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Cit. 19 BLC (AD); 19 BLC etc.

Contents

Appellate Division 89-104 High Court Division 105-184

Appellate Division

1 Abdul Momen Bhuiyan vs District Judge, Dhaka *(Civil)* 98
2 Kaisor-uz-Zaman (Md) vs State, represented by the Deputy Commissioner *(Criminal)* 01
3 Nurul Majid Mahmood Humayun vs Brigadier General Kazi Mahmud Hassan *(Civil)* 89
4 Shahjahan Khalifa vs State *(Criminal)* 95

High Court Division

1 Abdul Kader Bepary vs State *(Criminal)* 183
2 Abdus Samad (Md) alias Badsha vs State *(Criminal)* 171
3 Jahangir Hossain Molla vs State *(Criminal)* 167
4 Jamal Ahmed vs Md Humayan Kabir *(Civil)* 179
5 Juboraj Goula vs State *(Criminal)* 119
6 Kazi Md Akhtaruz-zaman vs Bangladesh *(Spl Original)* ... 148
7 PEB Steel-Asia Limited vs The Registrar, Office of the Registrar of Joint Stock Companies and Firms *(Statutory Original)* 141
8 Sadharan Bima Corporation vs Ceylone Shipping Corporation *(Civil)* ... 176
9 Shahadat Hossain (Md) vs State (*Criminal)* 125
10 State vs Abul Bashar *(Criminal)* 130

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Appellate Division

Anti-Corruption Commission Act (V of 2004)

Section 17(ক)(ঞ)—One of the functions of the Commission is to prescribe the procedure as to the sanction to be given by it in respect of the enquiry, investigation and filing of a case in relation to corruption. Neither in clause (ক) nor in clause (ঞ) of section 17, any difference has been made about the offences under the Ain, 2004 or the offences under other laws mentioned in the schedule to the Ain. *Kaisor-uz-Zaman (Md) vs State, represented by the Deputy Commissioner, Sylhet (Criminal)* 101

Section 20(1)—The moment the Ain, 2004 came into force, the police had lost its jurisdiction to continue with the investigation of the case and was legally obliged to stop the investigation of the case and send the same to the Commission to complete the investigation by it and submit the report accordingly. *Kaisor-uz-Zaman (Md) vs State, DC, Sylhet (Criminal)* 101

Sections 26, 27, 32 and 38(3)—Section 409 of the Code was in the schedule to the Act, 1957, it was a part of it and had to be treated as an offence under the Act. Sub-section (3) of section 38 of the Ain, 2004 was applicable in respect of the investigation of offence under section 409 of the Code. Offences mentioned in the schedule to the Ain, 2004, be it an offence as contemplated in sections 26 and 27 thereof, or the offences under other laws as mentioned therein, section 32 of the Ain, 2004 shall be applicable. *Kaisor-uz-Zaman (Md) vs State, represented by the Deputy Commissioner, Sylhet (Criminal)* 101

Anti-Corruption Commission Rules, 2007

Rule 13(1)(2)—Bidhi 13(1) of the Bidhimala, has clearly provided that prior sanction of the Commission or the authorized Commissioner of the Commission shall be necessary in case of submission of report in the competent Court (উপযুক্ত আদালতে) in case the allegation(s) of the commission of any mentioned in the schedule to the Ain, 2004 is proved against any person after completion of investigation. Sub-bidhi (2) of bidhi 13 has clearly provided that no Court shall take cognizance of an offence for trial if a copy of sanction given by the Commission or by the Commissioner as the case may be is not filed as a proof of such sanction against any person. *Kaisor-uz-Zaman (Md) vs State, represented by the Deputy Commissioner, Sylhet (Criminal)* ... 101

Code of Civil Procedure (V of 1908)

Order XIV, rule 2—What it follows is in appellable cases Courts below should, as far as may be practicable, pronounce their opinion on all the issues joined together whether they are related to fact or law or mixed question of fact and law unless the issues of law relate to the maintainability of the suit which goes to the root of the litigation and raises the question of jurisdiction of the Court to try the dispute. *Nurul Majid Mahmood Humayun vs Brigadier General Kazi Mahmud Hassan PSC (Rtd.) (Civil)*... 89

Code of Criminal Procedure (V of 1898)

Section 161—Mere delay in recording the statements of the witness under section 161 of the Code, cannot be considered fatal if the evidence adduced by them in court appears to be credible after sifting. *Shahjahan Khalifa vs State (Criminal)* 95

Constitution of Bangladesh, 1972

Article 104—This Division previously exercised the power of doing complete justice under 104 of the Constitution. The subject matter of the case represents an occasion to and demands exercise of this power by this Division for the purpose of protection of the dwelling house of the petitioners. *Abdul Momen Bhuiyan vs District Judge, Dhaka (Civil)* 98

Appellate Division
(Civil)

ABM Khairul Haque CJ
Md Muzammel Hossain J
SK Sinha J

Nurul Majid Mahmood Humayun .....Petitioner

vs

Brigadier General Kazi Mahmud Hassan PSC (Rtd.) and others..... .....Respondents*

Judgment
October 7th, 2010.

