (two) Appellate Division's Cases, namely (i) *Bangladesh Gas Fields Co. Ltd vs Md Fariduddin*, reported in *5 ADC 324* and *(ii) MA Hai & others Trading Corporation of Bangladesh* reported in *40 DLR (AD) 207 (iii) M/s Adamjee Jute Mills Ltd vs The Chairman, 3rd Labour Court* reported in *42 DLR 275* and some other unreported judgments passed by the High Court Division in Writ Petition No. 8275 of 2008, along with 12 other Writ Petitions, Writ Petition No. 7661 of 2008 along with 34 other Writ Petitions and also the Writ Petition No. 2381 of 2009 and they submit that the actions of respondents in issuing the impugned office orders by sending the petitioners on retirement before completing the relevant retiring age of 60 years are in derogations of the above-mentioned laws and decisions and, thus, the same are vitiated by illegality.

26. They, with regard to the issue of the maintainability, took us through Section 33, 213, 336 and some other relevant Sections of the Bangladesh Labour Act, 2006 and submit that the petitioners being placed on "retirement" are not eligible to approach the Labour Court. Their further submission, which they regard to be considered by this Court with great care, that the subject matter of this writ petition being an unique one, which is about an adjudication as to whether the petitioners are entitled to continue in their service for another three years and if adjudication of this kind of case start through the Labour Court and end up in the Supreme Court, it may take more than three years time. Therefore, time being an issue of pivotal importance in these cases, approaching the Labour Court is not an efficacious remedy inasmuch as if the petitioners are to succeed through resorting to the Labour Court to Supreme Court, the said process may take more than three years and, in that event, the government will have to pay three years' salaries and other benefits without receiving any service from them, which would be an awful wastage of public money.

27. The learned advocates also submit that the orders of retirement in respect of all these petitioners are discriminatory as the respondents earlier sent other workers on retirement after completion of 60 years of age but the petitioners were sent on retirement after completion of 57 years of age, which is a sheer violation of Article 27 of the Constitution. Thus, the

writ petitions are maintainable only on this ground alone inasmuch as in order for enforcement of fundamental rights, this Court is the only forum under Article 102(1) of the Constitution. By making the above submissions, the learned advocates for the petitioners pray for making all the Rules absolute.

28. Mr Tufailur Rahman with Mr Gazi Md Mohsin, Mr Md Ekramul Haque and Mr Ashrafuddin Bhuiyan, all the learned advocates appearing for the respondents, submit in one voice that since all the petitioners are the workers of Public Corporations or Enterprises, their services are governed by the service Rules of their respective Corporations or Enterprises and, as per their respective service Rules, the petitioners are required to be sent on retirement after the completion of their 57 years of age. They submit that as long as the service Rules of the public enterprise/corporation are in operation and has not been declared repugnant to the Bangladesh Labour Act, 2006 or Public Corporation (Management Coordination) Ordinance, 1986, the Rules shall be applicable to determine the service age of the government owned enterprise/corporation. They further submit that since the petitioners are the workers of government owned acorporation or enterprise, they are public servants and, as such, they should approach Administrative Tribunal.

29. Mrs Quamrun Nesa, the learned advocate for the respondents, adds an additional point in her submission that only the workers of the "enterprise" are entitled to be in their services up to completion of 60 years of age as provided in Section 14A of the Public Corporation (Management Co-ordination) Ordinance, 1986 and, as such, the others who are working in Corporation have been excluded from the benefit of being employed till the completion of 60 years of age.

30. Mr Mollah Kismat Habib, the learned advocate for the respondents, makes a further argument that Public Corporation (Management Co-ordination) Ordinance, 1986 is a special law and it is applicable only for the workers who work in the government owned Enterprises and Corporations and, thus, if a worker of an enterprise disqualifies to be a worker within the definition of Section 14A of the Ordinance, he cannot claim to be a worker under the labour law.

31. They submit that if the petitioners claim themselves to be the workers under Labour Act, 2006, they should approach the Labour Court created under the Bangladesh Labour Act, 2006 inasmuch as the Labour Court has been vested with ample powers to deal with the issue raised herein under the provisions of Bangladesh Labour Act, 2006. They, therefore, submit that it is not true that the petitioners have no efficacious remedy for which the petitioners are to seek relief under Article 102 of the Constitution. Since the petitioners are workers within the meaning of section 2(65) of the Bangladesh Labour Act, 2006 and since the matters relate to "retirement" of the petitioners as defined in Section 2(1) of the Bangladesh Labour Act, 2006, which falls within the purview of section 213 of the said Act, therefore, the forum available to the petitioners according to the Labour Act, 2006 is the Labour Court wherein they could get adjudication of their matters and, then, if they are dissatisfied with the order/decision/award of the Labour Court, they could invoke section 217 of the said Act to prefer appeals and, thus, only after having exhausted all the forums, as prescribed in the Bangladesh Labour Act, 2006, the petitioners could have approached this Constitutional Court. For not having done so, the writ petitions are not maintainable.

32. We have heard the submissions of the learned advocates, perused the writ petitions along with all the papers appended thereto, the affidavits-in-opposition and also relevant laws and legal precedents placed before us, which

have been considered by us very carefully.

33. The moot question before us is whether the service age of these petitioners should be 60 years as provided in Section 28 of the Labour Law, 2006 as well as Section 14A of the Public Corporation (Management Co-Ordination) Ordinance, 1986 or their services are regulated by the Service Rules or Regulations of the concerned corporation or enterprise

34. Let us first look at the provisions of these two Acts.

35. Section 2(1) of the Bangladesh Labour Act, 2006 defines the "retirement", which runs as follows:

"২(১) "অবসর" অর্থ এই আইনের ২৮ ধারা অনুযায়ী কোন শ্রমিকের নির্দিষ্ট বয়সে উপনীত হওয়ার কারণে স্বাভাবিকভাবে চাকুরীর অবসান। তবে কোন প্রতিষ্ঠানে ২৫ বছর চাকুরী পূর্ণ হওয়ার প্রেক্ষিতে শ্রমিকের স্বেচ্ছায় অবসর গ্রহণকেও অবসর বলিয়া গণ্য হইবে।

36. Section 2(65) of the Bangladesh Labour Act, 2006 provides us the definition of a worker, which runs as follows:

"২(৬৫) "শ্রমিক" অর্থ শিক্ষাধীনসহ কোন ব্যক্তি, তার চাকুরীর শর্তাবলী প্রকাশ বা উহ্য যেভাবেই থাকুক না কেন, যিনি কোন প্রতিষ্ঠানে বা শিল্পে সরাসরিভাবে বা কোন ঠিকাদারের মাধ্যমে মজুরী বা অর্থের বিনিময়ে কোন দক্ষ, অদক্ষ, কারিগরী, ব্যবসা উন্নয়নমূলক অথবা কেরাণীগিরির কাজ করার জন্য নিযুক্ত হন, কিন্তু প্রধানতঃ প্রশাসনিক বা ব্যবস্থাপনামূলক কাজে দায়িত্বপ্রাপ্ত কোন ব্যক্তি এর অন্তর্ভুক্ত হবেন না।

37. Section 28 (After the amendment on 13-5-2010) of the Bangladesh Labour Act, 2006 makes provision about the age of retirement of a worker, which runs as follows:

"২৮ শ্রমিকের অবসর গ্রহণ–(১) এ অধ্যায়ের অন্যত্র যা কিছুই উল্লেখ থাকুক না কেন, কোন প্রতিষ্ঠানের নিয়োজিত কোন শ্রমিকের বয়স ৬০(ষাট) বৎসর পূর্ণ হলে তিনি চাকুরী হতে স্বাভাবিক অবসর গ্রহণ করবেন।

38. "Proviso" of the Section 3(1) of the Bangladesh Labour Act, 2006 runs as follows:

"৩। চাকুরীর শর্তাবলী–(১) প্রত্যেক প্রতিষ্ঠানে শ্রমিকগণের নিয়োগ ও তৎসংক্রান্ত আনুষঙ্গিক অন্যান্য বিষয়াদি এই অধ্যায়ের বিধান অনুযায়ী পরিচালিত হবেঃ

তবে শর্ত থাকে যে, কোন প্রতিষ্ঠানের শ্রমিক নিয়োগ সংক্রান্ত নিজস্ব চাকুরীবিধি থাকতে পারবে, কিন্তু এই প্রকার কোন বিধি কোন শ্রমিকের জন্য এই অধ্যায়ের কোন বিধান হতে কম অনুকূলে হতে পারবেনা।

39. Section 336 of the Bangladesh Labour Act, 2006 runs as follows:

"৩৩৬। কতিপয় ক্ষেত্রে চাকুরীর বর্তমান শর্তাবলী সংরক্ষণ।–এই আইন অথবা কোন বিধি, প্রবিধান বা স্কীমের কোন কিছুই এই আইন প্রবর্তন হওয়ার সময় উহার দ্বারা রহিত কোন আইনের অধীন, অথবা কোন রোয়েদাদ, চুক্তি, নিষ্পত্তি বা প্রচলিত প্রথার অধীন কোন শ্রমিকের ভোগকৃত অধিকার বা সুযোগ-সুবিধা, তিনি যতদিন, উক্ত প্রবর্তনের তারিখে যে মালিকের অধীন কর্মরত ছিলেন, সে মালিকের অধীন চাকুরীরত থাকবেন ততদিন পর্যন্ত ব্যাহত বা ক্ষতিগ্রস্থ করবে না, যদি তার উক্ত অধিকার এবং সুযোগ-সুবিধা এই আইন, বিধি, প্রবিধান বা স্কীমের অধীন প্রদত্ত অধিকার ও সুযোগ-সুবিধা হতে অধিকতর অনুকূল হয়।

40. On the other hand, Section 2(e) of the Public Corporation (Management Co-Ordination) Ordinance, 1986 gives the following definition of a "worker":

2(e) "worker" means any person, skilled or unskilled, who works for hire or rewards, but does not include a person who is employed in any managerial, administrative, supervisory or solely clerical capacity.

41. Section 14A (which has been amended by Act No. XVII of 1994) of the said Public Corporation (Management Co-Ordination) Ordinance, 1986 provides the retirement age of a worker which runs as follows:

"14A.(1) A worker of an enterprise shall, notwithstanding anything contained

in the terms and conditions of his employment in any contract, rule, regulation, bye-law or other instrument, retire from employment on the completion of the sixtieth year of his age.

42. Provided that a worker who has completed the sixtieth year of his age on or before the date of commencement of the Public Corporations (Management Co-ordination) (Amendment) Act, 1994 shall cease to be in the employment of the enterprise on such commencement."

43. It appears that all the writ petitioners are workers of the scheduled enterprise/ company/corporation as shown in Item Nos. 1, 2, 8, 22 and 27 of the Schedule of the Public Corporation (Management Co-Ordination) Ordinance, 1986 in view of the fact that they do not perform any duty of administrative or supervisory nature. In this regard, it is to be noted that though in some of the affidavits-in-opposition it is stated that they are not workers but no paper as to their job descriptions have been produced before us and, in fact, the respondents did not endeavour to make out their cases in that line. The only strong line of argument that has been advanced by all the learned advocates for the respondents are that most of the petitioners are working in the government owned enterprise and, as such, according to the service Rules of the enterprises, they are to be retired at the completion of 57 years of their age. The other argument, though placed feebly, is that the petitioners who are working directly under a corporation and not in an enterprise of a corporation, are not workers as Section l(4)(Ka) & (Zha) of the Labour Act, 2006, excludes the persons to be workers who work in any government Office or Industry. The logic behind the above argument is that the persons who are working in corporations are government servants and, thereby, not to be treated as "worker", therefore, they have to approach the Administrative Tribunal if the concerned corporation is placed in the Schedule of Administrative Tribunal Act, and, if it is not included in the said schedule, then they should approach civil Courts.

44. We find in a series of unreported decisions of the High Court Division held in Writ Petition No. 8275 of 2008 along with other 12 Writ Petitions, Writ Petition No. 7661 of 2008 along with other 34 Writ Petitions and Writ Petition No. 2381 of 2009 that the workers, who are working in any public enterprise/corporation, are regulated by the provisions of section 14A of the Public Corporation (Management Co-Ordination) Ordinance, 1986 and, thus, entitled to be in service till completion a of 60 years of age. This view has also been supported by our Appellate Division in the case of *Bangladesh Gas Fields Co. Ltd vs Md Fariduddin* reported in *5 ADC 324.* We further find that Service Rules of government owned enterprise or corporation as to retiring their workers after completion of 57 years of age is not conducive for the workers and, as such, the provisions of the Proviso of Section 3(1) as well as section 336 of Labour Act, 2006 will operate here in these cases to make the petitioners entitled to be in their respective service till they complete 60 years of their respective age. With regard to the submissions of the respondents that without declaring the Service Rules of the Enterprise/Corporation *ultravires* to the Act of Parliament, there is no scope to by pass the said Service Rules in that the same remains intact and in operation, we find that though the submission apparently sounds sound, however, the petitioners' remedy will not be resisted by the presence of the said service Rules inasmuch as although it is within the jurisdiction of this Court to knock down a Rule inconsistent with any Act but it is always a better practice for the Courts to grant the aspired appropriate relief to the petitioners without knocking down the law as has been held in the case of *BADC vs Md Shamsul Haque Mazumder* reported in *60 DLR(AD) 152* "when a

case can be decided without striking down the law but giving relief to the petitioners that course is always better than striking down the law". With regard to the submissions advanced by Mrs Kamrunnessa, the learned advocate for the respondents, that only the workers of Public Enterprise are entitled to be in their employments, not the workers of the Corporation, we find it difficult to differentiate the entitlements of the workers of the Enterprise with those of the Corporation in the light of the provisions of Section 14 of the Public Corporation (Management Coordination) Ordinance, 1986, which runs as follows:

> Section: 14. Notwithstanding anything contained in any terms and conditions of service or in any contract or in any rules, regulations or bye-laws relating to any terms and conditions of service, a public corporation may, if it considers expedient in the interest of better administration of the affairs and business of itself or its enterprises, transfer the officers and other employees, including workers, of one enterprise to another enterprise or to itself.

