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Appellate Division

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Section 561A—Even if any order was passed by the Magistrate, the said order was revisable under section 439A of the Code by the Metropolitan Sessions Judge. The accused-respondent without exhausting the said forum directly moved the High Court Division under section 561A of the Code. The High Court Division is not invested with any appellate or alternative power under section 561A of the Code. *State vs Md Ariful Islam @ Arif (Criminal)* 82

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High Court Division

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Section 12(2)(3)—Artha Rin suit cannot be filed by any financial institution without selling of a mortgage property or any other institution first. Even if the suit has been filed wrongly or by mistake but in course of trial that has to be cured in terms of section 12(2) of Ain. Section 12(3) of Ain provides that if owing any reason a suit cannot be filed by the financial institution even then a suit can well be filed afterwards without any restriction. *Shakwat Hossain (Md) vs The Artha Rin Adalat No.2 Dhaka (Spl Original)* 74

Artha Rin Adalat Ain (VIII of 2003)

Section 33(4)—Decree-holder institution, by not resorting to sub-section (4) of section 33, has committed fraud on the Court by using the process of the same to grab the properties free of cost.

got involved in business. That he used to take heroin but was not addicted; that $1^1/_2$ months before the murder of Jibran Tayyabi he was acquainted with terrorist Osman and developed friendship with him. Osman took, him to a house at "Mistripara"' and gave him heroin there. In that house he met Kiron and Didarul Alam @ Didar with whom he was introduced by Osman. That a few days before the occurrence he, Osman, Didar and Kiron went to that house and took heroin there. At that time Osman told them that Didar's "Khalato Bhai" Yasin Rahman @ Titu son of Khalil Shahab told him that one manager of a shipping company insulted him and his girl friend and also raped or tried to rape that girl friend and told him also to punish that man for a consideration of Taka 10 lakhs. That Osman told them also to assist him in doing that job and told also that he would pay them for that. That thereafter Osman and Didar discussed about when and how they would kill that man. That at that time Didar asked Osman whether Titu showed that man to him and in reply Osman told that Titu showed him that man, his office, his car and also the path of his return from office. That he (confessing accused Zillur Rahman) kept silent when Osman asked for his assistance. Accused Zillur Rahman, in his confessional statement, has further stated that on 9-6-1999 at about 4-00/4-30 PM he went to that house 'at "Mistripara" for taking heroin and reaching that house he saw Osman and Kiron and 4/5 other unknown boys there. That Osman at that time told that those unknown boys were his men. That 10/15 minutes later Didar also reached there and within a few minutes thereafter Osman received a mobile phone call and Osman then told them to go out quickly. Then Osman, Didar and Kiron went by a red moto cycle and the unknown boys followed that motor cycle. He also went with those boys and came to the main road and was waiting in front of a stall. That seeing a car coming Osman showed that to Kiron and then Kiron threw a brick bat on the front glass of that car and the car stopped. Osman then broke the glass of the door by the side of the driving seat of that car by "kata rifle" and shot twice at the man who was driving that car. Thereafter,, Didar and Osman went away by motor cycle, Kiron went away with those other boys and after sometime he himself a1so went to that house of Osman by a taxi and saw there Osman and Didar. After a while Kiron also came to that house. That in that very night they all four went to Dhaka by a taxi and stayed at Hotel Al-Salam at Fokirapool. But subsequently they changed that hotel and went to the Hotel Golden International. That Osman and Didar made plan to go to India. Two days after he came back to Chittagong and subsequently he heard from Didar that he and Osman went to Azmir Sharif. In his confessional statement accused Zillur Rahman stated also that last Friday Didar contacted with him and told him that he got addicted and his physica1 condition was bad and requested him to arrange for his treatment and, as such, he got accused Didar admitted in "Diganta" hospital mentioning his name as Ali Akbar. Accused Zillur Rahman, in his confessiona1 statement, has stated also that accused Osman bore all their expenses of going to Dhaka, staying there and of coming back from Dhaka.

133. Accused Md Zahid Hossain @ Kiron in his confessional statement narrated the same story of murder of Jibran Tayyabi. He stated that he resided at Dhaka town and 7/8 years before he went to Chittagong to attend a marriage ceremony and at that time he was introduced with Osman. That 2/3 years before Osman went to Dhaka twice and both the time he met him; that one month before murder of Jibran Tayyabi Osman along with his wife Mukti whom he called "Mami" and two sons came to Dhaka and stayed at their Hotel Al-Salam for two days. Thereafter, they shifted to Rajarbagh Hotel where they stayed for 7/8 days. During that time he met Osman several times. That at the time of coming back to Chittagong Osman took him also with him. At that time he (confessing accused Zahid Hossain @ Kiron) stayed 7/8 days in the house of

Osman at Chittagong that while he wanted to come back to Dhaka Osman told him that he had to do a job and after doing that job he would go to Dhaka along with him. That subsequently Osman introduced him with Zillur Rahman, Didar and Jahangir. That Didar and Zillur Rahman used to come to the house of Osman very often and take heroin there. That Osman later told in presence of Zillur and Didar that he had to do that job for Titu the "Khalato Bhai" of Didar and that the job was to kill an Indian national Jibran by name. That being asked Osman told also that Jibran tried to rape the girl friend of Titu the daughter of Jambu Shahab in his office and for this reason Titu wanted to kill Jibran and that Titu would give Taka 10 lakhs to them for doing that job. That at that time Osman told also that Titu was the son of the owner of KDS. This confessing accused Zahid Hossain @ Kiron stated further that he continued staying in the house of Osman at Chittagong at that time at the request of Osman. That Osman selected Didar, Zillur, Jahangir and four others of Shahab Khalil to kill Jibran and engaged Alamgir the elder brother of Didar to give him informations about the movement of Jibran Tayyabi. That Titu showed Jibran and his office to Osman and Didar. That Alamgir used to stay in front of the office of Jibran and from there sent informations to Osman over mobile phone; that he {the confessing accused Zahid Hossain @ Kiron) Osman, Didar, Zillur, Kashai Jahangir and four boys of Moheshkhali would go to the house of wife of Zahid at "Mistripara" and keep waiting there for mobile phone from Alamgir; that thus on three occasions they, getting information from Alamgir, went to Sheikh Mujib road in front of Chung King Restaurant but could not kill Jibran as Jibran went away before they reached there. That on 9-6-1999, Wednesday, at about 4-00 PM he, Osman and Didar went to the house of wife of Zahed at "Mistripara" and saw there Zillur and four others of Moheshkhali. At about 5-15 PM Osman got a mobile phone call and then told them to go to Sheikh Mujib Road near Chung King Restaurant and accordingly all of them went there. That Osman and Didar went there by a red motor cycle and he and others went there on foot. That Osman showed him a white car and according to the instruction of Osman he threw a brick bat aiming at that car and the front glass of that car shattered and the car stopped. Then Osman, Didar, Zillur and four others of Moheshkhali encircled that car and Osman broke the glass of the right front door of that car by the rifle in his hand and shot twice at Jibran who was then alone inside the car. Thereafter, Osman and Didar went away by the motor cycle and the other four boys of Moheshkhali went away by baby taxi and he alone took a baby taxi and went to the house of Osman and saw there, Osman, Didar' and Zillur. Later, in that very night they went to Dhaka by hiring a private car and stayed in the Hotel Al-Salam, but on the next day they went to Hotel Golden International and stayed there for 7/8 days. That accused Zillur came back to Chittagong. That Didar and Osman procured passports and on 24-6-1999 they went to India and 15/16 days thereafter both of them came back to Dhaka and met him in their hotel and thereafter they went away to Chittagong.

134. The other confessing accused Omar Air @ Jahangir @ Jahangir Kashai also has given the same story in his confessional statement. The material portion of the confessional statement of accused Omar Ali @ Jahangir @ Jahangir Kashai is that he was acquainted with Zillur Rahman and with him he went to the house of wife of Zahed at "Mistripara" and saw there Osman, Didar, Kiron and 4/5 others. That Zillur at that time told him that they had to punish one person for misbehaving with the girl friend of Didar's "Khalato Bhai" Titu and he agreed that 3/4 days thereafter Zillur called him from his house and took him to the house of wife of Zahed where Didar, Osman, Kiron and 3/4 other boys also were present. That within a while Osman got a mobile phone call and thereafter they all went to Sheikh Mujib Road and kept standing there, but at about 5-00 PM receiving another mobile phone call Osman

told that the job could not be done that day. Those 3/4 days thereafter they all again went to Sheikh Mujib Road and Osman gave him a big stone wrapped in black polythene and told him to throw that on the glass of a car as per his indication. That at about 5-00 PM seeing a white car coming accused Osman told him to throw that stone on that car but he missed the aim and the stone fell on the ground. All of them scolded him at that time and he went away; those 3/4 days after that incident he knew from the newspaper that one Indian National was shot dead.

135. The other accused Md. Siddique though made a statement before a Magistrate, 1st Class, which was recorded under section 164 of the code of Criminal Procedure, narrating the occurrence of murder of Jibran Tayyabi but he did not implicate himself in that murder. The High Court Division, therefore, acquitted this accused Md Siddique finding his confessional statement exculpatory. On going through this confessional statement of accused Md. Siddique we also find it exculpatory and, therefore, refrain from narrating this exculpatory confessional statement of accused Md. Siddique as this statement, in fact, is no confession and, as such, not admissible in evidence.

136. However, the other four confessional statements of 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 and with that view made accused Osman a notorious terrorist agree to kill Jibran Tayyabi for a consideration of taka ten lakhs and accused Osman then made the other accused-persons agree to assist him in killing Jibran Tayyabi and according to the preplan and common intention of all the accused-persons accused Osman, with the help of other accused-persons, murdered Jibran Tayyabi by gun shot on 9-6-1999 at about 5-30 PM near Chung King Restaurant at Sheik Mujib Road, Agrabad, Chittagong while he was coming back from his office by driving his car. These confessional statements of the accused-persons have been found voluntary and true. Both the trial court and the High Court Division, on consideration of other evidence and all the attending facts and circumstances, found all these four confessional statements voluntary and true. Before this Division the learned counsel for the accused-appellant did not assail this concurrent finding of the trial court and the appellate court and did not raise any question as to voluntariness and trueness of these confessional statements. The learned counsel for the accused-appellant, however, has raised some questions as to the admissibility of these confessional statements and their use against co-accused the present accused-appellant. Before considering the arguments advanced by the learned counsel for the accused-appellant we need to state about the evidence of the prosecution witnesses.

137. PW I James Roy is the informant of this case who has proved the ejahar the exhibit-1 only. This man is not the eye-witness of the occurrence, nor stated anything involving any of the accused-persons in the alleged murder or supporting the prosecution case of triangular love affairs among deceased Jibran Tayyabi, Samanja and accused Yasin Rahman @ Titu.

138. PW 2 Fazlul Huq, PW 3 Alamgir Hossain @ Joy and PW 4 Hasan Murad @ Murad deposed to the effect that after the occurrence they took the victim Jibran Tayyabi to the Chittagong Medical College Hospital in bullet-injured condition. None of these three witnesses, however, said anything involving any of the accused-persons in the murder of Jibran Tayyabi.

139. PW 5 is Aleya Begum wife of Zahed Hossain. This witness has deposed corroborating the confessional statements of accused-persons to some extent. She deposed that she

resided at "Mistripara"that being in financial crisis as her husband had to go to jail hajat in connection with a case, she started selling heroin with the help of one Saidul of Pannapara; that Saidul used to supply heroin to her. That Liakat used to purchase heroin from her along with Liakat his other friends also used to come to her house and one day Liakat introduced Osman to her. That Osman also, since thereafter used to come with his other friends to her house. Osman used to sit along with his friends in the vacant room by the side of her room. Lastly one year before, on Wednesday, Osman came with his friends to her and wanted to purchase heroin and she gave three purias of heroin to him. She further stated that Osman had a "যন্ত্র" in his hand which sounded "কিউ কিউ" at that time and thereafter Osman went away. That at that time it was about 5-00/5-10 PM. This witness further stated that half an hour after Osman left she heard sound of two shots near Chung King Restaurant.

Subsequently she heard that an Indian National was shot dead inside the car. This witness has identified also accused Osman in dock and stated also that he gave statements to the investigating officer and also to Magistrate. During cross-examination she denied the defence suggestion that she did not tell the name of Liakat to the investigation officer and did not tell that Liakat along with his friends used to come to her for purchasing heroin. She denied also further defence suggestion that she did not state to the investigating officer what she had stated about Osman before the court and that she never stayed at "Mistripara".

140. PW 6 is Aleya Begum @ Alo wife of Ahmed Meah. This witness has deposed supporting the prosecution case that both the deceased Jibran Tayyabi and accused-appellant Yasin Rahman @ Titu had some relationship with Samanja the daughter of AK Shamsuddin Khan @ Jambu Khan. The material part of the evidence of this witness is that she started to work as a maid servant in the house of AK Khan where she worked for five years and then after his son Shamsuddin Khan @ Jambu Khan got separated from AK Khan she used to work as "Bua" in the house of Jambu Khan. That while she had come to work in the house of AK Khan, Samanja the daughter of Jambu Khan was aged 1 $/1^1/_2$ years only and 2 years before she gave up the job of "Bua" in the said house. This witness stated further that the mother of Samanja used to go to Chittagong Club to play golf and her father used to stay abroad most of the time in connection with his business. That six months before she left the house of Jambu Khan, Titu son of Khalil Shahab started visiting the said house. That one day at 10-00 PM Titu came to that house and asked her to allow Samanja to go out with him for walking but she denied saying that it was late in the night and told Titu that if he wanted to take Samanja he had to take her from her parents. The witness stated also that Samanja got acquainted with Titu at the house of Tasmery, her friend where Titu also used to visit. The further evidence of this witness is that Titli was the teacher of Samanja's school and Sharafnaj, sister of Samanja used to go to the house of Titli for studying as a private house tutor. That Titli and her husband Jibran Tayyabi were Indian Nationals. That there was visiting terms between the families of Jibran and Samanja and thus intimacy grew between them. That one day Samanja went to the office of Jibran in the name of doing photocopy of a paper keeping her sitting in the car and stayed there for about one hour. That another day at about 10-00 PM Jibran Tayyabi came to the house of Samanja and Samanja told him at that time to take her to a Chinese Restaurant but she (witness) did dot allow her to go as it was late in the night, but they brought soup from a Chinese Restaurant and took the same and thereafter Jibran went away. This witness stated further that presently Samanja was in London and before going to London Samanja was in Dhaka and that Emran

driver coming back to Chittagong from Dhaka told her that Samanja and Titu used to talk and move together the whole day. That when Samanja came back to Chittagong after staying in Dhaka for about two months Jibran started visiting her. That Titu also used to visit the house of Samanja. This witness has stated also that when she saw that Samanja was maintaining relationship with both of them which might have given rise to any bad incident she left the said house. One year thereafter she took the job at the house of Mr Jamal. During cross-examination by the defence this witness stated that she used to call the wife of Mr. Jamal as "Moly apa" who had one son and one daughter named Tasmia who was now in America. She denied defence suggestion that she did not state to the investigation officer what she stated before court about Samanja, Titu, Titli, Jibran and Sharafnaj. In course of cross-examination this witness stated that Jibran used to go to the house of Jambu Khan with his wife and he never used to go there alone. During cross-examination a defence suggestion was put to her to the effect that Tasmia was mad for Titu and "Moly Apa" wanted to have a marital tie between Titu and Tasmia, but the witness pleaded her ignorance as to that alleged fact and denied also the defence suggestion that as Titu did not want to marry Tasmia "Moly Apa" in connivance with police made Titu an accused in this case and made her also witness in this case. This witness has denied further defence suggestion that she fled away from the house of Samanja for some other reasons and that she deposed falsely at the instance of the police and influential quarter.

141. Being re-called by the prosecution this PW 6 stated further that Samanja had love with both Titu and Jibran and both of them used to mix with her; that when the said fact became known to each other enmity developed between them. She further stated that when two persons love one girl one person had to die that Titu and Jibran both used to love Samanja and mix with her and, as such, she had an impression that Titu murdered Jibran.

142. PW 7 Sadhan Chandra Das is a peon of Centrans Maritime (BD) Ltd. The material portion of the evidence of this witness which is relevant for this present appeal is that about one and half years before a lady came to their office over which there was a "golmal" between Jibran and the local people which he heard from the darwan as at that time he was not in the office. That three months after the said incident another woman came to their office at about 6-00/6-30 PM. At that time except he himself and Mr. Jibran no other staff was in the office. That the woman went out of their office after staying about one and half hours in the office room of Mr. Jibran. The witness stated also that when that woman entered into the room of Jibran her hair was combed and tied with rubber band but when she went out her hair was "এলোমেলো" without any band on her head. That the woman was wearing "salowar" and "kamij". He came to know from driver Rafique that the name of that woman was Samanja Khan, daughter of Jambu Khan. The witness further stated that he saw the said woman before at the house of Jibran 1/2 times. From the cross-examination of this witness nothing came out to make him unreliable.

143. PW 8 Ahmed Rad Nizam and PW 9 Imtiazul Huda are two employees of Centrans Maritime (BD) Ltd. who did not state anything involving any of the accused-persons in the murder of Jibran Tayyabi or in support of the prosecution case.

144. PW 10 Md Kamaluddin @ Kamal along with PWs 2-4 took Jibran in injured condition to the Chittagong Medical College Hospital after the occurrence. This witness also did not say anything in support of the charges against the present accused-appellant or against any other accused.

145. PW 11 Mihir Datta and PW 12 Gilbard -de-Silva were tendered by the prosecution. The defence though cross-examined these witnesses, but could not bring out anything material from them.

146. PW 13 Saiful Alam and PW 14 Moloy Kanti Pal are two neighbouring persons of the place of occurrence who saw the injured Jibran Tayyabi in bullet-injured condition just after the occurrence. These two witnesses deposed narrating the incident of murder of Jibran Tayyabi. and told also that they heard, some people present at the place of occurrence saying that Osman committed that murder.

147. PW 15 Zahidul Alam has been tendered by the prosecution.

148. PW 16 is Zakir Hossain. The material part of the evidence of this witness is that Titu (the present appellant) was one of his friends and that Titu was the younger son of Mr Khalilur Rahman, proprietor of KDM Garments. That he became acquainted with Titu in the middle of 1996 at the residence of Tasmia Zaman. After acquaintance they used to visit each other's residence and also used to have lunch and dinner together. That once he went to the residence of Samanja with Titu. That there was normal friendship between Titu and Samanja. That he heard from Titu that Samanja was doing "O" Level coaching in Dhaka and he did not know more about Titu and Samanja. At this stage this witness was declared hostile by the prosecution. In cross-examination by the prosecution this witness has stated further that the name of the wife of Jibran was Mrs Titli who was a teacher at CGS school in which Samanja also used to study. That in the said school a dance program was supposed to be held. That Tasmia, Samanja and others took part in the said dance program which was being directed by Jibran. That subsequently he came to know that the said dance program was also held either at the house of Samanja or in any other house.

149. PW 17 is Habib Ahsan Khan @ Rony Khan. This witness has deposed to the effect that deceased Jibran Tayyabi was their family friend and there was visiting term at their family level. That on 9-6-1999 at about 5-15 PM he went to the residence of Jibran on the occasion of the birth day of his wife Titli and while he was sitting in the drawing room along with Titli at about 6 PM they got the news of murder of Jibran over telephone and thereafter he along with Titli went to the medical collage hospital and saw there the dead body of Jibran and also the damaged car of Jibran. The material part of the other evidence of this PW 17 is that one year before the occurrence he went to the house of Jafar Hossain on the birth day of his son Jabir Hossain where he found Mr Jibran and Mrs Jibran and at that time Mrs Jibran by showing a boy of small stature told him that he was the son of Khalilur Rahman and was the boy friend of Samanja. That at that time he also saw Samanja there who was the daughter of Jambu Khan and girl friend of Titu. During cross-examination a defence suggestion was put to this witness to the effect that Titli was his girl friend and that he and Salman Ispahani got the deceased killed through the hired goondas, namely Murad, Kamal, Alamgir and some others. This witness denied this defence suggestion.

150. PW 18 Hebju Meah is a night-guard of Hotel Al-Amin who deposed to the effect that on 9-6-1999 he closed the gate of the hotel at 12 O'clock in the night and that after he opened the gate at 6-00 AM, Kiron the son of hotel owner came alone and then said after Azan when the gate was opened Kiron came. In cross-examination he stated that except Kiron he did not know the other accused and never saw them and that Kiron had gone out in the evening of the previous day.

151. PW 19 SM Liaquat @ Mukul has deposed to the effect that he was a business man by profession. In 1999, he became heroin

addict and used to go to Aleya Begum, wife of Zahed Hossain for taking heroin. That at the residence of said Aleya Begum he got acquainted with Osman, Kiron, Zillur and Didar. That one day Osman told him in the house of Aleya Begum that he had to do a job and being asked as to what was that job Osman told him $^{1}/_{2}$ days after that an Indian National, who had illicit relationship with the girl friend of Titu named Samanja had to be punished. That he told Osman that it would not be possible for him to do that job and also forbade Osman not to do that job. This witness stated further that on 9-6-1999 at 5-00 PM Osman, Zillur and Didar came to the room of Aleya when he also was present there and that after some time, on receiving a telephone call, Osman went out of that room along with others being 7/8 in number and 15/20 minutes thereafter he heard sound of firing of two shots from Sheikh Mujib Road. He then went out to find out the reason of shooting and heard that one man was killed by shooting in front of Chung King Restaurant at Sheikh Mujib Road and that on the next day he came to know from the news papers that an Indian National, named, Jibran was shot dead. The witness stated also that he suspected that Osman and his group might have committed that occurrence. This witness has identified the accused in dock.

152. During cross-examination this witness has stated that as he was in the health care clinic he could not come earlier. A suggestion was put to this witness that he did not state before the Magistrate and the IO the material part of his evidence which he stated before the court.

153. PW 20 Hasen Bhanu deposed to the effect that she used to work as a maid in the house of Mr Jibran. The material part of the evidence of this witness is that some times quarrel used to take place between Mr Jibran and his wife Mrs Titli over Samanja and that Mrs Titli wanted Jibran not to mix with Samanja. This witness denied the defence suggestion that PW Roni used to come to Titli very often in the absence of Jibran as he had love affairs with Titli and that quarrel used to take place between Mr Jibran and Mrs Titli over Roni. This witness denied the defence suggestion also that no quarrel used to take place between Jibran and Titli over Samanja .

154. PW 21 Salman Ispahani deposed to the effect that he became acquainted with Jibran Tayyabi two years before the occurrence and that he received the death news of Jibran at 6-30 PM on 9-6-1999. This witness, however, did not say anything concerning the involvement of any of the accused-persons in the murder of Jibran Tayyabi.

155. PW 22 Ananda Agarwala Indian national has deposed to the effect only that he knew Jibran Tayyabi and that getting the news of murder of Jibran Tayyabi he went to the hospital and also signed the inquest report of the dead body the exhibit-4.

156. PW 23 is Syed Ziad Rahman. The material part of his deposition is that he know Jibran Tayyabi whose father was his friend and that hearing the death news of Jibran Tayyabi from his wife over telephone he came back to Chittagong from Dhaka and that he informed the father of Jibran Tayyabi about that incident.

157. PW 24 Ratan Kumar Mali is a formal witness who signed the seizure lists the exhibit 5 and 6 as a witness .

158. PW 25 Constable 2639 Abdul Wahab took the dead body of the deceased to morgue and he deposed to that effect only.

159. PW 26 Kazi Lutfur Rahman an Assistant Director of BRTA Chittagong Circle deposed to the effect only that as per the requisition of IO Abdul Kader Khan he supplied the informations regarding ownership of the car bearing No. Chattra Metro-Ba-02/0951.

160. PW 27 Mizan Md Ferdous, Sub-Inspector of police filled up the FIR form and he deposed to that effect only.

161. PW 28 Md Mofizuddin an Upper Division Clerk, Zonal Passport Office, Agargaon, Dhaka has deposed to the effect that on 30-9-1999 Mr Abdul Kader Khan the IO of this case seized two applications for Indian passports filed by one Ali Akbar and Md. Zahid Hossain along with photos of those applicants and other connected papers from his office by preparing seizure lists the exhibit 11. This witness has proved this seizure list, his signature therein and the articles seized by that seizure list the material exhibit II series.

162. PW 29 Md Abdul Huq Chowdhury, Assistant Sub-Inspector of Patiya Police Station verified the character and antecedents of accused Osman. This witness deposed that on enquiry he came to know that accused Osman was a terrorist, a notorious dacoit and a man of very bad character and that there were several criminal cases of grave nature pending against him.

163. PW 30 Md Atahar Ali Sheikh, Inspector, CID, Khagrachhari Camp, is a formal witness who made some enquiry as to the car of accused Yasin Rahman @ Titu as per requirement of IO of this case and also put his signature in the seizure list the exhibit 13 by which IO seized the break up of mobile phone of one Mohammad Ali.

164. PW 31 Mainuddin Khan, ASI of Police is another formal witness who signed the seizure list the exhibit-14 by which the IO of this case seized a bullet recovered from the sized car of deceased Jibran Tayyabi.

165. PW 32 is Mrs Titli Tayyabi, wife of deceased Jibran Tayyabi. The material part of the evidence of this witness is that she came to Chittagong along with her husband Jibran Tayyabi for the first time on 8-11-1994 that her husband was the country manager of Centras Maritime Agency (Ltd). That they became acquainted with the families of Ispahani, A.K Khan, Habibullah, Ishaque Dada, Ziad Rahman as well as other families. That she joined CGS school as a honorary teacher at the request of Shirin Ispahani, wife of Salman Ispahani on 1-8-1995; that amongst many students of the school both male and female she could remember specially the names of Samanja Khan, Zariat Rahman and Tasmia Zamari. She used to teach Sharafnaj, younger sister of Samanja at her residence and thus closeness developed between them and the family of AK Khan and they used to join the parties of each other. That in Chittagong Grammar School Annual Night program used to take place every year. In 1996, the authority of the school gave her the charge to stage a dance program with six students of class IX which included Samanja, Zariat and Tasmia. That she requested Jibran to help her in staging the said program. That when rehearsal of the dance presentation started she found Samanja Khan trying again and again to have physical contact with her husband and thus she understood that Samanja became attracted to her husband gradually. She realized that her husband also had some weakness for Samanja for which she stopped the program after discussion with her husband. In 1997 when some families including the witness and her husband, Samanja Khan and her family went to a picnic at Sylhet she observed that Samanja was repeating the same behaviour with her husband, but as her husband did not respond to her said behaviour she behaved with them abnormally. The witness has stated further that during vacation of the said school she used to go to Calcutta and she heard and came to know that in her absence Jibran used to go to the residence of Samanja and she also used to come to the office of her husband and over the said matter a misunderstanding developed between herself and her husband. She deposed also that she tried to rectify her husband and to make

him understand but he told her not to bother for that; but suspicion did not subside and she informed the matter to Mrs. Ziad Rahman by giving hints and she also talked with Jibran but he totally denied the said fact and told that while Samanja was a student of standard 'X 'she became acquainted with one Yasin Rahman @ Titu through Tasmia Zaman and eventually relationship between Samanja and Titu became very intimate. That she (the witness) also came to know about that fact from various other sources. That Zariat Khan, daughter of Mrs. Ziad Rahman told that Samanja told her that she and Titu were very intimate. The witness stated also that after finishing "O" Level Samanja did her coaching in Dhaka for 5/6 months for admission in "A" Level School in London and that Samanja and Titu used to mix in Dhaka also which Samanja told to Zariat and Zariat told that fact to her. That after doing coaching in Dhaka Samanja came to Chittagong for two months and one day when she came to her house she talked over mobile phone and on being asked by her (witness) she (Samanja) told smilingly that she was talking to her boy friend. That she did not feel the necessity to ask the name of boy friend of Samanja as she already knew the name. The witness asserted also that she had no doubt that Titu was the boy friend of Samanja. This witness deposed also that in 1997, in birthday party of Zabir, son of Zafar Shahab, many guests came in the house of Zafar Shahab which included herself, Titu, Samanja and Jibran. That at one stage of the said party Titu confronted her husband over Samanja and when her husband totally denied the said fact Titu told him to leave Bangladesh and threatened also that if Jibran did not leave Bangladesh he would cause severe harm to him. That thereafter she, having thought that there might be troubles she left that party with her husband. That thereafter in 1998, in the first part of October, Titu told her husband in local language over telephone that if he did not leave Chittagong he would kill him. That Jibran informed the Indian High Commissioner Joy Majumder the said fact and the Indian High Commissioner wrote a letter to police commissioner informing that. That in that letter Joy Deb Majumder did not mention the name of Titu as Titu was the son of a renowned industrialist.

166. The material part of other evidence of this PW 32 Mrs Titli is that on 9-6-1999, in the morning, she went to her place of work and came back at about 4-20 PM; that it was her birth day. That Roni Khan came to her house on the occasion of her birth day and they were taking tea sitting in the drawing room and at that time at about 6-00 PM she received a telephone call from Imtiazul Huda a staff of her husband's office who informed her that her husband was shot and was taken to the hospital. She then, along with Roni, went to the hospital and saw there the dead body of her husband and also the damaged car. That at that time some boys told her that they tried to save her husband but could not. Subsequently at 10-00 PM she went to the house of Shirin Ispahani; thereafter on 10-6-1999 she received the dead body of her husband and took that to Dhaka and from Dhaka to Kolkata. This witness, at the end of her examination-in-chief, has stated further thus, "I am totally convinced that Yasin Rahman @ Titu planned and organized the killing of my husband Jibran Tayyabi on 9-6-1999. He hired professional killers to kill my husband because of his jealousy regarding Samanja." She further deposed that Titu and Samanja loved each other and Titu believed that Samanja and Jibran were having secret love affairs and that Titu believed that Jibran was thorn in his way, so he hired professional killers after organizing and planning to kill Jibran". This witness stated also that on 10-6-1999 she deposed to the police but as on that date her mental condition was bad she could not remember what she stated to police at that time. That subsequently she gave her statement to the IO over telephone from Kolkata.

167. This PW 32 was cross-examined on behalf of the accused-persons at length. During cross-examination she denied all the defence suggestions to the effect that what she stated in her examination-in-chief in court about the love affairs between Titu and Samanja, the conspiracy, planning and hiring of killers by Titu to kill Jibran because of the secret love between Jibran and Samanja were not correct. The defence, however, could not bring out anything material by cross-examining this witness to make her untrustworthy or her evidence unbelievable. Being asked by the defence 1awyers she stated that before taking the dead body of Jibran to Kolkata she did not tell anybody about her suspicion about the killer of Jibran as at that time she was not normal. The witness has denied the defence suggestion to the effect that she had some relationship with PW Roni Khan and that Roni Khan used to visit her house in the absence of her husband and it was Roni Khan who planned to kill Jibran.

168. PW 33 SM Jahangir Chowdhury is the area manager of TS International BD, Chittagong a non-Government organization which works as mobile connection provider. This witness has deposed to the effect that as per requisition of IO Kader Khan he informed him by the letter No.251(T.a.I.B) Chittagong/GE-irt/726/99 dated 13-10-1999 that the mobile phone bearing No.018311175 was in the name, of Rahman Yasin, Director, KIY Steel who used that mobile phone and that on 9-6-1999 from 9-30 AM to 21-53 PM total 16 calls were made from that phone to the mobile phone bearing number 017 508 95. As per identification of this witness the break up of mobile phone number 018311175 supplied by the witness was marked as exhibit-16.

169. The defence cross-examined this PW 33 at length, but could not bring out anything to make this witness unreliable or to make his evidence unacceptable.

170. PW 34 Md Abdul Malek Mia-inspector of police deposed to the effect that as per requisition of the IO of this case he went to Benapole Immigration check post on 4-10-1999 and on examination of the relevant registers of that check post he found that accused Didarul Alam and Osman using fake passport Nos. 0358392 and 0358393 in fake names Mi Akbar and Zahid Hussain went to India on 25-6-1999 and came back from India on 7 -7-1999. That he seized the relevant arrival and departure register of that check post and then gave those in the jimma of Mr Mosharaf Hussain, OC Immigration and took a photocopy of that register which was attested by OC Immigration. As per identification of this witness the said attested photocopy of the arrival and departure register was marked as exhibit-19.

171. PW 35 Din Mohammad, ASI, of police was posted at Benapole Check post on 1-10-1999. He deposed corroborating the PW 33

172. PW 36 Md Atahar Ali was the Metropolitan Magistrate, Chittagong at the relevant time. He recorded the confessional statement of accused Zillur Rahman the exhibit-22 and the statements of the witnesses Aleya Begum @ Alo wife of Ahmed Meah exhibit-23 and SM Liaquat. the exhibit-3 as per section 164 of the Code of Criminal Procedure.

173. PW 37 SM Morshed-uz-Zaman is the Deputy Manager, billing section, Grameen phone. From the evidence of this witness it was proved that mobile phone No. 017750895 was in the name of Alamgir Chowdhury.

174. PW 38 Makhan Chandra Pal, SI of Police is another formal witness who verified the character and antecedents of accused Zillur Rahman and Ali Akbar @ Didar.

175. PW 39 Md Moynul Hoque as Magistrate, First Class, Chittagong recorded the confessional statements of accused Didarul Alam and accused Md Omar Ali @ Jahangir—the exhibits 26 and 27 respectively.

176. PW 40 Dr. Prodip Kumar Chowdhury

held post-mortem examination of the dead body of victim Jibran Tayyabi and prepared postmortem report the exhibit-28.

177. PW 41 AKM Zamal Uddin,. ward master of Chittagong Medical College Hospital is a formal witness who signed the seizure list of emergency register and death register of the hospital seized in connection with this case and also the Zimmanama of exhibits-29, 30 and 31 respectively.

178. PW 42 Professor Shafi Kadari is the owner of "Diganta Madakashakti and Manoshik Chikithsha Kendra" who deposed to the effect only that accused Didar was admitted into the said Diganta Hospital on 17-7-1999 suppressing his real name in the fake name Ali Akbar. This witness proved also the relevant papers regarding the treatment of accused Didar Ali in the name of Ali Akbar Bhuiyan in Diganta Hospital which have been marked as exhibit-32 series.

179. PW 43 Md Rafiuddin Ahmed an employee of Dhaka passport office deposed to the effect that as per requisition from CID, Chittagong he supplied papers regarding passport of accused Yasin Rahman @ Titu.

180. PW 44 Md Mosharaf Hossain a formal witness has deposed only that the passport register seized in connection with this case was in his jimma.

181. PW 4 5 is Tarapada Sikdar. The relevant part of his evidence is that as per instruction of the IO of this case he arrested accused Siddique on 30-9-1999 and recovered an illegal L.G. and some cartridges from his custody.

182. PW 46 Md Yusuf Ali an Inspector of police, CID, Chittagong has deposed that he received accused Zahed Hossain Kiron from CID, Dhaka as per direction of IO of this case and also seized register of Hotel Al-Salam and recorded the 161 statement of night-guard of that hotel named Hefzo Miah and manager Mr. Anwar Hossain.

183. PW 47 Md. Delwar Hossain is the part investigating officer of this case. He took up investigation of this case on 11-6-1999 and investigated upto 16-6-1999. On 17-6-1999 he handed over the case diary to CID for further investigation.

184. PW 48 MA Kader Khan is the investigating officer of this case who submitted charge-sheet against the accused-persons. The material portion of the deposition of this witness is that he was posted in CID, Chittagong as ASP during the relevant time and on 18-6-1999 he took up investigation of this case. He visited the place of occurrence, recorded statements of witnesses under section 161 of the Code of Criminal Procedure and got the statements of four other witnesses recorded under section 164 of the Code of Criminal Procedure. He seized alamats, arrested accused-persons of whom accused Ali Akbar @ Didar, Zillur Rahman, Zahid Hossain @ Kiron, Omar Ali @ Jahangir and Siddique Khan made confessional statements implicating themselves and other accused-persons in the murder of Jibran Tayyabi. That he examined the wife of deceased Jibran Tayyabi and recorded her statements under section 161 of the Code of Criminal Procedure. That accused Osman and Didar went to India after the occurrence using fake passports and he seized the connected papers of those fake passports from Agargaon passport office by preparing seizure list the exhibit-11. The witness the IO of the case deposed to the effect also that in the middle of October, 1998 a threat was made to Jibran Tayyabi in the local language of Chittagong and Jibran Tayyabi informed that matter to the then Indian Assistant High Commissioner Joydeb Majumdar and Joydeb Majumdar then by letter dated 29-10-1998 informed that matter to Police Commissioner, Chittagong. As per identification of this witness the photocopy of the said letter was marked as XI. This witness has deposed also that during investigation he procured the break up of mobile phone Nos. 018-

311175 and 017750895 which showed that the mobile phone No.018311175 belonged to Yasin Rahman @ Titu and the mobile phone No.017 750815 belonged to Alamgir Chowdh-ury and that on the date of occurrence there were innumerable calls between these two phones. That after completion of investigation he submitted charge-sheet against the accused-persons under sections 302/109/122B/34 of the Penal Code.