Code of Civil Procedure (V of 1908)
Order XIV, rule 2

What it follows is in appellable cases Courts below should, as far as may be practicable, pronounce their opinion on all the issues joined together whether they are related to fact or law or mixed question of fact and law unless the issues of law relate to the maintainability of the suit which goes to the root of the litigation and raises the question of jurisdiction of the Court to try the dispute. .....(14)

Fazlur Rahman vs Rajab Ali, 30 DLR (SC) 30; Major SS Khanna vsBrig. FJ Dillon, AIR 1964 SC 497; Tara Kant Banerjee vs Puddo Money Dossee, (1865) 10 MIA 476: 5 WR 63 and Jugannath Rac-Dani vs Ram Bharosa, LR 60 IA 49; 37 CWN 321; AIR 1933 PC 33, ref.

Muhammad Mohsen Rashid, Advocate, instructed by Syed Mahbubar Rahman, Advocate-on-Record—For the Petitioner.

Qamrul Islam Siddique, Advocate, instructed by AKM Shahidul Huq, Advocate-on-Record—For the Respondent No.1.

None Represented—For the Respondent Nos.2-15.

*Civil Petition for Leave to Appeal No.308 of 2010

(From the order dated 31-1-2010 passed by the High Court Division in Election Petition No.4 of 2009)

Judgment

Md Muzammel Hossain J: This petition for leave to appeal under Article 103 of the Constitution of People's Republic of Bangladesh is directed against the order dated 31-1-2010 passed by the High Court Division in Election Petition No.4 of 2009 rejecting the petitioner's application under Order XIV, rule 2 of the Code of Civil Procedure,1908.

2. The present respondent No.1 filed Election Petition No.4 of 2009 before the High Court Division stating, *interalia*, that he being a veteran member of a political party, namely, Jatiyo Party was nominated by the Party on 17th November, 2008 for the 9th National Parliamentary Election and thereafter he submitted his application along with a copy of the nomination letter signed by the Secretary General of the said Jatiyo Party. He paid 'jamanat' of Taka 10,000 and was declared valid candidate for the constituency of Narsingdi-4 out of 6 candidates. The present petitioner, an Awami League nominee, Nurul Majid Mahmood Humayun (writ respondent No.13) who has been elected from the said constituency, was a loan defaulter till the date of swearing affidavit on 20-11-2008 and concealing this fact he contested the election. The present respondent No.1 and his agents raised objection verbally with regard to the acceptance of the nomination paper of the present petitioner to which the Returning Officer, i.e. the Deputy Commissioner of Narsingdi (Respondent No.6) did not pay any heed. Consequently, the respondent No.1 filed an application on 11-12-2008 under Article 91E of the Representation of the People Order,1972 but till filing the Election Petition the Election Commissioner did not take any step to conduct any investigation into the matter. Inspite of the fact that the respondent No.1 had been the lone candidate of Jatiyo Party contested from the same constituency, on 12-12-2008 Returning Officer issued a letter against him stating that on the basis of "Paripatra 13Ka" dated 11-12-

2008 issued by the respondent No.3 they had taken decision to exclude his name from the Election List as they could not allocate him any symbol. The said "Paripatra 13Ka" dated 11-12-2008 is against the provisions of the Representation of the People Order,1972 as Article 12(1)(b) clearly states that the candidate has to be nominated by a registered political party or has to be an independent candidate and the argument put forward by the Election Commissioner in para-2 of the "Paripatra 13Ka" is totally contradictory to the said Article 12(1)(b). As the Respondent No.1 was the only candidate nominated by Jatiyo Party and as the said party did not ask him to withdraw his candidature, denial to allocate him a symbol is violation of natural justice and against the provisions of the constitution and the Representation of the People Order,1972 because only the valid candidate has the right to withdraw his candidature or his agent can do so under Article 16(1). Returning Officer by refusing to allocate a symbol to him and withdrawing his candidature acted most illegally. Respondent No.1 further stated in the Election Petition that he submitted an application to rescind the decision of the Returning Officer on 15-11-2008 to which no step has been taken. Then he filed representations on 11-12-2008 and 15-12-2008 with the Election Commission alleging all these facts and requested the Commission to conduct an investigation against the violation of Code of Conduct by the returned candidate Nurul Majid Mahmood Humayun of Awami League, the petitioner and also against the decision of the Returning Officer refusing to give or allocate symbol to him on 12-12-2008, to which the Election Commission did not take any action. Being aggrieved by the said non-responsive attitude of the Election Commission as well as the Returning Officer, respondent No.1 filed a Writ Petition and a Division Bench of the High Court Division summarily dismissed the same with a direction to file an application in the Election Tribunal in accordance with the Ruling of this Division reported in *42 DLR (AD) 137*. Respondent No.1 then filed Election Petition No.4 of 2009 before the High Court Division without original papers because of the refusal of the Returning Officer to provide him certified copies of all the letters and official orders in response to an application filed by the respondent No.1 on 14-12-2008.