45. Before we arrive at a conclusion of the judgment, it is pertinent to deal with the issue of maintainability of these writ petitions as raised by the learned advocates for the respondents. This issue has also been discussed in a greater details in all the above mentioned unreported Cases and was held in favour of the petitioners on the ground that since the petitioners were "retired" from the service by the respondents, they are barred by the provisions of the Labour Act, 2006 to approach the Labour Courts as section 33 of the said Act provides forum to move the Labour Court only on the ground of "dismissal", "discharge" and "retrenchment" etc. but does not include the term "retirement". In arriving at the aforesaid decisions by the different Division Benches of this Division, all their Lordships relied mostly on the dictum of the Case of *M/s Adamjee Jute Mills Ltd vs The Chairman, 3rd Labour Court* reported in *42 DLR 275* wherein it was held that "since retirement, right or wrong, is not covered under any of the provisions of the Act as grievance; the workers so retired cannot invoke the jurisdiction of the Labour Court", We, with great respect, find it difficult to share the view taken by their Lordships in the aforesaid unreported decisions inasmuch as we find that the aforesaid case reported in *42 DLR 275* was delivered on 16-11-1989 and its dictum was capable of having force of law till enactment of the Labour Act, 2006, when the said Act made provision for the "retired" workers to approach the Labour Court. In Section 2(1) of the Act the definition of "retirement" has been provided, which runs as follows "২(১) "অবসর" অর্থ এই আইনের ২৮ ধারা অনুযায়ী কোন শ্রমিকের নির্দিষ্ট বয়সে উপনীত হওয়ার কারণে স্বাভাবিকভাসে চাকুরীর অবসান। তবে কোন প্রতিষ্ঠনে ২৫ বছর চাকুরী পূর্ণ হওয়ার প্রেক্ষিতে শ্রমিকের স্বেচ্ছায় অবসর গ্রহণকেও অবসর বলিয়া গণ্য হইবে"। Thus, after enactment of the Labour Act, 2006, from a concurrent reading of Section 2(1), Section 33 and Section 233 of the said Act, none of us is left with any option but to be of the view that there is no bar for any "retired" worker to approach the Labour Court to seek his aspired relief. So, we find before the enactment of the Labour Act, 2006, the "retired" workers being not accommodated in the Employment of Labour (Standing Order) Act, 1965, were rightly allowed to invoke Article 102 of the Constitution but since the legislature have made provisions for the "retired" worker to approach the Labour Court by incorporating Section 2(1) in the Labour Act, 2006, we hold that no writ petition is maintainable on this ground. We, thus, are of the view that after the incorporation of Section 2(1) of the Labour Act, 2006, the judgments delivered by different benches of the High Court Division holding the writ petitions to be maintainable for the absence of the word "retirement" in Section 33 adopting the view taken in *42 DLR 275* are to be treated as per incurium.

46. However, we find that since there are ambiguities in the laws of our land as to the definition of the "worker" and also for the reason that the "retirement age" for the workers provided in the Labour Act, 2006 as well as Public Corporation (Management Co-ordination) Ordinance, 1986 being inconsistent with the service Rules/Regulations of the Public enterprises and Corporations and, more importantly, most of these petitioners being the workers within the purview of Section 2(e) of the Public Corporation (Management Co-Ordination) Ordinance, 1986 and the same Ordinance having not prescribed for any forum to address their grievance, we hold that the Constitutional Court is the proper forum to adjudicate upon such like applications as has been held by our Apex Court in the Case of *MA Hai & others vs Trading Corporation of Bangladesh* reported in *40 DLR (AD) 207* and, as such, all the writ petitions are held to be maintainable on this ground.

47. Now, let us examine the other submissions advanced by the respondents that the petitioners who are the direct staffs of the corporations are not "workers", rather they are public servants and, as such, Administrative Tribunal is the proper forum for them. It appears that none of the petitioners perform any managerial or supervisory jobs and, secondly, even for the argument's sake, if it is conceded that they are public servants but as the Administrative Tribunal Act has not included the corporations of the petitioners in its Schedule, they are ineligible to make any application in the Tribunal. However, they might have approached the civil Court, but, again, since here in these cases interpretation of a number of Statutes and Rules are involved, therefore, Constitutional Court is the better forum for such like matters. Moreover, since the outcome of these cases would be as to whether to allow these petitioners to work for another three years from the date of completing 57 years of their age, which they have already intersected, we find that pragmatically it would be an unworthy order by this Court to ask the petitioners to seek redress from the Labour Court given that usually most of our Tribunals do require an average time of more than a year to adjudicate upon a case and, thereafter, if the respondent opts to" exhaust its appellate forums and other forums, including approaching this Court, it may take more than three years and in that event the respondent/government would have to pay the petitioners' salaries without being served by the petitioners for this three years, which would be wastage of public money. Had the cases involved any other usual issue of the Labour Act, 2006, we could have outright rejected the plea taken by the learned advocates for the petitioners that approaching directly this Court by passing the Labour Court is the most efficacious alternative remedy. In our view, by entertaining such writ petitions the High Court Division would assume the functions of the Labour Court upon gratuitously extending the jurisdiction of the High Court Division causing congestion in this Division which is already overwhelmingly overburdened with huge backlog of cases. Thus, we hold that although there is a statutory forum to seek remedy, given the exceptional scenario of these cases, writ is maintainable.

48. Accordingly, after threadbare consideration of the facts and circumstances, laws and decisions of the High Court Division as well as of the Appellate Division discussed hereinabove, it appears that there is a good deal of force in the submissions of the learned advocates for the petitioners in all these writ petitions and, thus, we find merit in all these Rules. As such, the Rules issued in Writ Petition Nos. 9524 of 2010, 6159 of 2011, 6225 of 2011, 6230 of 2011, 2959 of 2011, 4799 of 2011, 2574 of 2011, 1265 of 2011, 9325 of 2011, 3913 of 2011, 8129 of 2011, 8282 of 2011, 7753 of 2011, 7754 of 2011, 1907 of 2011, 1456 of 2012, 5538 of 2010, 5539 of 2010 and 5539 of 2011 are made absolute.

49. The respondents are directed to allow these petitioners to be in their respective employments till completion of the sixtieth year of their age. The petitioners who have already completed 60 years of their age during the pendency of these Rules, shall get all their back salaries and other service benefits as per law and the respondents are directed to make necessary arrangements for payments of their all service benefits treating 60 years of their respective age as their retirement age. However, there will be no order as to costs.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Syed Md Ziaul Karim J
Ashish Ranjan Das J

Judgment
May 15th, 2013.

Umme Kulsum @ Zinat Ara.....
.....Informant-Appellant

vs

Shahidul Islam & others...Respondent*

Nari-o-Shishu Nirjatan Daman Ain (VIII of 2000) **Section 11(kha)**

The allegation of torture does not mean causing hurt. The vague and unspecific allegation of torture made in the First Information Report does not attract an offence. .....(9)

MM Ishak vs State 56 DLR 516 ref.

No one appears—For the Appellant.

MA Mannan Mohon, DAG with Md Osman Goni Sheikh, AAG—For the State.

No one appears—For the Respondent No. 1-5.

*Criminal Appeal No. 3829 of 2004.

Judgment

Syed Md Ziaul Karim J: By this appeal the informant-appellant has challenged the legality and propriety of the order dated 14-8-2004 passed by learned Judge of Nari-o-Shishu Nirjatan Daman Special Tribunal No. 5, Dhaka, accepting the Final Report by rejecting Naraji Petition in Nari-o-Shishu Nirjatan Case No. 825 of 2003.

2. Facts in brief are that, on 21-4-2003 the appellant as informant lodged a First information Report with the Mirpur Police Station against the respondents alleging that on 21-4-2000 she was married with accused respondent No. 1 Shahidul Islam. During their wedlock one child born. She used to live in her conjugal home. Her accused husband along with other accused-respondents used to torture her for the cause of dowry. On 17-4-2003 all the accused tortured her and demanded Taka 3,00,000 (three lakhs) as dowry. When she refused, she was drove out from the conjugal home. She further alleged that afterward her accused husband divorced her. The First Information Report was recorded as Mirpur PS case No. 88 dated 21-4-2003.

3. The Police after investigation submitted Final Report on 18-8-2003. Against which on 30-6-2004 the informant filed a Naraji Petition.

4. Eventually, after hearing the learned Judge accepted the Final Report by rejecting the Naraji Petition by the impugned order.

5. Feeling aggrieved the informant preferred the instant appeal.

6. No one appears to support the appeal. In view of the facts this is an old appeal of 2004. We are inclined to take it up for disposal on merit considering the materials on record.

7. The learned Deputy Attorney-General appearing for the State opposes the appeal and submits that, the learned Judge of the Court below after considering the materials on record

rightly passed the impugned order, which calls for no interference by this Court.

8. In order to appreciate his submissions we have gone through the record and given our anxious consideration to his submissions.

9. On going to the materials on record it transpires that, the informant made allegations against the respondents for demanding of dowry by causing hurt which was recorded under Sections 11(kha)/30 of the Nari-o-Shishu Nirjatan Daman Ain, 2000. The police during investigation recorded statements of the witnesses under Section 161 of the Code of Criminal Procedure. But none of the witnesses deposed supporting the allegations of the informant. Moreover, two local witness namely Baharuddin and Md Hossain stated that informant was divorced by her accused husband long before. On meticulous examination of the materials on record particularly FIR, and Naraji Petition, we find that the allegation made therein are contradictory to each other. Moreso, the informant was divorced on 14-1-2002 by the accused and notices were duly served upon her. So the learned Judge of the court below rightly held that after divorce the question of demanding of dowry does not arise. Moreso, there is vague and unspecific allegation of torture, Mental or physical torture and causing hurt or injury are not the same act. The allegation of torture does not mean causing hurt. Thus the vague and unspecific allegation of torture made in the First Information Report does not attract an offence under section 11(kha) of the Ain. So, the allegations made in the First Information Report, even if are taken as true, do not constitute an offence punishable under section 11(kha) or 11(kha)/30 of the Act. With this regard reliance is being placed in the case of *MM Ishak vs State 56 DLR 516.*

10. Therefore, the learned Judge of the Court below after considering the materials on record rightly accepted the Final Report by rejecting the Naraji petition of the appellant. Thus the appeal having no merit fails.

11. In view of foregoing narrative the appeal is dismissed.

Office is directed to communicate the order at once.

Ed.

High Court Division
(Civil Appellate Jurisdiction)

Nozrul Islam Chowdhury J
KM Kamrul Kader J

Judgment
March 19th, 2012.

AHM Kamruzzaman Khan.....Plaintiff-Appellant

vs

Registrar, Joint Stock Companies & Firms and other...Defendant Respondents*

Specific Relief Act (I of 1877)
Section 42

The nature of the dispute is entirely a civil dispute and it can only be resolved by a competent civil court. There is no provision in the Companies Act to file any declaratory suit under which the plaintiff could seek reliefs he claimed in the suit and these reliefs are only available under section 42 the Act. .....(24)

Chalna Fibre Company Ltd. Khulna vs Abdul Jabbar, 20 DLR (SC) 335; Md Shamsuzzaman Khan vs MS Islam, 28 DLR 976 and Nurun Nahar Zaman vs Sea Pearl Lines Ltd., 11 BLC 111, ref.

Md Nur Hussain Chowdhury with Nasim Khan, Advocates—For the Appellant.

AKM Badrudduza, Advocates—For the Respondents.

*First Appeal No.304 of 2010 with Civil Rule No.489 (F) of 2010.

Judgment

KM Kamrul Kader J: This appeal at the instance of the plaintiff is directed against the judgment and decree dated 25-7-2010 passed by the learned Joint District Judge, 5th Court, Dhaka in Title Suit No. 162 of 2009, rejecting the plaint under Order VII Rule 11 of the Code of Civil Procedure filed by the defendant-respondents.

2. The material facts in short are that, the appellant as plaintiff filed Title Suit No. 162 of 2009 before the Court of learned Joint District Judge, 5th Court, Dhaka stating *inter alia* that R. Zaman & Company Ltd is a Private Ltd. Company, it is incorporated under the Companies Act, 1913, on 8-4-1984 under the defendant No. 1 and the plaintiff is the Managing Director of the said Company. Its authorized capital is Taka 1,25,00,000 only (one crore twenty-five lakhs), divided into 1 lac 25 thousand shares, each share worth Taka 100 (one hundred) only and paid up capital was Taka 10 lakhs as per balance sheet dated 30-6-2005, subscribed by the 13 shareholders.

3. The Company has purchased a denationalized and privatized industry namely Kuliarchar Ground Nut Mills Ltd. at a price of Taka 1,00,24,000 only, under an agreement dated 18-6-1987, executed by the Government and the Company. Thereafter, on 4-11-1994 a deed of financing was executed in between the plaintiff and the company for becoming Managing Director of the Company with Payment of Taka 55,00,000 (fifty-five lakhs) in share subject to the approval of the Ministry of Industries, which was accorded on 12-1-1995.

4. Next, on 1-4-1995 a meeting of the Board of Directors of the Company was held under the Chairmanship of Defendant No. 2 and in that meeting the plaintiff was appointed as the Managing Director of the Company and the company handed over 400 shares in his name, which was duly approved by defendant No. 10. Thereafter, the plaintiff was re-elected twice as Managing Director of the company for a period of 5(five) years each on 15-9-1999 and 30-10-2004 respectively. Next, on 30-5-2004, the defendant Nos. 2-6 expressed their intention to sell their 600 shares at a price of Taka 1, 20,000,00 only and the plaintiff agreed to purchase their shares and accordingly a deed of agreement was executed and the plaintiff paid an amount of Taka 42, 00,000 only to the defendants nos. 2-6. Thereafter, the defendant Nos. 3-5 served a notice on 10-6-2005 demanding payment of the balance amount, after receiving the said notice the Plaintiff gave a reply on 27-6-2005 expressing his willingness to make payment of the rest/balance amount provided that they will execute prescribed instruments to transfer the said shares in the name of the plaintiff, but they did not pay any heed to it.