185. In course of cross-examination this witness has stated that he recorded the statement of PW 5 Aleya Begum, wife of Zahed Hossain on 22-8-1999 and that Aleya Begum did not mention the name of PW Liakat in her 161 statement. The witness has denied the defence suggestion that PW 5 Aleya was a fake person. Being asked by the defence lawyer this witness stated that PW 6 Aleya Begum did not tell in her 161 statement that one night at about 10 PM accused Yasin Rahman @ Titu requested her to allow Samanja to go for walk with him. In course of cross-examination this witness stated further that PW Titli did not tell him that accused Titu confronted her husband (Jibran Tayyabi) over Samanja and threatened him to leave Bangladesh telling that otherwise he would cause severe harm to him and that to avoid trouble she left that party with her husband. This witness stated also that PW Titli did tell him about the threat given to her husband over telephone. The witness, however, voluntarily said that PW Titli stated to him about different threats given to her husband including the threat for leaving Bangladesh. In course of cross-examination this PW 48 stated also that PW 17 Roni Khan did not tell him about going to the birthday party of Zabir. This witness has denied the defence suggestion that he did not investigate the case proper]y and that he submitted charge-sheet against the accused-persons falsely by creating the confessional statements of the accused-persons and also the 161 statements of witnesses and other material and evidence to substantiate the prosecution story concocted by him.

186. PW 49 Rohi Das Zardar as Metro-politan Magistrate, Chittagong recorded the confessional statement of the accused Zahid Hossain and accused Md Siddique the exhibits-37 and 38 respectively and also the statements of the witness Aleya begum wife of Zahedur Rahman and Sadhan Chandra Das the exhibits-39 and 2 respectively.

187. These are the oral evidence which the prosecution adduced before the court to prove its case. It has already been mentioned above that in this appeal no question has been raised as to the murder and the time, place and manner of murder of Jibran Tayyabi as alleged by the prosecution. Both the courts below, on proper consideration of above oral evidence, the confessional statements of accused-persons, the inquest and post-mortem reports of dead body of Jibran Tayyabi and other facts and circumstances rightly held that the prosecution successfully proved its case that on 9-6-1999 at about 5-30 PM, Jibran Tayyabi was murdered by gun shot near Chung King Restaurant at Sheikh Mujib Road, Agrabad, Chittagong while he was going back from his office by driving his car. So, in this appeal we shall have to consider those evidence only which have been adduced to prove the other part of the prosecution case, particularly the alleged involvement of the present accused-appellant Yasin Rahman @ Titu in the murder of Jibran Tayyabi.

188. From he above stated oral evidence adduced by the prosecution it appears that the PW 5 Aleya Begum wife of Zahedur Rahman deposed corroborating the confessional statements of the accused-persons to the extent that on the date of occurrence at about 5-00 PM accused Osman and other accused-persons assembled in her house and at that time accused Osman got a mobile phone call and then all the accused hurriedly went out of that house and half an hour thereafter she heard sound of firing from near Chung King Restaurant. PW 6 Aleya @ Alo W/o Ahmed

Meah deposed supporting the prosecution case that Samanja had intimate relation with both deceased Jibran Tayyabi and this accused-appellant Yasin Rahman @ Titu. PW 7 Sadhan Chandra Das also deposed supporting the prosecution case that Samanja had intimate relationship with deceased Jibran Tayyabi. PW 16 Zakir Hossain a hostile witness also has corroborated the prosecution case to some extent by giving evidence to the effect that there was friendship in between this accused-appellant Yasin Rahman Titu and Samanja, PW 17 Habib Ahsan Khan @ Roni also has supported the prosecution case to some extent saying that PW 32 Titli (wife of deceased Jibran Tayyabi) showed him Samanja and accused Yasin Rahman @ Titu in a party and told him that Yasin Rahman @ Titu was the boy friend of Samanja. PW 19 SM Liaquat also has supported the prosecution case deposing to the effect that he became acquainted with accused Osman, Kiron, Zillur and Didar in the house of wife of Zahed and that accused Osman told him that Titu's girl friend Samanja had illicit relation with an Indian National and they had to punish that Indian National and that on 9-6-1999 at about 5-00 PM accused Osman along with other accused went out of the house of Aleya after receiving a mobile phone call and 15/20 minutes thereafter he heard sound of firing of shots and then came to know that Jibran Tayyabi was murdered by gun-shot. PW 20 Hasen Bhanu a maid servant of deceased Jibran Tayyabi and his wife Titli supported the prosecution case that deceased Jibran Tayyabi had relation with Samanja by deposing to the effect that Jibran Tayyabi and his wife Titli often had quarrels over Samanja. The evidence of PW 28 Md Mofizuddin and PW 34 Abdul Malek Mia coupled with exhibit 11 and material exhibits II series proved the prosecution case that soon after the murder of Jibran Tayyabi accused Osman and accused Didarul Alam went into hiding in India using fake passports concealing their real names. PW 32 Mrs Titli Tayyabi wife of deceased Jibran Tayyabi gave evidence supporting the prosecution case that Samanja used to maintain relation with both the deceased Jibran Tayyabi and the accused Yasin Rahman Titu and that accused Yasin Rahman Titu threatened Jibran Tayyabi several times to leave Bangladesh telling that otherwise he would cause SM Liaquat also has supported the prosecution case deposing to the effect that he became acquainted with accused Osman, Kiron, Zillur and Didar in the house of wife of Zahed and that accused Osman told him that Titu's girl friend Samanja had illicit relation with an Indian National and they had to punish that Indian National and that on 9-6-1999 at about 5-00 PM accused Osman along with other accused went out of the house of Aleya after receiving a mobile phone call and 15/20 minutes thereafter he heard sound of firing of shots and then came to know that Jibran Tayyabi was murdered by gun-shot. PW 20 Hasen Bhanu a maid servant of deceased Jibran Tayyabi and his wife Titli supported the prosecution case that deceased Jibran Tayyabi had relation with Samanja by deposing to the effect that Jibran Tayyabi and his wife Titli often had quarrels over Samanja. The evidence of PW 28 Md Mofizuddin and PW 34 Abdul Malek Mia coupled with exhibit 11 and material exhibits II series proved the prosecution case that soon after the murder of Jibran Tayyabi accused Osman and accused Didarul Alam went into hiding in India using fake passports concealing their real names. PW 32 Mrs Titli Tayyabi wife of deceased Jibran Tayyabi gave evidence supporting the prosecution case that Samanja used to maintain relation with both the deceased Jibran Tayyabi and the accused Yasin Rahman Titu and that accused Yasin Rahman Titu threatened Jibran Tayyabi several times to leave Bangladesh telling that otherwise he would cause severe harm to him and would kill him. The evidence of PW 33 Mr SI Jahangir Chowdhury and PW 37 SM Morshed-uz-Zaman disclosed that on the date of occurrence

from 9-30 AM to 21-53 PM 16 calls were made from the mobile phone of this accused-appellant Yasin Rahman @ Titu to the mobile phone of accused Alamgir. This fact supported the prosecution case that accused Alamgir. This fact supported the prosecution case that accused Alamgir who was the own "Khalatobhai" of accused Yasin Rahman @ Titu and full brother of other accused Didar was engaged to keep watch on the movement of the deceased Jibran Tayyabi and to give the information to other accused.

189. The High Court Division, on consideration of these evidence of the prosecution witnessess along with the confessional statements of the accused persons and the other facts and circumstances including the abscondence of some of the accused persons including the present accused-appellant soon after the occurrence came to the conclusion that all these evidence, confessional statements and the facts and circumstances together established a compact chain of circumstances which strongly supported the prosecution case that the accused Yasin Rahman @ Titu being envious of the relation of his girl friend Samanja with deceased Jibran Tayyabi planned to kill Jibran Tayyabi and with the help of accused Didar made the accused Osman agree to kill Jibran Tayyabi for a consideration of Taka 10 lakhs and accused Osman then made the other accused persons agree to assist him in killing Jibran Tayyabi and according to the pre-plan and common intention of all of them the accused Osman with the help of other accused-persons murdered Jibran Tayyabi by gun-shot on 9-6-1999 at about 5-30 PM near Chung King Restaurant at Sheikh Mujib Road, Agrabad, Chittagong.

190. Mr. Anisul Haque, the learned Senior Counsel for the accused-appellant has assailed this conclusion and finding of the High Court Division mainly on the grounds that the confessional statements .relied on by the High Court Division were not confessions at all, and were not admissible as against this present accused-appellant, that there were no other reliable and believable evidence to corroborate these confessional statements, that the evidence of the witnesses which the High Court Division relied on, were not at all reliable, that the witnesses whom the High Court Division trusted were not at all trustworthy, and that the circumstances stated by the prosecution and taken into consideration by the High Court Division were not proved and were not actually in existence at all.

191. Mr Anisul Haque has made long submissions elaborating the above grounds. He has submitted that in this case the prosecution, in fact, could not adduce any reliable and acceptable evidence of any kind to prove the alleged involvement of this accused-appellant Yasin Rahman @ Titu in the murder of Jibran Tayyabi. The learned counsel though has not assailed the concurrent finding of the trial court and the appellate court as to voluntariness and trueness of the confessional statements of the accused-persons but has questioned the admissibility and acceptability of these confessional statements on several grounds. He has argued that the so-called confessional statements of accused Zillur Rahman, Didarul Alam and Omar Ali @ Jahangir are not confessions at all as in these confessional statements the accused-persons did not state anything implicating themselves in the murder of Jibran Tayyabi that the so-called confessional statements of these three accused-persons being exculpatory in nature, these cannot be accepted as confessions and, as such, are not admissible in evidence at all. In support of this argument the learned counsel has cited the decisions in the case of *Palvinder Kaur vs State of Panjab* reported in *AIR 1952 (SC) 354* and in the case of *Nayan Swami vs Emperor* reported in *AIR 1939 (PC) 47*. Mr. Anisul Haque has made submission to the effect also that the so-called confessional statements of the accused-persons, even if, be treated as confessional statements these cannot be used as against the present accused-appellant Yasin

ahman @ Titu, in that, in none of these confes-onal statements the confessing accused told ıything to the effect that they themselves had ersonal knowledge about the conspiracy to ıurder Jibran Tayyabi allegedly made by this ccused-appellant, rather they told that they eard about this conspiracy from accused sman. The learned counsel has contended ıat since this accused Osman did not make ıy confessional statement stating that this ccused-appellant Yasin Rahman @ Titu ngaged him to murder Jibran Tayyabi the tatements of other accused-persons to the ffect that accused Osman told them that this ccused-appellant engaged him to murder bran Tayyabi should be treated as hearsay evi-ence and, as such, cannot be accepted at all. It as also been argued by the learned counsel of ne accused-appellant that the confessional tatements of an accused cannot be used as evi-ence against other co-accused and cannot be asis of the conviction of other accused. In sup-ort of this argument also the learned counsel as cited the decision in the case of *Kashmira Singh vs State of Madras Pradesh* reported in *AIR 952 SC 159*. The learned counsel for the ccused-appellant has argued also that all these onfessional statements were subsequently etracted by their makers and in the circum-tances the evidentiary value of these confes-ional statements as against co-accused is nil nd, as such, these cannot be used against co-ccused. In support of this argument also a decision in the case of *Amir Hussain vs State* reported in *37 DLR (AD) 139* has been referred o by the learned counsel.

192. The learned counsel for the accused-appellant has challenged the reliability and acceptability of the oral evidence also adduced by the prosecution raising several pleas. He has submitted that the PWs on whom the prosecution has relied much for proving the charges against this accused-appellant were examined by IO under section 161 of the Code of Criminal Procedure after an inordinate delay and has argued that this long delay in recording the 161 statements of the prosecution witnesses has made the whole projection case doubtful. In support of this argument also the learned counsel has cited a decision of the Appellate Division in the case of *Bangladesh (State) vs Paran Chandra Baroi* reported in *6 BCR (AD) 225*. The learned counsel has also drawn our attention to the fact that some of the material witnesses did not state to the investigating officer some material facts which they stated before the court and has argued that these omissions in the 161 statements of the prosecution witnesses make their evidence before court unreliable. The learned counsel has cited two decisions also made in the case of *Khalil Khan vs State of Madhya Pradesh* reported in *AIR 2003 467* and in the case of *Nazir Hussain vs Muhammad Shafi* reported in *17 DLR (SC) 40* in support of this argument. The learned counsel for the accused-appellant has challenged also the legality of examination of PW 32 the wife of the deceased by the investigating officer under section 161 of the Code of Criminal Procedure over telephone. Admittedly, the last IO of this case, examined the PW 32 who was residing in Kolkata over telephone. Mr Anisul Haque has argued that there is no provision in any law all owing examination of any witness under section 161 of the Code of Criminal Procedure over telephone and, as such, the examination of PW 32 by the IO over telephone has been illegal and that this fact also has made the evidence of this PW 32 before the court doubtful. Mr. Anisul Haque has made submissions challenging the credibility of PW 5, PW 6 and PW 19 also. He has argued that all these three PWs were not trustworthy at all, that they were procured by the police and deposed before the court as they were tutored by police. The learned counsel has made submissions to the effect also that in this case the High Court Division relied upon certain alleged circumstances, namely, (i) jealousy between the accused-appellant and the victim regarding courting of love of Samanja, (ii) the

abscondence of this accused-appellant and (iii) several alleged conversations over mobile phone between this accused-appellant Yasin Rahman @ Titu and accused Alamgir on the day of occurrence in finding the complicity of this accused-appellant in the murder of Jibran Tayyabi and has argued that in fact none of these alleged circumstances has been proved in this case by any cogent evidence. The learned counsel has submitted that this accused-appellant never absconded, rather he went to London for continuing his study there while he was not made an accused in this case and that when he came to know that he was made an accused in this case he wanted to come back and surrender before the court for defending himself, but could not do so as his passport was cancelled. The learned counsel has claimed also that the alleged mobile phone calls between this accused-appellant and accused Alamgir on the day of occurrence has not been proved at all, that the alleged break up of the mobile phone calls of this accused-appellant produced by the prosecution the exhibit-16 show that one Alamgir Chowdhury and not the accused Alamgir was the owner of the other mobile phone that the High Court Division committed wrong in relying on this alleged break up of the mobile phone calls the exhibit-16 and came to the wrong finding that on the day of occurrence this accused-appellant Yasin Rahman @ Titu had numerous mobile phone calls with accused Alamgir and took this fact as a circumstance in support of the prosecution case. The learned counsel has argued that the High Court Division without examining and considering the questions as to admissibility and acceptability of the confessional statements, credibility of the witnesses, reliability of their evidence, and the probability and proof of the alleged circumstantial evidence put reliance on these confessional statements and all other evidence adduced by the prosecution and consequently made a wrong decision as to guilt of the accused-appellant. Before concluding his argument the learned counsel for the accused-appellant has submitted also that from the cross-examination of the PW 48 the last IO of this case it transpired that this IO had some grudge towards this accused-appellant and the other members of his family and has argued that this fact also reasonably cast doubt on the prosecution case.

193. Mr MK Rahman, the learned Additional Attorney-General for the State respondent also has made long submissions refuting the above arguments of the learned counsel for the accused appellant. He has submitted that in this case the prosecution has adduced overwhelming evidence both direct and circumstantial which, along with the confessional statements of as many as four accused-persons, have proved the prosecution case beyond all reasonable doubt and, as such, the High Court Division committed no wrong at all in convicting this accused-appellant. 'The learned Additional Attorney-General has argued that all the confessional statements of the accused-persons are very much inculpatory and, as such, well admissible in evidence and also usable against all the other accused-persons as per section 30 of the Evidence Act.

194. In support of this submission the learned additional attorney-general has cited a decision in the case of *Nausher Ali Sarder vs State* reported in *39 DLR (AD) 194.* The learned additional attorney-general has argued also that from the reading of all the confessional statements together it cannot be said that the statements made in these confessional statements as regards this accused-appellant Yasin Rahman @ Titu are hearsay. The learned Additional Attorney-General has submitted also that in this case there are so many other evidence both direct and circumstancial corrobrating these confessional statements and in the circumstances these confessional statements along with other evidence can very well be the basis of conviction of the accused-appellant. The learned

Additional Attorney-General has submitted also that retraction of the confession has no impact on the evidentiary value the confessional statement carries and that if the confession is found voluntary and true, the fact of its being retracted cannot diminish its value and weight at all. The learned Additional Attorney-General has referred to the decision in the case of *Joygun Bibi vs State* reported in *12 DLR (SC) 156* in support of this submission.

195. Mr MK Rahman has made submissions to the effect also that none of the prosecution witnesses whom the High Court Division relied on to find the guilt of this accused-appellant was untrustworthy; that the High Court Division duly considered and examined all the allegations made from the side of this accused-appellant against the credibility of these witnesses and reliability of their evidence and rightly found that all these prosecution witnesses were trust-worthy and their evidence can be relied on safely that in this appeal nothing material could be shown from the side of the accused-appellant to make this finding of the High Court Division wrong. The learned Additional Attorney-General has argued also that the facts and circumstances of this case do not make the belated examination of some of the witnesses under section 161 of the Code of Criminal Procedure fatal at all. The learned Additiona1 Attorney-General has argued also that there is no bar to examine any witness under section 161 of the Code of Criminal Procedure over telephone; that in this case the PW 32 the wife of the deceased, admittedly, went away to Kolkata with the dead body of her husband and, as such, she was examined by the IO over telephone, that this PW 32 while deposing before the court admitted that she was examined by t he IO over telephone and in the circumstances this fact of examining the PW 32 under section 161 of the Code of Criminal Procedure over, telephone does not make any difference at all and does not make the prosecution case weak in any way that there was no suggestion of any doubt about the identity of the person with whom the IO spoke over the telephone.

196. Mr MK Rahman has submitted also that the High Court Division minutely examined and considered the defence a1legation that some of the prosecution witnesses did not state to the IO some material facts which they stated before court and rightly concluded that those omissions in the 161 statement of the accused-persons did not make the witnesses or their evidence before court unreliable that there are decisions also of the apex courts to the effect that the evidence of the witnesses before court if otherwise creditworthy cannot be discarded for the reason that it was not available in the 161 statement of that witness. The learned Additional Attorney-General has cited the decision in the case of *Alamgir vs State* reported in *AIR 2003 (SC) 282* in support of this submission.

197. Mr MK Rahman has made submissions to the effect also that in this case there are some very strong circumstances which not only corroborated the confessional statements of the accused-persons, but also strongly supported the prosecution case independently that though in a murder case motive behind the murder is not always important to be proved by the prosecution, but if the motive is proved it serves as a strong circumstantial evidence for finding the guilt of the accused that in this case from the evidence of so many witnesses it has been well proved that this accused-appellant Yasin Rahman @ Titu had a rivalry with the deceased Jibran Tayyabi concerning his girl friend Samanja and he all so threatened Jibran Tayyabi several times to leave Bangladesh telling also that otherwise he would kill him. The learned Additional Attorney-General has argued that this proven fact clearly indicates the motive behind the murder of Jibran Tayyabi and this motive of murder very reasonably points a finger at this accused-appellant Yasin Rahman @ Titu as the murderer. To substantiate this sub-

mission the learned counsel has cited two decisions in the case of *State vs Abdul Hatem* reported in *56 DLR 431* and in the case of *State vs Nurul Haque* reported in *45 DLR 306*. The learned Additional Attorney-General has argued also that in this case it has also been proved that soon after the murder of Jibran Tayyabi this accused-appellant fled to London and during the whole period of investigation and trial of the case he remained absconding and came back from London only a few days before filing of this appeal and about 4 years after passing of the impugned judgment by the High Court Division. The learned Additional Attorney-General has contended that this fact of abscondence of this accused-appellant soon after the murder of Jibran Tayyabi coupled with the motive of murder of Jibran Tayyabi alone can very well be the basis of conviction of the accused-appellant. The learned Additional Attorney-General has submitted also that the plea of the accused-appellant that he did not abscond, but could not come back from London as his passport was cancelled is not acceptable at all that the accused-appellant, admittedly, went to London with a Bangladeshi passport and there could not be any difficulty for him to come back to Bangladesh from London if actually his passport was cancelled; that the only effect of cancellation of passport is that the holder of the cancelled passport cannot leave Bangladesh, but there is no restriction in coming back of a citizen of Bangladesh from abroad, even if, his passport is cancelled.

198. The learned Additional Attorney-General has argued that in this case the confessional statements of as many as four accused-persons, the evidence of witnesses corroborating these confessional statements and the circumstances, namely, the rivalry between this accused-appellant and deceased Jibran Tayyabi concerning a girl, the abscondence of this accused-appellant soon after the murder and his remaining absconding for long several years and also the fact that this accused-appellant had as many as 16 mobile phone calls with the other absconding accused Alamgir on the date of occurrence established a compact chain of circumstances which were not only very much consistent with the hypotheses of guilt of this accused-appellant but also proved the charges against this accused-appellant beyond all reasonable doubt and, as such, the High Court Division committed no wrong in convicting this accused-appellant for the murder of Jibran Tayyabi.

199. We have considered the arguments advanced by the learned counsel for both the sides deeply. We shall examine first the objections raised from the side of accused-appellant against the confessional statements of the accused-persons. The main objection against these confessional statements raised by the learned counsel for the accused-appellant is that the confessional statements of accused Didarul Alam, accused Zillur Rahman and accused Omar Ali @ Jahangir are not confessions at all as these are not inculpatory in nature, rather exculpatory. The confessional statements of these three accused-persons have already been narrated above. We have examined the confessional statements of these three accused-persons attentively and we find all these three confessional statements very much inculpatory. Accused Didarul Alam in his confessional statement clearly stated that accused Yasin Rahman @ Titu who was his "Khalato Bhai" told him that he had to punish one man and for that purpose he required a terrorist and also asked Didarul Alam whether he knew any terrorist and accused Didarul Alam told him that he would look for a terrorist and subsequently he took terrorist Osman to accused Yasin Rahman @ Titu at the sea beach as per direction of accused Yasin Rahman @ Titu and there accused Yasin Rahman @ Titu talked with terrorist Osman and then, on their way back from the sea beach, accused Osman told accused Didarul Alam that accused Yasin Rahman @ Titu told him to "punish" one man

serving in "shipping" for a consideration of Taka 4/5 lakhs. In his confessional statement accused Didarul Alam stated further that on 9-6-1999 he went to the "heroin addakhana" of accused Osman at about 4-30/4-45 PM and saw there accused Osman, Kiron and Zillur and 4/5 other unknown boys and at that time accused Osman receiving a mobile phone call told all of them to go out and accordingly all of them came out and went to Sheikh Mujib Road, that Osman at that time took a "kata rifle" in his waist and gave four LGs to four other boys. In his confessional statement accused Didarul Alam narrated also the commission of murder "of Jibran Tayyabi in his presence and stated also that after that murder he along with accused Osman the assailant fled away from the place of occurrence by the motor cycle of accused Osman and came to the house of accused Osman and thereafter in that very night he, accused Osman, accused Zillur and accused Zahid Hossain @ Kiron came to Dhaka and stayed there in hotel for several days and thereafter he along with accused Osman went to India by procuring two passports. In this confessional statement accused Didarul Alam though did not state that he took any active part in the murder of Jibran Tayyabi but he clearly stated that he himself took the murderer Osman to accused Yasin Rahman @ Titu as per his asking knowing fully that accused Yasin Rahman @ Titu would engage terrorist Osman to "punish" a man and subsequently he, knowing very well that accused Osman was engaged by accused Yasin Rahman @ Titu to murder a man serving in a shipping company, was all along with accused Osman and other assailants when they assembled in a house and when they, being armed with fire arms, went to the place of occurrence and also when they murdered Jibran Tayyabi and after the murder he fled away with the accused Osman. These statements made by accused Didarul Alam in his confessional statement clearly show that accused Didarul Alam, being very much aware of the fact that accused Osman and the other persons assembled, who came to the place of occurrence with fire arms with the object of killing a man, willfully joined that unlawful assembly and continued in that assembly till murder of Jibran Tayyabi and then fled along with them. These acts and conduct of this accused Didarul Alam disclosed from his confessional statement prove well that he was a party to the criminal conspiracy and took part in the operation leading to murder of Jibran Tayyabi. So, evidently, the confessional statement of accused Didarul Alam @ Didar is very much inculpatory.

200. Accused Zillur Rahman in his confessional statement stated that he had friendship with accused Osman and that accused Osman told him in presence of accused Didar and Kiron that Didar's "Khalato Bhai" Yasin Rahman @ Titu engaged him to punish one manager of a shipping company for trying to rape or committing rape of his girl friend for a consideration of Taka 10 lakhs and that accused Osman told them also to assist him in doing that job and that when accused Osman asked for his assistance in doing that job he kept silent, but on the date of occurrence he along with other accused-persons including Osman assembled in a house at "Mistripara" and there accused Osman, receiving a mobile phone call, told them to go out hurriedly and accordingly all of them came to the place of occurrence, remained waiting there and thereafter accused Osman committed the murder with the help of other accused-persons in his very presence and then all of them fled away from that place of occurrence and went to the house of assailant Osman and from there to Dhaka and stayed in a hotel for several days. This confessional statement of accused Zillur Rahman also shows clearly that being very much aware of the plan and conspiracy to murder Jibran Tayyabi he was all along with the other assailants and at the time of murder also he joined the assembly of murderers and continued in that assembly

till the murder took place. These statements of accused Zillur Rahman also prove well that he was a party to the criminal conspiracy to murder Jibran Tayyabi. So, the confessional statement of accused Zillur Rahman also is very much inculpatory.

201. The other confessing accused Omar Ali Jahangir in his confessional statement told that accused Zillur Rahman told him that they had to "punish" one person for misbehaving with the girl friend of accused Didar's "Khalato Bhai" Titu and he agreed and subsequently he took active part in more than one attempt to kill Jibran Tayyabi but those attempts failed. Though in his confessional statement this accused Omar Ali @ Jahangir did not state that he was present at the time of murder of Jibran Tayyabi but the above statements of this confessing accused Omar Ali @ Jahangir made in his confessional statement show clearly that he was a party to the criminal conspiracy to murder Jibran Tayyabi and also took active part on several occasions to materialise that criminal conspiracy. So the confessional statement of accused Omar Ali @ Jahangir also is very much inculpatory.

202. We should mention here also that none of these three confessional statements contains any self exculpatory statements, rather the statements made in these confessional statements are very much indicative of complicity of the confessing accused in the murder of Jibran Tayyabi.

203. So we are unable to accept the argument of the learned counsel for the accused-appellant that the confessional statements of these three accused-persons namely, Didarul Alam, Zillur Rahman and Md. Omar Ali @ Jahangir are exculpatory.

204. Accused Md. Zahid Hossain @ Kiron also has made a long statements under section 164 of the Code of Criminal Procedure narrating the murder of Jibran Tayyabi and implicating himself and other accused-persons in that murder. There is no objection from the side of the accused-appellant as to the inculpatory nature of this confessional statement of accused Md Zahid Hossain @ Kiron.

205. The learned counsel for the accused-appellant has raised another objection as to the admissibility of these confessional statements as against the present accused-appellant Yasin Rahman @ Titu. The learned counsel has argued to the effect that in all these confessional statements it has been stated that accused Osman told the confessing accused that this accused-appellant Yasin Rahman @ Titu engaged him to murder Jibran Tayyabi for misbehaving with his girl friend, but accused Osman himself did not make any confessional statement stating that he was engaged by accused Yasin Rahman @ Titu to murder Jibran Tayyabi. The learned counsel has contended that where accused Osman himself did not make any confessional statement stating that he was engaged by accused Yasin Rahman @ Titu to murder Jibran Tayyabi the statements of other confessing accused that they heard from accused Osman that accused Yasin Rahman @ Titu engaged accused Osman to murder Jibran Tayyabi are not admissible in evidence that the rule of excluding the hearsay evidence is applicable in this circumstance also. But we are unable to accept this contention also of the learned counsel for the accused-appellant, firstly, for the reason that one of these confessing accused, namely, Didarul Alam has stated in his confessional statement to the effect that accused Yasin Rahman @ Titu was his own "Khalato Bhai" and he told him that he had to punish one man and asked him to look for a terrorist for that purpose and accordingly accused Didarul Alam himself took terrorist Osman to accused Yasin Rahman @ Titu who talked with terrorist Osman and later accused Osman told Didarul Alam that accused Yasin Rahman @ Titu engaged him to murder one man serving in a shipping company and these statements of

accused Didarul Alam are direct, not hearsay and secondly, for the reason that hearsay evidence is inadmissible when it is proposed to establish by the evidence the truth of what is contained in the statement, but it is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of statement, but the fact that it was made. In this case the statements of the other confessing accused that accused Osman told them that he was engaged by the accused Yasin Rahman @ Titu to murder Jibran Tayyabi is not admissible for the purpose of proving the fact that accused Yasin Rahman @ Titu engaged accused Osman to murder Jibran Tayyabi, but these statements are admissible for the purpose of proving the fact that accused Osman told the other confessing accused that he was engaged by accused Yasin Rahman @ Titu to murder Jibran Tayyabi. However, these statements of the confessing accused that accused Osman told them that he was engaged by accused Yasin Rahman @ Titu to murder Jibran Tayyabi coupled with the statement of other confessing accused Didarul Alam to the effect that accused Yasin Rahman @ Titu himself told him that he had to "punish" a man and told him also to look for a terrorist for that purpose and accordingly he took terrorist Osman to accused Yasin Rahman @ Titu who talked with terrorist Osman at that time and soon after that Osman told him that he was engaged by accused Yasin Rahman @ Titu to "punish" a man of a shipping company strongly support the prosecution case that accused Yasin Rahman @ Titu masterminded the plan to murder Jibran Tayyabi.

206. Mr Anisu1 Haque made arguments to the effect also that the confessional statements of an accused cannot be used against co-accused and cannot be the basis of conviction of co-accused. The learned counsel has argued also that as these confessional statements were retracted subsequently, the evidentiary value of these confessional statements is nil as against co-accused. But this argument of the learned advocate is not correct. Section 30 of the Evidence Act has allowed the confessional statement of an accused to be considered against co-accused in the same case for the same offence. Along with the other direct or circumstantial evidence the court may take into consideration the confessional statement of an accused if found voluntary and true to find out the complicity of co-accused in the same offence. And 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. If a confession is found voluntary and true the fact of its being retracted subsequently does not throw it out of consideration. Along with other evidence the retracted confessional statements also of an accused can be considered against the co-accused. Confessional statement of an accused, of course, cannot be the sole basis of conviction of a co-accused, but if there are other convincing evidence either direct or circumstantial lending support to the confessional statements, such confessional statements, even if retracted, can be taken into consideration for convicting the co-accused.

207. Our above view gets support from the judgments in the case of *Nausher All Sarder vs The State* reported in *39 DLR (AD) 194* in the case of *Mobarak Hussain vs State* reported in *33 DLR 274* and in the case of *Joygum Bibi vs State* reported in *12 DLR (SC) 156.*

208. It has also been argued from the side of the accused-appellant that the confessional statements of the co-accused cannot be used against this appellant in support of the charge of criminal conspiracy, that in view of section 10 of the Evidence Act there is no scope for taking into consideration these confessional statements to prove the charge of conspiracy in the facts and circumstances of this present case; that the High Court Division had illegally taken the confessional statements of co-accused into

accused Didarul Alam are direct, not hearsay and secondly, for the reason that hearsay evidence is inadmissible when it is proposed to establish by the evidence the truth of what is contained in the statement, but it is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of statement, but the fact that it was made. In this case the statements of the other confessing accused that accused Osman told them that he was engaged by the accused Yasin Rahman @ Titu to murder Jibran Tayyabi is not admissible for the purpose of proving the fact that accused Yasin Rahman @ Titu engaged accused Osman to murder Jibran Tayyabi, but these statements are admissible for the purpose of proving the fact that accused Osman told the other confessing accused that he was engaged by accused Yasin Rahman @ Titu to murder Jibran Tayyabi. However, these statements of the confessing accused that accused Osman told them that he was engaged by accused Yasin Rahman @ Titu to murder Jibran Tayyabi coupled with the statement of other confessing accused Didarul Alam to the effect that accused Yasin Rahman @ Titu himself told him that he had to "punish" a man and told him also to look for a terrorist for that purpose and accordingly he took terrorist Osman to accused Yasin Rahman @ Titu who talked with terrorist Osman at that time and soon after that Osman told him that he was engaged by accused Yasin Rahman @ Titu to "punish" a man of a shipping company strongly support the prosecution case that accused Yasin Rahman @ Titu masterminded the plan to murder Jibran Tayyabi.

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208. It has also been argued from the side of the accused-appellant that the confessional statements of the co-accused cannot be used against this appellant in support of the charge of criminal conspiracy, that in view of section 10 of the Evidence Act there is no scope for taking into consideration these confessional statements to prove the charge of conspiracy in the facts and circumstances of this present case; that the High Court Division had illegally taken the confessional statements of co-accused into

consideration in support of the charge of conspiracy. It has also been argued to the effect that whenever a charge of criminal conspiracy is brought against an accused-person section 10 of the Evidence Act comes into play which has limited the taking of the confessional statements in evidence in support of the charge of criminal conspiracy by attaching some conditions, but in this case those conditions did not exist and, as such, the consideration of the confessional statements of co-accused in support of the charge of conspiracy was illegal.

209. But we do not agree with this above argument advanced from the side of the accused-appellant. Section 10 of the Evidence Act provides —

> "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 of such persons in reference to their common intention, after the time when such intention was first entertained by any of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such persons was a party to it".

210. This sect ion 10 of the Evidence Act has been enacted in order to make acts and statements of a co-conspirator admissible against the whole body of the conspirators, because of the very nature of the crime. A conspiracy is hatched in secrecy, and executed in darkness. Naturally, therefore, it is not feasible for the prosecution to connect each isolated act or statement of one accused with the acts and statements of others, unless there is a common bond linking all of them together. Section 10 means that if two persons conspire together to commit an offence, each is regarded as being the agent of another and just as the principle is liable for acts of the agent, so each conspirator is liable for what is done by his fellow conspirators in furtherance of their common intention. Section 10 of the Evidence Act is founded on the principle of law of agency by rendering the statements or acts of one conspirator binding on the other co-conspirators under certain conditions. If the conditions laid down in this section are satisfied then the acts done or statements made by one of the conspirators are admissible in evidence against co-conspirators. The object of this section 10 is to make the statements and acts of one conspirator binding on other co-conspirators, but not to put any bar in 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. The conditions for taking the acts or statements of one conspirator into evidence as mentioned in section 10 are that there must be reasonable ground for believing that conspiracy exists and that the acts or statements of the conspirator shall be in reference to their common intention and in respect of a period after such intention was entertained by any of them.

211. In this present case there are reasonable ground for believing that this accused-appellant along with other accused made conspiracy to murder Jibran Tayyabi. The confessional statements of as many as four accused-persons have been taken into evidence in accordance with law and all these have been found voluntary and true and on the basis of these confessional statements along with some other corroborative evidence all the confessing accused and also a non-confessing accused have been found guilty and convicted for the charge of murder These 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 this accused-appellant. These confessional statements along with other evidence on record including the evidence to the effect that both

this accused-appellant and deceased Jibran Tayyabi had love affairs with one girl and that this accused-appellant threatened deceased Jibran Tayyabi concerning that girl make sufficient reasonable ground to believe that this accused-appellant made conspiracy with the other accused-persons to murder Jibran Tayyabi. All these confessional statements were made in reference to common intention to murder Jibran Tayyabi after the commission of that murder. So in these circumstances section 10 of the Evidence Act cannot be a bar at all in using these confessional statements against this accused-appellant in support of the charge of criminal conspiracy. Where section 30 of the Evidence Act has specifically made the confessional statement of an accused admissible against other co-accused by expressly providing that the confession made by one of several accused-persons in a joint trial may be taken into consideration against co-accused also, it will be ridiculous to say that the confessional statement of an accused cannot be considered against co-accused in support of the charge of conspiracy. Even if the conditions mentioned in section 10 of the Evidence Act are not present then also the confessional statement of an accused is admissible against co-accused in a joint trial for the same offence which may be criminal conspiracy also under section 30 of the Evidence Act. In fact, the conditions attached to section 10 of the Evidence Act are applicable for taking into evidence anything said, done or written by a conspirator for proving the charge of conspiracy against co-conspirators. But these conditions are not required to exist for taking into evidence the confessional statement which has been expressly allowed to be considered against co-accused by section 30 of the Evidence Act. However, in the present case there being sufficient reasonable ground to believe that this accused-appellant along with other accused-persons made conspiracy to murder Jibran Tayyabi there remains no room for argument that these confessional statements cannot be considered against this accused-appellant in view of section 10 of the Evidence Act.