5. Due to non-payment of the balance amount government charged penal interest, the plaintiff filed a title suit being No. 9 of 1999 (renumbered) before Joint District Judge, Dhaka against the defendant No. 10 for a declaration that the excess amount of money demanded by the government is wrong, unlawful and not binding upon the company. After conclusion of trial learned Additional Joint District Judge, Dhaka decreed the suit of the plaintiff. During pendency of the said suit, the defendants removed the plaintiff from the post of Managing Director on 22-3-1997, which was challenged by the plaintiff by filing a Writ petition being No. 1834 of 1997, before this Hon'ble Court and after hearing the parties, the Rule was made absolute by the judgment and order dated 5-8-2007.

6. The plaintiff filed an application on 23-10-2005 to the defendant No. 10 to make payment of rest of the installment, amounting Taka. 24,01,815.97 only (Taka twenty-four lakhs one thousand eight hundred fifteen and ninety seven paisa) by October, 2005. Subsequently,

the plaintiff made payment of rest of the amount on 23-1-2006 and filed Title Suit No. 1449 of 2008 for specific performance of contract against the defendant No. 10.

7. In the mean time, the defendant No. 2 received some money from a third party with a condition to sale of shares of the said Company, without any approval from the board of directors. Mr Rashiduzzaman and Mr. Khurshid-uzzaman sold their 280 shares to Mr. Shafiqul Islam, Mr. Rafiqul Islam and Mr. Saiful Islam and they were shown as the directors of the company on 30-3-2006. The defendant No. 2 in collusion with defendant Nos. 3-6 created some false documents to misappropriate the properties of the Mill. The plaintiffs post as Managing Director was shown vacant under section 110 of the Companies Act and the defendant No, 2 was shown as the Managing Director in a meeting held in the Kuliarchar Ground Nut Mill, wherein, defendant Nos. 2-6 were shown present in that meeting and passed the said resolution, though the defendant Nos. 3-5 were out of Bangladesh at the relevant period. On getting that information the plaintiff filed a General Diary entry on 14-8-2006 to the Kuliarchar Police Station and a copy of the said GD was sent to the defendant No. 1, after receiving the same the defendant No. 1 passed an order upon the plaintiff and defendant No. 2 to settle the matter amicably. Later, the plaintiff filed a Writ Petition No. 9278 of 2006 against the aforesaid order before this Hon'ble Court and after hearing the parties their Lordships was pleased to make the Rule Nisi absolute on 18-8-2008 and declared that the impugned letter dated 8-8-2006 has been issued without lawful authority and directed the Registrar of Joint Stock-Companies and Firms to hold an enquiry in respect of the return as submitted by the company M/s R. Zaman & Company through writ petitioner and the counter return, under the authority as availed to him under the provision of Section 193 of the Companies Act. 1994. The plaintiff after obtaining the certified copy of the aforesaid judgment and order sent it to defendant No. 1 on 24-5-2009, unfortunately, he without considering the said Judgment and order, passed an order which needs to be declared to have been passed unlawfully and hence not binding upon the plaintiff.

8. The defendant No. 2 in collusion with defendant Nos. 2-6 sold out stock and other articles of the said Mill amounting to over Tk. 2,00,00,000 (two crore), for depriving of the plaintiff from his due share as major share holder of the company. The defendant Nos. 2-6 collected rents from the tenants of the Mill, at the rate of Taka 12,000 per month, which is illegal and unauthorized. The plaintiff is the Managing Director of the Company. But the defendant No. 1 most illegally approved the appointment of the defendant No. 2 as Managing Director of the Company, which is illegal and void. Further, the defendant Nos. 2-6 tried to misappropriate the properties of the company. The cause of action of the suit arose on 24-5-2009. The plaintiff brought this suit for declaration praying for 7 reliefs, which read as follow:

"অতএব, প্রার্থনা এই যে,

১। আর, জামান এন্ড কোং লিঃ এর ব্যবস্থাপনা পরিচালক হিসাবে বাদীর নিযুক্তি বৈধ ঘোষণার ডিক্রী প্রদানে;

২। আর, জামান এন্ড কোং লিঃ এর ব্যবস্থাপনা পরিচালক হিসাবে বাদীকে অব্যহতি দান অবৈধ মর্মে ঘোষণার ডিক্রী প্রদানে;

৩। আর, জামান এন্ড কোং লিঃ এর ব্যবস্থাপনা পরিচালক হিসাবে ২নং বিবাদীর নিযুক্তী অবৈধ মর্মে ঘোষণার ডিক্রী প্রদানে;

৪। বিগত ১৮-৬-১৯৮৭ ইং তারিখে চুক্তিমুলে ক্রয়কৃত কতফছিল বর্ণিত কুলিয়ারচর গ্রাউন্ড নাট মিলের ক্রেপস (অস্থাবর সম্পত্তি) ২নং বিবাদী কর্তৃক বিক্রয় ক্ষমতা বর্হিভূত এবং বিক্রয়লব্ধ অর্থ উক্ত মিলের ব্যাংকের হিসাবে জমা দানের ডিক্রী প্রদানে;

৫। বাদীকে অবৈধভাবে অব্যাহতি দানের পর মিলের হিসাবে যে আয় হয়েছে, তাহা মিলের হিসাবে জমা দানের জন্য ২নং বিবাদীর বিরুদ্ধে ডিক্রি প্রদানে;

৬। বিগত ২৪-৫-২০০৯ ইং তারিখে ১ নং বিবাদী কর্তৃক আদেশ আইনানুগভাবে প্রদান করা হয় নাই মর্মে ঘোষণার ডিক্রী প্রদানে;

৭। বাদী অদ্যাবধি কোম্পানীর হিসাবে শেয়ার কেনা বাবদ ৯৭,০০,০০ (সাতানব্বই লাখ) টাকা এবং মিল খরিদের লক্ষ্যে বিগত ১৮-৬-১৯৮৭ইং তারিখের চুক্তির বিপরীতে বরাবরে টাকা ২৪,০০,০০০ (চব্বিশ লাখ) জমাদান কোম্পানীর শেয়ার কেনার বিপরীতে করা হইয়াছে মর্মে ঘোষণার ডিক্রী প্রদান; এবং

৮। আইন ও ইকুইটি মতে বাদী আর যে প্রতিকার পাওয়ার হকদার উহার আদেশ দানে মর্জি হউক।

9. During pendency of the suit the plaintiff filed an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure for restraining the defendant No. 2 from discharging duties as Managing Director of the Company and after hearing the party, learned Joint District Judge passed an Order of *ad-interim* injunction on 5-7-2009 and restrained the defendant No. 2 to act as Managing Director of the said Company till filing of the written objection.

10. The defendant No. 2 made appearance by filing a written objection against the application for temporary injunction. After submission of written objection the plaintiff filed an application along with a prayer not to accept the vokalatnama and the written objection as the same was filed by a fake person and to take necessary step in accordance with law. Thereafter, on 25-8-2009 the plaintiff filed another application along with prayer to submit the passport of the defendant No. 2.

11. Next, the defendant No. 2 on 2-9-2009 filed an application under Order VII Rule 11 praying for rejection of the plaint. In the meantime, the defendant No. 10 entered appearance upon filing a written statement denying the material allegations made in the plaint. Thereafter, on 3-6-2010, the defendant No. 10 filed an application for rejection of the plaint, under Order VII rule 11(a) and (d) of the Code of Civil Procedure. In both the applications under Order VII Rule 11 of the Code of Criminal Procedure the defendants alleged that the suit is barred by law and civil court has no jurisdiction to try this suit as the relief claimed by the plaintiff attract the provision of the section 3 and 43 of the Companies Act, 1994. The plaintiff on 25-10-2009 filed a written objection contending *interalia* that on 18-6-2009 the plaintiff filed an application along with a prayer not to accept the vokalatnama and the written objection as the same was filed by a fake person and to take necessary step in accordance with law and the same is still pending before the Court. It was necessary to resolve this matter first, before considering the application for Rejection of plaint. The learned Joint District Judge 5th Court, Dhaka, kept the application dated 18-6-2009 filed by the plaintiff in abeyance while allowed the application filed by the defendants under Order VII Rule 11 of the Code of Civil Procedure and rejected the plaint by his judgment and order dated 25-7-2010.

12. Challenging the said judgment and order dated 25-7-2010, which amounts to a decree the instant appeal has been preferred by the plaintiff appellant.

13. Mr Md Nur Hussain Chowdhury the learned counsel appearing on behalf of the appellant having taken us through the entire material on record including the impugned order submits that the plaintiff filed a Title Suit No. 162 of 2009 in the court of learned Joint District Judge. 5th Court, Dhaka, under section 42 of the Specific Relief Act, praying for 7 (seven) reliefs, but on misconstruction of law and facts learned Joint District Judge rejected the plaint under order VII, rule ll(a) and (d) of

the Code of Civil Procedure and holding that the suit is barred by law and the instant suit is not maintainable according to the provision of section 3 and 43 of the Companies Act, 1994 said finding is erroneous, if the Companies Act, the Rule and Rulings are read together, impugned order is not sustainable in law. He further submits that there is no provision in the Companies Act to file any declaratory suit under which the plaintiff could seek reliefs he claimed in the suit and these reliefs are only available under section 42 of the Specific Relief Act and, as such, the impugned order and decree is not sustainable in law.

14. The learned Counsel for the appellant submits that section 9 of the Civil Procedure Code gives Jurisdiction to the Civil Court to try all civil disputes unless they are expressly or impliedly barred. Sections 3 and 43 of the Companies Act have not barred the jurisdiction of the Civil Court in this matter. He further contended that the relief claimed by the petitioner cannot be grounded on any provision under the Companies Act. To substantiate his submission he placed reliance on the decisions of the cases of *Messrs Chalna Fibre Company Ltd. Khulna vs Abdul Jabbar and 9 others* reported in *20 DLR (SC) 335* and *Md Shamsuzzaman Khan vs MS Islam, 28 DLR 976.*

15. The learned Counsel lastly submits that the appellant as plaintiff filed this declaratory Suit before the court of learned Joint District Judge, 5th Court, Dhaka praying for 7 reliefs, these reliefs are not simple one in nature for adjudication in summary manner and need be adjudicated after taking both oral and documentary evidence and should not be decided in this summary proceeding under section 43 of the Companies Act. Reliance was placed on a decision in the case of *Nurun Nahar Zaman vs Sea Pearl Lines Ltd. 11 BLC (2006) 111.*

16. Mr AKM Badrudduza, the learned counsel appearing on behalf of the respondents submits that the learned Joint District Judge after carefully considering the plaint, relevant laws and other materials on record rejected the plaint and dismissed the suit of the plaintiffs. The learned Advocate for the respondents argued that the reliefs claimed by the Appellant fall under the jurisdiction of the High Court Division as company matter, under section 43 of the Companies Act, according to the provision of Rule 9 of the Companies Rule 2000. The learned Advocate for the respondents also submits that adequate remedies were provided for settlement of such dispute under the Companies Act. He has relied in this connection on section 43 of the Companies Act. The learned Counsel for the respondents further submits that the Court of Joint District Judge had no jurisdiction to entertain the suit as the reliefs claimed therein were in substance for reliefs under the provision of section 43 of the Companies Act and these reliefs could only be granted by the High Court Division under Rule 9 of the Companies Rules, 2000, which alone had exclusive jurisdiction in the matter under section 3 of the Companies Act. The affairs of the Company should be regulated in accordance with the law that has been provided by the Companies Act itself. In the case of any breach the grievances can only be addressed before a Company court according to the provision of the section 3 of the Companies Act. The judgment and decree passed by the learned Joint District Judge is well reasoned in terms of law, facts and the materials on record, there is no reason to interfere with it.

17. With a view to appreciate the submission made by the learned Advocates from both sides, we have to consider the plaint of the instant suit and the principles of law as laid down in the Civil Procedure Code and the Companies Act. According to the provision of section 9 of the Civil Procedure Code gives Jurisdiction to the Civil Court to try all civil disputes unless they are expressly or impliedly

barred. Expressly barred means barred by any enactment passed by legislature and impliedly barred means the remedy is available in the statute itself for the right or obligation it has created and, as such, same remedy cannot be sought in a civil court. In the cases of *Messrs Chalna Fibre Company Ltd. Khulna vs Abdul Jabbar* and *9 others* reported in *20 DLR (SC) 335* it was held that:

> "It is a well settled rule that the ouster of jurisdiction of a civil Court in respect of a civil suit is not to be readily inferred. Unless that jurisdiction has been either expressly or impliedly taken away by some other law it will continue to vest in the civil Court."

18. According to the provision of the section 2(d) of the Companies Act, 1994, the court means the court having jurisdiction under this Act. Section 3 of the Companies Act provides that the Court having jurisdiction under this Act shall be the High Court Division provided that the Government may, by notification in the Official Gazette and subject to such restrictions and conditions as it thinks fit empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court, and in that case such District Court shall, as regard the jurisdiction so conferred, be the court in respect of all companies having their registered office in the district.

19. The learned Advocate for the respondents argued that the reliefs claimed by the Appellant fall under the jurisdiction of the High Court Division as company matter, under section 43 of the Companics Act, according to the provision of Rule 9 of the Companies Rule 2000. Rule 9 of the Companies Rule 2000, provides that:

> "In all courts having jurisdiction under this Act shall be kept and maintained a book called "the Register of Company Matters" in which shall be entered and numbered serially all application made under sections 13, 15, 41, 43, 59, 71, 81, 82, 85, 89, 115, 151, 153, 111, 175, 176, 193, 203, 228, 229, 230, 231, 233, 245, 248, 251, 253, 255, 258, 259, 261, 262, 263, 264, 265, 293, 294, 296, 299, 300, 301, 302, 303, 305, 309, 311, 312, 314, 316, 326, 328, 331, 333, 338, 339, 340, 342, 346, 349, 395, 396, and any other original proceeding under the Act in relation to a company....."

20. According to provision of Rule 9 an aggrieved person can file an application under section 43 of the Companies Act, to rectify the register of members of a company. This Section provides that:

> 43. Power of Court to rectify register:—
>
> (1) If- (a) the name of any person is without sufficient cause entered in or omitted from the register of members of a company; or (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having become or ceased to be, a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.
>
> (2) The Court may either refuse the application, or may order rectification of the register and payment by the company of any damage sustained by any party aggrieved and may also make such order as costs as it may consider proper.
>
> (3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand and generally may decide any question necessary or expedient to be decided for rectification of

the register and may also decide any issue involving any question of law.

21. We also consider the submission placed by the learned Counsel for the appellant that the reliefs claimed by the Appellant are not only for rectification of share register, there are allegation of fraud against the defendants and adequate relief cannot be provided under the aforesaid section. Further, there is no provision in the Companies Act to file any declaratory suit under which the plaintiff could seek reliefs he claimed in the suit and these reliefs are only available under section 42 of the Specific Relief Act.

22. In the present suit, the plaintiff praying for following reliefs to the court, according to the provision of section 42 of the Specific Relief Act, to the effect that a decree be passed declaring that (a) the plaintiff is legally appointed Managing Director of the R. Zaman and Company Limited and (b) the removal of the plaintiff from the post of Managing Director of the Company is illegal and without jurisdiction and (c) a decree be passed to the effect that the appointment of the defendant No. 2 as Managing Director of the Company is illegal and other reliefs prayed by plaintiff with regard to the properties of the company and to deposit the same or equivalent money to the company's account. All that had been done, according to the plaint that his fictitious removal from the post of the Managing Director of the Company had been accepted by defendant No. 1. The plaintiff alleged that the defendant No. 2 in collusion with defendant Nos. 3-6 createdsome false documents to transfer shares of company to the 3rd parties and the defendant Nos. 2-6 in collusion with each other sold out stock and other articles of the said Mill amounting to Taka 2, 00, 00, 000 (two crore), for depriving of the plaintiff from his due share as major share holder of the company, all these had been done fraudulently and illegally. He also alleged that the defendant No. 2-6 tried to misappropriate the properties of the Mill and he had been illegally and fraudulently removed from his office of Managing Director and that he could only be restored to his said office, if he obtained a declaration from a competent court that his removal was illegal.

23. We also noticed that the plaintiff alleged, some forged documents have been created to deprive him from the properties and assets of the company, he also seeks reliefs with regard to the assets of the company, these reliefs are not simple in nature for adjudication in summary manner and need be adjudicated after taking both oral and documentary evidence and should not be decided in summary proceeding for rectification of the share register, according to the provision of section 43 of the Companies Act.

24. Considering the facts and circumstances of the case and the principle of law as laid down it appears that the nature of the dispute is entirely a civil dispute and it can only be resolved by a competent civil court. There is no provision in the Companies Act to file any declaratory suit under which the plaintiff could seek reliefs he claimed in the suit and these reliefs are only available under section 42 of the Specific Relief Act.

25. In view of submission made above, we find substance in this appeal.

26. Accordingly, the appeal is allowed and the judgment and decree dated 25-7-2010 passed by learned Joint District Judge, 5th Court, Dhaka in Title Suit No. 162 of 2009 is hereby set-aside and the connected Civil Rule being No. 489(F)/2010 is hereby discharged.

27. No order as to costs.

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

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Syed Md Ziaul Karim J
Abdur Rob J

Judgment
August 25th, 2011.

State.....Respondent

vs

Nurul Kabir.....
.....Condemned Prisoner*

Code of Criminal Procedure (V of 1898)
Section 374 and 376

Condemned-prisoner was aged about 28 years when he was examined under section 342 CrPC. The record indicates that the condemned-prisoner is not a hard criminal, he cannot be at all characterised to be a menace to the society. Taking an account of aggravating and mitigating circumstances, ends of justice will be met if death sentence is altered to one of imprisonment for life. .....(68)

Sanwar Hossain vs State, 45 DLR 489; Shadat Ali vs State, 44 DLR 217; Eyre L CR in RV Wood Cock (1789) 1 Leach 500 and Salim (Md) vs State, 54 DLR 359 ref.

Abul Kalam Azad, Advocate—For the Condemned-Prisoner. (In Death Reference No. 141 of 2005)

Abul Kalam Azad, Advocate—For the Convict-Appellant. (In Criminal Appeal No. 3778 of 2009)

Khalifa Shamsunnahar, Advocate— For the Convict-Appellant. (In Jail Appeal No. 1055 of 2005)

Md Idrisur Rahman, Advocate—For the Informant Appellant.

MA Mannan Mohon, DAG—For the Respondent No. 1.

Md Zafar Ahmed, Advocate—For the Respondent No. 2. (In Criminal Appeal No. 4347 of 2005)

*Death Reference No. 141 of 2005 with Criminal Appeal No. 3778 of 2009 with Jail Appeal No. 1055 of 2005 with Criminal Appeal No. 4347 of 2005.

Judgment

Syed Md Ziaul Karim J: This Death Reference under Section 374 of the Code of Criminal Procedure has been made by the learned Judge of Divisional Druto Bichar Tribunal, Chittagong (briefly as Tribunal) for confirmation of death sentence of condemned-prisoner.

2. By the Criminal appeal No. 3778 of 2009 and Jail Appeal No. 1055 of 2005 the convict-appellant has challenged the legality and propriety of the judgment and order of conviction and sentence dated 30-8-2005 passed by learned Judge of Tribunal, in Druto Bichar Case No. 10 of 2005 convicting the appellant under Section 302 of the Penal Code and sentencing him to death by hanging. By the same judgment the learned Judge acquitted the other co-accused Manjur Alam alias Manju from the charge. Against which the informant as appellant preferred Criminal appeal No. 4347 of 2005.

3. The Death Reference and all these appeals having arisen out of the common judgment, these have been heard together and are being disposed of by this judgment.

4. The prosecution case put in a nutshell are that on 15-12-2001 at 9-15 PM Jahir Ahmed (PW I) and his manager of salt crashing factory Mr Jaker Ahmed (PW 7) were discussing about business affairs at his house. At that time his brother Syed Karim alias Latkaia (since deceased) was passing towards east through the courtyard by motor cycle (briefly as PO). Having had heard the gun fire and screaming of his brother, he along with Jaker Ahmed (PW 7), father Haji Abdul Karim Sikder (PW 3), mother Rowshan Ara Begum alias Rowshan (PW 2), brother Muslem and deceased's wife Mosammat Joinab Begum (PW 4) rushed to the

scene to whom the victim disclosed that Nurul Kabir son of Haji Siddique Ahmed of village Maddya Napitkhali, inflicted gun fire to him (victim) and ran away. They also witnessed the assailant Nurul Kabir retreating and identified him by the electric light. They carried the victim to Malumghat Christian hospital wherein the attending doctor declared him dead. After occurrence the locals namely Shah Alam, Md Hefajat Ullah (PW 5), Shahabuddin (PW 10), Faridul Alam (PW 6), Jafer Ahmed (PW 9) happened al the scene who also disclosed that prior to occurrence accused Monjur Alam was roaming around the PO and they found accused Nurul Kabir running away. The reasons behind such murder might be the sequel to the conflict between the deceased and accused Monjur Alam over non payment of borrowed money by later who later on managed to commit murder by accused Nurul Kabir. The prosecution was launched by lodging a first information report (briefly as FIR) by the elder brother of deceased Jahir Ahmed as informant which was recorded as Cox's Bazar Police Station Case No. 12(12) 2001 corresponding to GR No. 444 of 2001.

5. The Police after investigation submitted charge-sheet under sections 302, 109 of the Penal Code accusing two accused namely Nurul Kabir and Monjur Alam.

6. Eventually the accused were called upon to answer the charge under Sections 302, 34 of the Penal Code to which the accused on dock pleaded not guilty and claimed to be tried.

7. In course of trial the prosecution in all, produced 15 witnesses, of them examined 14 witnesses and PW 3 was tendered by the prosecution and defence declined to cross-examine him.

8. After closure of the prosecution case the accused were examined under Section 342 of the Code of Criminal Procedure again they repeated their innocence and led no evidence in defence.

9. The defence case as it appears from the trend of cross-examination of the prosecution witnesses are that of innocence and false implication. It is divulged in defence that the deceased have been killed by unknown assailants but due to previous internal feud they were falsely implicated out of vengence by their local rivals.

10. After trial the learned Judge of the Court below convicted the accused as aforesaid.

11. The learned Deputy Attorney-General appearing for the State supports the reference and submits that the impugned judgment and order of conviction and sentence based on evidence on record. He adds that the deceased Syed Karim made a verbal dying declaration narrating the complicity of accused Nurul Kabir and the same was corroborated by the witnesses who also found that accused Nurul Kabir was retreating. He further submits that the injuries received by the victim were corroborated with the injuries shown in the inquest report. Therefore, the conviction and sentence calls for no interference by this Court.

12. The learned Counsels appearing for the condemned-prisoner by their common contentions seek to impeach the impugned judgment and order of conviction and sentence on the four fold arguments:

13. Firstly: *Prima-facie* it appears that the victim received the gun-shot injury at the back, so it was impossible for him to identify the assailants and according to him recognition was absolutely doubtful.

14. Secondly: Most of the witnesses categorically stated that at the time of occurrence blood of the deceased fell down but the investigating officer (briefly as IO) failed to seize blood stained earth from the PO. which cast a serious doubt upon the manner of occurrence.

15. Thirdly: Some of the witnesses were

did not state to him that after parking of motor cycle she heard the sound of gun fire and identified Monjur by the electric light and accused Nurul Kabir running away.

53. PW 15. CID Inspector Tanmoy Roy deposed that on 23-05-2005 he was attached with CID camp Cox's Bazar. On 07-08-2002 he took up the investigation, visited the place of occurrence and seized some alamats and recorded the statements of the witnesses under Section 161 CrPC. He submitted charge-sheet against the accused Nurul Kabir and Monjur Alam.

54. In cross-examination he stated that he examined some of the witnesses on two occasions. On 8-8-2002 for the first time he went to the place of occurrence. He examined PW 5 Md. Hefajat Ullah on 20-12-2002, who did not state to him that Monjur Alam carried weapons. PW 6 Faridul Alam did not state to him that Monjur Alam was carrying arms and running away. He examined PW 2 on 18-10-2002. He examined PW 4 Joinab Begum on 13-10-2002 who did not state to him that Muslem, Farid, Monjur were in PO PW 7 Jaker Ahmed did not state to him that he identified accused Monjur Alam by electric light and after occurrence Shah Alam, Shahjalal, Hefajat ullah master happened at the PO PW 8 Shahjalal did not state to him that at 9-00/9-30 he was going to the residence of Syed Karim, PW 9 Jafar Ahmed did not state to him that Shahjalal, Shah Alam, Hefajat ullah happened at the PO and identified the accused by torch light. He denied the suggestion that without proper investigation he submitted a perfunctory report.

55. These are all of the evidence on record adduced by the prosecution to prove the charge.

56. On appraisal of the evidence on record it transpires that in course of trial prosecution in all examined 14 witnesses, of them PW I is the informant. PWs 2-4 happened at the scene and heard the verbal dying declaration of the deceased Syed Karim. PW 5 was a local witness but he was declared hostile by the prosecution. PWs 6, 7, 9, 10, 12 are the local witnesses. PW 11 held autopsy upon the cadaver. PW 13 is the witness of the inquest report. PW 14 and 15 are the investigating officers who submitted charge-sheets.

57. It is pertinent to point out that the prosecution case absolutely rest on verbal dying declaration of the deceased Syed Karim and PWs. 1, 2, 4, 6, 7, 9, 11, 12 and 13 were examined to corroborate the dying declaration.

58. At the very outset and for the convenience of understanding section 32 of the Evidence Act reads as hereunder:

59. Section 32 : Case, in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant.-Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made was or not; at the time when were made, under expectation of death, and whatever may be nature of the proceeding in which the cause of this death comes into question."

2.....

3.....

4.....

5.....

6.....

7.....

8.....

60. The principles governing dying declaration were summed up as under:

(i) It is neither a rule of law nor of prudence that a dying declaration cannot be acted upon without corroboration *(Mannu Raja vs State of MP (1976) 2 SCR 764: A 1976 SC 2199: 1976 Cri LJ 54;*

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base a conviction on it, without corroboration *(State of UP vs Ram Sagar Yadav, A 1985 SC 416: 1986 Cri LJ 836; Ramavati Devi vs State of Bihar, A 1983 SC 164: 1983 Cri LJ 221; Ajit Singh vs State of Punjab, 1998 Cri LJ 3460 (P & H);*

(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination and the deceased had opportunity to observe and identify the assistants and was in a fit state to make the declaration *(Rama Chandra Reddy vs Public Prosecutor, A 1976 SC 1994: 1976 Cri LJ 1548);*

(iv) Where a dying declaration is suspicious it should not be acted upon without corroborative evidence *(Rasheed Beg vs State of MP (1974) 4 SCC 264: A 1974 SC 332: 1974 Cri LJ 1548);*

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected *(Kake Singh vs State of MP A 1982 SC 1021: 1982 Cri. LJ 986);*

(vi) A dying declaration which sufferfrom infirmity cannot form the basis of a conviction *(Ram Manorath vs State of UP 1981 SCC (Cri)281: 1981 Cri LJ 168);*

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected *(State of Maharshtra vs Krishnamurthi Laxmipati Naidu, A 1981 SC 617: 1981 Cri. LJ 94);*

(viii) Equally, merely because it is a brief statement it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth *(Surajdeo Oza vs State of Bihar, A 1979, ST 1505; Cri. LJ 1122);*

(ix) Normally the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail *(Nanahau Ram vs State, A 1988 SC 912);*

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon *(State of UP vs Madan Mohan A 1989, SC 1519: 1989 Cri LJ 1485).*

61. Dying declaration if found acceptable alone can form the foundation for a conviction. The General rule is that all oral evidence must be direct viz, if it refers to a fact which could be seen it must be the evidence of the witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it, if it refers to a fact which

could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in section 60. The eight clauses of Section 32 are exceptions to the general rule against hearsay just stated. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of the statement might defeat the ends of justice and, secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. These aspects have been eloquently stated by *Eyre L CR in RV Wood Cock (1789) 1 Leach 500.*

62. The situation in which a man is on death bed is so solemn and screen when he is dying that the grave position in which he is placed, is the reason in law to accept inveracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye witnesses in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

63. Though a dying declaration is entitled to a great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless, it is corroborated. The rule requiring corrobor ation is merely a rule of prudence.