212. We have considered also the argument of the learned counsel for the accused-appellant that the belated examination of some important witnesses under section 161 of the Code of Criminal Procedure has made the whole prosecution case doubtful. In this case, admittedly, some of the important PWs were examined by the IO under section 161 of the Code of Criminal Procedure more than two months after the murder and initiation of the case. It is true that in some circumstances the belated examination of prosecution witnesses make the prosecution case doubtful. But in the facts and circumstances of this present case the belated examination of some witnesses under section 161 of the Code of Criminal Procedure does not make the prosecution case doubtful at all. In this case there was no eye-witness of the murder of Jibran Tayyabi by the accused-persons. So, initially it was a clueless murder. Only when some of the accused-persons made confessional statements before Magistrate more than two months after the murder some facts and circumstances concerning the murder surfaced and the police then got idea as to who could be the necessary witnesses and then only the police started examining the necessary witnesses. So, in these circumstances the delay in examining the material witnesses by police does not cast any doubt on the prosecution case.

213. The next argument of the learned counsel for the accused-appellant is that some of the prosecution witnesses did not state to the investigating officer some material facts which they stated before the court and that these omissions in the 161 statements of the prosecution witnesses make their evidence before the court unbelievable.

214. We have considered this argument also of the learned counsel and examined the evi-

dence of the PW 5, PW 6, PW 7, PW 17, PW 19, PW 20 and PW 32 the material witnesses along with the evidence of two investigating officers of this case the PW 47 and PW 48. From the cross-examination of the investigation officers it came out that the PW 5 Aleya Begum wife of Zahid Hossain did not state in her 161 statement the name of PW Liakat and did not state also that Liakat introduced her with accused Osman. The PW 6 Aleya Begum @ Alo wife of Ahmed Miah did not state in her 161 statement that one night at about 10-00 PM accused Titu came and wanted Samanja from her for walking. The PW 7 Sadhan Chandra Das did not state in his 161 statement that except Jibran Tayyabi and he himself none else was present in the office while the woman (Samanja) went to that office. The PW 17 Habib Ahsan @ Roni did not state to the IO about attending birthday party of Jabir. The PW 19 Liakat did not state in his 161 statement that accused Osman, Zillur, Didar and Kiron used to take heroin in the house of wife of Zahid. PW 20 Hasen Bhanu did not tell to the IO that some times quarrel used to take place between Mr Jibran Tayyabi and his wife Mrs Titli Tayyabi over Samanja and that Mrs Titli Tayyabi wanted Jibran not to mix with Samanja. PW 32 Mrs. Titli Tayyabi did not state to the IO that accused Yasin Rahman @ Titu confronted her husband concerning Samanja and also threatened him to leave Bangladesh telling that otherwise he would cause severe harm to him. This PW 32 did not state also to the IO about the threats given to her husband over telephone. But the IO of the case the PW 48 while answering the questions of the learned defence lawyer regarding the above omissions in the 161 statement of PW 32 stated also that PW 32 stated to him about several threats to her husband including the threats to leave Bangladesh.

215. However, the above mentioned omissions in the 161 statements of the PWs 5,6,7 and 17 are not fatal at all these are minor omissions. The other part of the evidence of these witnesses before the court could not be shaken by the defence. These witnesses deposed before court narrating some facts or any particular event by several sentences. The omission of one or two of these sentences only in their 161 statements cannot make their whole evidence before court not creditworthy. 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 (vide *AIR 2003 (SC) 282 Alamgir vs State).* It should be mentioned here that the PW 5, PW 6, PW 7 and PW 19 made statements before the magistrate also which were recorded under section 164 of the Code of Criminal procedure and except PW 19 only the other 3 PWs stated before the magistrate the same as what they stated before the court.

216. The omission in the 161 statement of PW 20 Hasen Bhanu as mentioned above also, in the given facts and circumstances of the case does not make her evidence before the court unbelievable. This PW 20 was examined by the 2nd IO of this case the PW 47 within 2/3 days of the murder of Jibran Tayyabi when the fact of love affairs among Jibran Tayyabi, Samanja and accused Titu was not disclosed. So it might be that the IO did not ask this witness anything in that direction and this witness also an illiterate poor lady did not think this fact important to be told to police. However, considering the fact that the evidence of PW 32 the wife of deceased Jibran Tayyabi has strongly corroborated the evidence of PW 20 before court we find the evidence of this PW 20 credit worthy.

217. Now about the evidence of another most important witness the PW 32 Mrs. Titli Tayyabi. This witness is the wife of deceased Jibran Tayyabi. She has deposed before the court accusing this present accused-appellant Yasin Rahman @ Titu as murderer of her husband and also stated the reason behind this murder. This lady is a highly educated and res-

pectable lady and we find no reason for her to implicate this accused-appellant in the murder of her husband falsely. She had no enmity or ill feelings against this accused-appellant Yasin Rahman @ Titu. It is not believable that this lady would depose falsely against this accused-appellant at the dictation of police. Though from the cross-examination of the IO it came before the court that she did not state to the IO exactly what she stated before the court about giving of threats to her husband by this accused-appellant Yasin Rahman @ Titu concerning Samanja but it also came before court that she stated to the IO about several threats given to her husband by this accused-appellant Yasin Rahman @ Titu concerning Samanja. It has also been argued before us that this PW 32 Mrs. Titli Tayyabi was examined first by another IO immediately after the murder of her husband and at that time she did not state anything accusing this accused-appellant for the murder of her husband. It has been contended from the side of this accused-appellant that subsequently this PW 32, being tutored by the last IO of this case gave evidence in the court implicating this accused-appellant in the murder of her husband falsely. But we are unable to accept this contention of the learned counsel for the accused-appellant considering the very special facts and circumstances of this case. This PW 32 and her husband deceased Jibran Tayyabi were Indian nationals who were residing in Chittagong, Bangladesh in connection with the employment of Jibran Tayyabi. Jibran Tayyabi was murdered on 9-6-1999 and this PW 32 left Bangladesh on the very next day on 10-6-1999 with the dead body of her husband. She was examined by the first IO of this case on 10-6-1999. On that day the mental condition of this PW 32, obviously, was very bad and it could not be expected that on that day the next day of her husband's murder she could tell everything to the police concerning murder of her husband. It appears that the High Court Division, on examining the case dairy, detected that the first investigation officer Mr Abul Kalam Bhuiyan handed over the case dairy to DB Inspector Md. Delwar Hossain (the PW 47) on 11-6-1999 and Md. Delwar as 2nd investigating officer took up investigation of the case on 11-6-1999. The High Court Division detected also that the PW 47 Delwar Hossain appeared to have recorded the statement of PW 32 on 10-6-1999 (which was absurd) and commented that this fact showed that PW 47 tried to manipulate the course of investigation of the case. The High Court Division, from the case diary, found also that there is a note in the case diary made by the first investigating officer Mr Abul Kalam Bhuiyan that he attempted to examine the wife of deceased Jibran Tayyabi on 10-6-1999 but she denied to tell anything at that very moment. However, from the evidence of PW 48 the last IO of this case it has come before court that this IO examined this PW 32 on several occasions over telephone. The PW 32 herself also has admitted this fact of her examination by the IO of this case over telephone while deposing before the court. From the side of the accused-appellant the examination of PW 32 by the IO under section 161 of the Code of Criminal Procedure over telephone also has been challenged. The learned counsel for the accused-appellant has argued that law does not permit examination of any witness under section 161 of the Code of Criminal Procedure over telephone and, as such, the alleged examination of this PW 32 under section 161 of the Code of Criminal Procedure over telephone has been illegal and therefore, in the circumstances, the evidence of the PW 32 before court at a very belated stage accusing this accused-appellant Yasin Rahman @ Titu for the murder of her husband is not reliable at all. But we are unable to accept this very argument also of the learned counsel for the accused-appellant. We find no bar anywhere in examining any witness under section 161 of the Code of Criminal Procedure over telephone. Section 161 of the Code of Criminal Procedure does not prescribe any spe-

cial method for examining any witness orally by the investigating police officer of a case. This section 161 of the Code of Criminal Procedure has provided that any investigating police officer may examine orally any person and may reduce into writing any statement made to him in the course of examination under this section. The words "may examine orally any person" in this section 161 do not, in our opinion, confine the examination of any person by the investigating police officer sitting face to face. Questioning any person over telephone and giving answers to those questions over telephone can be termed as "oral examination" only it cannot be termed anything other than oral examination. This section 161 of the Code of Criminal Procedure or any other section of the Code of Criminal Procedure or any other provision of any other law do not put any restriction on examination of any person by a police officer under section 161 of the Code of Criminal Procedure over telephone. The statements made during examination under section 161 of the Code of Criminal Procedure and reduced into writing by the police officer do not require signature or verification of the person who made those statements. Moreover no question was raised about the identity of the witness who gave the statement to the IO. In this legal position, the examination of a witness under section 161 of the Code of Criminal Procedure over telephone, in this age of advanced technology, cannot be denied or rejected.

218. So, we find no illegality in examining this PW 32 Mrs. Titli Tayyabi by the IO of this case over telephone. In this connection we may refer a case of the High Court of Andhra Pradesh of India. In that case of *Dr. P Madan Mohan Rao vs State of Andhra Pradesh* their Lordships took into consideration the 161 statement of a witness made over telephone without any objection from any side. However, we are unable to accept the contention of the learned counsel for the accused-appellant that the testimony of this PW 32 Mrs. Titli Tayyabi before court is untrustworthy for the reasons that she did not state to the 2nd IO of this case about the alleged complicity of this accused-appellant in the murder of her husband Jibran Tayyabi and that her subsequent examination by the last IO of this case over telephone was illegal.

219. It has also been alleged from the side of the accused-appellant that the PW 5, PW 6 and PW 1 9 are not trust-worthy witnesses at all, that the PW 5 was a fictitious person and was procured by police to give false evidence in this case as per their dictation and that PW 6 Aleya Begum deposed falsely as per instruction of one "Moly Apa". But none of these allegations could be established by the defence. It appears that the High Court Division considered these allegations of the defence giving due importance and found both these allegations baseless. We also have considered these allegations against the credibility of PW 5 and PW 6 attentively but found no cogent material to accept these allegations. As against PW 5 it was argued before us that this lady was a fictitious person and that it is proved from the fact that she stated her husband's name before the magistrate and court as Zahidur Rahman but before the IO as Zahid Hossain. But from the cross-examination of this PW 5 it appears that she denied the defence suggestion that she stated to police her husband's name as Zahid Hossain, during cross-examination this witness rather asserted also that she stated to the police her husband's name as Zahidur Rahman. In the circumstances the mere fact that in her 161 statement the police recorded her husband's name as Zahidur Rahman does not prove at all that this PW 5 is a fictitious person and has been procured by the police. Rather, the fact that as many as four confessional statements of four accused-persons have corroborated the evidence of this PW 5 strongly supports the credibility of this PW 5. The allegation against the credibility of PW 6 Aleya Begum also has been considered and dealt with elaborately by the High Court Division and the High Court

Division found the allegations against the credibility of PW 6 not acceptable at all. We do not find any reason to differ with the finding of the High Court Division as to the credibility of PW 6 Aleya Begum. We also, in agreement with the High Court Division, find that this PW 6 Aleya Begum, being the maid servant in the house of parents of Samanja was most probable and natural witness and there is nothing to disbelieve this witness. The credibility of PW 19 Liakat has been challenged pointing out the facts that in none of the confessional statements the name of this PW Liakat has been mentioned and that before investigating officer also none of the witnesses told the name of this PW 19 Liakat and that before magistrate this PW 19 did not state what he deposed before court. It was alleged from the side of the defence that this PW 19 Liakat was a police source and police made him depose before court as per their dictation. It appears that the High Court Division, in the impugned judgment, has considered all these allegations against this PW 19 Liakat attentively and opined to the effect that there being no contradiction of the facts stated before the magistrate and his testimony in court as to the fact of his taking heroin at the residence of the wife of Zahed at Mistripara and taking of heroin there by accused Osman, Zillur Rahman, Didar and Kiron and his suspicion that Osman and his accomplices killed Jibran his whole evidence cannot be discarded and those can be very much considered along with other evidence. The High Court Division considered also the. defence suggestion to the effect that this PW 19 Liakat was a police source and he deposed falsely at the dictation of the police and disbelieved the said defence suggestion making comment that the said defence suggestion was very wild one. However, since the prosecution adduced other sufficient evidence to prove the complicity of this accused-appellant in the murder of Jibran Tayyabi we need not take into consideration the evidence of this PW 19 Liakat in this present appeal.

220. It has also been argued from the side of the accused-appellant that in fact this accused appellant did not abscond, rather, he went to London for continuing his study there when he was not made an accused in this case and when he came to know that he was an accused in this case he wanted to come back but could not do so as his passport was cancelled. But this argument of the learned counsel also is not acceptable at all. This accused-appellant is a citizen of Bangladesh and he was residing in London as citizen of Bangladesh with Bangladeshi passport. So, there could not be any barrier for him to come back to Bangladesh from London, even if, his passport was cancelled by the authority in Bangladesh. His passport did not contain any endorsement that it was cancelled. The only effect of cancellation of a passport is that the passport holder cannot leave Bangladesh, but the holder of a cancelled passport can return to Bangladesh with his cancelled passport.

221. The next argument of the learned counsel for the accused appellant is that the alleged mobile phone calls in between this accused-appellant Yasin Rahman @ Titu and the other absconding accused Alamgir on the date of occurrence has not been established at all. The learned counsel has contended that the alleged break up of the mobile phone calls the exhibit-16 show that one Alamgir Chowdhury and not the accused Alamgir was the owner of the other mobile phone and in the circumstances it is not proved at all that this accused-appellant talked with accused Alamgir several times on the date of occurrence over mobile phone. But this contention of the learned counsel for the accused-appellant also cannot be accepted. This exhibit 16, coupled with the evidence of PW 33 and PW 37 show that this accused-appellant Yasin Rahman @ Titu talked with one Alamgir Chowdhury as many as 16 times over mobile phone on the date of occurrence. The prosecution has claimed that this

Alamgir Chowdhury is the absconding accused Alamgir. From the side of the defence nothing could be shown to prove that this Alamgir Chowdhury was a different person. 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. But 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. Rather, to the contrary, the confessional-statements of accused Zahid Hossain @ Kiron to the effect that accused Alamgir was engaged to keep information about movement of deceased Jibran Tayyabi and to give that information to other accused strongly supports the prosecution's claim that the accused Alamgir was the holder of the other mobile phone mentioned in the exhibit-16, with whom Yasin Rahman @ Titu spoke 16 times in that fateful day of the murder of Jibran Tayyabi.

222. The last argument of the learned counsel for the accused-appellant was that from the cross-examination of the PW 48 the last IO of this case it transpired that this IO had some grudge towards this accused-appellant and his other family members and he submitted charge-sheet against the father, brother and other relations of this accused-appellant Yasin Rahman @ Titu in a case being Nari-o-Shishu case No.84 of 1998 and that for this reason the IO submitted false charge-sheet in this case also against this accused-appellant and others after holding perfunctory investigation. But examining the connected materials on record we do not accept this argument of the learned counsel for the accused-appellant. It appears from the judgment of the Nari-o-Shishu case No. 84 of 1998- which is on record that the divorced wife of this accused-appellants father filed that case making allegations of kidnapping and torture against her ex-husband and 21 others of his relations and the police, after investigation, filed final report in that case, but on the objection of that lady informant the Nari-o-Shishu Nirjatan Daman Tribunal ordered for a further inquiry and this present IO the PW 48 held the further inquiry of that case and submitted charge-sheet against the ex-husband of the informant and 4 others only out of FIR named 22 accused-persons. This accused-appellant Yasin Rahman @ Titu was not an accused in that case. However, ultimately that case ended on compromise in the tribunal. From these facts we do not find anything to accept the argument of the learned counsel for the accused-appellant that this PW 48 had grudge towards this accused-appellant Yasin Rahman @ Titu and his other family members and for that reason he submitted a false charge-sheet in this case against the accused-appellant Yasin Rahman @ Titu holding a perfunctory investigation.

223. In this case the accused-persons, apart from pleading innocence, pleaded further case by giving mere suggestions to the prosecution witnesses to the effect 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 Roni 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. But none of these defence suggestions was proved at all. From the side of accused-persons nothing could be brought before the court to substantiate these defence pleas. Rather, these defence pleas being self contradictory, are not believable at all. It appears that the High Court Division has considered all these defence pleas meticulously and disbelieved all these making observations and comment to the effect that these, defence pleas are improbable and also wild in nature

and there is no material at all to support any of these defence pleas. We also find that these are mere suggestions to the prosecution witnesses and there being nothing on record to support any of these defence suggestions these are not believable at all.

224. However, from the above discussion it is evident that in this appeal none of the objections raised from the side of the accused-appellant to. impeach the correctness and legality of the conclusion and findings arrived at by the High Court Division as regards the complicity of this accused-appellant Yasin Rahman @ Titu in the murder of Jibran Tayyabi is acceptable. We have found all the four confessional statements of four accused-persons very much inculpatory and admissible as against this present accused-appellant Yasin Rahman @ Titu also. We have found the prosecution witnesses mentioned above trustworthy and their evidence before court reliable. We have found also that this accused-appellant absconded soon after the murder of Jibran Tayyabi and remained absconding for a long period of several years.

225. All these four confessional statements have depicted the same story of murder of Jibran Tayyabi. From these confessional statements it appears that this accused-appellant Yasin Rahman @ Titu being envious of the relationship of his girl friend Samanja with accused Jibran Tayyabi masterminded a plan to kill Jibran Tayyabi and with the help of accused Didarul Alam @ Didar made accused Osman a terrorist-agree to kill Jibran Tayyabi for a consideration of Taka 10 lakhs and accused Osman then made the other accused-persons agree to assist him in killing Jibran Tayyabi and according to that conspiracy and pre-plan accused Osman, with the help of other accused-persons, murdered Jibran Tayyabi by gun shot on 9-6-1999 at about 5-30 PM near Chung King Restaurant at Sheikh Mujib Road, Agrabad, Chittagong. All these confessional statements have been found voluntary and true. Sufficient other evidence also both direct and circumstantial have strongly corroborated these confessional statements. The evidence of PW 5 has corroborated these confessional statements to the extent that on the date of occurrence accused Osman and other accused-persons assembled in the house of this PW 5 and getting a mobile phone call they all went out of that house together at about 5-00 PM and half an hour thereafter sound of two shots were heard from near Chung King Restaurant. The evidence of PWs 6, 7, 16, 17, 20 and 32 also have strongly corroborated these confessional statements. From the evidence of these witnesses it has been proved that both this accused-appellant Yasin Rahman @ Titu and the deceased Jibran Tayyabi had intimate relationship with one girl Samanja by name. The evidence of PW 32 has proved further that there was confrontation in between this accused-appellant Yasin Rahman @ Titu and deceased Jibran Tayyabi over Samanja and accused Yasin Rahman @ Titu threatened Jibran Tayyabi several times to leave Bangladesh telling also that otherwise he would cause severe harm to him and would kill him. This fact of intimate relationship of both this accused-appellant Yasin Rahman @ Titu and deceased Jibran Tayyabi with one girl and the fact also that Yasin Rahman @ Titu threatened Jibran Tayyabi several times concerning that girl coupled with the confessional statements of four accused-persons prove not only the charge of murder of Jibran Tayyabi against this accused-appellant Yasin Rahman @ Titu but also prove the motive of this murder. This motive of the murder itself also connects this accused-appellant with the murder of Jibran Tayyabi. 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 (vide *56 DLR 431 State vs Abdul Hatem)*. In the case of *State vs Nurul Haque* reported in *45 DLR 306* also it was held "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".

226. The evidence of PW 33 and PW 37 along with the exhibit 16 the break up of mobile phone of this accused-appellant Yasin Rahman @ Titu have proved that on the date of occurrence this accused-appellant Yasin Rahman @ Titu had as many as 16 mobile phone calls with another absconding accused Alamgir. 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.

227. Besides these confessional statements, evidence and the facts and circumstances there is another very strong corroborative circumstance leading to the complicity of this accused-appellant in the murder of Jibran Tayyabi. This is the abscondence of this accused-appellant. This accused-appellant Yasin Rahman @ Titu absconded soon after the murder of Jibran Tayyabi and remained absconding during the whole period of investigation and trial of the case in spite of issuance of all the processes from court to secure his arrest. Even, after his conviction and sentence by the appellate court also he remained absconding for about $4^1/_2$ years. He remained absconding for a total period of about 13 years. The explanation which he gave as to his abscondence is not acceptable at all. So, in these circumstances the abscondence of this accused-appellant immediately after the murder of Jibran Tayyabi and his remaining absconding for a long period of about 13 years indicates strongly that he was involved in the murder of Jibran Tayyabi (vide judgments in the case of *Mobarak Hossain vs State* reported in *33 DLR 274* and in the case of *Nizam Hazari vs State* reported in *53 DLR 475)*. We are aware of the fact that abscondence by itself is not always an incriminating matter, for, even an innocent person sometimes absconds to avoid harassment by police. But in this present case the abscondence of this accused-appellant Yasin Rahman @ Titu, 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.

228. So, we find no wrong or illegality in the conclusion arrived at by the High Court Division to the effect that the confessional statements coupled with the other evidence and facts and circumstances including the abscondence of this accused-appellant immediately after the murder of Jibran Tayyabi and his remaining absconding for a long period proved the charges against him beyond all reasonable doubt. The High Court Division rightly convicted this accused-appellant Yasin Rahman @ Titu for criminal conspiracy and the murder of Jibran Tayyabi.

229. In the circumstances this criminal appeal be dismissed.

Syed Mahmud Hossain J: I have gone through the separate judgments prepared by my learned brother Surendra Kumar Sinha, J and my learned sister, Nazmun Ara Sultana, J. I agree with the judgment of Nazmun Ara Sultana, J.

Muhammad Imman Ali J: I have gone through the separate judgments prepared by my learned brother Surendra Kumar Sinha, J and my learned sister Nazmun Ara Sultana, J. I agree with the judgment of Nazmun Ara Sultana, J.

Md Shamsul Huda J: I have gone through the separate judgments prepared by my learned brother Surendra Kumar Sinha, J and my learned sister Nazmun Ara Sultana, J. I

agree with the judgment of Surendra Kumar Sinha, J.

Order of the Court

This appeal is, however, dismissed by majority decision.

Ed.

Appellate Division
(Civil)

MM Ruhul Amin CJ
Md Fazlul Karim J
Md Joynul Abedin J

James Finaly Plc. Chittagong..Appellant

vs

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

Judgment
December 17th, 2008.

Jetty Rule
Rule 70

Realized amount is a deposit and in the lawful custody of the Port Authority and, as such, the question of limitation relating to refund under rule 70 of the Jetty Rules does not arise at all and the claim for refund cannot be treated as barred by limitation. .....(10)

Md Nawab Ali, Advocate-on-Record—For the Appellant.

Habibul Islam Bhuiyan, Senior Advocate instructed by Md Sajjadul Huq, Advocate-on-Record—For Respondent No.2.

Osman Gani, Deputy Attorney-General instructed by Md Sajjadul Huq, Advocate-on-Record—For Respondent No. 1.

*Civil Appeal No. 202 of 2001.

(From the judgment and order dated the 24th day of February, 1997 passed by the High Court Division in Writ Petition No.2595 of 1990).

Judgment

Mohammad Fazlul Karim J : The Appeal, by leave, is directed against the judgment and order dated 24-2-1997 passed by the High Court Division in Writ Petition No.2595 of 1990 discharging the Rule.

2. The facts of the case, in short, are that respondent, Chittagong Port Authority and other Shipping Agents realized crane charges from the appellant without providing crane services. The appellant paid the sum of 5,63,685.31 paisa between 17-4-1982 to 30-4-1995, both days inclusive, on account of crane charges though no such crane service was provided to the appellant during that period. Similarly the appellant also paid crane charge amounting to Taka 1,01,257.50 between 12-6-1985 both days inclusive though no crane service was provided to the appellant. On the representation of the appellant by circular No.113 of 85 dated 8-6-1985 Chittagong Port Authority informed all concerned that no hire charges be realized would be refunded to the respective port user as the cranes provided by the Port Authority were not capable of handling the containers of the Shipping Agents. Before issuance of the said circular on 29-5-1985 appellant filed an application to the Port Authority claiming refund of sum of Taka 5,63,685.31 as no crane service was provided to the appellant. Subsequently, on 26-6-1985, 16-7-1985 similar claims were made on 5-3-1985 appellant claimed refund of the aforesaid amount of Taka 5,63,685.31 and further amount of Taka 1,01,237.50 in total Taka 6,64,922.46. Long thereafter by impugned letter dated 2-7-1989 appellant was informed that its claim was barred under the provisions of Rule 70 of the General Rules and Schedule for working of the Chittagong Port Jetties.

3. The limitation imposed by the rule 70 of the General Rules and Schedule in the case would be from the date of decision to refund the amount to pay in excess and not for the date of actual payment. The High Court Division did not make the Rule absolute on the technical ground that the Rule was not issued on respondent No.2, Chairman, Chittagong Port Authority who issued the impugned letter although he entered appearance.

4. Leave was granted to consider the submissions of the learned Advocate the appellant that "The High Court Division after considering the writ petition and the affidavit-in-opposition on behalf of the respondent No. 2 found the impugned order illegal on merit but discharged the Rule on technical ground which needs interference by this Division for appropriate direction and/or order under Article 104 of the Constitution of Bangladesh for doing complete justice."

5. Mr Md Nawab Ali, learned Advocate-on-Record, appearing for the appellant submitted that no Rule was issued upon the Chittagong Port Authority and its officers although the High Court Division upon perusing the affidavit-in-opposition filed by the respondent No.2, Chairman, Chittagong Port Authority in the instant writ petition and upon hearing the respondent No.2 declared the impugned letter Memo. No.CR/SRD/Various vessels/85 dated 05/07,06.1989 communicating the decision of the Board of Trustees of the Chittagong Port Authority by the respondent No.3 to the appellant as illegal; that the High Court Division acted illegally in not making the Rule absolute on the ground of non-issuance of Rule upon the Chittagong Port Authority or its officers whereas the respondent No.2 caused their appearance in the instant writ petition; that the High Court Division erred in not allowing the prayer of the appellant for time to amend the prayer portion of the petition of inclusion of the name of the other respondents for issuance of a Rule along with the respondent No. 1 whose name was not included in the prayer portion of the petition. The learned Advocate further submitted that the High Court Division after considering the writ petition and the affidavit-in-opposition on behalf of the respondent No.2 found the impugned order illegal on merit but discharged the Rule on the ground of non-issuance of a Rule upon the Chittagong Port Authority or its officers whereas the respondent No. 2 caused appearance in the writ petition and filed affidavit-in-opposition and argued the case when the impugned letter No.CR/SRD/Various vessels/85 dated 5-7-6-1989 was declared as illegal which needs interference by this Division for setting-aside the judgment and order dated 24-2-1997 of the High Court Division and for appropriate directions.

6. Mr Habibul Islam Bhuiyan, learned Counsel, appearing for the respondent No.2 submitted that the writ-petitioner having claimed no relief against Chittagong Port Authorities, the High Court Division was justified in discharging the Rule Nisi. The learned Counsel further submitted that there having no application, nor even a verbal prayer, made before the High Court Division to amend the prayer portion of the writ petition in order to include Chittagong Port Authorities, there is nothing to interfere with the impugned judgment. The learned Counsel finally submitted that there is no illegality committed by the High Court Division which warrants interference with by this Division under Article 13 of the Constitution, therefore, the appeal is liable to be dismissed.

7. It appears from the record that upon representation by the ships agents, Chittagong Port Authority agreed that as their shore cranes of 3 tons capacity are not able to handle containers and therefore, no hire charges on this

account is realizable from the port user and such charges so far realized would be refunded to the respective port users. In this regard Traffic Manager of Chittagong Port Authority i.e. the respondent No. 4 issued a circulars being Nos.11 of 1985 and 113 of 1985 dated 8-6-1985. In view of the above circulars of the Chittagong Port Authority the appellant under cover of their letter dated 29-5-1985 addressed to the Deputy Traffic Manager (OP), Chittagong Port Authority i.e. the respondent No.4 issued a circulars being Nos.11 of 1985 and 113 of 1985 dated 8-6-1985. In view of the above circulars of the Chittagong Port Authority the appellant under cover of their letter dated 29-5-1985 addressed to the Deputy Traffic Manager (OP), Chittagong Port Authority i.e. the respondetn No. 5 submitted their refund claim amount to the extent of Taka 5,63,685.31 showing the details of the Chittagong Port Authority Jetty bills and the amount of crane charges realized from the appellant by Port Authority covering feeder vessel Voyage 3 to 59 with a request to refund the above amount at an early date. Subsequently, the appellant sent a reminder on 26-6-1985 to the Deputy Traffic Manager for refund of their claim. The appellant under cover of their letter dated 16-7-1985 addressed to the Traffic Manager, Chittagong Port Authority sent a fresh bills No.ST/21/85 dated 29-5-1985 for Taka 5,63,685.31 with a request for early payment. Subsequently, the appellant under cover of their letter dated 5-8-1985 sent to the Traffic Manager, Chittagong Port Authority their bills No.ST/81/85 dated 31-7-1985 for Taka 1,01,239.15 (Annexure-D series) together with statement showing details of crane charges realized from the appellant through their revolving deposit account No.DA-75 with Janata Bank, Port Branch, Chittagong covering feeder voyage 60 to 62 and, as such, total amount due from the respondents comes to Taka 6,64,924.46. Subsequently, the Chittagong Port Authority by its Circular No. 11/85 dated 8-6-1985 (Annexure-B to the writ petition) notified to all concerned that CPA shore cranes 113 tons capacity are not capable to lift containers and thereof no hire charges on this account is realizable from the port users. In this context no hire charges should be made from now and onwards and the amount already realized be refunded to the respective port users.

8. Accordingly, the appellant under Annexure-A dated 31st July, 1985 together with original copies of CPA jetty bills duly paid totalling an amount on account of crane chages only at Taka 1,01,237.15 was claimed. Subsequently, remainders dated 29th May, 1985 (Annexure-C) June 26, 1985 (Annexure-'Al') and charges of refund dated 29th May, 1985, 31st July, 1985 (Annexure-D series) were filed. But the Chittagong Port Authority by Memo. No.CR/SRD/Various Vessel/85 dated 2.7.1989 rejected the claims of the appellant on the ground that the claim is time barred as per Rule 70 of the Jetty Rules and Schedule of the Chittagong Port.

9. Rule 70 of the General Rules and Schedules for working of the Chittagong Jetty is as under:

> "70. Claims for refund of Jetty charges excess paid must be made within six months from the date of payments after-which period no claim will be entertained."

10. It appears that rule 70 of the Jetty Rules providing time limit for refund would not be applicable for the charges realized by Chittagong Port Authority as because the Port Authority by their Circular dated 8.6.1985 has specifically mentioned that the amount already realized be refunded to the respective port users and the provision of the applicability of the limitation has not been mentioned in the said circular. It appears that the realized amount is a deposit and in the lawful custody of the Port Authority and, as such, the question

of limitation relating to refund under rule 70 of the Jetty Rules does not arise at all and the claim for refund cannot be treated as barred by limitation under rule 70 of the Jetty Rules.

11. It is to be mentioned here that the claims for refund for the claim of crane charges on account of facilities not at all rendered to the appellant as admitted by respondents letter dated 20-7-1989 claimed pursuant to their circular dated 8-6-1985 illegally reclaimed from the appellants from 17-6-1982 to 25-7-1985 (paid under protest) for the crane service not at all rendered is liable to be refunded though agreead to be paid on 8-6.1985 and claims for refund has already been made and was awaiting payment/decision and same claims are made on 31-7-1985 after the communication of the said decision to refund dated 8-6-1985, and awaiting decision/repayment by the Port Authority and, as such, the issuance of the letter dated 2-7-1989 rejecting the claim of refund allegedly under jetty schedule 70, which provision has no manner of application in the instant facts and circumstances of the case.

12. Accordingly, the impugned Memo dated 2-7-1989 has been declared to have been issued illegally and without any lawful authority and of no legal effect. The appellants are entitled to the refund of their just claim of deposit on account of crane charges. The High Court Division also having held the impugned letter illegal should have made the Rule absolute as the learned Advocate for the Respondent representing others including Chittagong Port Authority also appeared for the parties and contested the Rule

13. In view of the above, we find substance in the submissions of the learned Advocate for the appellant.

Accordingly, the appeal is allowed without any order as to costs.

Ed.

Appellate Division
(Criminal)

Md Muzammel Hossain J
Surendra Kumar Sinha J
Md Abdul Wahhab Miah J
Nazmun Ara Sultana J
Syed Mahmud Hossain J
Md Imman Ali J

Judgment
August 2nd, 2012.

State....Petitioner
vs
Md Ariful Islam @ Arif.....
.....Respondent*

Code of Criminal Procedure (V of 1898)
Section 561A

Even if any order was passed by the learned Magistrate, the said order was revisable under section 439A of the Code of Criminal Procedure by the learned Metropolitan Sessions Judge. The accused-respondent without exhausting the said forum directly moved the High Court Division a petition under section 561A of the Code of Criminal Procedure. The High Court Division is not invested with any appellate or alternative power under section 561A of the Code of Criminal Procedure. .....(3)

Code of Criminal Procedure (V of 1898)
Section 561A

The power under this section is a special extraordinary one, the main aim and object of which is to save the people from any agony of the abuse of the process of the Court and also is designed to do substantial justice. The High Court Division exceeded its jurisdiction in making the direction in exercise of inherent powers. .....(4)

*Criminal Petition for Leave to Appeal No. 402 of 2009.

(From the judgment and order dated 10-11-2009 passed by the High Court Division in Criminal Miscellaneous Case No. 24129 of 2009).

Md Shahrowardi, Deputy Attorney-General, instructed by Sufia Khatun, Advocate-on-Record—For the Petitioner.

Md Tafique Hossain, Advocate-on-Record—For the Respondent.

Judgment

SK Sinha J: State seeks leave from an ex-parte order of the High Court Division made in exercise of its inherent power pursuant to a petition filed by the accused respondent directing the investigating agency to interrogate him at the jail gate if it feels necessary.

2. Accused respondent was said to have been involved in connection with a Motijheel police station case. The case was started in connection with offences punishable under different provisions of the Penal Code including murder and Explosive Substances Act. The police ultimately submitted a charge-sheet in case and eventually the case was taken up by the trial court for trial, and in the midst of trial, on the prayer of the prosecution, the case was sent back for further investigation on the reasoning that some accused persons who are directly involved in the incident have been left out and in their absence, if the trial concludes the prosecution will be highly prejudiced. The petitioner was arrested by the police on 15th September, 2009 in connection with another case and he was produced before the Chief Metropolitan Magistrate on the following morning in connection with the said case. He was thereupon taken on police remand and thereafter he was sent to the jail custody. Then he was shown arrested in connection with Motijheel PS Case No. 97 dated 22nd August, 2010. The investigating agency again prayed for seven days police remand in connection with this case. The learned Magistrate allowed the prayer for remand and subsequently another prayer for police remand was made before the learned Magistrate. It is at this stage, the accused petitioner moved the High Court Division a petition under section 561A The High Court Division without assigning any reason made the above direction disposed of the application summarily.

3. From the materials produced before the High Court Division, we noticed that the learned Magistrate did not pass any order pursuant to the application filed by the investigating officer. Even if any order was passed by the learned Magistrate, the said order was revisable under section 439A of the Code of Criminal Procedure by the learned Metropolitan Sessions Judge. The accused-respondent without exhausting the said forum directly moved the High Court Division a petition under section 561A of the Code of Criminal Procedure. The High Court Division is not invested with any appellate or alternative power under section 561A of the Code of Criminal Procedure.

4. This Division in a recent case in Criminal Petition No.371 of 2009 observed; the inherent powers of the High Court Division is neither an alternative nor an additional in its correct sense and is to be rarely invoked only in the interest of justice so as to seek redress of grievances for which no other procedure is available. This section confers no new powers on the High Court Division. It merely safeguards all existing inherent powers possessed by the High Court Division to secure the ends of justice. The section provides that those powers which the court inherently possesses shall be preserved lest it be considered that the only powers possessed by the Court are those expressly conferred by the Code and that no inherent powers had survived the passing of the Code. This provision should not be used to obstruct or divert the ordinary course of justice. The power under this section is a special extraordinary one, the main aim and object of which is to save the people from any agony of the abuse of the process of the Court and also is designed to do substantial justice. The High Court Division exceeded

its jurisdiction in making the direction in exercise of inherent powers.

The judgment of the High Court Division is set-aside. This petition is disposed of with the above observations.

Ed.

Appellate Division
(Civil)

ATM Afzal CJ
Mustafa Kamal
Latifur Rahman J
Md Abdur Rouf J
BB Roy Choudhury J } Lutful Karim and ors .....Petitioners

vs

Judgment
March 15th, 1998. } Shahidullah and others.....Respondents *

Specific Relief Act (I of 1877)
Section 42
Evidence Act (I of 1872)
Section 90

The documents are old documents of 50 years back and there is no evidence that the defendants willfully suppressed the documents from production in court.

The lower appellate court being the last court of fact wrongly held that the question of possession is of no importance and wrongly did not reverse the finding of the trial court with regard to possession of the defendants in the suit land as far back as in 1947. The defendants kabala being of 1947 and the defendants having asserted their possession since then, the lower appellate court wrongly held that possession is not material in this case. The question of exclusive possession of the defendants in the lands covered by the impugned kabalas as found by the trial court is a material and cogent fact in the case. Hence the finding on the question of possession has been erroneously not decided by the lower appellate court.

.....(5 & 6)

Khondkar Mahbubuddin Ahmed, Senior Advocate Mohammad Ozair Farooq, Advocate with him) instructed by Md Nawab Ali, Advocate-on-Record—For the Petitioners in both the Petitions.

AKM. Nazrul Islam, Advocate, instructed by Sharifuddin Chaklader, Advocate-on-Record—For Respondent No.1 In both the Petitions.

Not represented—Respondent Nos.2-17 in both the Petitions.

Judgment

Latifur Rahman J: Civil Petition for Leave to Appeal Nos. 57 and 58 of 1998 are disposed of by a common judgment as the fact and law involve therein are simi1ar. The plaintiff petitioners filed Title Suit Nos.43 and 44 of 1991 in the Court of Assistant Judge, Chatkhil Police Station, District-Noakhali for cancellation of two kabalas, being, Kabala Nos.3466 and 3467 registered on 11-7-47. Both the suits were dismissed by the trial court. Against the aforesaid judgment and decree the plaintiff preferred Title Appeal Nos.88 and 214 of 1993 and the Subordinate judge, Noakha1i by his judgment dated 17-7-93 allowed the appea1s thereby decreed the suits. The defendants being aggrieved by the judgment of the lower appellate court preferred Civil Revision Nos. 3459 and 3460 of 1995 and a learned Single Judge of the High Court Division by two separate judgment and orders dated 19-8-1997 made the Rules absolute and dismissed the suit. The plaintiff-petitioners aggrieved by the impugned judgment of the High Court Division have preferred these two leave petitions.

2. The plaintiffs filed the aforesaid title suits for declaration that two kabalas are forged, false, fraudulent, void, without consid-

*Civil Petition for Leave to Appeal Nos. 57 and 58 of 1998.

(From the judgment and order dated 19-8-97 passed by the high Court Division in Civil Revision Nos.3459 and 3460 of 1995) .

eration and not binding upon the plaintiffs. The plaint case is that the plaintiffs are the owners of the land by succession from their ancestor Charag Ali. The plaintiffs are in possession of the suit land and they have recently come to know that the predecessor of the plaintiff Charag Ali was impersonated as the Vendor and the predecessor of the defendants Salamat Ullah was impersonated as the Vendee of the impugned kabalas. The predecessor of the plaintiffs never offered to sell the disputed kabala lands to the predecessor of the defendants. The disputed kabalas do not contain the LTI's of Charag Ali and there is no statement in the said kabalas as to the exemption of the LTI. The disputed kabalas were manufactured fraudulently. The predecessor of the defendants never acquired any title or possession in the suit land by the impugned kabalas. The defendants for the first time claimed the ownership of the suit land on 5-5-1991 in connection with the recent survey of land and disclosed the existence of the impugned kabalas on 18-5-1991. Hence the suit.

3. The suit was contested by defendant-respondents No. 1, 2, 3, 6, 10, 11, 16 and 17 by filing written statements. The main assertion of the defendants was that the defendants are the successors of Salamatullah who is the Vendee of the suit land sold by Charag Ali, the ancestor of the plaintiffs as he was in need of money. Charag Ali handed over possession to the Vendee after the sale, Charag Ali was an educated person and was related to the then Sub-Registrar Mr Mozaffar Islam who exempted the said Charag Ali from giving his LTI while registering the impugned kabalas. The defendants are in possession of the suit land beyond the period of limitation. The disputed kabalas were legally and properly executed and, as such, the suit is liable to be dismissed.

4. Mr Khandker Mahbubuddin Ahmed, learned Advocate appearing for the plaintiff petitioners submits that the defendants who were custodian of the impugned kabalas did not produce the originals in court but only produced the certified copies of the kabalas, Exhibits 1 and 1(ka). Hence for not producing the original documents the plaintiffs did not get any opportunity of comparing the LTI's of Charag Ali on the kabalas themselves, since it was the positive assertion of the plaintiffs that the kabalas were executed by Salamat Ullah, the predecessor-in-interest of the defendants by false personation and not by Charag Ali himself. He next submits that by the impugned kabalas four plots were transferred but the defendants failed to prove their exclusive possession over the lands covered by the kabalas and, as such, the learned Single Judge of the High Court division failed to consider the ejmali possession of the parties therein.

5. In the instant case, the plaintiff petitioners challenged the kabalas Exhibits1 and 1(ka) as products of forgery and false personation by Salamatullah, the predecessor-in-interest of the defendants. The onus of proof of forgery and false personation is on the plaintiffs who allege that the documents are forged and fabricated. The original kabalas were not produced. Certified copies of those two impugned kabalas were produced by both the parties which were marked as Exhibits 1 and 1(Ka) by the trial court. The trial court accepted those documents and admitted them into evidence. From the evidence on record it has transpired that Charag Ali, predecessor-in-interest of the plaintiffs was not only an educated and well-known person in the locality but also a close relation of the Sub-Registrar. It is also on evidence that Charag Ali executed and registered two documents in the year 1918 and 1950 wherein the endorsement is simply that the executant Charag Ali is personally known to me (the Sub-registrar) and there is no endorsement that he was exempted from putting his thumb impression. This fact was admitted by PW 1 Luful Karim son of Charag Ali when he was confronted with those kabalas. When the plaintiffs assert that the impugned kabalas were forged by impersonation it was the duty

of the plaintiffs to take steps to prove that the thumb impressions as contained in the impugned documents were not of Charag Ali but of Salamat Ullah. It is on record that two registeted kabalas, being Kabala Nos.584 and 585 dated 26-2-1918 exempted by Charag Ali were on record about which PW 1 Lutful Karim son of the executant Charag Ali admitted that his father by those two kabalas sold out lands in 1918. In those kabalas Charag Ali was not exempted from putting his LTI and in those Kabalas also there were no endorsements of the Sub-Registrar exemptine Charag Ali from putting his left thumb impression. If the plaintiffs were serious and wanted to prove the forgery by impersonation then the LTI's of Charag Ali in thumb impression and signature book could have been called for by them and compared with the two kabalas of 1918. Thus, for non-production of the original kabalas it cannot be said that the plaintiffs did not get any opportunity to compare the LTI's of Charag Ali as the two kabalas of 26-2-1918 were on record. The plaintiffs did not take any effective steps to discharge the onus of proof that the impugned kabalas were forged by impersonation. It may be mentioned that the kabalas having been admittedly registered on 11-7-47 there is a presumption of correctness attached to the documents themselves that the registration was done validly and legally. Admittedly, the documents are old documents of 50 years back and there is no evidence that the defendants willfully suppressed the said documents from production in court. The broad fact remains that the trial court also accepted the certified copies of the kabalas.

6. With regard to the question of possession it may be stated that the trial court found that the plaintiffs have no possession. The lower appellate court being the last court of fact wrongly held that the question of possession is of no importance and wrongly did not reverse the finding of the trialcourt with regard to possession of the defendants in the suit land as far back as in 1947. The defendants kabala being of 1947 and the defendants having asserted their possession since then, the lower appellate court wrongly held that possession is not material in this case. The question of exclusive possession of the defendants in the lands covered by the impugned kabalas as found by the trial court is a material and cogent fact in the case. Hence the finding on the question of possession has been erroneously not decided by the lower appellate court.

For the above reasons, these petitions are dismissed.

Ed.

Appellate Division
(Criminal)

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

Judgment
June11th, 2013.

Sahab Uddin (Md)...Petitioner

vs

State and another .....Respondents*

Negotiable Instruments Act (XXVI of 1881)
Section 138

If a holder or the payee gets hold of a dishonoured cheque by any illegal means the drawer of the cheque shall have the liberty to take such defence during the trial. .....(9)

Arif-uz-Zaman (Md) vs State, 17 BLC (AD)176 = 21 BLT (AD) 234 ref.

Md Aftab Hossain, Advocate-on-Record—For the Petitioner.

*Criminal Petition for Leave to Appeal No. 395 of 2010.

(From the judgment and order dated the 30th day of May, 2010 passed by the High Court Division in Criminal Miscellaneous Case No.23880 of 2009).

B. Hossain, Advocate-on-Record—For Respondent No. 1.

ASM Abdul Mobin, Advocate instated by Mrs Sufia Khatun, Advocate-on-Record—For Respondent No.2.

Judgment

Md Abdul Wahhab Miah J: The accused has filed this petition for leave to appeal against the judgment and order dated the 30th day of May, 2010 passed by the High Court Division in Criminal Miscellaneous Case No.23880 of 2009 discharging the Rule.

2. Facts necessary for disposal of this petition are that respondent No.2, Md. Shamsul Alam as complainant (hereinafter referred to as the complainant) filed a petition of complaint before the Additional Chief Metropolitan Magistrate, Chittagong, under section 138 of the Negotiable Instruments Act, 1881 (the Act, 1881), alleging, *inter alia*, that in order to repay a loan due to him, the accused issued three cheques in his favour. All the cheques were drawn on Islami Bank Bangladesh Ltd., Chauk Bazar Branch. The cheques were dated 28-5-2008, 10-6-2008 and 28-5-2008 for Taka 5,20,000, Taka 10,000 and Taka 10,000 respectively. The cheques were lastly deposited on 3-11-2008 with Dutch Bangla Bank Ltd., Jublee Road Branch, the bank of the payee, for collection, but all the cheques were returned due to insufficiency of fund. Thereafter, a legal notice was issued by the payee upon the accused on 30-11-2008 claiming the amount due under the aforesaid three dishonoured cheques. The said notice was received by the accused on 3-12-2008, but he did not pay the amount due under those cheques. Thereafter, upon expiry of the period of thirty days from 3-12-2008, the complainant filed the petition of complaint on 4-1-2009 before the Additional Chief Metropolitan Magistrate, Chittagong. The complainant being examined under section 200 of the Code of Civil Procedure (the Code), cognizance was taken against the accused under section 138 of the Act, 1881. The accused petitioner appeared before the concerned Magistrate with the prayer for bail and he was enlarged on bail. The case being ready for trial, the records were transmitted to the Metropolitan Sessions Judge, Chittagong. The case was registered as Sessions Case No.1217 of 2009. The learned Metropolitan Sessions Judge framed charge against the accused in his absence on 9-8-2009 under section 138 of the Act, 1881. However, the accused was enlarged on bail by the learned Metropolitan Sessions Judge on 9-9-2009. Then he filed an application before the High Court Division under section 561A of the Code for quashing the Sessions case and obtained the Rule.

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

4. Heard Mr Md Aftab Hossain, learned Advocate-on-Record for the accused petitioner, Mr B. Hossain learned Advocate-on-record for respondent No.l, the state and Mr ASM Abdul Mobin, learned Advocate for the complainant respondent No.2 and perused the petition of complaint.

5. From the impugned judgment, it appears that before the High Court Division two contentions were raised on behalf of the accused-petitioner: (i) 3(three) cheques issued by the complainant dishonoured due to insufficiency of fund being account payee cheques those were not negotiable, therefore, no complaint could be filed under section 138 of the Act, 1881, the Sessions case in question arising out of the petition of complaint under the said section of the Act was nothing but an abuse of the process of the Court and (ii) the cheques alleged to have been dishonoured were taken

from the accused forcibly by kidnapping him and a criminal case is still pending against the complainant on such allegation, so the Sessions case in question could not be proceeded with till disposal of the case filed by the accused against the complainant.

6. From the impugned judgment, it appears that the High Court Division repelled the first contention on the finding that although the cheques in question ceased to be negotiable being account payee cheques, they did not cease to be negotiable instruments and therefore, the mischief of section 138 of the Act, 1881, was clearly attracted and the complainant rightly filed the petition of complaint alleging the commission of offence under the said section of the Act. So far as the second contention was concerned, the High Court Division observed that there was no legal scope of connecting the case filed by the accused with the instant case and that the said case had no relevance with the impugned proceedings. The High Court Division further held that the petition of complaint giving rise to the Sessions case was filed after observing all the legal formalities.

7. The first contention raised by the accused before the High Court Division squarely came up for consideration before this Court in the ease of *Arif-uz-Zaman (Md) vs State, 17 BLC (AD) 176 = 21 BLT (AD) 234* and this Division held that:

> The legislative mandate as used in clause (a) of sub-section (2) of section 123 A of the Act, 1881 that when a cheque is crossed "account payee" shall cease to be negotiable means it cannot be negotiated or encashed with any other person except the person in whose favour the same was issued. To make it clearer, a crossed cheque "account payee" must be enchased through the account of the holder in whose favour it was issued. So, by no means, a crossed cheque "account payee" loses its character as a negotiable one within the meaning of section 138 of the Act, 1881. Moreover, section 13 of the Act, 1881 which has defined "Negotiable instrument" has not made any distinction between crossed cheque "account payee" or cheque of other kind such as bearer cheque we ordinarily mean. Thus, we find that section 123A of the Act, in no way, creates any bar in proceeding with a case under section 138 of the Act, 1881. In other words, we do not see any nexus of section 123A with the proceedings to be initiated under section 138 of the Act."

8. We do not see any reason to differ with the view already taken in the above case on the question of character of the dishonoured cross cheques "account payee" as negotiable instruments. In the context, we also endorse the reasonings of the High Court Division on the question as stated hereinbefore. So far as the pendency of the criminal case filed by the accused against the complainant about the cheques in question is concerned, we are of the view that the operation of section 138 of Act, cannot be obstructed or, in any way, circumvented by the mere fact of filing of a criminal case by the drawer of the dishonoured cheque whatever may be the allegations, because such a device shall totally make the section itself nugatory. However, if a holder or the payee gets hold of a dishonoured cheque by any illegal means as alleged in the instant case, the drawer of the cheque shall have the liberty to take such defence during the trial.

9. In view of the above, we find no merits in the leave petition.

Accordingly, the same is dismissed.

Ed.

ing out the name of the defendant No.3 from the plaint, upon an application under section 151 of the Code of Civil Procedure.

2. Facts, in a nutshell giving rise to this Rule are that a ship bearing the name Master Ratul was carrying the loaded cargo belonging to the plaintiff, the ship was on sail and on it's way it was hit by another vessel known as MV Parabat-8 as a result the ship carrying the cargo was sunk. Thereafter, the owner of the cargo as plaintiff instituted the instant suit being Money Suit No.l of 2009 before the learned Joint District Judge, 2nd Court, Khulna seeking a compensation amounting to Taka 2,29,00,000 impleading the opposite party Nos.2 and 3 as defendants. During pendency of the suit the plaintiff filed an application for addition of part with a prayer for adding the opposite party No.l as defendant No.3. The said application for addition of party was heard by the learned Joint District Judge and by his order dated 27-1-2009 impleaded the opposite party No.l as defendant No.3 in the suit. Thereafter, upon receipt of the summons the defendant No.3 entered appearance and then filed an application under section 151 of the Code of Civil Procedure for striking him out as a defendant in the suit and the said application was heard by the learned Joint Distinct Judge and the impugned order on 9-9-2009 was passed.

3. Challenging the said order the plaintiff as petitioner obtained the present Rule.

4. Mr Md Ohiullah, the learned Advocate appearing for the petitioner has taken us through the materials on record including the impugned order and then submits that the impugned order upon an application under section 151 of the Code of Civil Procedure striking out the defendant No.3 from the suit, as has been done by the learned Joint District Judge, suffers from error of law which has resulted in an error in the decision occasioning failure of justice as such the same is liable to be set-aside.

5. The learned Advocate appearing for the petitioner submits further that in view of the existence of a specific provision of law namely Order I, rule 10 of the Code of Civil Procedure for deciding a matter like the instant one any application under section 151 of the Code of Civil Procedure for striking out the defendant No.3 is not at all sustainable , consequently the order passed on the basis thereof also cannot be sustained.

6. Having pointed out the facts of the case involved Mr Md Ohiullah, submits further that the damage was caused to the cargo belonging to the plaintiff while those were being carried by MV Ratul a ship which was hit suddenly by MV Parabat -8 on it's way and as a result of such hitting the vessel carrying the cargo had sunk consequently the enure goods carried by master Ratul were also lost as a result a suit has been instituted like the present one being Money Suit No.1 of 2009 before the learned Joint District Judge, 2nd Court, Khulna impleading initially the opposite party Nos.2 and 3 as defendant Nos. 1 and 2 . Thereafter, when it was detected by the plaintiff that the proprietor of the ship which hit the vessel, should also be impleaded as defendant in the suit. Accordingly, a separate application for addition of party, the oppsoite party No.l as proprietor of the offending vessel was impleaded as defendant No.3 in the suit.

7. It is also submitted by the learned advocate for the petitioner that the provision of Order 1, rule 10(2) of the Code of Civil Procedure does not contemplate striking out of the defendant No.3 from the suit despite such a position the learned Joint District Judge invoking section 151 of the Code of Civil Procedure has passed the impugned order striking out the defendant No.3 from the suit and that the facts involved in the suit do not warrant any such striking out as such the impugned order passed by the trial court is liable to be set-aside.

8. Mr Abdul Quiyyum the learned Advocate appearing for the opposite party No.l submits that the incident disclosed in the plaint attracts the jurisdiction of a Marine Court and untill and unless the Marine Court decides the liability of the defendantNo.3 in the occurrance, he cannot be included as defendant in the instant suit , therefore, the learned Joint District Judge has rightly struck out the defendant No.3 from the suit.

9. It is also submitted by the learned Advocate for the opposite party No.l that in the event of striking out the defendant No.3 from the suit and in view of the pendency of a Marine Case before the Marine Court over the self-same occurrence there is every possibility of conflicting decision in the matter as such for all fairness the defendant No.3 should be struck out from the suit and the learned Joint District Judge having done so has rightly passed the impugned order which calls for no interference by this court.

10. Heard the learned Advocates, perused the petition and the relevant materials including the impugned order wherefrom it transpires that it is as a matter of fact the instant suit being Money Suit No.1 of 2009 has been instituted claiming compensation to the tune of Taka 2,29,00,000 impleading initially the opposite party Nos.2 and 3 as defendant Nos.l and 2 and subsequently by separate application for addition of party, the opposite party No.3 as proprietor of the offending ship namely MV Parabat-8 was impleaded as defendant No.3 in the suit. Thereafter, the defendant No.3 having entered appearance in the suit filed an application for striking him out as defendant in the suit which was allowed by the Joint District Judge by his impugned order, We have also noticed that application for striking out the name of the defendant No.3 was made under section 151 of the Code of Civil Procedure and the same was not done invoking Order 1, rule 10(2) of the Code of Civil Procedure and in view of the existance of a specific provision of law for doing certain thing the learned Joint District Judge ought not to have invoked section 151 of the Code, unless a special circumstance deserve or warrant such exercise. We have also noticed that the scope available under Order 1, rule 10(2) of the Code of Civil Procedure which is the specific provision for striking out of a party from the suit is not also warranted under the facts and circumstance of the instant suit, therefore, under the facts disclosed, we are of the opinion, presence of defendant No.3 is essential for the purpose of adjudication of the dispute effectively and completely , therefore, the order striking out the defendant No.3 as has been done by the impugned order warrants interference by this court.

11. With respect to the submissions made by the learned Advocate for the respondent No.l we find that the same offence has given rise to two fold liabilities one is a criminal liability and other one is civil liability so far the civil liability is concerned the civil court is competent to adjudicate and so far the criminal offence is concerned that can well be looked into by the Marine Court, therefore, 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.

12. In view what has been stated above, the Rule is made absolute without nay order as to costs and the impugned order dated 9-9-2009 passed by the learned Joint District Judg, 2nd Court, Khulna in Money Suit No.1 of 2009 striking out the name of defendant No.3 is hereby set-aside. The suit shall proceed in accordance with law adding the opposite party No.l as defendant No. 3 in the suit.

The order of stay granted earlier by this court stands vacated .

Ed.

High Court Division
(Criminal Miscellaneous Jurisdiction)

Siddiqur Rahman Miah J
KM Kamrul Kader J

Judgment
January 9th, 2013.

Kazi Khairuzzaman and others....Petitioners

vs

State...Opposite Party*

Code of Criminal Procedure (V of 1898)
Section 561A

If the allegations in FIR and finding in the charge sheet are taken in their face value and accepted in their entirety, no *prima facie* charge is made out against the accused petitioners. .....(25)

Rahela Khatun vs Abul Hassan, 48 DLR (AD) 213; Latifa Akater vs State, 7 BLT (AD) 282; Md Obaidul Hoque vs State, 20 BLT 44; Ali Akkas vs Enayet Hossain, 17 BLD (AD) 44 = 2 BLC (AD) 16; Abdul Huque vs State, 60 DLR (AD) 1; Nazrul Islam vs State, 13 MLR (AD) 184; Salma Khaton vs State, 38 DLR 348; AHS Rahman vs State, 58 DLR (AD) 63; Bangladesh vs Shahjahan Seraj, 32 DLR (SC) 1; Abdul Kader Chowdhury vs State, 28 DLR (SC) 38; Sabdul Ali (Md) vs Md Mahed Ali Sarker, 50 DLR 146; Hazi Abul Bashar vs Hossan Uddin Ahmed, 6 BLT AD 193 = 51 DLR (AD) 14 ref.

Md Shahjahan, Advocate—For the Petitioner.

Mohammad Ali Zinnah AAG—For the State.

Judgment

Siddiqur Rahman Miah J: This Rule under section 561A of the Code of Criminal Procedure was issued calling upon the opposite party to show cause as to why the proceeding of Keranigonj PS case No. 16(11) 2004 under sections 147/148/249/379/307/447 of the Penal Code now pending in the court of 1st class Magistrate, Dhaka shall not be quashed.

2. The short facts of the prosecution case is that one Alhaj Abdur Rahman lodged FIR with Keranigonj PS on 9-11-2004 stating *inter alia* that he is the member of Governing Body of Doleshwar A Mannan College; that on 26-8-2004 accused Khairuzzaman with his followers claimed chanda; that accused Kazi Khairuzzaman on 5-11-2004 at about 12-30 with other accused including 100/150 persons being armed with piston, revolver, hockey-stick, chapati with Raj Mistry and other labourer entered into the college land and prepared to start work violating the *status-quo* order of District Judge, and that the local people Alhaj Nemayt Ullah, Firoj, Amzad, Nazir and others announced through Mosque's mike that the land of college was captured by the accused and hearing such sound, they left the place making blank fire by engine boat and they also took sign boards and thereafter the police appeared there. Thus Keranigonj PS case No. 16(11) 2004 under sections 147/1487/249/379/307/447 of the Penal Code was started.

3. The petitioners voluntarily surrendered before the court who were enlarged on bail and the case is under investigation.

4. The police after investigation submitted charge-sheet No. 29 dated 30-4-2005 against the petitioners.

5. Being aggrieved by and dissatisfied with the proceeding, the accused petitioners moved before this court under section 561A of the Code of Criminal Procedure praying for quashment of the proceeding whereupon this Rule was issued.

6. Mr Md Shahjahan the learned Advocate for the accused petitioners submits that the accused petitioner No.l Kazi Khairuzzaman is the real owner of the suit property and that the accused petitioner No. 1 filed Title Suit No. 291

*Criminal Miscellaneous Case No. 321 of 2005.

of 2004 in which the informant is a defendant No.6 wherein temporary injunction as granted and against which the informant filed Civil Revision No.418 of 2004 in the court of District Judge, Dhaka who upheld the order of the trial court. He further submits that being frustrated with the result of the civil case, the informant has been filing the criminal case against the accused petitioners one after another in order to grab the property.

7. It is further submitted that as per ejhar no *status-quo* was in force rather injunction order is in force against the informant refraining them from entering into the suit land and to construct any structure which they have violated for which violation Misc. case No.20 of 2004 was filed against the informant and others and, as such, they filed this case only to save them from the violation proceedings and that if facts considered to be true even then the proceeding can not be continued as on the same matter, civil case is pending and civil matter cannot be decided in criminal proceedings and their remedy if any lies with civil court.

8. Mr Md Shahjahan also submits that it is stated in the FIR that accused petitioner No. 1 Kazi Khairuzzaman and 10 others being armed with deadly weapons entered into the suit premises and started to construct structure and when the local people came forward to prevent them, then they went away making open fire. Whereas it transpires from the police Diary No. 1690 dated 6-11-2004 under section 54 of the Code of Criminal Procedure that on the same date and the same time, police was present on the place of occurrence and arrested nine of the accused persons who were preparing to commit some cognizable offence. Mr Shahjahan the learned Advocate for the accused petitioners stoutly submits that this documentary contradictions clearly proves that the case alleged against accused petitioners are false and concocted and the facts of the ejhar is fabricated. He further submits that the inherent jurisdiction of the High Court Division can be exercised to quash the proceedings to prevent the abuse of the process of the court or otherwise to secure the ends of justice where it is found that there is glaring contradiction between the FIR and police report and this documentary contradiction proves that FIR is the product of falsity and forgery and, as such, this proceeding is liable to be quashed.

9. The learned Advocate for the petitioner refers the decisions in the case of *Rahela Khatun vs Abul Hassan* reported in *48 DLR (AD)213,* in the case of *Latifa Akater vs The state and another* reported in *7 BLT (AD) 282,* in the case of *Md Obaidul Hoque @ Obaidullah @ Obaidul Islam @ Obaidullah and another vs The state and another* reported in *20 BLT HCD 44,* in the case of *Ali Akkas vs Enayet Hossain* reported in *17 BLD (AD) 44 = 2 BLC (AD) 16* in support of his contention.

10. Mr Mohammad Ali Zinnah, the learned Assistant Attorney-General for the state opposing the Rule submits that there is *prima facie* case against the petitioners and, as such, the impugned proceeding is not liable to be quashed.

11. He refers the decisions in the case of *Abdul Huque vs State* reported in *60 DLR (AD) 1,* in the case of *Nazrul Islam vs State* reported in *13 MLR (AD) 184,* in the case of *Salma Khaton vs The state* reported in *38 DLR, 348 and* in the case of *AHS Rahman vs State* reported in *58 DLR (AD) 63* in support of his contention.

12. Before entering into the facts of the case, let us first see the provision of section 561A of the Code of Criminal Procedure.

> "561A : 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".

13. Now let us see the decision of our Apex court. It is held in the case of *Bangladesh vs Shahjahan Seraj* reported in *32 DLR (SC) 1.*

> "The inherent jurisdiction is attracted firstly to make such orders as may be necessary to give effect to any order under the code, secondly to prevent abuse of process of any court and lastly otherwise to secure the ends of justice. Section 561A emphases that the High court has widest jurisdiction to pass orders to secure the ends of justice".

14. Our Supreme court held in the case of *Abdul Kader Chowdhury vs The State* reported in *28 DLR (SC) 38.*

> "High Court extra-ordinary power under its inherent jurisdiction in relation to courts subordinate to it under section 561A is to be exercised to prevent abuse of the process of the Court and advance substantial justice ".

15. It is held in the case of *Md Shamuddin @ Lambu vs State:*

> "When a prosecution arises out of ill motive or improper motive, the machinery of administration of justice need to be available to such person".

16. Our Appellate Division held in the case of *Ali Akkas vs Enayet Hossain* reported in *17 BLD (AD) 44 :*

> "in a case where the allegations in FIR or the petition of complaint, even if taken at their face value and accepted in their entirety do not constitute the offence alleged".

17. Now let us see whether the proceeding of this case is liable to be quashed in view of the above decisions considering the facts and circumstances of the case.

18. The facts of the case are that on 5-11-2004 at 12-30 night the accused petitioner No. 1 Kazi Khairuzzaman along with 19 (Nineteen) other accused persons being armed with deadly weapons entered into the College premises and tried to start construction work but when the local people came forward to prevent them, then they left the place of occurrence.

19. But it transpires from the police report submitted by SI Md Shamsuzzaman in connection with Keranigonj PS General Diary No. 1690 dated 6-11-20004 under section 54 of the Code of Criminal Procedure that on the same time, same date and same place, police of Keranigonj was present there who arrested nine of the accused persons for taking preparation of committing cognizable offence. The above mentioned glaring contraction between the contents of FIR with that of police report clearly proves that the contents of FIR is false and concocted. It further appears to us that the IO being biased submitted charge-sheet against the accused persons overlooking such contradictions.

20. There is no denying of the fact that the land centering which the allegation is revolving is a disputed land. Both the college and the accused petitioner No.l has been claiming the land. The accused petitioner No. 1 filed Title Suit No. 291 of 2004 in respect of the suit land in which the informant is defendant No.6 and prayed for injunction which was granted and the defendant filed revision in the Court of District Judge, Dhaka who upheld the order of the learned trial court. It is the contention of the accused petitioner that being frustrated about result of the Civil suit, the informant has filed this false Criminal case only to harass and humiliate the accused. There is substance in the contention of the accused petitioners.

21. Moreover the place of occurrence is still under the possession of accused petitioner, No.l so his entering into the place of occurrence does not constitute offence of Criminal trespass under section 447 of the Penal Code. The Criminal proceeding in the instant case is required to be quashed to secure the ends of justice so that the title may be set alright once for all by the Civil court. We find support of the above view in the case of *Sabdul Ali (Md) vs Md*

Mahed Ali Sarker reported in *50 DLR 146* and in the case of *Hazi Abul Bashar vs Hossan Uddin Ahmed* reported in *6 BLT AD 193 = 51 DLR (AD) 14.*

22. It is stated in counter Affidavit filed on behalf of the accused petitioner No.1 that the petitioner is a very respectable and distinguished person in the society. He is a very renowned businessman and proprietor of Romel Motors, Jewel Automobiles, Arju Enterprise etc. and was a member of Dhaka Chamber of commerce Industry. He is one of the highest tax payees and associated with different charitable and social work oriented activities and organization. He is a PHF member of the Rotary Club. He is also the president @ Founder of Kari Belali Darul Ulum Madrasha, South Keranigonj, member of Shura committee of Jamia Hosainia Islamia Arjabad, Mirpur, the President of Utar Shamoly Parcham Agargaon Shamaz Kayllan Samity, vice President of west Agargaon Central Jame Mosque, Dhaka and a Human Rights activist also.

23. It is not believable that the man of such outstanding background can go with 19 men to construct structure in the land which is in his possession.

24. On perusal of the materials on record it appears that out of a well planned design, the petitioners have been implicated in this case. It further appears that the fact of the case is so preposterous that no criminal case stands against the petitioners. In spite of that the police most illegally had submitted charge-sheet against the accused petitioners. The judicial process should not be allowed to be abused in such a way out of vlendetta and enmity for the sake of upholding the confidence of the people in our justice delivery system and, as such, it is reasonably presumed that the accused petitioners are the victim of a grave conspiracy and design. On perusal of the evidence on record it appears that the accused petitioners are absolutely innocent. They never committed any offence as alleged against them. They have been falsely implicated in this case only for harassment and humiliation.

25. In view of the above decisions and considering the facts and circumstances of the case and evidence on record, it appears that no *prima facie* case has been made out against the accused petitioner. The informant being the enemies of the petitioners has brought this false and concocted case against the petitioners. If the allegations in FIR and finding in the charge sheet are taken in their face value and accepted in their entirety, no *prima facie* charge is made out against the accused petitioners.

26. Having regard to the facts and circumstances of the case as noticed above, we find no *prima facie* case against the accused petitioners to connect the petitioners with the alleged commission of offence and that the allegation has been falsely brought against the accused petitioners only to harass and humiliate them.

27. Considering the above facts and circumstances of the case, we find that it is fit case to interfere at this stage under section 561A of the Code of Criminal Procedure to prevent the abuse of the process of the court and to secure the ends of justice and thus the Continuation of such proceedings will be a flagrant abuse of the process of the court and such process of law must be not used as an engine of harassment.

28. In view of the above fact, we hold that the instant proceedings against the petitioners is an abuse of the process of the court and interference of this court is required under its inherent jurisdiction to secure the ends of justice and the said proceedings is liable to be quashed.

29. In the result, the Rule is made absolute. The proceeding of Keranigonj PS Case No. 16(11) 2004 corresponding to GR No. 449 of 2004 pending in the court of 1st class Magistrate, Dhaka is hereby quashed.

30. The order of stay granted earlier by this court is hereby vacated.

Let a copy of this judgment be sent to the court below at once.

Ed.

High Court Division
(Special Statutory Jurisdiction)

Md Bazlur Rahman J
Sheikh Hassan Arif J } Bureau Veritas (Bivac) ...Appellant-Petitioner

vs

Customs, Excise and VAT Appellate Tribunal and others..... .....Respondents*

Judgment
March 11th, 2013.

Customs Act (IV of 1969)
Section 196D

Since the High Court Division's ordinary appellate power includes the power to send the case back on remand and that power having not been clearly and unequivocally ousted by the relevant provisions of the Act, the High Court Division is empowered to send the case back on remand, if it feels necessary, in disposing of an appeal preferred before it......(10)

Section 196G

Although not specifically mentioned under Section 196G of the Act, the High Court Division, in the exercise of its appellate power as the second the appellate forum, has also the power to send the case back to the lower authorities on remand. .....(11)

*Customs Appeal No. 86 of 2008.

Md Zulfikar vs Abul Kalam Chowdhury, 1990 BLD (AD) 58 = 58 DLR (AD) 83 ref.

MA Azim Khair, Advocate with Md Iqbal Hossain, Advocate—For the Appellant.

Protikar Chakma, AAG—For the respondents (argued with the leave of the Court)

Judgment

Sheikh Hassan Arif J: Appellant, a PSI agent, has preferred this Appeal under Section 196 D of the Customs Act, 1969 ("the said Act") against the judgment and order dated 08-07-2008 passed by the Customs, Excise and VAT Appellate Tribunal ("the Tribunal") as contained in File No. CEVT/Case (Cus)-222/2004 dismissing the Appeal preferred by the Appellant and thereby affirming the order dated 15-03-2004 as contained in File No. 5-Cus/PSI(1835) Buro:/2002/Group-2/5790(6) dated 15-03-2004 passed by the Commissioner of Customs, Customs House, Dhaka (respondent No. 2) imposing a penalty of Taka 25,000 under Article 10(1) of the PSI Order 1999 (SRO No. 316-Ain/99/1807/Sulko dated 19-10-1999).

2. Short back ground facts, relevant for disposal of the appeal, are that the Butterfly Electronics Limited (proforma-respondent No.3) imported some television parts from Korea covered by Letter of Credit No. 1269-02010085 dated 28-03-2002 under PSI scheme and, accordingly, presented bill of entry on 14-07-2002. The said television parts were certified by the Appellant as PSI agent through CRF certificate, being BDH 2002 45181C dated 24-06-2002, classifying them under HS Code 8529.90.30. During assessment, the Customs Authority, however, found them to be Complete Built-in-Unit (CBU) and accordingly assessed them at a higher rate in respect of duties under HS Code No. 8528.12.90. Admittedly, the said parts were of the colour

TV and were imported except the Picture Tube, which, according to the Appellant, is the vital part of the Television without which the same cannot be called or termed as CBU or not even Complete Knock Down (CKD) goods. Since, during adjudication, the HS Code, as certified by the Appellant, was found wrong, it was found to be responsible for such wrong certification and was accordingly imposed a penalty of Taka 25,000 vide order dated 13-03-2004 passed by the respondent No. 2 in view of Article 10(1) of the PSI Order, 1999. Being aggrieved by this adjudication order, the Appellant preferred an appeal before the Tribunal under Section 196A of the said Act, whereupon, the Tribunal, after hearing the parties, dismissed the same by the impugned judgment and order dated 08-07-2008 and, thereby, affirmed the said adjudication order passed by the Commissioner of Customs, Dhaka (respondent No. 2). As against this judgment and order of the Tribunal, the Appellant has preferred this Appeal under Section 196D of the said Act.

3. Mr MA Azim Khair, learned advocate appearing for the Appellant, at the very outset, has drawn our attention to the different nomenclatures as used internationally in respect of the identification of different goods, in particular the terms CBU and CKD as used under Chapter-85 of the Schedule-2 to the said Act, as amended by the Finance Act, 2003. Mr Khair submits that although the admitted position is that the parts of the said colour television were imported without the Picture Tube, the Customs Authority, most arbitrarily and in a mechanical way, classified the same as CBU under HS Code No. 8528.12.90. Referring to the descriptions of the terms CBU and CKD as down-loaded from a website (www.abbreviations.com), Mr Khair submits that in the instant case the term CBU should mean a complete television unit imported as a whole in a built-in condition, on the other hand, the term CKD should mean parts of a complete television unit imported as parts and which may become a 'complete television' after import through assemble in the country where they are so imported. Mr Khair argues that had the Commissioner of Customs or the Tribunal done a little bit examination of the said terms as against the parts certified by the Appellant, they would have reached a correct conclusion. However, in the instant case, he submits, neither the Customs Authority nor the Tribunal took the trouble to go into those questions of facts for determination of the real identity and character of those parts as against the nomenclatures used in the Schedule-2 to the said Act. Mr Khair further submits that it has now become practice, both for the Customs Authority and for the Tribunal, to reach conclusions as to the correct HS Codes without even examining the facts before them, which, under the law, they are obliged to do and thus this is a fit case for sending the same to the Tribunal on remand to assess those facts vis-a-vis the descriptions of the terms 'CBU' and 'CKD' as referred to in the said Schedule-2.