64. Dying declaration if found acceptable alone can form the foundation for a conviction. The rule requiring corroboration is merely a rule of prudence.

In the case of *Salim (Md) vs State 54 DLR 359* held :

> "The dying declaration of victim has not been reduced to writing, yet when it has been proved by overwhelmming ocular evidence to prove the guilt of accused-appellant, the dying declaration of victim itself stands out as a strong piece of evidence proving the guilt of the appellant. "

65. PW 1, brother of the deceased, having had heard the gun-fire and screaming of the deceased rushed to the PO along with others namely PWs. 2, 4 and 7 to whom the victim Syed Karim stated that accused Nurul Kabir inflicted gun fire and running away. They also found accused Nurul Kabir running away towards north. Later on PWs 6 and 9 happened

at the scene they also found the accused Nurul Kabir running away and heard that the accused Nurul Kabir inflicted gun-fire upon deceased Syed Karim, So the evidence of all the above prosecution witnesses in respect of hearing the verbal dying declaration of the deceased and running away the accused Nurul Kabir are consistent, uniform and corroborative with material particulars. There is absolutely no reason to disbelieve the consistent and corroborative evidence of those competent witnesses, having no reason whatsoever to depose falsely against the condemned-prisoner. The defence extensively cross-examined them but nothing could be elicited to shake their credibility in any manner whatsoever. So the same are invulnerable to the credibility.

66. It is true that the case was investigated twice by the two investigating officers so obviously the examination of the witnesses will occur in two different occasions. So the same will not prejudice the accused in any manner. Furthermore there are some minor discrepancies in respect of circumstantial facts which can not be denoted as contradictions and affected the merit of the case. With that regard we must bear in mind that the discrepancies have to be distinguished from the contradictions whereas contradictions in the statements of witnesses may be fatal for the prosecution but minor discrepancies in evidence will not make the prosecution case doubtful where the discrepancies are of minor character and do not go to the root of the prosecution story and do not shake the basic version of the witnesses, they need not be given much more importance and their testimony should not be jettisoned.

67. It appears that the defence unsuccessfully tried to make out the case that blood stained earth was not seized at the relevant time but it is in the evidence that it was diminished by walking and IO did not find it at or about the time of occurrence. Moreover, the learned Counsel repeatedly urged that the gun fire was inflicted from the back but the post-mortem report does not support the same. So, we are unable to accept it. Therefore, we find the complicity of the accused Nurul Kabir with crime of murder is well proved and the Court below rightly and legally convicted him.

68. Moreover the impugned judgment and order of conviction and sentence in its entirety is well founded in the facts and circumstances of the case. So the grounds urged and cont entions advanced by the learned Counsel for the condemned-prisoner arc not the correct exposition of law. However, the condemned-prisoner was aged about 28 years when he was examined under Section 342 CrPC. The record indicates that the condemned-prisoner is not a hard criminal, he cannot be at all characterised to be a menace to the society. Taking an account of aggravating and mitigating circumstances, ends of justice will be met if death sentence is altered to one of imprisonment for life. Condemned-prisoner Nurul Kabir, thus stands sentenced to imprisonment for life.

69. In the light of discussions made above we find no evidence against Monjur Alam for abating accused Nurul Kabir to commit murder of deceased Syed Karim. Most of the witnesses merely stated that the accused Monjur Alam was roaming around the place of occurrence for certain moment but the deceased Syed Karim himself did not disclose such fact to his inmates and other neighbouring witnesses. So we failed to discover any merit in Criminal Appeal No. 4347 of 2005.

70. In the result the reference is rejected with a modification of sentence to the above terms;

71. The Criminal appeal No. 3778 of 2009 and Jail appeal No. 1055 of 2005 are allowed in part with a modification to the effect that the condemned-prisoner Nurul Kabir is convicted under Section 302 of the Penal Code and sentenced to suffer imprisonment for life.

72. In view of the provisions laid down in Section 35A(1) of the Code of Criminal Procedure the total period the condemned-prisoner have been in the custody before conviction in connection with this offence shall be deducted from the sentence of imprisonment for life awarded to him.

73. Criminal appeal No. 4347 of 2005 is dismissed.

The office is directed to send down the records at once.

Ed.

High Court Division
(Statutory Original Jurisdiction)

Md Rezaul Hasan J

Mosharraf Hossain (Md).....Petitioner

vs

Saad Securities Limited and others .....Respondents*

Judgment

September 29th, 2013.

Companies Act (XVIII of 1994)
Section 233

Title of the section can be looked into, in aid of interpretation, only when there is any ambiguity in the contents of the section. .....(8)

Inherent Power

This court, in exercise of its inherent jurisdiction and power, can give consequential relief as well. .....(8)

Delwar Hossain Somaddar, Advocate—For the Petitioner.

None one appears—For Respondents.

*Company Matter No. 355 of 2011.

Judgment

Md Rezaul Hasan J : This is an application under section 233 of the Companies Act, 1994 (the Act). The supplementary-affidavit do form part of the substantive application.

2. It has been stated amongst other in the petition that at the time of in corporation of the Company corporate set up of the Company was as follows:

a.	Atique Ulla Khan	Managing Director
b.	Md Abdulla	Chairman
c.	Md Delwar Hossain	Director
d.	Shirin Ara	Director

That after incorporation of the Company director of the Company Atikulla Khan and Shirin Ara (250 + 250) = 500 share transferred to the petitioner on 20-7-1999 and thereafter the corporate set up of the company was as follows:

a.	Md Delwar Hossain	Managing Director
b.	Md Moshrraf Hossain	Chairman
c.	Mrs Shamsun Nahar	Director

That on 13-3-2002 Delwar Hossain acquired 6,000 shares by allotment and M/s Shamsunnar acquired 6000 shares by allotted and petitioner Mr Mosarraf Hossain Bhuiaya acquired 12,000 share by the allotment on 13-3-2002; that after appoint at the post of Managing Director the Respondent No.2 was working at his sweet will without paying any respect to companies Act and Rules; that the Managing Director Md Delwar Hossain taking the illegal advantage of his position, he has made a false resolution whereby he has increased authorized capital from 1(one) crore to 7 (seven) crores and also allotted further 6,00,000 shares of Taka 100 each, but he has illegally allotted 1,00,000 shares in favour of himself, on 14-12-2008. These works were done by the said Md Delwar Hossain keeping the petitioner fully in dark. At the time of holding Extra Ordinary General Meeting on 30-11-2008 and Board Meeting on 14-12-2008, the petitioner was staying in United

States of America, but the Respondent No.2 has put the petitioner's signature in the resolution book by forging the same and he also shown the petitioner as present in the Meeting. After returning from America the petitioner have learnt these from the Office of the Registrar of Joint Stock Companies and firms (RJSC). That the respondent No.2 did not invest any further amount against the further allotted shares and this allotment is unlawful and is of no legal effect; that after knowing also out this matter the petitioner asked the respondent No.2 about that resolution, but he has not response positively. Thereafter, the petitioner sent three legal notices respondent to No.2 on 10-7-2011, 31-7-2011 and 24-8-2011 about the said disputed resolutions and others illegal activities committed by him, but the respondent could not answer satisfactory; that the present Managing Director of the Company is not taking any steps for auditing the accounts of the company and is not holding the Annual General Meetings or as the board meeting of the Company, that the present Managing Director is not co-operating for doing any business of the Company. For his non-cooperation business of the Company has been collapsed; that now every works and steps of the Respondent Nos.2 is prejudicial to the interest of company as well as to the interest shareholders of the Company; that the respondents No.2 in the above noted manner has acted arbitrarily and illegally and by that he has lowered down the reputation of the company. As such, to ensure proper and lawful functioning of the company and to preserve the legal rights of the petitioner the said disputed resolution are required to be cancelled and the unauthorized allotment of 1(one) lakh further shares in favour of the respondent, made on 14-12-2008, needs to be omitted from the Registrar of Members of the Company. Hence this application.

3. The learned Advocate Mr Delwar Hossain Somaddar, appearing for the petitioner and having placed the petition alongwith the annexures submits that originally the petitioner was holding 50% shares in the company and the respondent Nos. 2 and 3 (who are husband and wife) were holding 50% shares of the company as described in paragraph No.7 of the petition. In otherwards, he submits that originally the petitioner was holding 500 shares and respondent Nos. 2 and 3 were jointly holding 500 shares. He next submits that subsequently on 13-3-2002 further allotment of shares were made, whereby the petitioner allotted 12,000 shares to the respondent Nos.2 and 3, each receiving 6000 shares. As such, as on 13-3-2002 the petitioner was holding 12 thousand shares and Respondent No.2 was holding 6,000 shares and respondent No.3 was holding 6,000 shares. He then submits, that the respondents Nos. 2 and 3 are brother-in-law and sister of the petitioner, who resides in USA for maximum time and, as such, on good faith he entrusted the management of the company to respondent No.2 (managing directors), who is husband of the petitioner's sister, i.e the Respondent No.3 and that taking advantage of absence of the petitioner in Bangladesh, the respondent Nos.2 and 3 held a purported EGM on 30-11-2008 (annexure-B), whereby they have adopted certain resolutions and increased authorized share capital of the company from Taka 1(one) crore to Taka 7 (seven) crore and has falsely shown presence of the petitioner is that meeting by forging his signature, but notice of the said Extraordinary General Meeting was never served upon the petitioner, nor indeed the petitioner was present in the said EGM dated 30-11-2008, nor he has put any signature on the minutes (annexure-B) for increasing the paid up capital. He next submits that the respondent Nos.2 and 3 has fraudulently and unauthorizedly made further allotment of 1,00,000 shares in favour of the respondent No.2, who is husband of respondent No.3, although there was no resolution or decision of the Board of Directors to increase the subscribed capital or to alter the articles of the association of the com-

pany or to make further allotment of shares. As such, he submits that the purported resolution dated 30-11-2008 shown to have adopted in EGM by using forged signature of the petitioner is liable to be set-aside as well as the allotment of 1,00,000 shares shown to have been made in favour of the respondent No.2 by submitting form-XV (annexure-BI) on 14-12-2008, in violation of section 155 (1) of the Act and by resorting is forgery is liable to be cancelled and the Register Members may be rectified accordingly, as consequential relief. The learned Advocate, then referring to the photostat copy of the passport (annexures-E and G series) of the petitioner, submits that on the date of adopting the disputes resolutions on 30-11-2008 (annexure-B), the petitioner was at USA.

4. None appeared to oppose the application.

5. Heard the learned Advocate and perused the application alongwith the annexures.

6. I find that the case of the narrated in the petition as well as the submission made by the learned advocate for the petitioner is duly supported by the documents annexed to the substantive petition and to the supplementary affidavit sworn on 29-9-13, namely the annexures referred to in the submission.

7. I do no find any decision of the Board of Directors, in the record, to increase the subscribed capital by allotment further shares, as required by section 155 of the Act. I also find that the petitioner acquired 500 shares, by purchase on 20-7-99, from the promoter share holders Atikullah Khan and Shirin Ara, each holding 250 and 250 shares respectively. In otherwords, petitioner was holding 50% shares and the Respondents No.2 and 3 were holding the rest 50% shares in the paid up capital of the company, but the petitioner was not in the management or in the Board of Directors of the company.

8. Having examined the provisions of section 233 of the Act, I find that the title of the section is, "Power of the court to give direction for protecting interest of the minority," but the precondition to file a petition under section 233 to have not less than 10% shares in the paid up capital of the company. So, far as the *locus standi* to file the petition is concerned, I am of the view that the petitioner has met the requirement in as much as he holds not less than 10% shares in the paid up capital of the company. I am also of the view that the title of the section shall not govern it's content. It is the content that shall be looked into in arriving at the decision and the content of a section shall have overriding effect over it's title, in case of any inconsistency between them. Title of the section can be looked into, in aid of interpretation, only when there is any ambiguity in the contents of the section. But the language used in section 233 of Act admits of no ambiguity. Hence, title of the section shall not debar the petitioner in this particular case. Besides, having found that the petitioner is not a member in the Board of directors and, as such, he is not or he cannot be instrumental to conduct the affairs of the company or to exercise the power of the directors in a manner prejudicial to the interest of any member. Hence, in may considered opinion, in order to file a petition under section 233 of the Act, the petitioner must satisfy the following two conditions while it is immaterial whether he is a minority share holder or not, namely-

(i) he holds not less then 10% shares in the paid up capital of the company, as required by sub-section (1) of section 233 and (ii) he is not a director of the company to be instrumental to conduct the affairs of the company and is not in a position to exercise the power of a director in a manner prejudicial to the interest of one or more of it's members or in disregard to his or their interest , as stipulated at clause (a) of sub-section (1) of section 233. However, any director(s) having not less than 10% shares in the paid up capital of the company can file an

application, if he/they represents minority shares in the Board of directors. Besides, I am of further view that this court, in exercise of its inherent jurisdiction and power, can give consequential relief as well.