4. Mr Protikar Chakma, learned Assistant Attorney General present in Court, arguing on behalf of the Customs Authority with the leave of the Court, submits that there is no such illegality in the impugned judgment and order and, as such, the Appeal is liable to be dismissed.

5. Considered the submissions of the learned advocates and materials on record. Upon perusal of the judgments and orders passed by the Tribunal as well as the Commissioner of Customs, Dhaka (respondent Nos. 1 and 2 respectively), it in fact appears that neither the Customs Authority nor the Tribunal took the trouble to examine the questions of facts involved in this case in that whether or not the television parts as imported by the importer and certified by the Appellant do fall under the terms 'CBU' as referred to under Chapter-85 of

the Second Schedule to the said Act. Neither of them even mentioned a single word as to how those parts come within the perview of the term CBU (Complete Built-in Unit) when the admitted position is that the importer did not import the television as a whole but imported parts thereof except the Picture Tube.

6. As against the judgments and orders of the authorities below, we have also examined the provisions under Section 196 F and 196G of the said Act to explore the scope of jurisdiction of the High Court Division as the Second Appellate Forum to find, in particular, whether the High Court Division has power to send the case back either to the Tribunal or to the Customs Authority on remand. While exploring the same, we have also examined the provisions of sections 196A, 196B and 196C of the said Act to see the scope of power of the Tribunal in disposing of an Appeal preferred before it.

7. It appears from section 196B that although the power of sending a case on remand was not available with the Tribunal before 2006, the said power was inserted therein by way of amendment vide Act No. 22 of 2006. As regards the power of the High Court Division in disposing of an Appeal as the Second Appellate Forum, no such power of remand has been specifically mentioned under section 196G, which only says:

> "Where an Appeal is preferred under section 196D, the High Court Division shall decide the points raised therein and such other points incidental thereto as are deemed necessary and shall deliver its judgment thereon".

8. Now the question is when the Statute is silent about the specific power of remand being vested in the High Court Division, can the High Court Division send the case back on remand. Although the exact issue was not examined or raised before this Court in earlier cases, Mr Khair has cited a decision of our Appellate Division in *Md Zulfikar vs Abul Kalam Chowdhury, 1990 BLD (AD) 58 = 42 DLR (AD) 83* wherein the Appellate Division had the opportunity to examine a similar issue.

9. In *Zulfikar's case*, the District Judge was vested with the appellate jurisdiction under sub-section (4) of section 29 of the Local Government (Union Parishad) Ordinance, 1983 against the judgment and order passed by the Election Tribunal. This particular provision was silent about the power of transfer of such appeals by the District Judge. Examining various decisions of this Court as well as the superior Courts of England and this sub-continent, our Appellate Division held that;

> "When the Legislature confers special or additional jurisdiction on a recognized Court, it may lay down the manner in which it is to be exercised, but if it is silent then all rules of procedure that apply to its ordinary jurisdiction will be attracted in regard to the special jurisdiction: It is a settled principle of law that if jurisdiction clearly conferred on a Court is to be ousted, the exclusion of such jurisdiction must be made in clear and unequivocal term." (Para-9)

10. It further appears from section 196B as well as section 196G of the said Act that while the Legislature specified the functions of the Appellate Tribunal in disposing of an Appeal and particularized as to what orders can be passed by the Tribunal, namely confirming, modifying or annulling the decision or order or may refer the case back to the authority which passed such decision or order, section 196G has specified none such specific powers of the High Court Division. This means that the Legislature is silent as regards the second appellate jurisdiction of the High Court Division while it has given such special jurisdiction on the High Court Division for disposing of such second

appeal preferred before it against the appellate judgment and order of the Tribunal. Thus, taking recourse to the ratio as settled by our Appellate Division in the *Zulfikar's case,* we may safely hold that since the High Court Division's ordinary appellate power includes the power to send the case back on remand and that power having not been clearly and unequivocally ousted by the relevant provisions of the said Act, the High Court Division is empowered to send the case back on remand, if it feels necessary, in disposing of an Appeal preferred before it under section 196D. We also find reference of this principle of law in the minority judgment of our Appellate Division (per Mr KM Sobhan, J) in *Bangladesh vs Shahjahan Siraj, 32 DLR (AD) 1* (Para-42) wherein it has been observed that every Court, in the absence of any specific provision in the law, must be deemed to posses, as inherent in its jurisdiction, all such powers as are necessary to the right and to undo the wrong in the course of administration of justice on the principle that when a law gives a person anything it gives him that without which it cannot exist ("quande lex aliquid alicui concedit concedera videtorid sine quores ispsa essenon polest").

11. In the instant case, since the special second appellate power has been vested in the High Court Division by the Legislature under the relevant provisions of the said Act, we are of the view that, in disposing of the said Appeal, the power to send the case on remand is such a power without which the High Court Division, as the second appellate forum, cannot function in the ordinary course and such power is concomittal with the power to dispose of such Appeal. This being so, we hold that, although not specifically mentioned under section 196G of the said Act, the High Court Division, in the exercise of its appellate power as the second the appellate forum, has also the power to send the case back to the lower authorities on remand with such directions as it may think fit.

12. As stated earlier, both the authorities below have failed to determine the questions of facts involved in this matter as regards the determination and classification of the parts imported by the importer for the purpose of allocating correct HS Code, which they were obliged to do. We are in agreement with Mr Khairs' submissions that this is a fit case for sending the same back to the Appellate Tribunal for determination of those facts first and to reach its decision as to the allocation of correct HS Code to the said imported goods, and, only after that, the liability or culpability of the Appellant for issuing the CRF certificate in question may be determined.

Regard being had to the above discussions of law and facts, we are inclined to send this matter back to the Appellate Tribunal on remand for the determination of facts involved therein as regards the proper identification of the parts as certified by the Appellant as against the description of the terms CKD and CBU in the Schedule-2 to the said Act and to determine whether, after such examination, those parts fall under CBU. If it is found that those parts do not come under the description of CBU, then they will take the decision as regards the culpability of the Appellant in issuing the CRF certificate in question in accordance with law.

13. With the above observations and direction, this Appeal is allowed. Accordingly, the impugned judgment is set-aside. The Tribunal is directed to dispose of the appeal on remand in line with the above observations as soon as possible, preferably within 06 (six) months from the date receipt of the copy of this judgment and order.

Office if directed to send a copy of this judgment and order under the seal and signature of an officer of this Court to the respondent No. 1 in view of sub-section (3) of section 196G of the said Act.

Ed.

High Court Division
(Special Original Jurisdiction)

Md Bazlur Rahman J
Sheikh Hassan Arif J

Abdul Wahab & anr...
.....Petitioner

vs

Chairman, First Labour Court, and others..Respondents*

Judgment
February 26th, 2013.

Employment of Labour (SO) Act [VIII of 1965] **Section 18(1)(4)**

When sub-section (1) of section 18 provides for personal hearing if such prayer is made, sub-section 4(a) provides for inquiry which may in some particular cases should include *'personal hearing'* as well although not specifically mentioned therein. Inquiry as an eyewash cannot be the contemplation of the Legislature. Although personal hearing in an inquiry, if not sought by the delinquent worker, is not provided specifically by sub-Section (4) of Section 18, depending on the facts and circumstances of a particular case the Domestic Tribunal should read therein the words *'personal hearing'* as a mandatory requirement in particular when the allegations themselves do not confirm the identity of the delinquent workers. .....(18)

Employment of Labour (SO) Act [VIII of 1965] **Sections 18(4)**

Personal hearing ought to have also been given through the inquiry to the petitioners who did not seek such hearing as the same is envisaged under sub-Section (4) of Section 18 in some circumstances and in that hearing they ought to have been given the opportunity to cross-examine the victims. .....(19)

*Writ Petition Nos. 1962, 1963, 1964 & 1965 of 2009.

SH Quddus vs Chairman, Labour Court, Chittagong, 33 DLR 1; Bashir Ahmed vs Bangladesh Jute Mills Corporation, 44 DLR (AD) 267; MA Hai vs TCB 32 DLR (AD) 49; Bangladesh vs Md Abu Taher [31 DLR (AD) 33; Mostafa Miah vs Chairman, First Labour Court, Dhaka, 46 DLR 373; Bashir Ahmed vs BJMC, 44 DLR (AD) 269; Manager, GBSM Ltd vs Chairman, First Labour Court, 34 DLR 1; Adamjee Jute Mills vs Chairman, Third Labour Court, 42 DLR 371; Md Motabar Hossain vs BJMC, 36 DLR (AD) 282; Principal, Shahriar Murshed, 48 DLR (AD) 33; Masum Iqbal vs Director, SW, BUET, 49 DLR 104; Kazi Mokhlesur Rahman vs Secretary, Ministry of Law, 49 DLR 126 and Akhlasur Rahman vs Safarullah 42 DLR (AD) 189, ref.

Md Mozammel Hossain, Advocate—For the Petitioner in all the Writ Petitions.

Kazi A Habib, Advocate—For the Respondent No.2 in all the Writ Petitions.

Judgment

Since similar questions of law and facts are involved in the aforesaid four writ petitions, the same have been taken up together for hearing and are now being disposed of by this single judgment.

2. At the instance of the writ petitioners, similar Rules were issued calling upon the respondents to show cause as to why four judgments and orders, all dated 25-2-2009, passed in Complaint Case Nos. 12, 13, 14 and 15 of 2002 respectively by the Chairman, First Labour Court, Dhaka (Annexure-H to all writ petitions) should not be declared to be without lawful authority and are of no legal effect.

3. Short back ground facts, relevant for the disposal of the Rules, are that the writ petitioner-workers filed four Complaint Cases being Complaint Case Nos. 12, 13, 14 and 15 of

2002 respectively before the First Labour Court, Dhaka (respondent No.1) under Section 25(1)(b) of the Employment of Labour (Standing Orders Act, 1965) (hereinafter called "the SOA 1965") challenging their dismissals by the Dhaka Electric Supply Authority ("DESA") (respondent No.2) alleging, *inter alia*, that the petitioners were permanent workers of the DESA and were Trade Union activists holding different posts in Narayangong Branch of the DESA Sramik League (registration No. B-9), which was the Collective Bargaining Agent (CBA) of the DESA till 18-2-2002; that each of the first three petitioners was served with separate charge-sheets dated 4-10-2001 and the other petitioner was served with charge-sheet dated 10-10-2001 seeking their reply, and to face inquiry by an Inquiry Committee constituted by the DESA, to the allegations that on 26-9-2001, when a DESA team of Officers, including Mr Mustafizur Rahman, Assistant Director (internal audit), went for meter inspection, the petitioners along with some other unruly workers and outsiders assaulted Mr Rahman physically, snatched some papers from him and took him on a vehicle forcefully and thereby obstructed the team from performing their duty; the petitioners, by their written replies, denied all the allegations; however, the Inquiry Committee, during inquiry, without giving them proper opportunity to defend and hearing and without examining any witnesses, found them guilty; DESA accordingly, dismissed them all from services under section 17(3) of the SOA 1965 as a measure of victimization for their trade union activities; the petitioners then lodged the aforesaid Complaints before the Labour Court as their grievance notices under section 25(1) (a) of the SOA 1965 got no response. DESA contested the said Complaint Cases by filing Written Statements contending, *inter alia*, that the petitioners were involved in the said assault and attempted abduction of the officers of the said inspection team and they were accordingly proceeded against through charge-sheets followed by an inquiry in accordance with law and having been found guilty were dismissed from service. The Labour Court concerned, after examining the witnesses and considering the materials produced by the parties, vide judgment and order dated 14-11-2005, allowed the Complaint Cases and directed the DESA to re-instate the petitioners in their respective services with all back wages. Being aggrieved by this judgment, DESA moved Writ Petition Nos. 567- 570 of 2006 from the High Court Division of the Supreme Court of Bangladesh, whereupon, a Division Bench of the High Court Division, vide judgment and order dated 3-8-2008, made the Rules issued therein absolute upon setting-aside the said judgment and order dated 14-11-2005 passed by the Labour Court. Through that judgment, the High Court Division, however, did not pass any order or observation as to the legality of the order of dismissal or procedure followed leading to the said orders of dismissal, but sent the Complaint Cases back to the Labour Court on remand for determining those issues as per the observations made in the said judgment. Thereafter, the Labour Court again heard the parties arguments and, finally, by impugned judgment and orders, all dated 25-9-2009, dismissed all the four Complaint Cases filed by the petitioners. Being aggrieved by these judgments and orders, all dated 25-9-2009, the petitioners moved this Court and obtained the aforesaid Rules.

4. DESA contested all the four Rules by filing separate affidavits-in-opposition maintaining its earlier position that there was no procedural flaw on the part of the DESA in passing the orders of dismissal and that the Labour Court, on remand, rightly dismissed the Complaint Cases in question.

5. Mr Md Mozammel Hossain, learned advocate appearing for all the four petitioners, at the very outset, has taken us through the earlier judgment dated 3-8-2008 of this Court

passed in Writ Petition Nos. 567-570 of 2006 (Annexure-G) and submits that he does not have any issue with regard to the observations of law made by this Court in that judgment. However, he submits that, the Labour Court, on remand, did not or failed to follow those observations of law in their true essence in the particular set of facts and circumstances of the instant cases. Referring to the cases as cited in the said judgment, namely the case of *SH Quddus vs Chairman, Labour Court, Chittagong [33 DLR 1]* and the case of *Bashir Ahmed vs Bangladesh Jute Mills Corporation [44 DLR (AD) 267]*, Mr Hossain argues that since the superior Courts of this country have time and again held that it is the responsibility of the Labour Court to see whether there was any flaw in the procedures adopted by the employer before passing an order of dismissal against a particular worker, the Labour Court concerned has failed to detect that procedural flaw inasmuch as that the alleged victims of the incident were not even produced before the Inquiry Committee and none of their evidences or depositions was recorded by the Inquiry Committee in presence of the writ petitioners, thus depriving them any opportunities of cross-examining those victims. Accordingly, he continues, the DESA Inquiry Committee or the DESA authority not only failed to conduct proper inquiry for finding the guilt of the concerned workers in view of section 18(4)(a) but also failed to give real personal hearing within the meaning of section 18 (1)(c) when such prayer for personal hearing was admittedly made by some workers. Mr Hossain further submits that although the statement allegedly made by the victim officers as regards the alleged assault was before the Inquiry Committee and the same was taken into consideration by the Inquiry Committee for reaching its conclusion, yet the said statement was even not produced before the petitioner-workers nor their attention was ever drawn to the contents of such statement. This being so, he submits, the Inquiry Committee, thereby, failed to give them any opportunity either to controvert the allegations contained therein or to give proper reply as to those allegations. Given this particular scenario of the instant cases, he submits that the ratio as applied in the Bashir Ahmed's case in the facts of that case will not be applicable in the facts and circumstances of the present cases in that the Labour Court in the instant case on remand failed to appreciate that the authority had committed major procedural flaw in reaching its conclusion of awarding major punishment of dismissal against the petitioners. In support of his submissions, Mr Hossain refers to the decisions of this Court in *MA Hai vs TCB [32 DLR (AD) 49, Bangladesh vs Md Abu Taher [31 DLR (AD) 33* and *Mostafa Miah vs Chairman, First Labour Court, Dhaka [46 DLR 373]*.

6. Mr Kazi A Habib, learned advocate appearing for the DESA, on the other hand, submits that since the Labour Court in the earlier judgment decided the cases like an appellate forum through re-assessing the evidences, the High Court Division in Writ Petition Nos. 567-570 of 2006 set-aside the said judgment of the Labour Court and sent the cases back on remand directing the Labour Court to decide the cases like a revision and further directed it not to re-assess the evidences. In the said judgment, he continues, this Court observed that in view of the ratio declared by our Appellate Division in Bashir Ahmed's case, cross-examination of witnesses in all cases were not required and the authority could reach its decision of dismissal by mere questioning the accused-workers. Mr Habib submits that since the Labour Court, on remand, followed the direction given by the High Court Division in the said judgment and accordingly found no procedural flaw on the part of the DESA in punishing the concerned workers, this Court should not interfere into the same. Mr Habib further points out that since the allegation was that some officers were physically assaulted by

some workers including the petitioners, it would have been much more embarrassing for those officers to again come forward and depose before the Inquiry Committee allowing the petitioners to cross-examine them regarding the said assault. Considering this aspect, he continues, the Inquiry Committee rightly decided no to bring those victim officers before the Inquiry Committee and reached its conclusion relying on the statement made by those officers on the day of occurrence. Mr Habib further argues that the petitioners, who sought personal hearing as per law, were given such hearing and they were asked specific questions through questionnaire, to which they gave their reply. This being so, he submits that, the authority followed all the procedural requirements of law as regards the inquiry and/or hearing and, as such, committed no illegality in reaching its decision. In support of his above submissions, Mr Habib refers to the decisions of this Court in *Bashir Ahmed vs BJMC [44 DLR (AD) 269], SH Quddus vs Chairman, Labour Court, Chittagong [33 DLR 1], Manager, GBSM Ltd vs Chairman, First Labour Court [34 DLR 1], Adamjee Jute Mills vs Chairman, Third Labour Court [42 DLR 371], Md Motabar Hossain vs BJMC [36 DLR (AD) 282], Principal, Shahriar Murshed [48 DLR (AD) 33], Masum Iqbal vs Director, SW, BUET [49 DLR 104], Kazi Mokhlesur Rahman vs secretary, Ministry of Law [49 DLR126]* and *Akhlasur Rahman vs Safarullah [42 DLR (AD) 189].*

7. Considered the submissions of the learned advocates, perused the writ petitions, impugned judgments, Labour Court Records and other materials on record. It is on record and admitted position that the petitioners were ordered to be re-instated with back wages by the Labour Court through its earlier judgments and orders dated 14-11-2005. However, this Court, vide its judgment dated 3-8-2008 passed in Writ Petition No. 567-570 of 2006, set-aside the same and directed the Labour Court to rehear the Complaint Cases on merit in line with the guidelines and observations contained in the said judgment. In formulating the guidelines and observations in the said judgment, this Court relied on the ratio declared by the High Court Division and the Appellant Division of this Court in two cases, namely *SH Quddus vs Chairman, Labour Court, Chittagong 33 DLR 1 and Bashir Ahmed vs Bangladesh Jute Mills Corporation 44 DLR (AD) (1992) 267,* and observed as follows:

> "So it is seen that the Labour Court cannot make any reassessment of the evidence recorded by the Domestic Tribunal and arrive at its own finding unless the same is a perverse one. The duty of the Labour Court under Section 25 is to see whether the Domestic Tribunal complied with the requirements enumerated in Section 18(1) of the Act of 1965, nothing more, nothing less. Precisely speaking, in this respect, the Labour Court is akin to a Revisional Court.
>
> Coming back to the present case, it is on record that no witnesses were examined by the Domestic Tribunal either on the side of the DESA or on the side of the workers. However, out of four workers, Abu Hanifa and Abdul Wahab prayed for personal hearing and accordingly they were heard in person and they also replied to the written questionnaires supplied to them. But the remaining two workers, namely, Md Jane Alam and Abul Hashem did neither make any prayer for personal hearing nor they were supplied with any written questionnaires. In any case, all the workers were found guilty of misconduct by the Domestic Tribunal leading to their eventual dismissal from service.
>
> The 'ratio' that has been enunciated in the case of Bashir Ahmed vs Bangladesh Jute Mills Corporation and others reported in 44 DLR (AD) 267 is that in an appropriate case, the Domestic Tribunal may arrive at a decision simply by questioning the

accused and considering his explanation and again, in, a particular case, examination of witnesses in presence of the accused my be absolutely necessary. So the mandate of our Appellate Division is that examination of witnesses in all cases by the Domestic Tribunal is not a must. The above 'ratio' decided by the Appellate Division should have been taken note of by the Labour Court in deciding the Complaint Cases lodged by the workers".

8. Finally, this Court concluded by observing:

"It appears that the Labour Court did not bear in mind the requirements of Section 18(1) of the Act of 1965 while disposing of the Complaint Cases instituted by the workers. It is the duty of the Labour Court to see whether the Domestic Tribunal committed any procedural flaw in finding the guilt of the workers or whether the said finding was perverse or not. The Labour Court ought to have disposed of the cases just like a Court of Revision but surprisingly enough the Labour Court made an in-depth analysis of the evidence of the witnesses examined before it and arrived at its own findings like a Trial Court. The materials upon which the Domestic Tribunal banked in finding the guilt of the workers were not considered by the Labour Court.

In view of the discussions made above, we are led to hold that the impugned decisions of the Labour Court are without lawful authority and of no legal effect. But since we are inclined to remand the cases to the Labour Court for disposal on merit, we refrain from making any observation thereon". *Underlines supplied to give emphasis)*

9. It appears from the above observations of this Court that the High Court Division very purposefully refrained from passing any order or observation as to the very legality of the procedure adopted by the Inquiry Committee or DESA and left it for determination by the Labour Court on remand. The emphasis as given by this Court in that judgment was on the responsibility of the Labour Court to see whether or not the authority, through its Domestic Tribunal, committed any procedural flaw in finding the guilt of the workers. The ratio declared by the cases of Bashir Ahmed and Quddus are also almost on the same premises which are that the Labour Court cannot act as an appellate forum and, as such, cannot reassess the evidences as already assessed by the Domestic Tribunal and, thereby, cannot substitute the finding of guilt reached by the said Domestic Tribunal. The only responsibility of the Labour Court is to see whether the Domestic Tribunal, in the particular facts and circumstances of a case, has committed any procedural flaw.

10. The procedures provided under section 18 of the SOA 1965 for imposing punishments of dismissal or discharge on a worker have to be followed by the Domestic Tribunal or the authority in reaching its decision to impose such punishment. Those procedural requirements include the writing of the allegations against the delinquent worker, giving copy of such allegations to him, according him a personal hearing if such prayer is made, an inquiry to be made as regards such allegations and the worker has to be found guilty of any of the charges alleged. It is further provided under sub-section 4(b) of Section 18 that if the delinquent worker is not found guilty as such he shall be deemed to have been on duty for the period of suspension for inquiry and shall be entitled to his wages for such period of suspension upon adjustment of subsistence allowances received already.

11. Now the question before us is whether, as per the ratio declared by this Court in the cases of Bashir Ahmed and Quddus, the Labour Court concerned did examine properly

whether or not there was any lapse on the part of the Authority or the Domestic Tribunal in fulfilling the requirements of the aforementioned procedures as provided under section 18. In doing such examination, however, Labour Court cannot go into the re-assessment of the evidences or materials before the Domestic Tribunal unless it is a case of no evidence or a case of perverse decision.

12. Since recording of allegations and serving copies thereof on the petitioner-workers are not disputed by either of the parties before us, the entire issue is focused on the question of 'inquiry' and 'personal hearing' as provided under section 18 of the SOA 1965. The petitioners' contention is that although an inquiry took place, the same was not a proper inquiry and that the petitioners were not given proper hearing. To address these two issues, we have examined the Labour Court Records. It appears from orders of the Labour Court dated 22-1-2009 to 25-2-2009 that upon receiving the copy of the judgment of the High Court Division passed in the earlier Writ Petition Nos.567-570 of 2006, the Labour Court concerned proceeded with the hearing of arguments by the parties as the parties refused to produce any further witness to depose. For better scrutiny of the scope of inquiry and hearing as conducted and accorded by the DESA through its Domestic Tribunal, we have perused the depositions of the Inquiry Officer, who deposed before the Labour Court as DW 2, to get some light as to the procedure adopted in the said inquiry. It appears from the said deposition that the written statement of the victims as given on the day of occurrence was before the Inquiry Committee for its consideration as had already been sent to it by the DESA authority. It further appears that the petitioners, who sought personal hearing, were given one set of written questionnaire seeking their answers to several questions already written therein. The said questions mostly concerned as to whether or not the said petitioners assaulted the said Mr Md Mustafizur Rahman and whether they snatched papers and spectacles from him, to which they answered in the negative. The petitioners who did not want any personal hearing, were not given any such questionnaire to answer, and the Inquiry Committee, upon mere examining the charge, reply and the said written statement of the victim officers, reached its conclusion of guilt as to the involvement of the petitioners in the said assault.

13. Section 18 of the SOA 1965 gave emphasis on, amongst others, two major requirements, viz, the 'personal hearing', if the same is sought by the delinquent worker, and finding him guilty "on inquiry". We have already gone through the decisions of this Court in the case of Quddus and Bashir Ahmed and in full agreement with them in that examination of witnesses in all cases is not required and that the Domestic Tribunal may reach its decision in some cases by mere putting some questions to the delinquent workers in the form of questionnaire. Now the question is whether, in the given facts and circumstances, the instant cases are those cases where examination of witnesses was not necessary. In other words, whether the inquiry by the Domestic Tribunal was done properly. To examine that issue, we have perused the provisions under Section 18 for better understanding of the words "on inquiry" as mentioned under sub-section 4(a) of section 18.

14. In the facts involved in the instant cases, it appears that a copy of charge-sheet was served upon each of the petitioners containing the allegations as to their alleged involvement in the assault on Mr Mustafizur Rahman and his team, to which the petitioners, in reply, denied in categorical terms, although admitted that they were present at the place of occurrence at the relevant time and gave explanation for their such presence. It further appears from the written questionnaire as well that the same

questions were put to some of them in written form to which they again replied in the negative and explained the reasons for their presence at the place of occurrence.

15. It is true that the examination of witnesses in all cases are not required but this cannot be the rule for each and every set of facts. Even in Bashir Ahmed's case, our Appellate Division observed that in a particular case examination of witnesses in presence of the accused may be absolutely necessary. But on the facts of that case, the Apex Court held that such opportunity of cross-examination was not necessary. The factual matrix of the cases before us and the Bashir Ahmed's case are totally different. In Bashir Ahmed's case, there were allegations against the delinquent employee regarding his involvement, active or passive, in the supply of jute from a place not authorized by the authority concerned. Upon inquiry it was found that although the higher quality of Jute were to be supplied from Kanaipur, in fact inferior quality of Jute were purchased from Zikargacha causing a loss of Taka 2.81 lakh and in that supply of lower quality Jute the connivance of the delinquent employee was found. The toll-receipts of a particular bridge and other documents indicating the purchase of lower quality jute from Zikargacha were before the Inquiry Committee on the basis of which the Inquiry Committee was able to reach its conclusion as to the involvement of the delinquent employee. However, in the instant cases, the admitted position is that the situation was tensed at the place of occurrence at the relevant time. It is even apparent from the very statement of the victim-officers (as submitted before the Labour Court and kept in the Lower Court record in Complaint Case No. 13 of 2002), that some unruly people assaulted the concerned officers and snatched papers from them. The said statement of victims further reveals that even the victims were not entirely sure as to the identity of the petitioners. The statement reads at one point:

"পরে জানা যায় শারিরিকভাবে লাঞ্ছিত করার ক্ষেত্রে মূখ্য ভূমিকা পালন করেন জানে আলম নামক একজন ব্যাক্তি, যিনি লাইনম্যান হিসাবে প ও স বিভাগ, নারায়নগঞ্জে কর্মরত আছেন। ইহাছাড়াও যাহাদের সনাক্ত করা যায় তাহারা হইলেন জনাব আবু হানিফা, মিটার পাঠক, জনাব আব্দুল ওহাব, ইলেকট্রিশিয়ান-বি, মিটার রিডিং কাজে কর্মরত। ইহাছাড়াও উক্ত দলে পনের-বিশজন সদস্য ছিল যাহাদের সনাক্ত করা যায় নাই।"

(Underlies supplied)

16. At another stage, the said statement of victims reads:

"কর্মকর্তাদের বহণকারী গাড়ি দুইটি ঢাকার উদ্দেশ্যে রওনা হইলে হামলাকারীরা বলেন জনাব আবুল হাশেম, সিবিএ ইউনিট কমিটির সাধারণ সম্পাদক, সাহেবের নির্দেশ রহিয়াছে সকল পরিদর্শক সদস্যকে সিংশ্লিস্ট বাঃ পঃ নারায়নগঞ্জ অফিসে যাইতে হবে।"

(Underlies supplied)

17. This statement itself reveals that the identity of the persons involved in the assault or behind the assault came to the knowledge of the victim-officers subsequent to the occurrence, which means they came to know about their identity from other sources and not on their own. It further shows that although the names of the petitioners are mentioned in the said statement, the petitioners were not personally known to the victims at the time of occurrence. Be that as it may, we are not in a position to say anything as to the genuineness of the source or basis of those information as contained in the said statement of the victims. Those information may be entirely correct or partially correct or wrong. But the million dollar question is when the victim officers came to know about the identity of the writ petitioners from other sources subsequent to the occurrence, did the petitioners not have any right to controvert those knowledge of identity or sources of identity implicating them in the alleged assault? Again, when there were more than 20 persons present in a tensed situation at the place of occurrence at the relevant time, did the petitioners not have any right to justify their presence at the place of occurrence by question-

ing the victims as to the manner and nature of assault took place in detail? At the same time, we fail to agree with Mr Habib that if such opportunity of cross-examination was given, that would have been more humiliating to the victim-officers in particular when it is on record that the said victim Mr Mustafizur Rahman was later produced by DESA before the Labour Court to depose and was allowed to be cross-examined, although he was not required to be produced before the Labour Court as such.

18. Besides, it is further admitted by the parties and even admitted by the Inquiry Officer in his deposition before the Labour Court that the said statement of victims was not even brought to the notice of the writ petitioners during inquiry. When Section 18 particularly provides for finding of guilt on inquiry, we are of the view that the inquiry in question has to be a proper inquiry and not a mockery of inquiry. Had it not been the intention of the Legislature, the words "on inquiry" and the words "a worker is found guilty of any of the charges alleged" would become redundant. When sub-Section(1) of Section-18 provides for personal hearing if such prayer is made, sub-section 4(a) provides for inquiry which may in some particular cases should include 'personal hearing' as well although not specifically mentioned therein. Inquiry as an eye-wash cannot be the contemplation of the Legislature. Although personal hearing in an inquiry, if not sought by the delinquent worker, is not provided specifically by sub-Section (4) of Section 18, we are of the view that depending on the facts and circumstances of a particular case the Domestic Tribunal should read therein the words 'personal hearing' as a mandatory requirement in particular when the allegations themselves do not confirm the identity of the delinquent workers.

19. As stated earlier, the factual scenario in the instant cases before us is totally different from the facts of the *Bashir Ahmed's case*. Here, most of the petitioners admitted that they were present at the place of occurrence at the relevant time but they did not commit any assault or were not involved in committing any assault even behind the door as alleged in the charge-sheet. The statement of the victims also do not confirm their involvement as a first-hand knowledge rather it implicates them on the basis of information received subsequently from other sources. Therefore, this is a fit case, as indicated in the Bashir Ahmed's case, where cross-examination of the witnesses or victims were absolutely necessary. For the same reasons, personal hearing ought to have also been given through the inquiry to the petitioners who did not seek such hearing as the same is envisaged under sub-Section (4) of Section 18 in some circumstances like the instant ones and in that hearing they ought to have been given the opportunity to cross-examine the victims.

20. Again, although the inquiry committee observed in the Inquiry Report (Annexure-E) that the presence of some of the delinquent workers at the place of occurrence were not acceptable or they were not supposed to be present there, we are not in a position to question their judgment as we are not disposing of this matter as an appeal, nor even the Labour Court was not in a position to substitute the opinion or inference drawn by the Inquiry Committee. Our concern is whether the inquiry was properly done or not. Since we have already found that this is a fit case where cross-examination of the witness or victims was absolutely necessary and since the statement of the victims, the very basis of the entire charges against the writ petitioners, was not even brought to the notice of the petitioners during inquiry, we are of the view that there were major procedural flaws in the inquiry by the Domestic Tribunal vitiating the decision of dismissal reached by the DESA. Since the law provides that finding of guilt of the delinquent workers has to be "on inquiry" and that

inquiry, in the instant cases, is vitiated by major procedural flaws, we have no option but to hold that the finding of guilt as reached by the DESA was not 'on inquiry' as contemplated in the relevant provisions of law, but on some extraneous matters, which are not permitted by law.

21. Regard being had to the above facts and circumstances of the case and the discussions of law, we are of the view that the Rules have substance and the same should succeed. However, since we have focused on the procedures of inquiry adopted by the Domestic Tribunal and not on the finding of the guilt by the Domestic Tribunal or the DESA, which we cannot, and considering the seriousness of allegations against the petitioners, we are of the view that the authority should still be at liberty to proceed against the writ petitioners if it is so advised in strict compliance with the procedures mentioned under Section 18 of the SOA 1965 and the observations given hereinabove.

22. In the result, the Rules are made absolute. All the four impugned judgments and orders dated 25-2-2009 passed by the First Labour Court, Dhaka (respondent No.1) on remand and the orders of dismissal in question passed by the DESA are, accordingly, set-aside. However, the DESA will be at liberty to proceed against the writ petitioners again, if it desires so, in strict compliance with the procedures under Section 18 of the Employment of Labour (Standing Orders) Act, 1965 and the observations made hereinabove.

Send down the Labour Court Records and communicate this order at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Md Bazlur Rahman J
Sheikh Hassan Arif J } Shamsunnahar.....
.....Petitioner

vs

Judgment
March 13th, 2013. } Bangladesh and others.....Respondents*

Artha Rin Adalat Ain (VIII of 2003)
Section 33(4)

Decree-holder institution, by not resorting to sub-section (4) of Section 33, has committed fraud on the Court by using the process of the same to grab the properties free of cost. This is an ample example of the abuse of process of the Court and the spirit of law for which we have no option but to interfere to prevent such gross injustice. .....(10)

Interpretation of Statute

It is the Court's responsibility to look into the intention of the Legislature behind the black words of the statute.

The impugned order, compared with the entire proceedings and the subsequent orders, passed by the executing Adalat in the instant case reveals how a provision of law may be applied in a very harsh way and how a gross injustice can be done under the shelter of literary, mechanical and pedantic application of a particular provision. .....(9)

Md Mozibur Rahman, Advocate—For the Petitioner.

Rani Akhter, Advocate—For the Respondent No.3.

Judgment

Sheikh Hassan Arif J: Rule was issued calling upon the respondents to show cause as to why the impugned order dated 24-8-2010 and 7-11-2010 (Annexures-D and F) passed by the Second Court of Artha Rin Adalat, Dhaka

*Writ Petition No. 4733 of 2011.

(respondent No. 2) in Artha Execution Case No. 164 of 2010, arising out of Artha Rin Case No. 209 of 2009, should not be declared to be without lawful authority and are of no legal effect.

2. Short facts, relevant for the disposal of the Rule, are that the First Lease Finance and Investment Limited (respondent No. 3), a financial institution, filed Artha Rin Case No. 209 of 2009 against the petitioner and respondent Nos. 4 and 6 for realization of Taka 55,25,729.36 (the petitioner being impleaded as third party mortgagor). When the case was taken up for order on 24-2-2010, the defendant No. 4, the father-in-law of the petitioner, entered appearance and filed written statement along with an application for acceptance of the same, but the Adalat rejected the said application and took up the suit for ex-parte hearing and decreed the same ex-parte against the petitioner and others by judgment and decree dated 24-2-2010. The decree-holder institution, accordingly, filed execution case, being Execution Case No. 164 of 2010, before the Artha Rin Adalat for execution of the said decree through auction sale of the mortgaged properties as well as by other means in accordance with law. The decree-holder institution then took steps under section 33(1) of the Artha Rin Adalat Ain, 2003 ("the said Ain") for selling of the said mortgaged properties through auction, whereupon the Adalat, by the First impugned order dated 24-8-2010 fixed 3-10-2010 for auction sale of the said properties. On 3-10-2010, the decree-holder institution itself having filed an application for participation in the auction bidding, the Adalat allowed the same. Accordingly, the auction took place and the decree-holder institution turned out to be the only bidder for the purchase of the said properties with a bid money of Taka 1,63,54,677.23. However, the Adalat, by order dated 3-10-2010, refused to accept the said bid on the ground of lack of competition as the decree-holder institution was the only bidder and accordingly fixed 7-11-2010 for taking steps for further auction sale in view of Section 33(4) of the said Ain. On 7-11-2010, the decree-holder institution filed an application under Section 33(7) of the said Ain for conferring the title of the said properties in favour of it and for issuance of certificate to that effect, whereupon the Adalat, by the Second impugned order dated 7-11-2010, allowed the said application and declared and conferred title of the said mortgaged properties in favour of the decree-holder institution purportedly under Section 33(7) of the said Ain. Accordingly, by the subsequent order dated 1-12-2010, the Adalat issued certificate and disposed of the execution case in view of Section 33(9) upon sending the said certificate to the registry office for registration. Thereafter, the decree-holder institution again filed application before the executing Adalat for reviving the execution case and for an order of possession of the said properties in its favour in view of sub-section (7Ka) and (7Kha) of the said Ain, whereupon the Adalat, by different orders, issued warrant of possession in its favour. At this stage, the petitioner moved this Court and obtained the aforesaid Rule. This Court, vide Rule issuing order dated 8-6-2011, stayed operation of the said certificate.

3. The Rule is contested by the respondent No. 3 Financial Institution by filing an affidavit-in-opposition.

4. Mr Md Mozibur Rahman, learned advocate for the petitioner, submits that the relevant orders of the execution proceeding in question show that the entire proceeding was continued on the premise that the decree-holder institution would some how grab the mortgaged properties for itself without any proper auction sale in accordance with law. Mr Rahman points out that it is apparent from the said orders that when the decree-holder institution wanted to purchase the properties for Taka 1,63,54,677.29 as a single bidder as against the total liability of the petitioner being Taka

59,65,658.93, the Adalat refused the same and by the impugned order dated 7-11-2010 transferred ownership of the said properties in favour of the said institution free of cost, thereby, depriving the petitioner from lawful adjustment of the decreetal amount out of the sale proceeds and to apply the remaining amount in order to repay the loans obtained in connection with other transactions with the same financial institution. Mr Rahman further submits that when the Adalat itself opined that the bid of Taka 1,63,54,677.23 submitted by the said institution was not enough because of the lack of competition, the same property was given to the same bidder free of cost, which is the abuse of the process of the Court and the provisions of the Artha Rin Adalat Ain, 2003. This being so, he submits, this Court should interfere and knock down the certificate issued by the Adalat in favour of the decree-holder in respect of the said properties. Drawing our attention to a supplementary affidavit by the petitioner sworn on 5-3-2013, Mr Rahman submits that some flats under Schedule-Ka property had already been sold out to the *bonafide* buyers even before granting of credit facilities in favour of the petitioner and some other flats were sold subsequently very much within the knowledge of the decree-holder institution. This being so, he submits, unless the certificate issued by the Adalat is set-aside and an order or observation is passed by this Court for protecting the interests of those innocent purchasers, there will be great injustice.

5. Ms Rani Akhter, learned advocate for the decree-holder institution (respondent No. 3), on the other hand, submits that sub-section (7) of Section 33 clearly provides that in spite of the provisions of sub-sections (4) and (5) of Section 33, the Adalat, on the application of the decree-holder institution, can issue certificate of ownership of the mortgaged properties in favour of the decree-holder institution. This having being done in the instant case, she continues, the Adalat or the said institution committed no illegality. Considered the submissions of the learned advocates, perused the writ petition, supplementary affidavit, affidavit-in-opposition and materials on the lower court records. Section 33 of the Artha Rin Adalat Ain, 2003 has made provisions for selling out the mortgaged properties through auction upon following several procedures. The first step to be followed is provided under sub-Section (1) of Section 33 through which an attempt for auction sale of the said property may be taken. If the said attempt is failed for any reason or the bid in the said auction is not accepted by the Court for any reason, the procedures provided under sub-section (4) are to be adopted for the second auction attempt. If, in spite of such second attempt, the properties cannot be sold, the decree-holder, under sub-section (5), may take over the mortgaged properties through Adalat and it may attempt for selling of the same during a period of 6 (six) years. If it succeeds in selling the said properties for a price which is more than the decreetal amount, the remaining amount has to be refunded to the judgment-debtor in view of sub-Section (6). During this six years' period, the decree-holder can also file application before the Adalat for conferment of title of the said properties in its favour in view of sub-Section (6 Kha). Unless such steps are taken or failed for any reason during this six years' period, the decree-holder, with the expiry of the said six years, will get the ownership of the said properties on its own by operation of law. Sub-Section (7), however, has given an upper-hand to the decree-holder. It provides that notwithstanding the above provisions under sub-Sections (4) and (5), the decree-holder, after first attempt of auction sale under sub-section (1) of Section 33, under sub-section (1) of Section 33, may seek title of the said properties from the Adalat, whereupon the Adalat will issue such certificate of ownership in favour of the decree-holder.

6. Ms Rani Akhter, putting emphasis on the said provisions under sub-section (7), submits that even if no attempt is made for second auction sale under sub-section (4), the decree-holder can still avail of the opportunities given under sub-section (7) of the said Ain and, as such, the Adalat, in the instant case, has committed no illegality in granting such certificate of ownership in favour of the respondent financial institution.

7. If we read the provisions under section 33 in a mechanical way, the submissions made by Ms. Rani Akhter will sound correct. However, if we examine said provisions along with the relevant orders passed by the executing Adalat in issuing the certificate of ownership in favour of the respondent-institution, the impression will definitely be changed. Admittedly, at the instance of the decree-holder, an attempt for auction sale was made by the Adalat under Section 33(1). The decree-holder institution was also allowed by the Adalat to participate in the said auction as a bidder and, accordingly, it submitted its bid for Taka 1,63,54,677.23 for the purchase of the said properties, although the decree-holder filed the very execution case for recovery of a total amount of Taka 59,65,658.93. This means, the decree-holder institution was happily ready to purchase the said properties for an amount which was three times higher than the total decreetal amount for which the auction of the said properties was attempted. Order dated 3-10-2010 shows that the Adalat did not even accept this bid of the decree-holder institution on the ground of lack of competition as the decree-holder institution was the only bidder in the said attempted auction. It may very easily be understood from this order of the Adalat that the value of the properties in question was taken to be much more higher than the bid submitted by the Institution and it was expected that had there been more bidders, much more higher bids would have been submitted.

8. Upon reading the provisions under sub-sections (1), (4), (5) and (6), it appears that the intention of the Legislature in such execution sale was to get as high as possible price for the mortgaged properties so that the judgment-debtor can get some money refunded out of the sale proceeds and that no unfair practice can take place in respect of the sale of the said properties depriving the judgment-debtor from getting a competitive price. Keeping this aspect in view, the Adalat, by the said order dated 3-10-2010, observed that there were opportunities for further auction sale under Section 33(4) of the said Ain and, accordingly, refused to accept the bid submitted by the decree-holder respondent for an amount which was even three times higher than the decreetal amount. If we compare this order dated 3-10-2010 with the impugned order dated 7-11-2010, our impression changes drastically. While the Adalat did not accept a bid which was three times higher than the decreetal amount, the same Adalat, by the impugned order dated 7-11-2010, transferred the entire properties in favour of the decree-holder free of cost. When the decree-holder institution itself wanted to purchase the said properties for a price which was three times higher than the total decreetal amount, we do not see any reasonableness behind the impugned order dated 7-11-2010 through which the Adalat, by mechanical application of sub-section (7) of Section 33, passed an order for issuing certificate of ownership in favour of the same bidder followed by orders issuing the certificate and warrant of possession allowing the decree-holder institution to take possession of the said properties.

9. Although, on the face of the said impugned order and the provisions under sub-section (7), if examined mechanically, there is no illegality as such, peeping behind the orders will reveal the game played by the parties and the sheer injustice done in particular by the decree-holder institution to grab the said prop-

erties without spending a single farthing. Although the provisions under sub-section (7) of Section 33 seem to be harshly imbalanced, the Legislature of a democratic country like ours cannot intend injustice to be done by application of such provisions in a mechanical way as has been done in the instant case. It is always the Court's responsibility to look into the intention of the Legislature behind the black words of the statute. The impugned order, compared with the entire proceedings and the subsequent orders, passed by the executing Adalat in the instant case reveals how a provision of law may be applied in a very harsh way and how a gross injustice can be done under the shelter of literary, mechanical and pedantic application of a particular provision.

10. Considering the facts in this case and comparing in particular the order dated 3.10-2010 with the impugned order dated 7-11-2010, we are of the view that the decree-holder institution, by not resorting to sub-section (4) of Section 33, has committed fraud on the Court by using the process of the same to grab the said properties free of cost. This is an ample example of the abuse of process of the Court and the spirit of law for which we have no option but to interfere to prevent such gross injustice.

11. Thus, we are of the view that the impugned order dated 7-11-2010 suffers from gross illegality and injustice and the same should not sustain in law. Consequently, the subsequent orders also fall apart. However, we do not find any illegality in the earlier impugned order dated 24-8-2010 taking steps for auction sale of the properties under Section 33(1) of the said Ain.

12. Accordingly, since we find substance in the Rule in so far as the impugned order dated 7-11-2010 is concerned, the Rule is made absolute in part. Thus, the impugned order dated 7-11-2010 and the subsequent orders issuing certificates of ownership of the mortgaged properties, warrant of possession etc in favour of the decree-holder institution are declared to have been passed without lawful authority and are of no legal effect.

13. Since it has been brought on record that some flats under Schedule-Ka properties had already been sold out to some innocent purchasers even before issuance of credit facilities and subsequently within the very knowledge of the decree-holder financial institution, we are of the view that the decree executing Adalat will take this aspect into consideration while executing the decree in particular in line with the provisions of sub-section (7 Kha) of Section 33 of the said Ain.

Send down the Lower Court records and communicate this order immediately.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Sharif Uddin Chaklader J
AKM Shahidul Huq J

Bangladesh Commerce Bank Ltd. and another.....
Defendant-Petitioner-Applicant

vs

Md Nasir-ur-Zaman...
.....Plaintiff-Respondent-Opposite-Party*

Judgment
April 17th, 2013.

Code of Civil Procedure (V of 1908)
Order VII, rule 11(d)

Bangladesh Bank Order (PO 128 of 1972)
Article 34(5)

An employee, when terminated with stigma and for removing the stigma suit is maintainable even the service condition is gov-

*Civil Revision Nos. 1135 & 1136 of 2010

erned by master and servant rule. .....(11)

Rupali Bank Limited vs Md Arab Ali, 7 BLC (AD) 2002, 1; General Manager, Sonali Bank vs Abul Khayer 17 BLD (AD) 183 =2 BLC (AD) 88; Rupali Bank Ltd vs Nazrul Islam Patwary, 1 BLC (AD) 159; Bangladesh Shilpa Rin Sangstha vs Rahman Textile Mills Ltd., 4 MLR (AD) 228 =51 DLR (AD) 221 ref.

AKM Mainul Hoque, Advocate—For the Defendant-Petitioner-Applicant.

AJ Mohammad Ali, Advocate with Zulfiqur Rahman, Advocate—For the Plaintiff-Respondent-Opposite Party.

Judgment

Sharif Uddin Chaklader J: This two rules at the instant of defendant-petitioner directed against judgment and order dated 26-10-2009 passed by the learned Additional District Judge 8th Court, Dhaka in Civil Revision No. 168 of 2009 and Civil Revision No. 169 of 2009 confirming those dated 19-5-2009 passed by the learned Assistant Judge, 11th Court, Dhaka rejecting application under Order VII Rule 11 of the Code of Civil Procedure in Title Suit No. 6465 of 2008.

2. Plaintiff opposite party challenging dismissal order from service filed Title Suit No. 6465 of 2008 stating that plaintiff joined as an Assistant Officer (Junior) on 11-1-1988 of defendant petitioner's Bank and was promoted as Senior Officer in 2006 and he worked with efficiency and honour in the same post till was dismissed on the ground of misappropriation of money of Bank whereupon a departmental enquiry was held giving show cause notice to him which was replied and was found to be not satisfactory and thereafter, he was finally dismissed from service by Memo No. BCBL/Proka/Prosha/Officer/Dismissal/2008 /0797 dated 9-1-2008.

3. Defendant-petitioner filed written statement denying the plaint case. Defendant-petitioner thereafter filed application under Order VII Rule 11(d) of the Code of Civil Procedure for rejection of the plaint merely on the ground that defendant Bank being a private Bank and there exists a relationship of master and servant between plaintiff and defendant Bank as such against any legal essential order or termination for service employees entitle for termination benefit, no reinstatement as such the suit is not maintainable.

4. Both the courts below concurrently rejected the prayer of defendant-petitioner.

5. Mr AKM Mainul Hoque, learned Advocate, appeared for the defendant-petitioner, placed before us the Memorandum and article of association of Bangladesh Commerce and Investment Bank Limited and report of the Bank showing that the Bank is private Bank. Learned Advocate in support of his submissions relied on the case of *Rupali Bank Limited vs Md Arab Ali, 7 BLC (AD) 2002, page 1* where the Appellate Division held that if employees of any private Bank is terminated from service or dismissed illegally remedy lies only in termination benefit.

6. Mr AJ Mohammad Ali and Mr Zulfiqur Ahmed, learned Advocates, appeared for the plaintiff-respondent-opposite party and submits that, plaintiff having been dismissed from service with stigma as such the suit is maintainable.

7. The question before us as to whether plaintiffs suit is maintainable even it is found that the relation between plaintiff and defendant Bank is that of master and servant.

8. Our Appellate Division of the Hon'ble Supreme Court of Bangladesh in the case of *General Manager Sonali Bank vs Abul Khayer 17 BLD (AD) 183=2 BLC (AD) 88* on similar question held as:—

"The High Court Division in the present case referred to the 'proviso' to section 25(1) (b) of the Act, which it was observed, was not brought to the notice of this Division while deciding the case in *44 DLR (AD) 260*. The 'Proviso' originally stood thus:—

"Provided that no complaint shall lie against an order of termination of employment of a worker under section 19, unless the worker concerned is an officer of a registered trade union and his employment is alleged to have been terminated for his trade union activities or unless the worker of a registered trade union or not, has been deprived of the benefits specified in that section.

Provided that no complaint shall lie against an order of termination of employment of a worker under section 19, unless the service of the worker concerned is alleged to have been terminated for his trade union activities or unless the worker concerned has been deprived of the benefits specified in that section.

"It is clear from the above original 'proviso' which was in force when the plaintiffs service was terminated in 1981 that he could not make any complaint against the order of his termination before the Labour Court as his case did not fall within the exceptions mentioned in the said 'proviso' that is to say, he was not an officer of a registered Trade Union and his employment was not alleged to have been terminated for his Trade Union activities nor he was alleged to have been deprived of the benefits specified under section 19 of the Act. The plaintiff brought the suit for a declaration that the order of termination was illegal, void etc. which relief could not be prayed before the Labour Court."

9. In the case of Managing Director, *Rupali Bank Ltd vs Nazrul Islam Patwary, 1 BLC (AD) 159* wherein it is held that:—

"Rupali Bank is undoubtedly a commercial establishment and the plaintiff being a security guard his condition of service, in addition to the bank service Rule, is also regulated under the provisions of the Act. The term "worker" as is defined in section 2(v) of the Act does contemplate not only a person to be employed in the work for productive purposes in any commercial or industrial establishment, but also embraces a person who on being employed does any skilled, unskilled manual, technical, trade promotional or clerical work for hire or reward, whether the term of employment be express or implied. But a person does not come within the category of "worker" who is employed mainly in a managerial or administrative capacity, or who, being employed in a supervisory capacity, exercises either by nature of the duties attached to the office or by person of power vested in him, functions mainly of managerial or administrative nature. Considering the nature of work attached with the post of security guard of the appellant-bank, unhesitatingly it can be said that the plaintiff clearly comes within the definition of "worker" provided in section 2(v) of the Act. But having agreed with the main contention of Dr Rafiqur Rahman, we find that the civil suit is yet maintainable in view of the Act does not provide him any scope for lodging any complaint seeking any redress thereafter, as the order of termination of employment of the plaintiff, although made under section 19 of the Act, was not passed for his trade union activities or did not deprive him for all the benefits specified in section 19 of the Act. Thus the argument of Dr Rahman that section 25 stands as a bar to a civil suit against an order of termination simpliciter, is not acceptable in the facts and circumstances of the case."

10. In the case of *Bangladesh Shilpa Rin Sangstha vs Rahman Textile Mills Ltd., 4 MLR (AD) 228= 51 DLR (AD) 221* wherein it is held as:—

"The reasoning of the High Court Division that there is clear distinction between a case where the suit appears to be barred from the statement in the plaint and a case in which the Court after consideration of the entire materials including oral and documentary evidence comes to the conclusion that the statement in the plaint is false, is correct as far as interpretation of Order VII, Rule 11 CPC is concerned. But the instant cases are governed by Article 34(5) of PO No. 128 of 1972. To the extent that the determining factors of Order VII, Rule 11 CPC and Article 34(5) are different and inconsistent, those of Order VII, Rule 11 CPC. The defendant-appellant need not have filed applications under Order VII, Rule 11 CPC it could have maintained applications under Article 34(5) of PO 128 of 1972, not for rejection of the plaint, but for not entertaining the suits, as the prayers in the two plaints squarely attract the mischiefs of Article 34(5)(a)(i) and (ii) of PO 128 of 1972 when it is palpably clear that the suits are not entertainable at all. When the reliefs claimed fall within the clear mischiefs of Article 34(5)(a)(i) & (ii) it will be idle formality to ask the defendant-appellant to file petitions afresh under Article 34(5) praying for not entertaining the suits."

11. Since the Appellate Division of the Hon'ble Supreme Court of Bangladesh held that plaintiff, an employee, when terminated with stigma and for removing the stigma suit is maintainable even the service condition is governed by master and servant rule, we find no substance in the rule.

In the result, the rule is discharged without any order as to cost. Communicate this order at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Md Ashfaqul Islam J
Md Ashraful Kamal J } Shakwat Hossain (Md) .....Petitioner

vs

Judgment
June 6th, 2013. } The Artha Rin Adalat No.2 Dhaka and another.....Respondents*

Artha Rin Adalat Ain (VIII of 2003)
Section 12(2)(3)

Artha Rin suit cannot be filed by any financial institution without selling of a mortgage property or any other institution first. Even if the suit has been filed wrongly or by mistake but in course of trial that has to be cured in terms of section 12(2) of Ain. Further section 12(3) of Ain provides that if owing any reason a suit cannot be filed by the financial institution even then a suit can well be filed afterwards without any restriction. .....(9)

Khan Ziaur Rahman, Advocate—For the Petitioner.

Md Khurshed Alam, Advocate—For the Respondent No.2.

Judgment

Md Ashfaqul Islam J: At the instance of the petitioner Md Shakwat Hossain, this Rule Nisi was issued calling upon the respondents to show cause as to why the impugned Order No.1 dated 7-6-2012 passed by the respondent No.1 so far it relates to sale of the Cargo Vessel MV Shawon-2 under section 33 of the Artha Rin

*Writ Petition No. 8320 of 2012.

Adalat Ain, 2003 (hereinafter referred to as Ain) by way of auction shall not be declared to have been passed without lawful authority and is of no legal effect.

2. The background leading to the Rule, in short, is that the petitioner availed of a loan facility from the respondent No.2 the Premier Bank Limited Saver Branch, Saver, Dhaka. Subsequently he became defaulter in paying off the loan for which the respondent-bank as the plaintiff filed Artha Rin Suit No. 145 of 2012 before the respondent No. 1 Artha Rin Adalat No.2, Dhaka stating *inter alia* that the plaintiff bank sanctioned a term loan facility for an amount of Taka 1,00,00,000 (one crore) in favour of the petitioner's business firm for purchasing a steel body cargo vessel. The said loan was secured by mortgaging of land measuring 33 decimals situated in the District of Gazipur and 3.63 decimals of land situated in the District Dhaka under Police Station Sabujbagh and another 7.50 decimals of land situated in the District Dhaka under Police Station Khilgaon and the petitioner also executed letter of hypothecation dated 11-2-2009.

3. Thereafter, Artha Rin Suit was filed on 7-6-2012 by the respondent bank and from the plaint that has been annexed to the petition it appears in paragraph 16 that the respondent-bank in compliance of section 12 of the Ain on 19-4-2012 published auction notice in the "Daily Prothom Alo" to sell the mortgaged property but the bank could not able to sell the property as the order of auction sale was stayed by a Division Bench of this Court in a Writ proceeding. Therefore, the bank in compliance with section 12(2) read with section 12(3) proceeded on and accordingly issued order No.2 dated 7-6-2012 (Annexure-B) for selling of the Cargo vessel MV Shawon-2. It is at this stage challenging the said order the petitioner moved this Division and obtained the present Rule and order of stay.

4. Mr Khan Ziaul Rahman, the learned counsel appearing for the petitioner after placing the petition, impugned order and the relevant Annexures with it mainly submits that the impugned order has been passed in gross violation of Artha Rin Adalat Ain, 2003 in that, without following provision of section 33(1) the order has been passed which is a clear abuse of process of the Court.

5. Mr Md Khurshed Alam, the learned Advocate, on the other hand, by filing affidavit-in-opposition opposes the Rule and pressed paragraphs 6 and 6(A) of the same. The sum and substance of his submissions is that the respondent-bank before filing the suit on 19-4-2012 published notice in the "Daily Prothom Alo" for auction sale of the mortgaged property but the said notice was challenged in Writ Petition No.4768 of 2012 and a Division Bench of this Court stayed the notice for which the respondent-bank could not exhaust the provision of section 12 of Ain. Further he submits that in all fairness the execution should proceed in accordance with law.

6. Be that as it may, we have heard the learned counsel of both sides at length and considered their submissions. We have gone through the petition, impugned order, the different Annexures to the petition and the affidavit-in-opposition carefully.

7. Only question that calls for consideration in this petition is whether the facts and circumstances of the case the order impugned against can sustain.

8. In this respect we thinks it profitable to quote the provisions of section 12(1)(2)(3) of Ain.

"(১) উপ-ধারা (২) এর বিধান সাপেক্ষে, কোন আর্থিক প্রতিষ্ঠান, উহার নিজ দখল বা নিয়ন্ত্রণে থাকা বিবাদীর কোন সম্পত্তি যাহা পণ বা বন্ধক (Lien or pledge) রাখিয়া ঋণ প্রদান করা হইয়াছে, এবং যাহা বিক্রয় করিবার আইনগত অধিকার বাদীর রহিয়াছে বা বাদীকে অর্পণ করা হইয়াছে, উহা

বিক্রয় না করিয়া এবং বিক্রয়লব্ধ অর্থ ঋণ পরিশোধ বাবদ সমন্বয় না করিয়া, অর্থ ঋণ আদালতে কোন মামলা দায়ের করিবে না। *(emphasis added)*

(২) উপ-ধারা (১) এর বিধান সত্ত্বেও, কোন আর্থিক প্রতিষ্ঠান নিজ দখল বা নিয়ন্ত্রণে থাকা পন বা বন্ধকী সম্পত্তি বিক্রয় না করিয়া মামলা দায়ের করিলে অনতিবিলম্বে উক্ত সম্পত্তি পূর্ব-বর্ণিত মতে বিক্রয় করিয়া বিক্রয়লব্ধ অর্থ ঋণের সহিত সমন্বয় করিবে এবং বিষয়টি আদালতকে লিখিতভাবে অবহিত করিবে।

(৩) কোন আর্থিক প্রতিষ্ঠান, বিবাদীর নিকট হইতে কোন স্থাবর সম্পত্তি (Immovable Property) বন্ধক (Motgage) রাখিয়া অথবা অস্থাবর সম্পত্তি (Movable Property) দায়বন্ধ রাখিয়া (Hypothecated) ঋণ প্রদান করিলে এবং বন্ধক প্রদান বা দায়বন্ধ রাখার সময় বন্ধক বন্ধকী বা দায়বন্ধ সম্পত্তি বিক্রয়ের ক্ষমতা ১[* * *] আর্থিক প্রতিষ্ঠানকে প্রদান করা হইয়া থাকিলে, উহা বিক্রয় না করিয়া এবং বিক্রয়লবন্ধ অর্থ ঋণ পরিশোধ বাবদ সমন্বয় না করিয়া অথবা বিক্রয়ের চেষ্টা করিয়া ব্যর্থ না হইয়া, অর্থ ঋণ আদালতে কোন মামলা দায়ের করিবে না।" *(emphasis added)*

9. On a plain reading of the above provisions we get a clear picture of the law as it stands. The essence of section 12 is that the Artha Rin suit cannot be filed by any financial institution without selling of a mortgage property or any other institution first. Even if the suit has been filed wrongly or by mistake but in course of trial that has to be cured in terms of section 12(2) of Ain. Further section 12(3) of Ain provides that if owing any reason a suit cannot be filed by the financial institution even then a suit can well be filed afterwards without any restriction.

10. In that view of the above discussions as based upon analysis of law governing the subject we are of the view that the Artha Rin Adalat vide its order No.2 dated 7-6-2012 (Annexure-B) passed an order to take recourse of section 33 of the Ain and accordingly published notice in the newspaper dated 14-6-2012 (Annexure-C). May be section 33 of Ain was wrongly quoted but that does vitiate the proceeding under section 12 of Ain. Artha Rin Adalat will proceed as usual in accordance with law. This Rule should be discharged being devoid of any substance.

In the result, the Rule is discharged without any order as to cost. The order of stay granted earlier by this Court is hereby recalled and vacated. Communicate at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Mirza Hussain Haider J
Md Khurshid Alam Sarkar J

Judgment
July 31st, 2013.

Emrul Kayes (Md) and others.....Petitioners
vs
Government of the People's Republic of Bangladesh and others.....Respondents in all the Writ Petitions*

Constitution of Bangladesh, 1972
Articles 27, 29, 39 and 147(2)

It transpires from the chronology of the facts of fixation of the amount of house allowance that before 1990 when there was only 20-30 High Court Judges, there was hardly any shortage of bungalow type houses for the Judges and the provision regarding payment of money as was fixed as house allowance before 1990 was not so unreasonable as it stands today. .....(188)

Article 31

A law will be violative of Article 31 if the Court finds that it is so demonstrably unreasonable or arbitrary that the members of Parliament acting as reasonable men could not pass that law. .....(183)

*Writ Petition Nos. 5267, 5247 and 5276 of 2013.

Constitution of Bangladesh, 1972
Articles 27 & 31

Equality before law and Protection of equal law—"Equality before law" should not be taken in its absolute sense to hold that all persons are equal in all respects irrespective of their different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess and others may lack. By the term 'protection of equal law', it is not meant that all persons or things are equal in all cases, rather it is to mean that the persons similarly situated should be treated alike. Provisions of equal protection, guarantees that similar people will be dealt with in a similar way and people different circumstances will be treated in a dissimilar way. .....(186)

Supreme Court Judges (Remuneration and Privileges) Ordinance (XI of 1978)
Section 4(1)(a)

We declare the second part of Section 4(1)(a) of the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978 in the language of " .....and until such residence is provided, a judge shall be paid a residence allowance of Taka 26,600 per month" void for being the same ultra vires of Articles 27, 29, 31 and 147(2) of our Constitution. .....(189)

Mumbai Kamgar Sabha, Bombay vs Ms Abdul Bhai, AIR 1976 (SC) 1466; SP Gupta vs President of India, AIR 1982 (SC) 149; BALCO Employees Union (Regd) vs Union of India, 2001 AIR SCW 5135; SP Gupta vs Union of India, 1981 (Supp) SCC 87; Janata Dal vs HS Chowdhury, (1992) 4 SCC 305; Tariq Transport Company, Lahore vs Sargodha-Bhera Bus Service, Sargodha, 11 DLR (SC) 140; Mian Fazal Din vs Lahore Improvement Trust, 21 DLR (SC) 225; Benazir Bhutto vs Federation of Pakistan, PLD 1988 (SC) 416; Bangladesh Sangbadpatra Parishad vs Bangladesh, 43 DLR (AD) 126; Dr Mohiuddin Farooque vs Bangladesh, 49 DLR (AD) 1; Ekushey Television Ltd. vs Dr Chowdhury Mahmood Hasan, 54 DLR (AD) 130; Bangladesh vs Advocate AKM Shafiuddin, 1 LCLR [2012] HCD 339 = 64 DLR 508; Advocate Manzil Morshed vs Government of Bangladesh; Bangladesh Sangbadpatra Parishad vs Bangladesh, 43 DLR (AD) 126; Dr Mohiuddin Farooque vs Bangladesh, 49 DLR (AD) 1; BRAC vs Professor Mozaffar Ahmed, 54 DLR (AD) 37; National Board of Revenue vs Abu Sayeed Khan, 18 BLC (AD) (2013) 116; Secretary, Ministry of Finance vs Masdar Hossain, 52 DLR (AD) 82; Bangladesh vs Md Idrisur Rahman, 17 BLT (AD) 231 = 15 BLC (AD) 49; Bangladesh vs Advocate AKM Shafiuddin; 64 DLR 508; Advocate Manzil Murshid vs Bangladesh, 33 BLD 121; State vs Abul Hossain, 14 BLC 223; Ataur Rahman (Md) vs Bangladesh, 62 DLR 329; Indian Judges' Association vs Union of India (1993) 4 JT (SC) 618; Dr Nurul Islam vs Bangladesh, 33 DLR (AD) 201; Fazlul Quader Chowdhury vs Muhammad Abdul Haque PLD 1966 SC 486 = 18 DLR (SC) 69; Secretary, Ministry of Finance vs Masdar Hossain (2000) BLT (AD) 234 = 52 DLR (AD) 82; Marbury vs Madison (1803); Asma Jihani vs Government of Punjab, PLD 1972 SC 139; AT Mridha vs State, 25 DLR (1973) 335; Md Shoib vs Government of Bangladesh, 27 DLR 315; Anwar Hossain Chowdhury vs Bangladesh, 41 DLR (AD) 165; Keshavanda, AIR 1973 SC 1461; Indira Gandhi, AIR 1975 SC 1590; Minarva Mills, AIR 1980 SC 1789; Woman Rao, AIR 1981 SCR 1; Khandaker Delwar Hossain vs Italian Marble Company Limited, 62 DLR (AD) 298; Siddique Ahmed vs Bangladesh 65 DLR

(AD) 8; Md Abdul Mannan Khan vs Bangladesh, 64 DLR (AD) 169; Sultana Kamal vs Bangladesh, 14 BLC (2009) 141; M. Samsul Haque vs Bangladesh, 17 BLT 523 = 15 BLC 236; Monzur Ahmed Bhuiyan vs Adilur Rahman Khan, 18 BLC (AD) 47; Idrisur Rahman vs Bangladesh, 60 DLR 714; United States Supreme Court in Middleton vs Texas P & L Co, 248 US 152; Gulf colorado Rly. vs Ellis, 165 US 150; Southern Rly Co. vs Grane, 216 US 400; Shujat Ali vs Union of India, AIR 1974, SC 1631; Smt. Indira Gandhi vs Raj Narayan, AIR 1975, SC 2279; Bhoomi Vikash Bank Ltd vs its workmen, AIR 1990 SC 495; State of West Bengal vs Anowar Ali Sarkar, AIR 1952, SC 75; Dhirendra Kumar vs Government of West Bengal, AIR 1954, SC 424; Panduranga Rao vs Andhra Pradesh Public Service Commission, AIR 1963 SC 268; Hamidul Huq Chowdhury vs Bangladesh, 34 DLR 190; Zainul Abedin vs Bangladesh, 34 DLR 77; Bangladesh Krishi Bank vs Meghna Enterprise, 50 DLR (AD) 194; SA Sabur vs Returning Officer, 41 DLR (AD) 30; Chandpur Textile Mills Ltd vs Subordinate Judge, 2 BLC 50; Anisur Rahman vs Bangladesh 12 BLC 22; Malpe Viswanath vs Moharashtra (1998) 2 SCC 1; Sayeda Rizwanna Hasan vs Bangladesh, 18 BLC (AD) 54;

Aneek R Haque, Advocate—For the petitioners. (in Writ Petition No. 5267/2013).

AM Aminuddin with SM Mahbubul Islam, Riead Mahmud and Mohammad Imran Miah, Advocates—For the Petitioner. (in Writ Petition No. 5247/2013).

SM Rezaul Karim with BM Elias and Jotirmoy Burua, Advocates—For the Petitioner. (in Writ Petition No. 5276/2013).

Mahbubey Alam, Attorney-General with Al Amin Sarker, DAG Zakir Hossain Ripon, AAG and KM Masud Rummy, AAG—For Respondents (in all the Writ Petitions).

Judgment

Md Khurshid Alam Sarkar J: All these three writ petitions have taken up simultaneously for hearing as common questions of law and fact are involved and, accordingly, they are being disposed of altogether by this single judgment.

2. Initially, on 20-5-2013, Rules were issued in all the above writ petitions in the following terms:

Let a Rule Nisi be issued calling upon the respondents to show cause as to why the overall actions of the respondents in allocating the Government houses for the dignitaries positioned at serial No. 5 (Cabinet Ministers) to 16 (Secretaries to the Government) of the Warrant of Precedence, including their action in the allotment of House No. 12, Minto Road, Dhaka in favour of respondent No. 3 in defiance to the recommendation of the Hon'ble President of the People's Republic of Bangladesh for allocation of the said house in favour of a Judge of the Supreme Court of Bangladesh, being in violation of the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978, the Bangladesh Allocation Rules, 1982 and the Warrant of Precedence, shall not be declared to have been done without lawful authority and of no legal effect.

3. And why the respondents shall not be directed to arrange "a furnished residence free from the payment of any rent and charges on account of municipal taxes and local rate and of the use of electricity, water and gas" (bungalow type or similar accommodation) for all the persons holding Constitutional positions, specially for the dignitaries under Serial No. 5 to 10 of the Warrant of Precedence;

4. And, further, to show cause as to why the respondents shall not be directed to period-

ically review the said provisions of Section 4(1)(a) of the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978, so far as it relates to the amount of the money for house allowance, in order to update and harmonize the same with the socio-economic conditions of the country;

5. And also to show cause as to why, in case of failure of making such residential allotment in favour of the aforesaid dignitaries, the respondents shall not be directed to bear the costs incurred from the house rents, bills, charges and all other expenses at actual, in addition to the fixed house allowance, and/or pass such other or further order or orders as to this Court may seem fit and proper.

6. At the time of issuance of the above Rules on 30-5-2013 the following interim orders were passed upon the respondents:

Respondent Nos. 1 and 2 are directed to submit a list of total number of bungalow type houses including the number and names of allottees/present occupants of the same within 2(two) weeks from the date of receipt of this order.

7. Pending hearing of the Rule, the respondents are directed not to allot any bungalow type house/similar accommodation to anyone without providing the same to the dignitaries under Serial Nos. 5 to 10 of the Warrant of Precedence.

8. Further, the respondents are restrained by an order of injunction from handing over the possession of 12, Minto Road, Dhaka to respondent No. 3.

9. On 20-6.2013, upon the prayer of the petitioners, a supplementary Rule was issued along with interim order in the following terms;

10. Let a supplementary Rule Nisi be issued calling upon the respondents to show cause as to why the 2nd part of Section 4(1)(a) of the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978 shall not be declared to be *ultra vires* as the same is violative of Articles 27, 29, 31 and 147(2) of the Constitution and, also, for being contradictory and repugnant to the first part of the said provisions of section 4(1)(a) of the said Ordinance, 1978.

11. Pending hearing of the Rule, respondent No. 1 is directed to submit a list of total number of flats/houses of the superior category which have been allotted to the Joint Secretaries to Secretaries with number and particulars of the present occupants before this Court within 10 (ten) days.

12. Succinctly, the background of the case is that the writ petitioners in all the above three writ petitions are the practising advocates of the Supreme Court of Bangladesh and, day before the issuance of the instant Rules, they together with a handful young advocates approached this Court in the form and style of "mentioning" a particular matter by placing some news clippings/reportings which state that the Government has allotted House No. 12, Minto Road, Dhaka, in favour of the Secretary, Ministry of Industry despite the same being recommended by the Hon'ble President of the People's Republic of Bangladesh for an Hon'ble Judge of the High Court Division and submitted that the said news, having caught sight of the petitioners, prompted them to engage in investigation into the matter and it was revealed that while a number of Hon'ble Judges' applications for accommodation, after the same being forwarded by the Hon'ble Chief Justice of Bangladesh, are lying unnoticed in the Ministry of Public Works and Housing, the members of the administrative branch, ranking from Joint Secretary to Senior Secretary, are being regularly endowed with luxurious apartments and bungalows and, thus, the cases of Hon'ble Judges are being purposely ignored. Then, they submitted that they felt dismayed at

the deplorable treatment of the state functionaries in providing the Judges of this Court with their legal entitlements and, hence, they consider the matter as a fit case for issuance of a Suo motu Rule and, accordingly, prayed for the same. However, this Court, instead of issuance of a Suo motu Rule, asked the petitioners to come up with a formal application, if they find themselves to be aggrieved with the actions of the respondents.