9. Having considered the pleadings, submission and the materials on record, I find that the aforesaid conduct of the respondents Nos.2 and 3, proved by the documents annexed, establishes the facts that:

(a) the affairs of the company are being conducted and the powers of the directors, namely Respondents Nos. 2 and 3, are being exercised in a manner prejudicial to the interest of the petitioner,

(b) the company, represented by the Respondent Nos. 2 and 3, has acted in a manner which has discriminated the interest of the petitioner,

(c) The purported resolution adopted in the EGM dated 30-11-2008 (Annexure-B) is fraudulent and the allotment of 1,00,000 shares made on 14-12-2008 (Annexure-BI) to the Respondent No.2 is fraudulent, unauthorized and was made in clear violation of sub-section (1) of section 155 of the Act.

In view of the deliberation recorded above, I find merit in this application.

In the result this application is allowed. The disputed resolution dated 30-11-2008 adopted the purported EGM (Annexure-B) is hereby set-aside.

The allotment of 1,00,000 shares, made on 14-12-2008, to the Respondent No.2 is hereby cancelled. In consequence, I pass this incidental order, directing the Respondents to rectify the Register of Members by ommitting 1,00,000 shares (Annexure-B-1) shown to have been allotted to Respondent No.2 and the Return (form-XV dated 14-12-2008, Annexure-B1) shall stand cancelled. Since, there is no evidence of making an payment as against this 1,00,000 shares, so question of reduction of share capital does not arise and no direction is required to be given in that respect. The Respondents are further directed to run and manage the affairs of the company as per provisions of the Act and the Articles of Association.

Let a copy of this Judgment be sent to the Registrar of Joint Stock Companies & Firms for doing the needful.

Parties will bear their respective cost.

Ed.

High Court Division
(Civil Appellate Jurisdiction)

Mamnoon Rahman J
Md Abu Zafor Siddique J

Polish Ocean Lines, and anothers.....
.....Appellants

vs

Al-Amin Seatrans Ltd and others.....
.....Respondents*

Judgment
March 20th, 2012.

Carriage of Goods by Sea Act (XXVI of 1925)
Article 3 Rule 6

Unless a suit is brought against the carrier within 1 year from the date of discharge of the cargo the suit is barred by limitation. .....(12)

14 BLC (AD) 115; 61 DLR 463; 13 BLC 763; 1983 BLD 3; 10 DLR 307; 59 DLR 151; 12 DLR 418; 13 DLR 186 AIR 1937 Sind 11 and AIR 1932 Bombay 330; 28 DLR 231; 31 DLR (AD) 114; 45 DLR 591 and 17 BLD 159 ref.

Muhammad Ohiullah, Advocate—For the Appellants.

*Civil Rule No.201(F) of 1995.

Judgment

Mamnoon Rahman J : This Appeal at the instance of the Appellants/Defendant Nos. 1 and 2 is directed against the judgment and decree dated 21-9-1994 and 24-9-1994 respectively passed in Money Suit No. 139 of 1994 by the 3rd Court of Subordinate Judge at Chittagong decreeing the suit against the defendant Nos. 1 and 2/appellants with costs and interest at @ 18% per annum from the date of filing of the suit till realisation.

2. The short facts for the disposal of the case are that the plaintiff is a limited Company incorporated in Bangladesh and have been carrying on business as a shipping agent for a long period of time at the Ports of Bangladesh handling both foreign and local ships and that the defendant No.l is the owner of the vesselMV Grunwald represented in Bangladesh by their local agents, Bangladesh Shipping Agencies (Pvt) Ltd, Chittagong and the defendant No.2 also carries on with the business of shipping and that the vessel MV Grunwald, the defendant No.l was chartered by Polsin Pvt Limited, 2 Mistri Road, AC Building, Singapore for carriage and delivery of various cargoes at the Port of Chittagong and the said vessel arrived at Chittagong Port on 12-3-1986 under import Rotation No.188/86 and that the plaintiff acted as charterer's agent at Chittagong Port and submitted with the Customs Authority the statutory declaration under Section 55(e) of the Customs Act, 1969, undertaking the liability to indemnify the cargo owners for any shortage/shortlanding of goods and also making themselves answerable to Customs penal action for such shortage/shortlanding and that the owner's agents at Gdynia, M/s. Baltic Far East Shipping Pte Ltd, issued on behalf of the owners Bills of Lading for 24,000 bags of Soda Ash, 2000 bags of Skimmed Milk Power and 4000 bags of Thermoplastic Moulding Compund for carriage to and delivery at Chittagong and that after arrival of the vessel at the Port of Chittagong on 12th March, 1986 the vessel MV Grunwald discharged her cargo into the custody of the Chittagong Port Authority, whereafter it was found that there was a shortlanding of 149 bags of Thermoplastic Moulding Compund, 209 bags of Skimmed Milk Power, 6629 bags of Soda Ash from the vessel MV Grunwald owned by the defendant No.l for which necessary shortlanding certificate was issued by the Chittagong Port Authority and that the consignees made their claim for shortlanding of the cargo as mentioned above on the plaintiff for settlement thereof, whereupon the plaintiff forwarded the aforesaid claim bills to the owner's-local agents namely, Bangladesh Shipping Agencies (Pvt) Ltd, the defendant No.2, for settlement and that such claims were however, settled by the said owner's agent, the defendant No.2 in the suit and that thereafter the Customs Authority issued a notice to show cause upon the plaintiff, the declaring agents to show cause as to why the amount of Taka 21,64,901 shall not be imposed on them for shortlanding of 149 bags of Thermoplastic Moulding Company's Compound, 209 bags of Skimmed Milk Powder and 6,629 bags of Soda Ash from the aforesaid vessel MV Grunwald and that the plaintiff filed before the Customs Authority a reply to the said Show Cause notice which was duly heard by the Assistant Collector of Customs MCD (Import) Chittagong and on conclusion of hearing imposed a penalty of Taka 21,64,901 on the plaintiff for shortlanding of the cargo as mentioned above from the vessel MV Grunwald owned by the defendant No.l and chartered by the plaintiffs principal and that the Customs Authorities are pressing the plaintiff for payment of the said penalty amount but upon receipt of the said penalty order the plaintiff requested the owner's local agent, Bangladesh Shipping Agencies (Pvt) Ltd, Chittagong, the defendant No.2 in the suit for settlement of the penalty but

inspite of repeated requests and approaches neither the owners of the vessel, the defendant No.l, nor their local agents the defendant No.2 in the suit have taken steps for settlement of the said penalty amount with the of result that the plaintiff has been put to a miserable condition for their liability to the Customs Authority arising out of the statutory declaration filed by them making them amenable to Customs penal action whereas they hold no funds from the ship owners or their agents to mitigate the customs claim and that in the circumstances, the plaintiff has no other alternative to realise the said penalty amount from the owners of the vessel and their local agents. The further case of the plaintiff is that the vessel MV Grunwald has entered into Port of Chittagong and is now at the Jetty No.4 and the said vessel is scheduled to leave the Port of Chittagong without settlement of the plaintiffs claim on account of Customs penalty to the extent of Taka 21,64,901 and that the defendants Nos.l and 2 have not been paying their attention to the matter of customs penalty and are maintaining silence and, as such, it is very much clear that they have no intention to pay the amount of penalty imposed on the plaintiff, such amount being payable by the owners and their local agents, the defendant Nos.l and 2 according to law but the plaintiff has been dragged to enormous financial stringencies at the whims and caprices of the defendants Nos.l and 2 and the plaintiff has no way out to be relieved from the customs penalty action and that the defendants Nos.l and 2 owe considerable amount of money to the plaintiff on account of customs and ports disbursements and other contingencies paid by the plaintiff from their own funds which' are also not expected to be received from the above defendant in due course other than through the Court of law and that the plaintiff, therefore, reserves the right to add such amounts to the claim in the suit by amending the plaint and that all the efforts of the plaintiff to recover the amount in the suit from the defendants have been in vain and the defendant No.l has no property or asset in Bangladesh excepting the vesselMV Grunwald and, as such, it is liable to be attached before judgment conditionally so that the defendants may be compelled to deposit the amount of claim in cash together with costs and expenses of the suit or in the alternative furnish a Bank Guarantee to the Court to secure the amount claimed in the suit till its disposal and that the said vessel MV Grunwald is the only property of the defendant No.l now berthed at Jetty No.4 of Chittagong Port Authority and she is reported to be preparing to leave Chittagong within 24 hours and in case the said vessel is not attached before judgment immediately the plaintiff shall be left with nothing to satisfy the decree that may be passed in favour of the plaintiff in the suit and that the plaintiff has a good *prima-facie* case for success in the suit for recovery of the Government dues and the plaintiff has accordingly prayed for a decree for Taka 21,64,901 against the principal defendants.

3. The defendant Nos.l and 2 entered their appearance in the suit and contested the suit by filing written statement. It has been stated by the defendant Nos.l and 2 in the written statement that the suit is not maintainable in its present form and that the suit is barred by limitation as well as by the principles of estoppel, waiver and acquiescence and that the suit is bad for non-joinder, mis-joinder of parties and multifariousness and that the plaintiff has got no *locus-standi* to file the present suit as against these defendants and that the plaintiff has got no cause of action for the suit as against these defendants and that the suit being mis-conceived, misleading and harassing is liable to be dismissed.

4. It has been stated on behalf of the defendant Nos.l and 2 that since the plaintiff was the declaring agent of the vessel as charter-

er's agent in Chittagong the question of settlement of any cargo claim by the defendant Nos.l and 2 as owners agent does not arise at all and that if at all any penalty is imposed the plaintiff is to pay the same as declaring agent and that since the plaintiff itself had made customs declaration making themselves liable for any shortage/damage of the goods under S.55(e) of the Customs Act, 1969 as such the plaintiff is bound to pay the penalty, but the defendant Nos. 1 and 2 are in no way is liable to pay any penalty and the defendants No.l and 2 are not liable to the plaintiff for any disbursements on account of Ports and Customs dues and the plaintiff has no right to recover any amount from the defendant Nos.l and 2 and that furthermore the plaintiff has got no right to attach the vessel MV Grunwald under Order XXXVIII, rule 5 of the Code of Civil Procedure.

5. It has been further stated by the defendants in its written statement that the vessel MV Grunwald owned and controlled by the defendant No.l was chartered by M/s Polsin Pvt Ltd, Singapore from the defendant No. 1 for carriage to and delivery of the suit consignment from the Port of Gdynia, Poland to Chittagong, Bangladesh and accordingly as per declaration made by the shipper i.e. Mates Receipt (GL) No. 16, the Master issued the Bill of lading No.214 originally for 10,000 bags Soda Ash and that subsequently when it was found that the shipper has loaded 3,004 bags instead of 10,000. bags the shipper amended the Mate's Receipt to th quantity of 3004 bags and its weight and accordingly the Bill of lading No.214 was also' amended to quantity and weight, the loading report No.45/NZI/M/86 dated 4-2-1986 of the said goods at the Port of Gdynia will justify its actual shipment and that the charterer at Singapore namely M/s. Polsin Pvt Ltd issued another set of Bill of lading showing quantity of 10,000 bags instead of 3004 bags only under Bill of lading No.214 and the aforesaid Bill of lading was forwarded to their local agent i.e. the plaintiff who subsequently without making correction submitted to the Customs Authority as a clearing agent and that it is clear from the mates receipt that the Bill of lading and cargo manifest of the port of loading that there was a short shipment of 6,996 bags soda ash at the port of loading the fact which was unknown to the Customs Authority and that if the plaintiff would have produced the original load port amended Bill of lading to the Custom Authority the question of penalty would not have arisen at all. It has been further stated in the written statement that the ship MV Grunwald arrived at Chittagong Port, Chittagong and discharged her cargo in full and in good order and condition to the Chittagong Port Authority and that since these defendants have got no privity of contract with the consignee these defendants are in no way liable for any shortage/damage as alleged, rather the charterer and its agent who itself gave the declaration under S.55(e) of the Customs Act, 1969 i.e. the plaintiff may be liable and that furthermore that the comments of the Marine Insurance Company of the charterer namely WARTA at the Port of loading will also evidence that the "Number of Bags of Soda Ash really loaded at Gdynia under Bill of lading No.214(Velb/L-16) on MV Grunwald in January, 1986 and number of Bags mentioned on B/L, 214-(Velb.l6) and manifest printed and signed at Singapore by Polsin Pvt Ltd which has been not corrected and delivered to their agent Al-Amin Seatrans Ltd who presented the same to Customs Officer (without correction), and that according to loading documents under B/L No.214 (Velb.16) at Gdynia really loaded 3004 bags of Soda Ash instead of 10,000 bags i.e. 6996 bags were short shipped due to the lack of space in the ship's hold and that in the premises from the above facts it can be safely stated that these defendants are in no way liable for the plaintiffs' claim or at all and that it is denied that any cause of action for the suit arose against these defendants on the date or dates in any manner or in the place as alleged in the

plaint and that the plaintiff is not entitled to any decree in the suit as against these defendants for an amount of Taka 21,64,901 or any amount or cost of the suit or interest at the rate of 18% pendentilite or any relief or reliefs as prayed for in the suit or at all and that the schedule of claim is baseless and hence denied and hence the suit is liable to be dismissed with costs in favour of these defendants.

6. Based on the pleadings filed by the parties the Court framed the following issues—

1) Is the instant suit is maintainable in its present form and manner?
2) Is the plaintiff's suit barred by limitation?
3) Is the suit bad for defect of parties?
4) Is the plaintiff entitled to any decree as prayed for?