13. At this juncture, on the following day, the petitioners filed 3 (three) applications under Article 102 of the Constitution. All of the petitions are almost with the same contentions and prayers. It is stated in all the writ petitions that the state functionaries, who are responsible for fixation of remunerations, privileges and other benefits, including allocation of suitable accommodation for the Judges of the Supreme Court, are discriminating against the latter in allocation of the residence in violation of the relevant laws of the land. It is stated that the Judges of this Court are not supposed to approach anyone in the Republic other than the Hon'ble President of the Republic, the highest authority of the land, and when the application of Mr Justice Md Jahangir Hossain for allotment of House No. 12 at Minto Road was recommended by the Hon'ble President, respondent Nos. 1 & 2 were duty bound to comply with the said recommendation, but, instead, they allotted the House to respondent No. 3. It is stated that the respondents have committed a serious misconduct by defying the recommendation of the Hon'ble President of the Republic and thereby allotting the said house to respondent No. 3. The underlying concern of the petitioners is that unless the impugned actions of the respondents are adjudicated upon at an earliest convenience, it shall, at the very least, establish a dubious precedent of action arbitrarily and peremptorily taken with impunity against the legitimate rights and interests of a member of the Bench of the Superior Judiciary, thereby, operating inimically to the interests and image of the Supreme Judiciary as a whole.

14. It is stated that lawyers are the integral part of the judiciary and as the conscious citizens of the country and members of the legal profession the petitioners believe in the independence of the judiciary and they are tirelessly working towards the establishment of the rule of law as they hold the Constitution of Bangladesh in high esteem as sacred inviolable superior law of the land. The petitioners stated that they consider the said incident to be a degrading treatment for the Hon'ble Judges of the Supreme Court with a perilous consequence to the state which consists of the Executive, the Legislative and the Judiciary and, as such, the petitioners felt the urge to come up with these applications in the form of public interest litigation (PIL) for vindication of a public grievance related to the greater interest of the judiciary with a view to strengthening the position of the judiciary and, thereby, ensure the independence of the judiciary. Hence, these Rules.

15. For illuminating the facts of these writ petitions stated hereinbefore and also of the discussions, observations and orders to be made/passed in these cases hereinafter and, further, for the ease of reference, let the respondents' identities be known. In all the writ petitions respondent No. 1 is the Secretary, Ministry of Housing and Public Works, respondent No. 2 is the Director, Directorate of Government Accommodation, respondent No. 3 is the Secretary, Ministry of Industry, respondent No. 4 is the Secretary, Ministry of Law, Justice and Parliamentary Affairs and respondent No. 5 is the Secretary, Ministry of Finance. All of them entered appearances by filing affidavits-in-opposition.

16. The affidavit-in-opposition filed on behalf of respondent Nos. 1 and 2 contends, *inter-alia*, that there are, in total, 124 superior

type of houses (bungalows) and out of them 20 houses have been earmarked for the Judges of the Supreme Court and the Registrar of the Supreme Court of Bangladesh is in charge of allocation of all the said 20 houses and, currently, all these earmarked houses are being occupied by the Hon'ble Judges of the Supreme Court of Bangladesh. It is stated that normally no bungalow type house, except the aforesaid 20 earmarked houses, is allotted to the Judges of the Supreme Court of Bangladesh by respondent No. 2. However, on special consideration, in addition to the said 20 earmarked houses, 27 extra superior types of Government houses have been allotted to the Judges of the Supreme Court and, thus, presently total 47 superior type of houses, being situated at Minto Road, Bailey Road, Dhanmondi Residential Area, Mohammadpur Residential Area and Gulshan Residential Area, are being occupied by the Judges of the Supreme Court. It is stated that the Government has undertaken a project at 67, Circuit House Road, Ramna, Dhaka for construction of 76 apartments of 4200 Square feet for the Judges of the Supreme Court and the construction of the same is going on at full speed.

17. It is stated that most of the bungalow type houses at Minto Road, Bailey Road and Hare Road are earmarked for the Ministers, State Ministers, Deputy Ministers, Commissioners of Election Commission, Inspector General of Police (IGP), Auditor and Comptroller General of Bangladesh, Governor of Bangladesh Bank, District Judge, DC, SP of the Dhaka District and some other special designated officers. It is stated that as per the Bangladesh Government Allocation Rules, 1982 Government Officers with the scale of Taka 32,300 and above, ranking from Joint Secretary to Senior Secretary, are entitled to get allotment of the superior type of houses and, at present, there are 6 (Six) earmarked buildings for the said officers having 195 superior type of flats of above 4000 square feet. Nevertheless, there is an acute shortage of accommodations of the high-ranking Government servants and in order to cope up with the situation a good number of bungalow houses at Minto Road and Bailey Road and 9 (nine) bungalow type of houses outside the said areas have been allotted in favour of the Government servants with the rank of Secretary, Senior Secretary and Cabinet Secretary. It is stated that House No. 12 at Minto Road, Dhaka is a bungalow type house and the said house has been allotted to respondent No. 3 on 20-11-2012 upon his application dated 25-10-2012 and handed over to him on 15-5-2013. It is stated that Mr Justice Md Jahangir Hossain made his application to the Hon'ble President of the Republic for allocation of the said house on 8-11-2011 and the same, being recommended by the august office of the Hon'ble President of Bangladesh on 10-11-2012, was received only on 20-11-2012 and 21-11-2012 by respondent Nos. 1 and 2 respectively and, thus, it could not be allotted to the Hon'ble Mr Justice Md Jahangir Hossain as the said house, by then, was allotted to respondent No. 3 on 20-11-2012. It is stated that Mr Justice Md Jahangir Hossain has been living in a superior type of house at House No. 71/1, Circuit House upon getting it allotted on 2-1-2012.

18. By filing a separate affidavit-in-opposition respondent No. 3 contends, *inter-alia*, that currently he is living in a superior type house in Gulshan area allotted by the Government but his office being in Motijheel area, he was encountering severe traffic jam everyday on the way to and from his office and, under the situation, he applied for House No. 20 at Minto Road, Dhaka on 20-11-2012 and the same was handed over to him on 15-5-2013.

19. By filing another affidavit-in-opposition respondent No. 5 contends, *inter-alia*, that as per the Supreme Court Judges (Remuneration and Privileges)(Amended) Act, 2010 at present the Hon'ble Judges of the Supreme Court gets Taka 26,600 per month as their resi-

dence allowance. It is stated that previously the residence allowance was Taka 20,000 and recently the "Committee on Pay and Privilege of the Judges of the Supreme Court of Bangladesh" has been formed by the Government to place recommendation regarding revised remuneration of the Judges of the Supreme Court and the said Committee recommended for free furnished residence with all other facilities and a monthly payment of Taka 35,000 as residence allowance, in the event of its non-availability. It is stated that the Finance Division will do the needful to increase the amount of the residence allowance, if any such proposal is made by the Ministry of Law and Parliament.

20. Mr AM Aminuddin, Mr SM Rezaul Karim, Mr BM Elias and Mr Aneek R. Haque, all of the learned advocates appeared for the petitioners. They, at the very outset, submit in one voice that the petitioners are the conscious citizens of the country and are committed to the welfare of the Republic and to uphold the Rule of Law and our society expects that the lawyers, such as the petitioners, should always be vigilant against any action of the state taken to the disadvantage of the judiciary and, thus, all these Public Interest Litigations (PIL) are being moved in the interest of the public at large as pro-bono publico.

21. They submit that the statements/discussions by those holding high office and wielding state power, the elite class or the members of the civil society in different seminars and in the electronic/print media as to the establishment of rule of law in the country would be regarded by the common men to be a farce, if, at first, an environment for the judiciary to work independently is not created. They submit that members of the judiciary must be allowed to work uninterruptedly being free from any anxiety about maintaining their personal and family life. They submit that if the Judges of the Supreme Court are to be dependent on the kindness of the members of the executive branch for their various legal entitlements such as, here in this case, allocation of houses, they will not be in a position to demonstrate their impartiality at the time of adjudication upon a case against the concerned authority of the government. They submit that if the Judges of the higher judiciary is to be engaged in satisfying the members of the executives, the judiciary as an organ of the state shall never be independent.

22. Then, they placed Section 4(1)(a) of the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978 (hereinafter referred to as the Ordinance, 1978) and submit that it is a mandatory duty of respondent Nos. 1 and 2 to arrange for furnished residences with free electricity, gas, water and other facilities, which may either be bungalow type houses or flats in view of the words "provided with" employed in the said Section in furtherance to the words "shall be entitled to". They submit that by using the phraseology "a judge shall be entitled to, and provided with", the legislature intended to ensure that all the Judges of the Supreme Court must be provided with a suitable accommodation just after entering into their office.

23. Then, they refer to the amount of money figured in the second part of Section 4(1)(a) of the Ordinance, 1978 which makes the provisions for monthly payment of Taka 26,600 in the event of the failure by the Government for arranging furnished houses for the Judges of the Supreme Court and term the said figure to be completely impractical and unreasonable as well as inconsistent with the provisions as prescribed in the same Section of the said Ordinance as to providing furnished residence for the Judges. They submit that the amount of money spent for providing a Judge with a furnished residence, together with the rent, charge and bills of electricity, water and gas does cost the Government nearly Taka 2,00,000 (two

lakhs) per month and, on the other hand, only Taka 26,600 is being paid to the Judges living in privately rented accommodation. They submit that anyone with minimum prudence will get bewildered at the comparison of the above figures. They, therefore, submit that the provisions made in the Ordinance, 1978 for payment of Taka 26, 600 is violative of Articles 27 and 29 of the Constitution inasmuch as all the Judges of the Supreme Court being at par, some of them cannot be subjected to discrimination by the respondents by purposely not providing a furnished residence. They, thus, submit that the said provision is required to be declared *ultra vires* the Constitution.

24. The learned advocates, by sketching out a comparative rent schedule of the different areas of the Dhaka City, submit that most of the Judges of the Supreme Court, who are yet to get Government accommodation, are living in the privately rented houses of 4 to 5 bed rooms and they are monthly spending for their house rent Taka 40,000 to Taka 70,000, based on the area/location and size of the flat and, in addition to that, they are paying Taka 10,000 to Taka 20,000 per month as service charges and for bills of electricity, water and gas and, therefore, the learned advocates for the petitioners assailed the second part of Section 4(1)(a) of the Ordinance, 1978 to be repugnant to the provisions of the first part of the said Section on the ground of lacking any basis in fixation of Taka 26,600. They submit that incorporation of the said part in Section 4(1)(a) of the Ordinance, 1978 has created scope for the respondents to act arbitrarily in allocation of accommodations for the Hon'ble Judges and, thereby, deprive them of getting their residence and, as such, the said part is an unreasonable legislation and requires to be deleted from the said Section 4(1)(a) and an alternative provisions should be incorporated therein to defuse the respondents' tendency of being actuated by their whims, arbitrariness and malice in fixation of the amount of money as the residence allowance for the Judges of the Supreme Court in case of non-availability of the Government accommodation.

25. They submit that it is the foremost responsibility of the State to ensure the hassle-free enjoyment of the privileges of the Judges as prescribed in the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978 as the Judges are entitled to get protection of Article 31 of the Constitution which guarantees that everyone will be treated in accordance with law. They refer to annexures X & X(1) series appended to the affidavit-in-compliance where superior types of flats and bungalow houses have been listed. They assail the said list to be incorrect as the petitioners have come to know that there are some more superior type of accommodations presently lying vacant but the respondents do not intend to allot the same to the Judges and, thence, those have not been shown in the aforesaid 2 (two) lists. In this context, they refer to the statements made in Writ Petition No. 5276 of 2013 where, at the investigation of the petitioners, the House No. 8/15 at Sir Syed Ahmed Road has been surfaced to be vacant. They also referred to another news clipping which reports that a house in Dhanmondi area, for which the Government is litigating for years to dispossess the alleged owners, has been allotted to an Hon'ble Judge of the Supreme Court with an ulterior motive of maligning the image of the judges of the higher judiciary. They, then, refer to a number of decisions of our Apex Court where an Article or a part of the Constitution or a piece of legislation was struck down for being repugnant to the other provisions of the same statute or for being *ultra vires* the Constitution.

26. They referred to Section 2(a) of Bangladesh Allocation Rules, 1982 and submit that when it does not become possible for the Government to make arrangement of accommodation for the Government servants from the houses/flats owned by the Government, it hires or requisitions houses/flats for the

Government servants for mitigating the demands and, thus, by drawing an analogy from the said provisions of the Bangladesh Allocation Rules, 1982 the learned advocates for the petitioners submit that the respondents ought to have hired or requisitioned the required number of houses or flats of 4,200 square feet for the Judges of the Supreme Court until the project of construction of 76 flats of 4200 square feet at 67, Circuit House Road, Ramna, Dhaka is completed inasmuch as it is the imperative for the respondents to provide accommodation. They, in the manner of placing a suggestion to the respondents through this Court, submit that the location of the hired or requisitioned flats should be within the proximity of the Supreme Court premises, such as Eskaton, Siddheshwari, Kakrail and Bailey Road areas and, in the case of non-availability of the required number of houses/flats in the said area, secured residential areas like, Dhanmondi, Gulshan and Banani should be selected. They put a further suggestion that the hired or requisitioned flat should not be of less than 4,200 square feet as they submit that the said residence for the Judges of the Supreme Court should have sufficient space with an internal arrangement of a study room, in addition to having at least 4 bed rooms, one dining room and one guest room. In a bid to compare the residential arrangements of the Judges of the Supreme Court with that of the members of the executive, they placed the fact before this Court that the flats earmarked for the Joint Secretaries to Secretaries at Eskaton, Bailey Road, Gulshan, Dhanmondi and other areas of the City are of 4,000 square feet and, further, the Ministers' Flats situated at Minto Road earmarked for the State Ministers are of 5,200 square feet and submit that in comparison to the above facts and figures the Judges of the Supreme Court, being positioned in the Constitutional post, must deserve allotment of the flats of larger space than those of the Secretaries to the Government.

27. Per contra Mr Mahbubey Alam, the learned Attorney-General appearing for all the respondents, submits that fixation of an amount of money as the residence allowance for the persons holding the Constitutional posts or for the Government servants is completely a policy decision and the power of making the policy decision has been vested in the legislature and in the executive and, as such, the same is not judicially reviewable. To augment the submissions, he draws our attention to the maxim "No man should be judge in his own cause (Nemo debet esse judex in propria causa)" and adds that since the issue is related to the self-interest of the honourable Judges of this Court, it may be fair to leave the dispute upon the policy makers for their considerations instead of adjudication upon the same by itself.

28. He submits that the legislature in their wisdom have intended to provide furnished residence together with the rents, charges and bills for the Judges of the Supreme Court and if the said arrangement cannot be made due to the non-availability of the houses or flats, provisions have been made in the same piece of legislation for making payment of a fixed amount of money for the Judges of the Supreme Court as the residence allowance. He submits that previously the amount was Taka 20,000 which has, recently in 2010, been increased to Taka 26,600 and the Government is actively considering to increase it to Taka 35,000 and, as such, it will be illogical to say that the Government is not reviewing the provisions laid down in the second part of Section 4(1)(a) Ordinance, 1978.

29. He submits that this Court is empowered to declare an Act of Parliament to be void only if it is clearly found that the same is inconsistent with any part of the Constitution and, in the case at hand, as he submits, there being no inconsistency of the provisions of second part of Section 4(1)(a) of the Ordinance, 1978 with

any Article of the Constitution, there is no ground for declaring the same to be *ultra vires* the Constitution.

30. He, by referring to the news clippings centering house No. 12 at Minto Road, Dhaka, submits that the adjudication upon these types of disputes by this Court may give rise to an unwanted unhappiness among the members of the executives and, thereby, may create an unhealthy working environment with the higher judiciary. He refers to Rules 3, 4 and 8 of the Bangladesh Allocation Rules, 1982 and submits that only the Government Servants are entitled to the superior type of houses and the Government has the power to reserve the required number of accommodations in order to allot the same to the holders of specific posts and the Judges of the Supreme Court being not in the service of the Republic cannot claim the houses/flats managed and controlled by respondent Nos. 1 and 2. He submits that the Judges of the Supreme Court, being the Constitutional post holders, should be provided with accommodation at a specified place where only the Judges exclusively may live with their families and, keeping this view in mind, the Government previously has constructed 20 independent bungalow type houses within the vicinity at Kakrail and in view of the increasing appointments in the higher judiciary the Government has already undertaken a project to construct a building with 76 flats of 4,200 square feet each and the project is due to be completed in the next couple of years and, after completion of the said project, it is expected that there will be no shortage of accommodation for the Judges of the Supreme Court.

31. The learned Attorney-General endeavors to indicate that the present writ petitions are aimed at making a particular Judge of the Supreme Court, who was trying to get allotment of a bungalow type house in Minto Road area, happy and submits that this sort of phenomenon should be discouraged by this Court as it may lead to bridging up an unsolicited rapport of the petitioners with the said Judge. He submits that the House in question should not be allotted to the said Hon'ble Judge in the light of the fact that he might feel indebted towards the petitioners for their co-operation in encountering the concerned members of the Executive branch, if the said house is allotted to him consequent to the verdict of these writ petitions. He does not concede to the claim of the petitioners that the instant writ petitions are directed *bonafide* and aiming at vindication of a public concern and, thus, submits that the petitioners do not have any *locus standi* to file the instant applications under Article 102 of the Constitution.

32. We have heard the submissions advanced by the learned advocates for the petitioners and the learned Attorney-General at length and perused the writ petitions, affidavits-in-opposition and the annexures appended thereto. We have also looked at the relevant provisions of the law and gone through the decisions placed before us and considered them with great care.

33. Since the learned Attorney-General for Bangladesh has raised the question of maintainability of these writ petitions on the ground of the standing of the petitioners as well as the competency of this Court in adjudication upon the matter, for being the same related with the self-interest of the Judges of this Court, this Court is required to deal with the said issues at first before entering into the task of examining the constitutionality of the impugned part of Section 4(1) (a) of the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978 as well as the impugned actions of the respondents.

34. In order to carry out the said examination, we should look at the wordings of Article 102 of our Constitution in tandem with the decisions of our jurisdiction and foreign jurisdictions.

35. Since we are a new born nation and have been bestowed with our Constitution only since 42 years, let us first look at the old jurisdiction, such as UK, India and Pakistan, for the interpretation made and hold on the point of standing of a petitioner in judicial review cases by their Constitutional Courts.

36. In India, the concept of public interest litigation was imported by Mr VR Krishna Iyer, J in the case of *Mumbai Kamgar Sabha, Bombay vs Ms Abdul Bhai* reported in *AIR 1976 (SC) 1466* and, eventually, in the celebrated case of *SP Gupta vs President of India* reported in *AIR 1982 (SC) 149* (known as Judges case) the jurisprudential basis was laid down. In that case several advocates of different Bars challenged the Government's action transferring some Judges of the High Courts and Justice Bhagwati approved the *locus standi* in paragraph 17.

> "Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is, by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public maintain an application.....seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons".

37. In Indian jurisdiction the *locus standi* has been enlarged to such an extent that now it is left completely upon the discretion of the Courts on the basis of the fact of the each case. In the cases of *BALCO Employees Union (Regd) vs Union of India, 2001 AIR SCW 5135, SP Gupta vs Union of India, 1981 (Supp) SCC 87, Janata Dal vs HS Chowdhury, (1992) 4 SCC 305* and in many other latest cases, the standing of a petitioner was accorded giving liberal meaning of the "person aggrieved".

38. In Pakistan, in the year of 1956, in the case of *Tariq Transport Company, Lahore vs Sargodha-Bhera Bus Service, Sargodha* reported in *11 DLR (SC) 140*, the Supreme Court of Pakistan observed.

> "..... a person seeking judicial review must show that he has a direct personal interest in the act which he challenges before his prayer for review is entertained."

39. In the case of *Mian Fazal Din vs Lahore Improvement Trust* reported in *21 DLR (SC) 225*, the Pakistan Supreme Court took somewhat liberal view stating—

> ".....the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense; but it is enough if the applicant disclose that he had a personal interest in the performance of the legal duty, which if not performed or performed in a manner not permitted by law, would result in the loss of some personal benefit or advantage or the curtailment or the curtailment of a privilege or liberty or franchise."

40. However, the development in this field took place in Pakistan only in the recent past. In the case of *Benazir Bhutto vs Federation of Pakistan, PLD 1988 (SC) 416*, the Pakistan Supreme Court held that as the provision of Article 184(3) is open-ended, the proceedings could be maintained by an individual whose fundamental rights are infracted or by a person *bona fide* alleging infraction of the fundamental rights of a class or a group of persons, as there is no rigid incorporation of the notion of 'aggrieved party' in Article 184(3).

41. In England, no written Constitutional or any statutory provision as to the *locus standi* of a petitioner to file judicial review application, like the words "any person aggrieved" as used

in our Constitution, was in existence before 1981. The English Courts have, de facto made the legislation as to the *locus standi*. In the English jurisdiction, the leading English case on *locus standi* is ex parte Sidebotham, (1880) 14 Ch D 458 where the Court held that a person aggrieved is a man "who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

42. After the said judgment, there have been significant developments in the English jurisdiction as to the rule of *locus standi* and shifted from restrictive view of standing.

43. In the case of *RV Metropolitan Police Commissioner ex P Blackburn [1968] 1 All ER 763* and, subsequently, in the case of *P Blackburn vs Attorney-General [1971] 2 All ER 1380* and, then, in the case of *RV Metropolitan Police Commissioner ex P Blackburn [1973] All ER 324* the petitioners were accorded standing as the Courts found that the petitioners had 'sufficient interest' in the performance of the public duty.

44. Thereafter, by the enactment of the Supreme Court Act, 1981 the issue has finally been settled.

45. To return to our jurisdiction, the observations made by our Appellate Division in the case of *Bangladesh Sangbadpatra Parishad vs Bangladesh* reported in *43 DLR (AD) 126* (para 9), having compared the standing of a petitioner in the context of our Constitution to that of UK and India, may be quoted which is as under:

> "In our Constitution the petitioner seeking enforcement of a fundamental right or constitutional remedies must be a "person aggrieved". Our Constitution is not at pari materia with the Indian Constitution on this point. The Indian Constitution, either in Article 32 or in Article 226, has not mentioned who can apply for enforcement of fundamental rights and constitutional remedies. The Indian Courts only honoured a tradition in requiring that the petitioner must be an "aggrieved person". The emergence in Indian of pro bono publico litigation, that is litigation at the instance of a public-spirited citizen espousing causes of others, has been facilitated by the absence of any constitutional provision as to who can apply for a writ. In England, various tests were applied. Sometimes it was said that a person must be "aggrieved" or he must have "a specific legal right" of or, he must have a "sufficient interest". Now, after the introduction of the new Rules of the Supreme Court, Order LIII Rule 3, any person can apply for "judicial review" in England under the Supreme Court Act, 1981 if he has a "sufficient interest"."

46. Let us first look at Article 102 of our Constitution, the repository power of this Court to review the actions of any person, reads as follows:

> "Powers of High Court Division to issue certain orders and directions, etc. (1) The High Court Division on the application of <u>any person aggrieved,</u> may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.
>
> (2) the High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-
>
> (a) on the application of any <u>person aggrieved,</u> make an order- *(underlined by us)*

47. Under Article 102(1) of our Constitution, our Court exercises the power of judicial

review if an impugned action is made in violation of fundamental rights on the application of "any aggrieved person". Under Article 102(2), in order to have *locus standi* to invoke the jurisdiction, an applicant has to show that he is an aggrieved party in an application for certiorari, *mandamus* or prohibition but not in an application for habeas corpus or *quo warranto*, where Writ Petitioner is not required to be a 'person aggrieved'.

48. In our jurisdiction the question of *locus standi* of the petitioners was examined for the first time in the *Beru Bari Case* reported in *26 DLR (SC) 44*. In the aforesaid case their Lordships of the Supreme Court held as follows:

> "We have given the respondents' objection as to the Appellants' *locus standi* to move the High Court Division our anxious consideration. It appears to us that the question of *locus standi* does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstances of each case. The appellant has complained that he is under impending threat of deprivation of his fundamental rights under Article 36 of the Constitution and his right of franchise. Because of this as well as of the exceptional and extra-ordinary Constitutional issues raised in this case involving consideration of an international agreement between this country and the friendly Republic of India, we decided to hear the appellant."

49. In *Dr Mohiuddin Farooque vs Bangladesh, 49 DLR (AD) 1*, (popularly known as BELA's case) Mr BB Roy Chowdhury, J, observed:

> "In such harrowing conditions of our people in general if socially conscious and public-spirited persons are not allowed to approach the court on behalf of the public or a section thereof for the enforcement of their rights the very scheme of the Constitution will be frustrated. The inescapable conclusion, therefore, is that the expression "person aggrieved" means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligation. It does not, however, extend to a person who is an interloper and interferes with things which do not concern him. This approach is in keeping with the constitutional principles that are being evolved in the recent times in different countries".

50. In the said *BELA's case*, his Lordship Mr Justice Mostafa Kamal of the Appellate Division held in paragraph 40:

> "We now proceed to say we interpret Article 102 as a whole. We do not give much importance to the dictionary meaning or punctuation of the words 'any person aggrieved."

51. It was further held in *BELA's case* in paragraph 47:

> "The Supreme Court being a vehicle, a medium or mechanism devised by the Constitution for the exercise of the judicial power of the people on behalf of the people, the people will always remain the focal point of concern of the Supreme Court while dispensing justice or propounding any judicial theory or interpreting any provision of the Constitution. Viewed in this context, interpreting the words "any person aggrieved" meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the Constitution. There is no ques-

tion of enlarging *locus standi* or legislation by Court. The enlargement is writ large on the face of the Constitution."

52. Ultimately Mr Justice Mostafa Kamal held in the same case in paragraph 48:

"The traditional view remains true, valid and effective till today in so far as individual rights and individual infraction thereof are concerned. But when a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved, it is not necessary, in the scheme of our Constitution, that the multitude of individuals who have been collectively wronged or injured or whose collective fundamental rights have been invaded are to invoke the jurisdiction under Article 102 in multitude of individual writ petitions, each representing his own portion of concern. In so far as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organization, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102."

53. In the case of *Ekushey Television Ltd. vs Dr Chowdhury Mahmood Hasan* reported in *54 DLR (AD) 130* (popularly known as ETV case), it was held in paragraph 48:

"What is meant by 'sufficient interest' is basically a question of fact and law which shall have to be decided by the Court. None of the fundamental rights like rule of law is subject to mechanical measurement. They are measured by our human institutions i.e. the Courts and by human beings i.e. the Judges, by applying law. Therefore, there will always be an element of discretion to be used by the Court in giving standing to the petitioner. From the above, it appears that the Courts of this jurisdiction have shifted their position to a great extent from the traditional rule of standing which confines access to the judicial process only to those to whom legal injuries are caused or legal wrong is done. The narrow confines within which the rule of standing was imprisoned for long years have been broken and a new dimension is being given to the doctrine of *locus standi*."

54. In the Case of *Bangladesh and others vs Idrisur Rahman (10 Judges Case)* reported in *17 BLT (AD) 231* the petitioner, Mr Idrisur Rahman, was an advocate and the subject matter of the writ petition was reinstatement of some High Court Judges under Article 95 of the Constitution. Thus, though the petitioner was not found to be personally aggrieved but his standing was accorded on the ground that the petitioner, as a lawyer, has an intensive interest in the establishment of the independence of the Judiciary.

55. In the case of *Bangladesh vs Advocate AKM Shafiuddin 1 LCLR [2012] HCD 339 = 64 DLR 508* (which has subsequently been disposed of by the Appellate Division in CP No. 2212 of 2012), the petitioner, who is a lawyer of this Court, challenged the proceedings of the Parliament where a derogatory remark was made about an Hon'ble Judge of this Court and, further, a "Ruling" was passed by the Parliament demoralising the position and jurisdiction of this Court. In adjudication upon the said case, the competency of the petitioner in filing the writ petition was not viewed by this Court negatively.

56. In the case of *Advocate Manzil Morshed and others vs Government of Bangladesh and others* (Writ Petition No. 2427 of 2011) the petitioners' standing was not questioned albeit the subject

matter of the case was related to the Supreme Court Judges' remuneration (the matter being appealed by the Government as CPLA No. 1775 of 2013 is awaiting disposal by our Appellate Division).

57. In all the above Stare Decisis (Starred Decisions), the standing of the petitioner was approved by our Courts.

58. However, in the case of *Bangladesh Sangbadpatra Parishad vs Bangladesh* reported in *43 DLR (AD) 126*, the *locus standi* of the petitioner was denied. Later on, ATM Afzal J. in *Dr Mohiuddin Farooque vs Bangladesh, 49 DLR (AD) 1*, in according *locus standi* to the petitioner, laid down some principles to be observed by our High Court Division:

> "A person pleading sufficient interest may be able to cross, what is called, the threshold stage on the averments made in the writ petition but it will always remain open for a prospective respondent to contest the said claim on facts and also to assail the *bonafides* on even the appropriateness in a particular case of the petitioner for seeking a relief invoking the constitutional jurisdiction of the High Court Division under Article 102 of the Constitution. For example, standing was denied to the Bangladesh Sangbad Patra Parishad to represent its opulent members, namely, the newspaper owners who were directly affected by the Wage Board Award but even then none of them moved personally, but the consideration would have been different if any organization representing a weaker section of the society had come to complain about a breach of any fundamental right of its members or any public wrong done to the members generally in breach of any provision of the Constitution or law. The Court will have to decide in each case, particularly when objections is taken, not only the extent of sufficiency of interest but also the fitness of the person for invoking the discretionary jurisdiction under Article 102 of the Constitution. Ordinarily, it is the affected party which is to come to the Court for remedy. The Court in considering the question of standing in a particular case, if the affected party is not before it, will enquire as to why the affected party is not coming before it and if it finds no satisfactory reason for non-appearance of the affected party, it may refuse to entertain the application."

59. In the Case of *BRAC vs Professor Mozaffar Ahmed* reported in *54 DLR (AD) 37* (popularly known as BRAC Bank Case) our Apex Court did not approve the standing of Professor Mozaffar Ahmed in availing the jurisdiction of this Court as the Court did not find any element of Public Interest in the case and also the petitioner was not found personally aggrieved due to not having his connection with any existing bank.

60. Thereafter, in a recent case of *National Board of Revenue vs Abu Sayeed Khan and others* reported in *18 BLC (AD) (2013) 116*, our Appellate Division, after reviewing the views taken in the above cited series of decisions, has directed the High Court to be vigilant in entertaining the PIL cases in the following words:

> "Now-a-days, it is noticeable that a group of lawyers have developed a tendency of filing PIL petitions on behalf of persons or organizations challenging the propriety of the Government in taking decision relating to policy matter, its development works, orders of promotion and transfer of public servants, imposition of taxes and fixation of tariff value by the authority for achieving dubious goal for generating publicity for themselves or to create public sensation. The High Court Division has been taking cognizance of those petitions without looking at whether or not such petitions are at all maintainable in the light of the principles settled by this Division in

Mohiuddin Farooque, Professor Mozaffor Ahmed and Ms. Syeda Rizwana Hasan. It is also noticeable that after seeking an order from the High Court Division by filing a PIL, the lawyers are appearing before the electronic and print media propagating that the Court has made such and such directions, which suggest that those petitions have not been made for the cause of the needy or underprivileged or less fortunate people, who could not seek redress for a wrong done by the Government or a local authority, rather it were moved for achieving dubious goal for generating personal publicity."

61. Then, in the said case, our Apex Court took the pain of formulating guidelines for the High Court Division which is as under:

"We reemphasize the parameters within which the High Court Division should extend its discretionary jurisdiction in entertaining a PIL.

1. Before entertaining a petition the Court will have to decide the extent of sufficiency of interest and the fitness of the person invoking the discretionary jurisdiction.
2. The Court while considering the question of *bonafide* in a particular case will have to decide as to why the affected party has not come before it and if it finds no satisfactory reason for non-appearance of such affected party, it may refuse to entertain the petition.
3. if a petition is filed to represent opulent members who were directly affected by the decision of the Government or Public Authority, such petition would not be entertained.
4. The expression 'person aggrieved' used in Article 102(1) means not any person who is personally aggrieved but one whose heart bleeds for the less fortunate fellow beings for a wrong done by any person or authority in connection with the affairs of the Republic or a Statutory Public Authority.
5. If the person making the application on enquiry is found to be an interloper who interferes with the action of any person or authority as above which does not concern him is not entitled to make such petition.
6. The Court is under an obligation to guard that the filing of a PIL does not convert into a publicity interest litigation or private interest litigation.
7. Only a public spirited person or organization can invoke the discretionary jurisdiction of the Court on behalf of such disadvantaged and, helpless person.
8. The Court should also guard that its processes are not abused by any person.
9. The Court should also guard that the petition is initiated for the benefit of the poor or for any number of people who have been suffering from common injury but their grievances cannot be redressed as they are not able to reach the Court.
10. It must also be guarded that every wrong or curiosity is not and cannot be the subject matter of PIL.
11. No petitions will be entertained challenging the policy matter of the Government, development works being implemented by the Government, Orders of promotion or transfer of public servants, imposition of taxes by the competent authority.
12. The Court has no power to entertain a petition which trespasses into the areas which are reserved to the executive and legislative by the Constitution.

13. A petition will be entertained if it is moved to protect basic human rights of the disadvantaged citizens who are unable to reach the Court due to illiteracy or monetary helplessness.

14. Apart from the above, the following are some categories of cases which will be entertained:

a) for protection of the neglected children.

b) non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of labour laws (except in individual case).

c) petitions complaining death in jail or police custody, or caused by law enforcing agencies.

d) petitions against law enforcing agencies for refusing to register a case despite there are existing allegations of commission of cognizable offences.

e) petitions against atrocities on women such as, bride burning, rape, murder for dowry, kidnapping.

f) petitions complaining harassment or torture of citizens by police or other law enforcing agencies.

g) petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life.

h) petitions from riot victims".

62. Now, let us vet the competency of the present petitioners in the light of the provisions of our Constitution, other laws and the decisions of the Apex Court of our and foreign jurisdictions discussed hereinbefore.

63. It is evident that the petitioners are the practising advocates of the Supreme Court of Bangladesh and the subject matter of these applications is not related to their personal issues, rather it is related to the interest of the Judges of the Supreme Court and, that being the scenario, we are to examine how they are aggrieved by the incorporation of the impugned provision of Section 4(1)(a) of the said Ordinance, 1978 and by the impugned actions of the respondents. It is the contentions of the petitioners that they are public spirited advocates and have come forward to remedy the injury caused to the administration of justice when they noticed that Judges of this Court are attempted to be maligned with a likely consequence of weakening the position of the judiciary. We find substance in the said contentions in that a lawyer has a vital interest in the independence of the judiciary as the legal profession is an integral part of the judicial system and, further, a lawyer is an Officer of the Court who sits and practises in the Court and, therefore, he has a legitimate interest in preserving the integrity of independence of the judicial system and if the integrity and interest of the judiciary is threatened by an act of a state functionary, naturally, it shakes the conscience of a lawyer.

64. When there appears some scheme and a design to demoralize Judges of the highest Court, lawyers feel perturbed as they are always serious in maintaining the high standards of fearless, impartial and unbending justice. One may be able to live in a world of logic detachment when unjustified abuses are hurled at one's self personally, but when the question is of injury to an institution, such as the highest Court of justice in the land, one cannot overlook its effect upon national honour and prestige. It becomes a matter deserving consideration of all serious minded people who are interested in seeing that democracy does not flounder or pale in this country.

65. In this connection it may be mentioned that in the celebrated judgment of the case of *SP Gupta vs Union of India, AIR 1982 (SC) 149,* (popularly known as Judges' case, which is a 524-page judgment), it was observed by their Lordships that the profession of lawyers is an essential and integral part of judicial system and the lawyers may figuratively be described as priests in the temple of justice. They have special interest in preserving the integrity and independence of the judicial system, and if the integrity and independence of judiciary is threatened by any act of State or any public authority, they would naturally be concerned about it because they are equal partners with the Judges.

66. In our jurisdiction, in the land mark cases of the *Secretary, Ministry of Finance vs Masdar Hossain* reported in *52 DLR (AD) 82, Bangladesh vs Md Idrisur Rahman* reported in *17 BLT (AD) 231 = 15 BLC (AD) 49* (popularly known as 10 Judges Case) *Bangladesh vs Advocate AKM Shafiuddin* reported in *64 DLR 508* (which has subsequently been disposed of by the Appellate Division through the CP No.2212 of 2012), *Government of Bangladesh vs Advocate Manzil Morshed* (CP No. 1172 of 2012, case relating to the medical allowances of the Judges of the Supreme Court of Bangladesh) and *Advocate Manzil Murshid vs Bangladesh and others 33 BLD 121* (case on the increase of the remuneration of the Supreme Court Judges where Rule having been made absolute, CP No. 1775 of 2013 is awaiting final disposal), *Advocate Manzil Morshed vs Government of Bangladesh* (Writ Petition No. 100027 of 2011, where the circular of the Biman Bangladesh Airlines was challenged to be discriminatory on the ground of non-incorporation of the provisions for the judges to upgrade their tickets like other dignitaries below the Judges), the members of the judiciary i.e. the advocates and the judicial Officers were the petitioners who have been held to be competent to approach this Court in the event when an injurious action to the judiciary was taken by the state functionaries.

67. In Kamini Kumar Datta Memorial Lectures (*supra*, pages v, vi) Mostafa Kamal, J said "Constitutional development is no doubt an evolution of the Constitution through judicial decisions, but judicial decisions on the Constitution are the outcome of dedicated lawyering backed by intensive academic studies. The role of the Judges is no doubt important, but it is the practising lawyers who open the multiple keys to the Constitution and show to the Judges the wealth contained in it. A responsive Judge picks up the wealth thus exposed, although there have been and are Judges in all jurisdictions who need no keys. The wealth of the Constitution is stored in their wisdom. The lawyer has to know to pick it up bits and pieces".

68. On top of getting support from the above landmark case laws and lexis of the jurists on the *locus standi* of the advocates of our country in PIL Cases in approaching this Court in the interest of the judiciary, "The Bangladesh Bar Council Canons of Professional Conduct and Etiquette" encourages the lawyers to take a standing in the establishment of social justice, which declares that "And whereas by their efforts Advocates are expected to contribute significantly towards the creation and maintenance of conditions in which a government established by law can function fruitfully so as to ensure the realization of political, economic and social justice by all citizens"(Fourth Paragraph of the Preamble).

69. Also Paragraph 1 of Chapter III of the said legal instrument prescribes the duty of a lawyer to the Court in the following words "It is the duty of an Advocate to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance".

70. Thus, upon reading through the above laws of the land and careful analysis of the Stare Decisis (Starred Decisions) of our Apex Court, it is our plain understanding that the lawyers are considered to have their status in the judiciary as members of the judicial fraternity and, in our modern judicial system, by virtue of their active engagement in legal profession in the Court, they are considered and believed to be the inseparable part of the judiciary and, accordingly, they have been imposed with a heavy duty of protection of the interest of the judiciary.

71. In the past as well, the members of the Bar could not turn a blind eye and shrug off their Constitutional responsibilities in the matters related to the independence of the judiciary, rather they have risen to the occasion being above all political bias joining hands with others to resist any unholy attempt to pollute and/or to ruin the highest judiciary which is the repository of the public.

72. That being the position of the lawyers in the judiciary, we see the petitioners' present move in seeking redress for the alleged wrong done by the respondents in the matters of allocations of the houses for the Hon'ble Judges of Supreme Court as an innate reaction inasmuch as we are satisfied that their conduct, in moving these petitions, are not for personal gain or political motivation or for any other oblique purpose. We find that it was a *bona fide* step of all these writ petitioners to bring to the notice of this Court that there has been a violation of laws and norms in allocation of a particular bungalow type house to a particular Judge of the High Court Division of the Supreme Court and, later on, during the course of hearing of these writ petitions, the petitioners' further exertion with a prayer for issuance of supplementary Rule to challenge the vires of the second part of section 4(1(a) of the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978 also demonstrate their *bona fides* inasmuch as we find their subsequent march as an effort to make out a fit PIL case on the ground that a handful of the Judges of the Supreme Court are persistently being victimized due to the operation of the said part of the law, hence, it is their contention that the same is liable to be declared *ultra vires* to Article 27 of the Constitution and a guideline should be given by this Court in the form of directions upon the respondents so that there will not be any scope for the respondents to allocate Government accommodations at their sweet will, whims and self-interest. Thus, we do not find any element of making any particular judge happy by moving the instant applications. Rather, we are satisfied that these are directed at endeavouring the establishment of the independence of the judiciary and rule of law.

73. Furthermore, apart from being lawyers, the advocates are conscious citizens of the country. In our way of understanding the spirit of our Constitution, as mirrors in the above cited Berubari's case, the BELA's case, the BRAC Bank case, the ETV case and the case of *National Board of Revenue vs Abu Sayeed Khan and others* reported in *18 BLC (AD) 116*, is that any public spirited conscious citizen may, *bona fide*, come forward for resolution of a grievance of a public nature through the Court of law for the benefit of the public, as opposed to the personal benefit, and our inevitable conclusion is that the petitioners are 'person aggrieved' within the meaning of Article 102 of the Constitution. In coming to our conclusion we have taken into our consideration the cautionary principles laid down by Mr ATM Afjal, J in BELA's case *49 DLR (AD) 1* and also the guidelines given by our Apex Court in the case of *National Board of Revenue vs Abu Sayeed Khan* reported in *18 BLC (AD) 116* on top of other scores of decisions of our jurisdiction and that of India, Pakistan and UK.

74. With regard to the issue of competency

of this Court in adjudicating upon the instant cases, we may again profitably refer to the cases of the *Secretary, Ministry of Finance vs Masdar Hossain and others* reported in *52 DLR (AD) 82*, *Bangladesh vs Md Idrisur Rahman* reported in *17 BLT (AD) 231 = 15 BLC (AD) 49* (popularly known as 10 Judges Case), *Bangladesh vs Advocate AKM Shafiuddin 1 LCLR [2012] HCD 339 = 64 DLR 508* (which has subsequently been disposed of by the Appellate Division in CP No. 2212 of 2012), *Government of Bangladesh vs Advocate Manzil Morshed* (CP No. 1172 of 2012, case relating to the medical allowances of the Judges of the Supreme Court of Bangladesh) and *Bangladesh vs Advocate Manzil Morshed 33 BLD 121* (CP No. 1775 of 2013), *Advocate Manzil Morshed vs Government of Bangladesh* (Writ Petition No. 100027 of 2011). We may sum up the issue by noting that in course of dealing with the issue of standing of the present petitioners, it has been divulged and perceived that in all the cited cases the direct interests of the Judges of this Court were involved, nevertheless, the same were decided by this Court without being blamed as to getting predisposed. It is our considered view that while there is no separate forum for the adjudication of grievances related to the benefits and interests of the Judges of the Supreme Court, this Court being bestowed with the power of judicial review is not debarred to take up the present cases for its consideration. Furthermore, in a case where a judge's criminality is required to be tried, there being no special forum consisting of non-judicial persons, we the Judges of this Court have never hesitated to award sentence, if found guilty. The maxim Nemo debet esse judex in propria causa, thus, hardly has the scope of application in such like cases in that the judiciary is an organ of the state and the said organ is staffed and run by human beings who may commit sin and, thereby, face trial and the outcome of the trial may be against or in favour of a single member of the judiciary or as a whole of the judiciary. Also, side by side, as a citizen of this country the judges are entitled to enjoy their lawful rights guaranteed in the Constitution and other laws of the land and if their rights are invaded by any state functionary or individual, they are entitled to have recourse to the competent Court of law.

75. Article 31 of our Constitution guarantees that it is an inalienable right of every citizen to be treated in accordance with law and to enjoy the protection of law.

> Article 31: "Right to protection of law. To enjoy the protection of law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law".

76. The Judges, thus, being the citizens of this country are entitled to benefit from the above Constitutional protection. Further, a Supreme Court Judge himself is an institution who cannot act unscrupulously for his personal gain and, for this reason, all the citizens including the members of the executive branch are duty bound to pay homage to them.

77. In the case of *State vs Abul Hossain* reported in *14 BLC (HCD) 223* it has been observed that:

> "Let it be known to everybody, if it is not already known, that a Judge of the Supreme Court is an upholder of the Rule of Law and is a Justice of the Peace for and of the whole of Bangladesh. Any disrespect shown to him, constitutes disrespect towards the Supreme Court and also to the Republic itself, because the Supreme Court wields the power of the Republic."

78. The essence of the said maxim Nemo debet esse judex in propria causa, thus, is that

no judge should try his own case and, further, in conducting the trial of a case where interest of other Judges, be that expressly or impliedly, are involved, the Judges should maintain impartiality. We can recall that we had indicated to the learned Attorney-General, in course of making his submissions on the said issue, that this Court is not dealing with an isolated complaint regarding allocation or non-allocation of a house for a particular Judge, rather the onerous task devolved upon this Court is to examine the position of the impugned statute in line with our Constitution and other relevant laws of the land and, further, to see as to whether there is any need to frame a guideline for the executive to be observed in allocation of the superior type of houses to the dignitaries, particularly to the persons holding the Constitutional posts, as submitted by the learned advocate for the petitioners.

79. Judges interpret the law as they find it and, thus, not as they would like to do it. They are inherently conditioned by the training that they would undertake their judicial functions with dispassionate objectivity without being influenced by personal and individual predilections. The Judges of this Court are under the legal obligation to protect, preserve and defend the Constitution and to dispense justice in accordance with law without any fear or favour, ill will or affection, be it the subject matter of adjudication involving our own interest or the interest of any near and dear one. The Judges, thus, can never act selfishly to personally benefit from the judgment or order passed by them. Rather, they act upon the dictates of their conscience which invariably leads them to act according to their oath.

80. The law is reason unaffected by desire or free from passion as propounded by the great philosopher Aristotle.

81. Lord Mansfield sees the duties of a Judge in the following words:

> "I will not do that which my conscience tells me is wrong, upon this occasion, to gain the hurrah of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow."

John Adams said:

> "Judges are deaf as an adder to the clamours of the populace"

Judge Hiller B. Zobel comments:

> "Must follow their oaths and do their duty, heedless of editorials, letters, telegrams, picketers, threats, petitions, panelists and talk-shows. In this country, we do not administer justice by plebiscite."

82. Thus, we see the present applications to be one of our routine cases which we are dealing everyday as a Court of law without being partial to any parties to the litigations.

83. Accordingly, we find that the present Writ Petitions are maintainable at the instance of the petitioners and we also find that this Court is competent to adjudicate upon the cases.

84. The resolution of the above technical issues in the affirmative leads this Court to undertake the core issues of the case namely, (i) the impugned actions of the respondents in allocation of the Government accommodation to the person holding Constitutional posts and (ii) the constitutionality of the second part of Section 4(1)(a) of the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978.

85. Let us first take up the actions of the respondents which have allegedly been taken in violation of the laws and norms of the land. The alleged actions are (i) illegal allocation of

House No. 12 at Minto Road in favour of respondent No. 3, (ii) non-compliance of the recommendations made by the Hon'ble President of the Republic, (iii) withholding of the Supreme Court Judges' applications for residence and non-cooperation of respondent Nos. 1 and 2 in allocation of the residence to the Supreme Court Judges and (iv) illegal allotments of a number of bungalow type houses in favour of Secretaries to the Government or other officials below serial No. 9 of the warrant of precedence.

86. It is alleged by the petitioners that when Mr Justice Md Jahangir Hossain's application for obtaining allotment of House No. 12 at Minto Road was lying before respondent Nos. 1 & 2, they ignored the same and volunteered to allot the said house in favour of respondent No. 3. It is further alleged that since the said application was recommended by the Honourable President of the Republic for allocation of the said house, the respondents have committed a serious illegality by not complying with the recommendation of the highest functionary of the Republic. It appears from annnexures 1, 2 & 3 that the application of Mr Justice Md Jahangir Hossain has been shown to have been received by respondent No. 1 on 20-11-2012 though the same has been forwarded from the Office of the Honourable President on 10-11-2012, which appears to be an inordinate delay inasmuch as usually all the correspondences from the Office of the Honourable President reaches the concerned Ministries within a day or two. Even, if it was received on 20-11-2012, allocation of the house in favour of respondent No. 3 on 20-11-2012 (on the day of receiving of Mr Justice Jahangir's application) cannot escape from being exposed to question in the light of the fact that after receiving the letter from the Office of the President, the dispatch of the said allocation letter could well have been stopped. In any event, when a Judge of the High Court Division has asked for the same, the allocation letter should have been revoked inasmuch as a Judge of the Supreme Court holds a much higher post than that of a Secretary. Moreover, when the said application was recommended by the highest person of the Republic, the respondents had no option but to deal with the same first and comply with it but, instead, they showed the audacity of handing over of the residence to respondent No. 3 on 15-5-2013 i.e. after issuance of the instant Rules, which demonstrates the deliberate disregard to a Judge of the Supreme Court and the Honourable President of the Republic. Thus, the conducts of respondent Nos. 1 & 2 clearly appears to be *malafide.*

87. Also, it is the allegation of the petitioners that while the applications for accommodation of a number of High Court Judges are not being dealt with for years, quick disposal of the application of respondent No. 3 on 20-11-2012, which was received only on 25-10-2012, demonstrates the arbitrariness and self-interest of respondent Nos. 1 & 2. Furthermore, the petitioners have unveiled the fact that while a handful High Court Judges are kept in the pipeline for suitable residences, a number of Senior Secretaries, Secretaries and Additional Secretaries of the Government are occupying bungalow type houses.

88. Now, let us see what their duty is and what they have done. Respondent Nos. 1 & 2 are entrusted with the functions of constructions of Government houses and thereafter maintain and allot the same to the deserving applicants from the Constitutional post holders and Government servants. In discharging their duties, they are required to act in accordance with the laws of the land and, thus, not being actuated by their sweet will and interest. Now, let us see what the law prescribes in the matters of allocation of residence to the Constitution post holders and whether the said respondent Nos. 1 and 2 have acted lawfully.

89. Article 147(1) of the Constitution reads as follows:

> "(1) The remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which this article applies shall be determined by or under Act of Parliament, —

90. In compliance to the above mandatory provisions the legislature in their wisdom have enacted the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978 and section 4 (1) (a) of the same deals with the matters of accommodation of the Judges of the Supreme Court which reads as under:

> (1) A Judge shall be entitled to, and provided with
>
> (a) a furnished residence free from the payment of any rent and charges on account of municipal taxes and local rate and of the use of electricity, water and gas and until such residence is provided, a judge shall be paid a residence allowance of Taka, 26,600 per month.

91. Thus, it transpires that the entitlement to a furnished house of a Supreme Court Judge is a statutory right stemming from the Supreme law, the Constitution. Therefore, making allocation of an accommodation to a Supreme Court Judge is an unbreachable duty of the State.

92. Furthermore, in the Warrant of Precedence the position of the High Court Judges is at serial No. 9 and it is worthy of mentioning here that the said Warrant of Precedence is framed and used for carrying out all sorts of functions of the State, not for ceremonial occasions only. If the provisions of the warrant of Precedence, for the arguments' sake, is taken to be not applicable for the affairs of house allocation, nonetheless, by dint of statutory right, as enshrined in the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978, the Supreme Court Judges shall get preference over the Secretaries to the Governments.

93. Invoking the provisions of the Note 1 of the Warrant of Precedence which provides: "the order in the Warrant of Precedence is to be observed for State and ceremonial occasions as well as for all purpose of the Government" and agreeing with the view taken in the case of *Ataur Rahman vs Bangladesh* reported in *62 DLR 329* it is our considered view that the provisions of Warrant of Precedence is applicable for all the purposes including the matters of house allocation and, thus, it is the duty of the respondents to ensure that the houses are provided for dignitaries listed therein as per their serial and positions and, accordingly, when the allocation of the superior type of houses for the dignitaries positioned at serial Nos. 5 to 8 in the Warrant of Precedence is completed, the High Court Judges shall be entitled to the same. However, the lists of the superior type of houses (annexures-x & x (1) portray an opposite scenario as these record that a good number of Secretaries to the Government have been allocated bungalow type houses. Without, first, accommodating the High Court Judges in bungalow type house or superior flats in any secured place, allotments of the same to the Government servants appear to be a bizarre action by the respondent Nos. 1 & 2. If the same are left over and available after all the Judges have been provided with their houses, there might have been an option for them but until a single Judge or any other Constitutional post holder is left without residence, no Government servant shall be eligible for the said bungalow type houses in that the Judges of the Supreme Court are Constitutional post holders and their remuneration and privileges are guaranteed in the Constitution but the Secretaries to the Government are Government servants and their terms and conditions of services are governed by the ordinary law and rules.

94. Here, in the cases at hand, the respondents failed to comprehend that while the source of entitlement of the Supreme Court

Judges to an accommodation is an Act of Parliament being a compliance to Article 147(1) of the Constitution, the source of entitlement to the accommodation of the Secretaries is Rules such as, Bangladesh Service Rules (BSR) and the Bangladesh Allocation Rules 1982 etc.

95. As per the words of the statute "A Judge shall be entitled to, and provided with", respondent Nos. 1, 2 & 5 are under a mandatory duty to arrange for accommodation, be that a hired or Government owned property. Entitlements prescribed in a statute shall always override and, thus, get preference to that of a Rule. An obligation imposed upon the Government functionaries vide the provisions of the Constitution may be compared with and termed as "Farj", the highest obligation imposed by the holy Quran. If it is imposed by an act of Parliament, the same may be termed as "Wazib", if the same is imposed by any Rule, it may be compared to "Sunnah" and if the source of obligation is any "Government Circular", then the same may be considered as "Nafal". The respondents are, thus, found to be more fanciful to perform "Sunnat" and "Nafal" leaving the "Farj" and "Wazib". Islam being the state religion, as enshrined in Article 2A of our Constitution, the comparison is made for ease of understanding and aimed at simplification of the duties and obligation of the respondents and, thus, without any prejudice to the Islamic law.

96. For the Secretaries to the Government, there is nothing to be jealous with the privileges and remuneration of the Judges of the Supreme Court, rather the state functionaries are expected to look after the Judges and should never disturb the Judges in enjoying their normal privileges and benefits, let alone providing any extra privileges.

97. In the cases of All *Indian Judges' Association vs Union of India (1993) 4 JT (SC) 618* the following observations were made:

> "The judicial service is not service in the sense of employment of the judiciary; they exercise the sovereign judicial power of the State. They are holders of public offices as the ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State and each one of them in turn represents the authority of the State. However, those who exercise the State power are the ministers, the legislators and the judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political. Similarly, the legislators are different from the judicial staff. So also the judges from the judicial staff. The party is between the political executive, the legislators and the judges and not between the judges and the administrative executive. In some democracies like the USA, members of some State judiciaries are elected as much as the members of the legislature and the heads of the State. The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutional or functional. It is high time that all concerned appreciated that for the reasons pointed out above there cannot be any link between the service conditions of the judges and those of the members of the other service".

98. Let it be known to the people what a Supreme Court Judge gets after his elevation

and what he is to sacrifice. Before being elevated as a Judge from the Bench or subordinate judiciary, all the Judges of the Supreme Court were financially better off in terms of earnings given that as a District Judge they used to enjoy comfortable accommodation arrangement in an independent bungalow type house in the District Headquarters and also, in addition to their monthly salaries, there were various benefits in their service life such as, judicial allowance and some ancillary allowances for attending Government meetings, seminars and trainings. And the judges who have been elevated from the bar used to earn a significant and considerable amount of money in their legal profession. People from both the arenas by the strength of their solvent background do accept the offer of holding a position of a Judge of the Supreme Court only in an expectation of getting honour from the society, otherwise, the offer for accepting the post of a Judge of the Supreme Court hardly could entice them, if it is to be considered in terms of payment of remuneration. The Judges of the Supreme Court, thus, do not get financially anything or any other privileges, which make this post too precious to be lured, rather they accept the offer of elevation for the greater interest of the nation with an interest to contribute something in the development of the jurisprudence. The lure, thus, is of the dignity and esteem attached to the position of a Judge and not of enjoyment of a sound financial position or any other pecuniary interest.

99. Though the Judges require the state of solitude in preparing their verdicts, unfortunately still today the judges have not been provided with full logistic support that they need and the working condition of the judges also has not been upgraded as they have never been provided with adequate facilities and privileges besides raising the level of salary. The concerned organs of the State never give their attention and make earnest endeavour to this aspect of the case. The state functionaries should conceive and concede to the fact that in pronouncing a judgment, a Judge does everything on his own without taking assistance from his colleagues but the other state functionaries carries out their job being assisted or advised by their bosses or assistants, advisors or colleagues. Unlike other state functionaries, the Supreme Court Judges can never accomplish their works between 9 am to 5 pm, rather their work volume compels them to work day-night, even, during the vacations. They hardly find any time to go for social outings for recreation and with the passage of time in the said process they eventually become workaholics.

100. In accepting the position of a judge, thus, the lawyers of the Supreme Court as well as the District Judges are to sacrifice huge financial benefits and other equally lucrative prospects. The Judges of the Supreme Court are entrusted with the duties of a sacred nature and after being positioned as a Judge of the Supreme Court, they place themselves in an isolated and aloof environment having remained incommunicado where they find themselves to be in a fragile condition, a state of being overwhelmingly professional preoccupation that others may find difficult to fathom.

101. To portray the painstaking duty of a Judge, Chief Justice Harlan Fiske Stone expressed his feelings to the President Truman of the United States in the following words;

> "Few are aware that neither my predecessor, nor 1, in more than twenty years since I have been a Justice of the Supreme Court, have been able to meet the daily demands upon us without working nights and holidays and Sundays. The administrative duties of the Chief Justice have increased and many other duties have been imposed on him by acts of Congress which my predecessors were not called on to perform..... Unlike the functions of an executive officer, practically none of these can be delegated (13th February 1946: cited at

page 125 of the book titled "Judges and Justices", supra)."

102. Justice William Brenan Jr narrated the Judges' function in the following language;

> "The writing of opinion is not easy work. It always takes weeks, and sometimes, months. The most painstaking research and care go into the task. Research, of course, concentrates on relevant legal materials-precedents particularly. But Supreme Court cases often require also some familiarity with other disciplines-history, economics, the social and other sciences-and the authorities in these area are, too consulted" (An Affair with Freedom Supra, page 336-338, also reproduced at page 192-193 of the book, "Judges and Justices", *supra*).

103. Justice Blackburn of the United States Supreme Court relates the work load of a Judge of the Supreme Court in the following words;

> "I have never worked harder and more concentratedly than since I came to Washington just five years ago. I thought I had laboured to the limits of my ability in private practice, in my work for a decade as a member of the section of Administration of the Mayo organization, and as a Judge of the Court of Appeals. Here, however, the pressure is greater and more constant, and it relents little even during summer months. One, therefore, to a large extent relies on experience and an innate and, hopefully, developed proper judicial reaction. One had better be right! Good health is an absolute requisite. The normal extracurricular enjoyment of life becomes secondary, if it can be said that they exist at all. "(Page 185, Judges and Justices, supra)".

104. Justice Mostafa Kamal, in describing his own experiences of the job of judgeship, states;

> "Snatching sometimes away from my days' (and nights') Court work, I have prepared these lectures all alone in my study". (Kamini Kumar Dutta Memorial Law Lectures 1994: Bangladesh Constitution: Trends and Issues: Page VIII).

105. The Supreme Court Judges are highly dignified persons whose appointments are made as per the provisions of the Constitutions and they are not subordinate and, thus, accountable to any authority including the Chief Justice, Prime Minister and President of the Republic in discharging their functions. Our Constitution, as provided in Article 94(4), has guaranteed the above position of the Judges. Moreover, Article 112 has asked all the authorities of the Republic to act in aid of the Supreme Court. Considering the above dignity of the position of the Judges of the Supreme Court, legislature in their wisdom have honoured the Judges of the High Court Divisions to hold the social status equivalent to a State Minister but it is curious enough that though there is no shortage as to the allocations of accommodations for other Constitutional post holders, either equivalent to the status of Supreme Court judges such as State Ministers or Election Commissioners or below to the Judges such as Deputy Ministers, MPs etc, respondent Nos. 1 & 2 are habitually coming out with a ready excuse of non-availability of accommodation for the Judges of the Supreme Court, which seems to be dubious and implausible and these actions of respondents have hardly ever been under any scrutiny.

106. There are two vital reasons for allocation of residence to a Judge immediate after his elevations, which are (1) leading a community life is beneath the dignity of a Judge and (2) it will expose him to the members of the public. People will have easy excess to him which is bound to tarnish his image and in such situation a Judge may even be sold behind his back. Many of the judges of this Court reside in pri-

vate houses and flats where there is no arrangement for safety and security. Besides, it exposes the judges to the members of the public who have easy excess to a judge. This kind of situation is not desirable. This makes the position of the judges vulnerable. In a developing country like ours, judges should maintain a distance from all and lead a secluded life for the reason that a judge should keep himself above all suspicion. In this regard we may follow the example of former Chief Justice Mr Justice Shahabuddin Ahmed who, during the terms of office as a judge of this Court and the Chief Justice of Bangladesh, never allowed any one including his close relatives to visit his residence. He maintained a high degree of seclusion and that is ideal for our society.

107. The Judges of this Court are oath bound to impart justice to all people, including the members of the executive branches and legislature, according to law without fear or favour, affection or ill-will. Regrettably, the members of the Executive, without apprising themselves of the nature of tasks of the Judges, very often take a hostile stand against this Court and the Judges which is most unfortunate. The executive must try their best to rise above self-interest and parochial consideration and extend co-operation to Supreme Court Judges with their legal entitlements and privileges instead of being jealous of them.

108. It is not understood as to why the Secretaries, who have been occupying the bungalow type houses at Minto Road, Bailey Road and other places, have not chosen to stay in the flats earmarked for them as listed in annexure X(1) where a good number of Joint Secretary to Additional Secretaries are living. Those are F type accommodations and as per Rule 4 of the Bangladesh Allocation Rules, 1982, those are reserved and earmarked only for Senior Secretaries to Joint Secretaries and the Senior Secretaries/Secretaries would obviously get preference in getting allocation of the said earmarked flats as per the Rules, norms and practice. Until a single Secretary to the Government is in pipe line to get the said flat, the other officers with the rank below the Secretary should not be accommodated therein until the said earmarked type flats becomes available to them.

109. Thus, it appears that the actions of the respondents in allocation of the bungalow type houses or superior type flats have been taken in sheer violation of the obligation imposed upon them by the Constitution and the Statute. Therefore, the allotment of House No. 12 at Minto Road in favour of respondent No. 3 and the allocations of other bungalow type houses situated at Minto Road, Bailey Road, Dhanmondi, Gulshan and Banani to the Government servants, which have not been earmarked for any persona designate, are declared to have been done illegally.

110. We may now turn to the final issue of the instant Rules as to whether the impugned part of section 4(1)(a) of the Ordinance, 1978 is liable to be deleted therefrom upon declaring the same *ultra vires* of Articles 27, 29, 31 and 147 (2) of the Constitution and also repugnant to the scheme of the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978.

111. The apparent reasons for attack on the impugned part of section 4(1)(a) of the Supreme Court Judge's (Remuneration and Privileges) Ordinance, 1978 are that, firstly, in case of non-availability of the houses/flats for the Supreme Court Judges, the concerned state functionaries get an extensive license not to provide the Judges with the accommodation despite the availability of bungalow type houses or superior type flats. Secondly, with the excuse of non-availability of the accommodation, the amount of money are being paid to the judges as residence allowance is too petty to compare with the facilities and benefits of the first part of the said section 4(i)(a) of the Ordinance, 1978. And,

thirdly, keeping the provisions of the payment of a specific amount of money as house allowances makes the Supreme Court Judges dependable on the executive and legislature as it requires a review to increase the amount of house allowances from time to time.

112. Now, let us take up the first point as to whether incorporation of the words "and until such residence is provided.....", meaning "in the case of non-availability of the furnished houses", creates a scope for the respondents to act arbitrarily in dealing with the Supreme Court Judges' application for accommodation. It appears from the statements made in the supplementary affidavit of Writ Petition No. 5276 of 2013 that a bungalow type house at Mohammadpur is available for allocation but the same has not been shown in the list supplied by the respondents, which indicates that the concerned authorities who are entrusted with the duties of allocation of the houses for the Supreme Court Judges, are not earnest in tracing out the vacant bungalow type houses or superior flats for the Supreme Court Judges. Rather, they simply tend to avoid their duties by informing the Judges that houses are not available for allocation. It means that taking advantage of the second part of section 4(1)(a) of the Ordinance, 1978, they instead of earnestly carrying out their duties as imposed upon them by the statutes in the following words " shall be entitled to and provided with", come out with the excuse of non-availability of the house and thereby abuse and exploit the provisions of the statute. Thus, we are of the view that the presence of the words "and, until such residence is provided", in section 4(1) (a) of the Ordinance frustrates the spirit of the statute which intends to actually provide a furnished residence for the Supreme Court Judges. It is our considered view that incorporation of any word/s in a statute, if gives unfettered discretionary power to the authority in taking a decision on a matter of statutory obligation, then, the presence of the said words is repugnant to the scheme of the said law and, consequently, deserves to be deleted therefrom. In the case of *Dr Nurul Islam vs Bangladesh* reported in *33 DLR (AD) 201*, the unfettered discretionary power of the Government as to sending any public servant on compulsory retirement was held to have been illegal being vitiated by malice in law.

113. Now, let us pick up the second point as to the payment of money to the Supreme Court Judges as residence allowance. All the Judges of the High Court Division of the Supreme Court do stand on similar footings and when a High Court Judge is allowed to enjoy a furnished residence free from any rent and charges of electricity, water and gas", he enjoys a benefit of around Taka 2(two) lakhs and, on other hand, a Judge receives only Taka 26,600 as residence allowance because of non-availability of the furnished house, which appears to be a striking unequal treatment and, thus, ridiculous given that the very purpose of incorporation of residence allowance is to allow and enable the non-allottee Judges to privately arrange for their accommodation but the said amount, cannot even meet half the costs of a suitable house because most of the judges live in 4 to 5 bedroom flats which incurs costs of, inclusive of service charges, bills of gas, water and electricity, around seventy to eighty thousand taka and, similarly, the judges who live in their own flat or house, if those are rented out, would get a rent of around Taka seventy to eighty thousand from their tenants. In figuring out the amount of residence allowance, the concerned authority should have taken into consideration if the Government has to hire or requisition houses or flats of 4200-4500 square feet for the High Court Judges at a sparsely populated residential area in terms of being conducive to their security, it would cost around 1 lakh taka, inclusive service charges and bills. Thus, it appears that the amount of residence allowance of Taka 26,600 is too low to arrange for a suitable accommodation for the Judges privately.

114. In this context, it becomes a pertinent question that on what objective basis or standard the amount of house allowance is assessed and determined. We did not get any clue to the said question from the respondents. In absence of any guidelines for assessment and determination of the amount of house allowance, there is always a serious likeliness of deprivation of enjoying rational amount of house allowance by which a Judge may be able to cope up with the expenses of privately rented house.

115. In our view, "the Committee on Pay and Privilege of the Supreme Court Judges" formed by the Government, as stated by respondent No. 5 in its affidavit-in-opposition, should have its authority from the Ordinance, 1978, which may be constituted by incorporating a section in the Ordinance, 1978. The said Committee may be headed by the Auditor and Comptroller General of Bangladesh and the Finance Secretary, the Law Secretary, the Housing and Works Secretary, the Registrar of the Supreme Court and the Chief Executives of both the City Corporations of Dhaka should be the members of the Committee. The said Committee shall mandatorily sit, at least twice in every calendar year, may be in the last week of each June and December, for carrying out the following tasks (i) to decide as to whether there is any need to hire the flats/houses for the non-allottee judges, a better resolution of the accommodation problems in case of non-availability of the Government owned houses, (ii) to get the data and information as to living costs of a dignitary with his family including the amount of prevailing rates of house rent from the Dhaka City Corporations and from the Councilors of the Wards of the areas where the Supreme Court Judges are supposed to be housed such as the residential areas within the proximity of the Supreme Court or Dhanmondi, Gulshan and Banani and the areas where the Judges live in their own accommodation (iii) approve the rent agreements of the non-allotee judges entered with their landlords and their bills of electricity, gas, water and service charges (iv) to assess the rental value of the flats/houses of the judges who are living in their own accommodation and to periodically review the said rental value on their own or upon the request of judges made through the Registrar and, if required, increase the amount of house allowance in order to adapt to the costs of living.

116. Now, let us take up the third point that incorporation of a specific amount of money as house allowance in the second part of section 4(1) (a) of the Ordinance, 1978 makes the judges dependable on the executives as the concerned authorities never feel urge to spontaneously increase the same enabling the Judges to cope with the changed socio-economic condition. The past experiences lead us to believe that above contention is not a mere apprehension of the petitioners but, in true sense, it is a reality. Though the Judges should not be expected to approach the executive for their privileges which they are legally entitled to but unfortunately, in practice, the Judges do not get anything without approaching them. While, in this 21st century, the Judges of the Supreme Court are dealing with a huge number of litigations where the executives are the parties, it is not desirable that the Judges of the Supreme Court would be placed in a situation to keep contacts with the parties of the litigations, here the executive, pending before them. In other words, since the State in the present day has become the major litigant and the superior courts have become centers of turbulent controversies, some of which with a flavour of political repercussion, and the Courts have to face tempest and storm because their vitality and neutrality is a national imperative, and, in such circumstances, the Government, namely the major litigant, cannot be justified in enjoying absolute authority as to sanctioning any particular privilege to its arbitrator. The executive cannot be allowed to enjoy the absolute authority in the matter of fixation of remuneration and/or with

This is an ample example of the abuse of process of the Court and the spirit of law for which we have no option but to interfere to prevent such gross injustice. *Shamsunnahar vs Bangladesh (Spl Original) 67*

Code of Civil Procedure (V of 1908)
Order VII, rule 11(d))

Bangladesh Bank Order (PO 128 of 1972)

Article 34(5)—An employee, when terminated with stigma and for removing the stigma suit is maintainable even the service condition is governed by master and servant rule. *Bangladesh Commerce Bank Ltd vs Md Nasir-ur-Zaman (Civil) 71*

Code of Criminal Procedure (V of 1898)

Section 561A—If the allegations in FIR and finding in the charge sheet are taken in their face value and accepted in their entirety, no *prima facie* charge is made out against the accused petitioners. *Kazi Khairuzzaman vs State (Criminal) 51*

Constitution of Bangladesh, 1972

Articles 27, 29, 39 and 147(2)—It transpires from the chronology of the facts of fixation of the amount of house allowance that before 1990 when there was only 20-30 High Court Judges, there was hardly any shortage of bungalow type houses for the Judges and the provision regarding payment of money as was fixed as house allowance before 1990 was not so unreasonable as it stands today. *Emrul Kayes (Md) vs Government of the People's Republic of Bangladesh (Spl Original) ... 76*

Constitution of Bangladesh, 1972

Articles 27 & 31—"Equality before law" should not be taken in its absolute sense to hold that all persons are equal in all respects irrespective of their different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess and others may lack. By the term 'protection of equal law', it is not meant that all persons or things are equal in all cases, rather it is to mean that the persons similarly situated should be treated alike. Provisions of equal protection, guarantees that similar people will be dealt with in a similar way and people different circumstances will be treated in a dissimilar way. *Emrul Kayes (Md) vs Government of the People's Republic of Bangladesh (Spl Original) 76*

Article 31—A law will be violative of Article 31 if the Court finds that it is so demonstrably unreasonable or arbitrary that the members of Parliament acting as reasonable men could not pass that law. *Emrul Kayes (Md) vs Government of the People's Republic of Bangladesh (Spl Original) 76*

Customs Act (IV of 1969)

Section 196D—Since the High Court Division's ordinary appellate power includes the power to send the case back on remand and that power having not been clearly and unequivocally ousted by the relevant provisions of the Act, the High Court Division is empowered to send the case back on

remand, if it feels necessary, in disposing of an appeal preferred before it. *Bureau Veritas (Bivac) vs Customs, Excise and VAT Appellate Tribunal (Spl Statutory)* 55

Section 196G—Although not specifically mentioned under section 196G of the Act, the High Court Division, in the exercise of its appellate power as the second the appellate forum, has also the power to send the case back to the lower authorities on remand. *Bureau Veritas (Bivac) vs Customs, Excise and VAT Appellate Tribunal (Spl Statutory)* 55

Employment of Labour (SO) Act [VIII of 1965]

Section 18(1)(4)—When sub-section (1) of section 18 provides for personal hearing if such prayer is made, sub-section 4(a) provides for inquiry which may in some particular cases should include 'personal hearing' as well although not specifically mentioned therein. Inquiry as an eyewash cannot be the contemplation of the Legislature. Although personal hearing in an inquiry, if not sought by the delinquent worker, is not provided specifically by sub-section (4) of section 18, depending on the facts and circumstances of a particular case the Domestic Tribunal should read therein the words 'personal hearing' as a mandatory requirement in particular when the allegations themselves do not confirm the identity of the delinquent workers.. *Abdul Wahab & anr vs Chairman, First Labour Court, (Spl Original)* 59

Sections 18(4)—Personal hearing ought to have also been given through the inquiry to the petitioners who did not seek such hearing as the same is envisaged under sub-section (4) of section 18 in some circumstances and in that hearing they ought to have been given the opportunity to cross-examine the victims. *Abdul Wahab vs Chairman, First Labour Court, (Spl Original)* ... 59

Supreme Court Judges (Remuneration and Privileges) Ordinance (XI of 1978)

Section 4(1)(a)—We declare the second part of section 4(1)(a) of the Supreme Court Judges Ordinance, in the language of " .....and until such residence is provided, a judge shall be paid a residence allowance of Taka 26,600 per month" void for being the same ultra vires of Articles 27, 29, 31 and 147(2) of our Constitution. *Emrul Kayes (Md) vs Government of the People's Republic of Bangladesh (Spl Original)* 76

Interpretation of Statute—It is the Court's responsibility to look into the intention of the Legislature behind the black words of the statute. *Shamsunnahar vs Bangladesh (Spl Original)* 67

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