7. Both the parties adduced oral and documentary evidences in support of their respective cases. On behalf of the plaintiff, one Mr. Azizul Hoque adduced oral evidence in support of the plaintiff's case. He stated in his deposition that the plaintiff as the charterer's agent gave a declaration under section 55(e) of the Customs Act. On behalf of the defendant one Mr. Abdul Majid adduced evidence in support of the defence case. He stated in his deposition that the vessel was chartered by Polsin Pvt Ltd. He further stated in his deposition that the quantity of cargo supposed to be loaded, the same was not loaded. Initially Polsin Pvt Ltd issued bill of Lading for the full quantity of the cargo but subsequently the shipowner amended the bill. This bill of lading was not filed by the plaintiff with the Customs Authorities. As the plaintiff did not file the amended bill of lading with the Customs Authorities, the penalty was imposed due to the mistake committed by the plaintiff. DW1 filed the amended bill of lading which was marked as Exhibit Ka and Ka-1. He further deposed by saying that for such imposition of penalty the charterer's agent is responsible. PW1 produced documents which were marked as Exhibit 1 that is the Outturn report dated 31-7-1986 issued by the Chittagong Port Authority, (No shortlanding certificate issued by the Chittagong Port Authority was however filed or exhibited) Exhibit 2 is the penalty bill issued by the Customs Authorities, Exhibit 3 is the adjudication order passed by the Customs Authorities, Exhibit-4 is a letter written by the plaintiff to the defendant No.2, Exhibit 5 is a letter written by the Defendant No.2 to the plaintiff, Exhibit 5 is a letter written by the Defendant No.2 to Mr. J. Hapki, Exhibit Ka is the bill of lading and Exhibit Ka-1 is also bill of lading.

8. We have considered the pleadings filed by the parties, the issues framed by the Court and the oral and documentary evidence adduced by both the parties including the Exhibits filed by both the plaintiff and the defendants.

9. It appears that the plaintiff as per its own admission made in the plaint in paragraph 4 has stated that the plaintiff acted as the charterer's agent at Chittagong port for the vessel MV Grunwald and submitted to the Customs Authorities the statutory declaration under section 55(e) of the Customs Act, 1969, undertaking the liability to indemnify the cargo owners for any shortage/short landing of goods and also making themselves answerable to customs penal action for such shortage/shortlanding. It also appears that the vessel MV Grunwald came to Chittagong port on 12 March, 1986 and discharged her cargo into the care and custody of the Chittagong Port Authority whereafter it was found that there was an alleged shortage of 149 bags of the monoplastic Moulding compound, 209 bags of Milk Powder, 6629 bags of Soda ash from the vessel MV Grunwald. It also appears that the plaintiff in the plaint has stated in the cause of action paragraph that the cause of action for the suit arose on the 12th

March, 1986 when the vessel MV Grunwald arrived at the Port of Chittagong with the suit consignment on the 27th March, 1986 when the Chittagong Port Authority issued a shortlanding certificate, on the 12th February, 1991 when the Assistant Collector of Customs MCD (Import), Chittagong imposed the penalty of Taka 21,64,901 vide its Order No.22. on the plaintiff , on the 16th March, 1991 the date of sending the said penalty order for settlement thereof by the plaintiff and on 18-3-1991 the date of sending the said penalty bill to the owners representatives Mr J Hapko, Dhaka for settlement thereof and the cause of action is continuing at Chittagong Port, PS Bandar, District, Chittagong within the jurisdiction of the Court.

10. Mr Muhammad Ohiullah, the learned Advocate for the Appellant submits that the Court below committed a serious error in decreeing the suit although the suit filed by the plaintiff/Respondent No.l is hopelessly barred by limitation. He further submits that the Court below committed a serious error in decreeing the suit although the plaintiff was the declaring agent of the vessel as charterer's agents and the plaintiff itself made the necessary customs declaration under section 55(e) of the Custom Act, 1969 making itself liable for any kind shortage of the goods and, as such, the plaintiff/ Respondent No.l above is bound to pay the penalty and the Defendant Nos.1 and 2/ Appellants are not bound to pay any penalty. He also submitted that if the plaintiff/respondent No.l had produced the subsequently amended bill of lading before the Customs Authority, there would not have been any penalty and accordingly he submitted that the judgment and decree passed by the Court below is liable to be set-aside against the Appellants/Defendant Nos.1 and 2.

11. It appears that the Court below while deciding the issues also committed a serious error in not dismissing the suit of the plaintiff since the suit was bad for defect of parties. The plaintiff left the Chittagong Port Authority and the Customs Authorities out of the suit which made the suit defective and same is reflected in the Order No.43 dated 12-6-1994 passed by the Court below. The presence of the Chittagong Port Authority and the Customs Authorities was absolutely vital in the suit. However, their names having been struck out the suit has become defective and, as such, the suit is liable to be dismissed for defect of parties.

12. In support of his contention that the suit is hopelessly barred by limitation Mr. Muhammad Ohiullah cited Article 3 Rule 6 of the Carriage of Goods by Sea Act, 1925 which is incorporated in the Bill of Lading and he further cited the decisions of *14 BLC (AD) 115, 61 DLR 463, 13 BLC 763, 1983 BLD 3, 10 DLR 307, 59 DLR 151, 12 DLR 418, 13 DLR 186, AIR 1937 Sind 11* and *AIR 1932 Bombay 330* wherein it has been clearly laid down that unless a suit is brought against the carrier within 1 year from the date of discharge of the cargo the suit is barred by limitation. We find that in the instant case the vessel MV Grunwald came to Bangladesh on 12th March, 1986 and completed discharge of her cargo on 27th March, 1986. Thereafter as per the allegation of the plaintiff the Chittagong Port Authority on 12th February, 1991 issued a shortlanding certificate (although the same was neither filed in the suit nor exhibited) and the Assistant Collector of Customs issued a penalty order imposing a penalty of Taka 21,64,901 vide order No.22 on the plaintiff/ Respondent No.l on 16th March, 1991 and the adjudication order passed by the Assistant Commissioner of Customs alongwith the penalty bill was sent by the plaintiff/respondent No.l to the Appellant/ defendant Nos.l and 2 on 18-3-1991. We fail to understand how the Court below could have decreed the suit against the Appellants/ Defendant No.l and 2 despite the fact that the plaintiff/respondent No.l itself had given the declaration under section 55(e) of the Customs Act, 1969 making itself answerable for any kinds of shortage that

may be found during the discharge of the cargo from the vessel MV Grunwald. We also find it difficult to understand how the trial Court could have decreed the suit despite the fact that a period of almost 5 years had elapsed since the cargo had been discharged from the vessel MV Grunwald although the suit was filed long beyond the prescribed period of limitation . It is pertinent to note that even though the plaintiff/respondent No.l had filed this money suit claiming to recover customs penalty from the protecting agent of the owners of the vessel the suit is clearly not maintainable because the Government of Bangladesh/Customs Authorities had never assigned its rights to the plaintiff/Respondent No.l and the plaintiff respondent No.l had also never acquired any right through the Government of Bangladesh to file the suit to recover such customs dues and penalty from the Appellants/ Defendant Nos. 1 and 2. It was solely within the domain and discretion of the Customs Authorities to commence any action against the defendant Nos.l and 2/ Appellants to recover any customs dues and not for the plaintiff to take the same on its own shoulders when the plaintiff clearly had no authority to file such suit.

13. Finally, Mr Muhammad Ohiullah the learned Advocate for the Appellants submitted that the plaintiff attached the vessel MV Grunwald under Order XXXVIII Rule 5 of the Code of Civil Procedure when the vessel came to Chittagong during her subsequent voyage and the Defendant Nos.l and 2/Appellants were into coerced into giving a Bank Guarantee to release the vessel from the order of attachment passed by the Court below. He submitted that the very attachment of the vessel MV Grunwald under Order XXXVIII Rule 5 of the Code of Civil Procedure was *prima facie* illegal. In support of his contentions he referred to the cases of *28 DLR 231, 31 DLR (AD) 114, 45 DLR 591* and *17 BID 159*. We find force in such contention of Mr Muhammad Ohiullah. In such view of the matter we also hold that the attachment of the vessel MV Grunwald under Order XXXVIII Rule 5 of the Code of Civil Procedure was also clearly illegal.

14. Considering the facts and circumstances of the case and the points of law involved we are of the considered view that the Court below committed a serious error of law as well as in facts in decreeing the suit against the Defendant Nos.l and 2/Appellants. Consequently the same is liable to be set-aside.

15. Accordingly the appeal is allowed without any order as to costs and the judgment and decree dated 21-4-1994 and 24-9-1994 passed by the 3rd Court of Subordinate Judge, Chittagong is hereby set-aside and the suit filed by the plaintiff is hereby dismissed. It appears from the records that the Respondent No.1/Plaintiff had commenced execution case No.l of 1995. The 3rd Court of Subordinate Judge Chittagong on 24-5-1995 directed Agrani Bank, Chittagong to issue a pay order in favour of the Court upon encashment of LG 2454-011-260-91 dated 8-6-1991 for Taka 21,64,901 Against this backdrop the Appellant/ Defendant Nos.l and 2 obtained stay of the Execution Case No.l of 1995 from this Court in Civil Rule No.201(F) of 1995 which was made absolute on 22-1-1998.

16. Since the instant appeal has been allowed and the judgment and decree passed by the Court below has been set-aside and the plaintiff's suit has been dismissed, we hereby direct the trial Court to return the LG N6.2454-011-260-91 dated 8-6-1991 for Taka 21,64,901 to the defendant Nos.l and 2/Appellants immediately and any payment order arising out of the aforesaid bank guarantee is also hereby recalled.

Send down the lower Court records at once.

Ed.

High Court Division
(Civil Appellate Jurisdiction)

Md Anwarul Haque J
Kazi Md Ejarul Haque Akondo J
} Dong Sung Shipping Company Ltd and another .....Defendants-Appellants

vs

Janata Bank and others.... Respondent-Opposite-Parties*

Judgment
July 19th, 2012.

Indemnity Bond

If any connivance or manipulation of Indemnity Bond is found to have been made; the same can be brought within the mischief of criminal offence but the same cannot be made responsible to the others like guarantor or mortgager as required in the loan agreement. .....(15)

AF Hasan Ariff with Muhammad Ohiullah with Nur Ahmed with BM Golam Mustafa Taj, Advocates—For the Defendant-Appellant.

Masud Ahmed Sayeed with Syed Ejaz Kabir, Advocates—For the Respondent No.l.

Judgment

Md Anwarul Haque J: This appeal has been preferred by defendant Nos. 1 and 2 of Money Suit No.21 of 1991 filed in the court of the then Subordinate Judge and Commercial Court No.2, Chittagong for realization of the loan amount to the tune of Taka. 16,40,000 with interest which was given to defendant No.4 for the purpose of opening LC to import Powder Milk from Singapore and ultimately defendant No.l carried such imported goods and reached in the Chittagong Port on 8-7-1982 circulating the expected date of arrival in the daily news paper published on 5-7-1982 with an intention to inform all to receive the imported goods from the ship belonging to the defendant No.l and also the agent (carrier) defendant No.2. Ultimately on the submission of the indemnity bond defendant No. 4 took delivery of the goods with the help of his clearing agent defendant No.3 on 21-7-1982 beyond the knowledge of the plaintiff, Janata Bank Ltd. on the plea of non-availability of original papers.

2. However, in spite of repeated request neither the defendant No.4 nor any other defendant has come forward to pay the loan amount to the tune of Taka 16,40,000 which defendant No.4 took in the form of Over draft for the purpose of opening LC to import the goods, referred to above.

3. It is further alleged that defendant Nos.1-3 in connivance with the defendant No.4, the loanee, has managed to take delivery of the imported goods beyond the knowledge of the Bank, the present plaintiff; as such Bank has filed this money suit for recovery of the amount referred to above.

4. On the other hand, defendant Nos.l and 2 filed joint written statement and defendant No.3 though filed a separate written statement but ultimately did not turn up to contest the suit whereas the loanee defendant No.4 has not, at all, turned up allowing the court to proceed against him exparte.

5. Beside the documentary evidence plaintiff has examined only one PW namely Md Abdul Awal, local Branch Manager of the Bank, whereas defendant No.2 has examined Mr MA Mazid in support of their written statement.

6. However, the then learned Subordinate Judge (now Joint District Judge) and the Judge of the commercial court No.2 has passed the decree against all the defendant who has caused loss of the plaintiff in connivance with each other; as such the decretal amount with interest is to be realized from the defendants jointly and severally.

7. Mr AF Hasan Ariff the learned advocate, appearing on behalf of the appellant-

*First Appeal No.164 of 1994.

defendant Nos.1 and 2, at the very outset of his argument has tried to bring our attention in the recital of the plaint which was filed for recovery of admitted loan amount to tune of Taka 16,40,000, granted to defendant No.4 in the form of Over draft for the purpose of opening LC; as such when the money suit is found to have been filed for recovery of such loan with interest in terms of agreement the question of liability of other agency like agent does not, at all, arise and must be kept out of consideration. Mr Arif, the learned advocate, further submits that in no way this type of alleged facts of connivance of causing loss of the plaintiff can be brought within the mischief of money suit which has been filed for the purpose of recovery of admitted loan granted in favour of the defendant No. 4 who has allowed the court to pass an exparte decree against him. Moreover, the indemnity bond as alleged by the plaintiff was duly issued at the relevant period facilitating the importer defendant No.4 to release the imported goods at an earliest opportunity because original documents was not available at the time of the arrival of the vessel on 8-7-1982; as such to avoid demurrage it was decided to release the goods in favour of the importer by taking indemnity bond, duly indorsed by the Bank where LC was opened. In support of his contention Mr Arif has referred a letter issued by the Janata Bank on 7-2-1983 addressed to Lieutenant SM Ahmad, Bangladesh Navy, Staff Offices to SZ ML A-9, Port Rest House, Chittagong but unfortunately he has not been examined during the course of trial.

8. On the other hand, Mr Masud Ahmed Sayeed the learned advocate appearing on behalf of the plaintiff-respondent submits that in a money suit all the defendants are jointly and severally liable to pay the decretal amount; as such it is open to the decree holder to execute the decree against any of the defendant which decree holder may deem fit and proper.

9. Mr Sayeed further submits that since defendant No.4 is admittedly a loanee to the tune of Taka 16,40,000 which was given in the form of Over-draft to open LC for importing Powder Milk and there can be no scope to deny the allegation brought against him since it has neither been paid nor any way it has been adjusted with the plaintiff-Bank. In support of sanction of such loan in favour of the defendant No.4 the learned advocate appearing on behalf of the appellant has referred a series of documents exhibits 1-11. Mr Sayeed has given much emphasis on the fact of the delivery of the goods on the basis of false documents like indemnity bond which was not, at all indorsed by the Bank; as such the court below has rightly made an observation that delivery of the imported goods in favour of the defendant No.3 by the defendant Nos.l and 2 was absolutely illegal for which they are to be held responsible and liable to pay compensation for it. The learned advocate further submits that the learned Judge of the court below though has decreed in the form of the compensation against the defendant Nos.1, 2 and 3 but virtually the amount as has been decreed is a loan amount to be recovered from the defendant No.4 with interest.

10. On the face of these submission, we have gone through the pleading meticulously. Admittedly plaintiff, Janata Bank (Foreign Currency Branch) Dhaka sanctioned loan in the form of over-draft to defendant No.4 in order to open LC for the purpose of importing Powder Milk from Singapore. It is also admitted that the defendant No.l M/s Dong Sung Shipping Company Ltd. represented by local agent M/s Progati Shipping Bangladesh Ltd was the carrier who ultimately carried the imported goods by vessel and reached in the Chittagong Port on 8-7-1982. It is also admitted that as a carrier defendant Nos.l and 2 declared their expected dated of arrival by two daily news papers, known as "Daily Life" and "Bangladesh Time" published on 5th July, 1982 requesting to concerned authority to receive the goods at an earliest opportunity. After observing all formalities defendant No.2 M/s Progati Shipping

Bangladesh Ltd. as a local agent of defendant No. I also informed about the arrival of the goods on 10-7-1982 to the importer, loanee defendant No.4 to receive the goods at an earliest opportunity in default defendant No.l will have no other alternative but to confisticate it and to dispose of by public auction under section 82 of the Custom Act, 1969 and the copy of such letter was also sent to Janata Bank, Motijheel Branch, Dhaka for information, ext.Kha. It is also admitted that defendant No.3 on behalf of the defendant No.4 received the imported goods by submitting indemnity bond alleged to have been duly indorsed by the plaintiff. It is also admitted and evident that defendant No.4, being a loanee received the imported goods in time without bringing any allegation of damage or shortage but till now he has not paid the loan amount received from the plaintiff, the financial Institution. It is also admitted that the imported goods was not pledged to the plaintiff.

11. On the basis of all these admitted facts let us examine the plaint where the case of the plaintiff is available.

12. In paragraph 1-9, 10 plaintiff has narrated the entire facts which will go to say that all the defendants in connivance with each other released the goods by creating the fake papers like indemnity bond and accordingly all the defendant are individually liable to pay the compensation in the form of money but in paragraphs 11 & 11A subsequently amended version is absolutely found otherwise which has made out a new facts, quoted below:

> "That from the facts stated above it is evident that the defendants are not willing to pay the plaintiff Bank's dues and, as such, the plaintiff has no other alternative but to realize its dues through legal process".

13. In paragraph 11A as incorporated—

> "That it is further submitted that defendant No.4 besides being party to the fraud, forgery of Indemnity Bond and unauthorized delivery of the suit goods as stated above. Defendant No.4 received the Overdraft advance from the Plaintiff-Bank for import of the disputed Skimmed Milk Powder on condition of repayment of the over-draft loan together with interest and other charges, within seven days of the notice of receipt of the Shipping documents by the plaintiff. The plaintiff gave due notice of the receipt of Shipping documents to defendant No.4 who did not repay the over-draft loan, interest and other charges in spite of repeated demand made to him. Defendant No.4 as opener of the disputed letter of Credit and as Principal debtor of the Over-draft loan is also personally and individually liable for the claim of the plaintiff in the suit."

14. PW I has also asserted the facts as stated above with a prayer to recover such amount from him alone.

15. On the face of these facts narrated in the plaint we are of the opinion that in a Money Suit filed by the Financial Institution against the loanee, defendant No.4 is to be realized from him alone because other defendants were neither surety nor guarantor; as such they cannot be held responsible for payment of such loan amount. If any connivance or manipulation of Indemnity Bond is found to have been made; the same can be brought within the mischief of criminal offence but the same cannot be made responsible to the others like guarantor or mortgager as required in the loan agreement. In the impugned judgment the learned Subordinate Judge, fully aware of such factual aspect of the case, has made the following decision:

> "যেহেতু ১/২ নং বিবাদী তাহাদের বর্ণিত রুপে ইনডেমনিটি বন্ড দাখিল করিতে পারে নাই বা ইনডেমনিটি বন্ড এর অস্তিত্ব প্রমান করিতে পারে নাই এবং বৈধ ইনডেমনিটি বন্ড এর বিপরীতে ২নং বিবাদী ডেলিভারী অর্ডার প্রদান করিয়াছে তাহা উপরোক্ত অবস্থা হইতে প্রমান করিতে পারে নাই এবং যেহেতু

শিপিং ডকুমেন্টস ছাড়া উক্ত ২নং বিবাদী নাঃ মালের ডেলিভারী অর্ডার প্রদান করিয়াছে এবং উক্ত ডেলিভারী অর্ডার দেওয়ার অন্য পক্ষ মাল নিয়ে যায় যাহার জন্য বাদীর ক্ষতি হয় সেহেতু ২নং বিবাদী নাঃ মালের ডেলিভারী অর্ডার দিয়া একটি বেআইনী কার্য্য করিয়াছে যাহার জন্য বাদীর ক্ষতি হইয়াছে এবং ১/২ নং বিবাদীদ্বয় দায়ী এবং বাদীর ক্ষতি পূরণ পরিশোধ করিতে ১/২ নং বিবাদী আইনতঃ বাধ্য বলিয়া প্রমানে আসিল। ৩নং বিবাদী যেহেতু অত্র মামলায় কনটেষ্ট করে নাই এবং ৩নং বিবাদী যেহেতু মাল বাদী থেকে আনার জন্য বৈধ অথরিটি পেয়েছে তাহা প্রমান করিতে পারে নাই এবং ৩নং বিবাদী যেহেতু বেআইনীভাবে মালের ডেলিভারী অর্ডার নেয় সেহেতু ৩নং বিবাদী ক্ষতিপুরণের জন্য দায়ী এবং আইনতঃ পরিশোধ করিতে বাধ্য"।

16. The above observation made by the learned the then Subordinate Judge (now Joint District Judge) and Judge of the Commercial Court is absolutely without his jurisdiction because it was not a suit for compensation rather it was a suit for recovery of loan amount; granted in favour of the defendant No.4 who has not yet paid back such loan. Since defendant Nos.1-2 is neither mortgagor nor guarantor they cannot be held responsible for the purpose of payment of loan amount which admittedly received by the defendant No.4 who also took delivery of imported goods through his agent defendant No. 3. In fact, the defendant Nos.l and 2 have performed their duty to carry the imported goods and to hand over the same to the importer defendant No. 4 who has raised no objection over the matter.

17. In the light of the above observation we are to says that the decree as has been given by the court below will remain good and to be executed or implemented against defendant No,4 alone. Decree against defendants Nos. 1 & 2, carrier of goods, affording the plaintiff an opportunity to realize the amount in the form of compensation in the Money Suit filed for recovery of loan is hereby set-aside.

18. In the result, the appeal is allowed in part. The decree passed in favour of the defendant Nos.l and 2 is hereby set-aside and decree passed against other defendants will remain good. Plaintiff is at liberty to realize the amount from the loanee the defendant No.4 with cost as has been given by the court below.

19. Accordingly the Civil Rule No.l35(F)95 is discharged. The order of stay passed in Civil Rule No.l35(F)/95 is hereby vacated.

Let a copy of the order along with LCR be sent to the court below at once for information and necessary action.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Nozrul Islam Chowdhury J
Anwarul Haque J

Judgment
January 20th, 2011.

Green Delta Insurance Company Ltd.....
.....Petitioner

vs

MV Parabat-8 and others....Opposite Parties*

Code of Civil Procedure (V of 1908)
Sections 115(1) and 151

Two proceedings are being carried out simultaneously and each court is at liberty to decide the question in their respective domain without any conflicting decision as alleged.

.....(11)

M Hafizullah with Md Ohiullah, Advocates—For the Petitioner.

Abdul Quiyyum with Sk Sharifuddin, Advocates—For the Opposite Party No. 1.

Judgment

Nozrul Islam Chowdhury J: This Rule is directed against order No.10 dared 9-9-2009 passed by the learned Joint District Judge,2nd Court, Khulna in Money Suit No.l of 2009 strik-

*Civil Revision No.3985 of 2009.

must not be a defaulter on the date of submission of the nomination paper. *Taposh Malaker vs Government of Bangladesh, Represented by the Secretary, Ministry of (LGRD) (Civil)* ... 1

Circumstantial Evidence—Evidence of PWs 33 and 37 along with the exhibit 16 the breakup of mobile phone of appellant have proved that on the date of occurrence appellant had as many as 16 mobile phone calls with another absconding accused. This fact also has corroborated the confessional statement of accused Zahid Hussain @ Kiron who stated in his confessional statement that the accused Alamgir was engaged to keep watch on the movement of deceased Jibran Tayyabi and to give those informations to other accused-persons over mobile phone. (Per Nazmun Ara Sultana J majority) *Yasin Rahman @ Rahman Yasin @ Titu vs State (Criminal)* 8

High Court Division

Carriage of Goods by Sea Act (XXVI of 1925)

Article 3 Rule 6—Unless a suit is brought against the carrier within 1 year from the date of discharge of the cargo the suit is barred by limitation. *Polish Ocean Lines vs Al-Amin Seatrans Ltd (Civil)* 38

Code of Civil Procedure (V of 1908)

Sections 115(1) and 151—Two proceedings are being carried out simultaneously and each court is at liberty to decide the question in their respective domain without any conflicting decision as alleged. *Green Delta Insurance Company Ltd vs MV Parabat-8 (Civil)* 48

Code of Criminal Procedure (V of 1898)

Section 164—Since it is a case of business transaction and no initial deception to pay the amount is found the same is to be considered as a case of civil nature which cannot be allowed to bring within the criminal jurisdiction causing abuse of the process of the court. *Shajahan Chowdhury (Md) vs State (Criminal)* 5

Section 241A—The Court is not required to assign any reason at the time of framing any charge against an accused in a case. But the Court is mandated by law to assign reasons at the time of discharging him from the case. *Basiratun Naher vs State (Criminal)* 1

Sections 374 and 376—Condemned-prisoner was aged about 28 years when he was examined under section 342 CrPC. The record indicates that the condemned-prisoner is not a hard criminal, he cannot be at all characterised to be a menace to the society. Taking an account of aggravating and mitigating circumstances, ends of justice will be met if death sentence is altered to one of imprisonment for life. *State vs Nurul Kabir (Criminal)* 25

Companies Act (XVIII of 1994)

Section 233—Title of the section can be looked into, in aid of interpretation, only when there is any ambiguity in the contents of the section. *Mosharraf Hossain (Md) vs Saad Securities Limited (Statutary Original)* 35

Constitution of Bangladesh, 1972

Article 102(2)—Entertaining writ petitions the High Court Division would assume the functions of the Labour Court upon gratuitously extending the jurisdiction of the High Court Division causing congestion in this Division which is already overwhelmingly overburdened with huge backlog of cases although there is a statutory forum to seek remedy, given the exceptional scenario of these cases, writ is maintainable. *Abdul Malek (Md) vs Government of the People's Republic of Bangladesh (Spl Original)* 7

Nari-o-Shishu Nirjatan Daman Ain (VIII of 2000)

Section 11(kha)—The allegation of torture does not mean causing hurt. The vague and unspecific allegation of torture made in the First Information Report does not attract an offence. *Umme Kulsum @ Zinat Ara vs Shahidul Islam (Criminal)* 17

Penal Code (XLV of 1860)

Section 109—Question of 'mens rea' of an accused cannot be gone into in a criminal revision under section 439 of the Code. That is essentially a matter of evidence and trial. *Basiratun Naher vs State (Criminal)* 1

Section 406 *read with* **420**—Since it is a case of business transaction and no initial deception to pay the amount is found the same is to be considered as a case of civil nature which cannot be allowed to bring within the criminal jurisdiction causing abuse of the process of the court. *Shajahan Chowdhury (Md) vs State (Criminal)* 5

Specific Relief Act (I of 1877)

Section 42—The nature of the dispute is entirely a civil dispute and it can only be resolved by a competent civil court. There is no provision in the Companies Act to file any declaratory suit under which the plaintiff could seek reliefs he claimed in the suit and these reliefs are only available under section 42 the Act. *AHM Kamruzzaman Khan vs Registrar, Joint Stock Companies & Firms (Civil)* 18

Indemnity Bond—If any connivance or manipulation of Indemnity Bond is found to have been made; the same can be brought within the mischief of criminal offence but the same cannot be made responsible to the others like guarantor or mortgager as required in the loan agreement. *Dong Sung Shipping Company Ltd vs Janata Bank (Civil)* 45

Service Benefits—Petitioners who have already completed 60 years of their age during the pendency of these Rules, shall get all their back salaries and other service benefits as per law. *Abdul Malek (Md) vs Government of the People's Republic of Bangladesh (Spl Original)* ... 7

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