3. Finally in the Election Petition the respondent No.1 stated that since the Returning Officer most illegally restrained him from contesting the Parliamentary Election for Norsingdi-4 constituency violating Article 12 and Article 18 of the guidelines of the Election Commission for the conduct of elections to Parliament and thereby most illegally deprived him of his fundamental rights, violating the provisions of RPO 1972 the Returning Officer validated the candidature of Nurul Majid Mahmood Humayun of Awami League, a loan defaulter whose candidature is also liable to be invalidated and, as such, the election of Narsingdi-4 constituency as a whole is void.

4. Against the Election Petition filed by the respondent No.1, this petitioner (respondent No.13) filed written statement contending, *interalia*, that the petition is not maintainable as the Respondent No.1 was not a contesting candidate or a candidate at all. Under Article 49(1) of the Representation of the People Order, 1972, no election can be called in question except by an election petition presented by "a candidate for that election in accordance with the provisions of chapter V Election Disputes" of the RPO 1972. The Respondent No.1 was nominated by Jatiyo Party, which is a registered political party having a registered and reserved symbol "PLOUGH". Under the law and Rules, as amended, prior to the elections the parties are permitted to jointly and severally contest elections. Although Jatiyo Party was part of the "Moha Jote" led by Awami League, it contested the elections with its own symbol, whereas, some other parties like the Jatiyo Samajtantrik

Dal (JSD) and the Workers party contested the elections with the symbol of the Awami League. Pursuant to the understanding between the Jote members, Jatiyo Party had to contest only in 48 seats and to withdraw its candidates from all other seats where the party had nominated its candidates. It is common knowledge that the Jatiyo Party had nominated candidates for more or less 300 seats, and all the candidates had filed nomination papers. Accordingly, Jatiyo Party candidates withdrew their candidatures from all seats except the agreed and designated 48 seats. The Respondent No.1's constituency of Narsingdi-4 was not a Jatiyo Party designated seat as per the seat sharing arrangement between the "Moha Jote" constituents. The Respondent No.1 as a Jatiyo Party candidate, who is also a Presidium member of his Party, as a former member of the Defence Forces should himself have shown respect to the political decisions that the party had taken but unfortunately he did not do so, as a result the party symbol which is the property of the party was not allocated to him because the party had submitted the list to the Election Commission in respect of 48 seats only. In view of the aforesaid facts, the Respondent No.1 was not given a symbol and, as such, he did not contest the elections. The implication of this entire episode is that he stood withdrawn from the race and was not a candidate pursuant to the amendments made in the Representation of the People Order,1972, vide the Representation of the People (Amendment) Ordinance 2008, the Respondent No.1 cannot be said to be a candidate and, as such, before proceeding with the merit of the case, the issue whether the Respondent No.1 is a candidate or not, or has a right in law to come before the Tribunal is required to be answered/ settled.

5. The present petitioner as respondent No.13 filed an application under Order XIV, rule 2 of the Code of Civil Procedure,1908 for framing of a legal issue as to whether under Article 49(1) of the Representation of the People Order,1972 and the amendments made thereto the respondent No.1 is a candidate of that election who can call in question the election of the returned candidate of Narsingdi-4 constituency by way of an election petition and sought that this issue be disposed of first closing the settlement of the issue of fact until the issue of law on standing of the respondent No.1 has been determined. In the said application the present petitioner as the respondent No.13 stated, *inter-alia*, that the election petition is not maintainable as the present respondent No.1 was not a contesting candidate or a candidate at all; that pursuant to the amendments made in the Representation of the People Order, 1972, the respondent No.1 cannot be said to be a candidate; that under the present scheme of the law the symbols are registered with the party as opposed to the previous practice of reserved symbols, thus the symbol now is the property of the political party concerned. In that view of the matter the prospective candidate is to follow the provisions of Article 12(3a) of the Representation of the People Order,1972 whereby a candidate must secure a letter from the party concerned; that the party is empowered under the law and the rules to nominate more than one candidate. Subsequently, one or all candidates of the given party as per the instructions of the party is or are to withdraw his or her candidature. In case of failure of the candidate to withdraw the candidature the party can sent a letter withdrawing the letter given to the candidate which would leave the candidate without a symbol, as he is precluded from being an independent candidate because of the new requirement of 1% signatures on the nomination paper. In the case of the respondent No.1 once the party (Jatiyo Party of the former President General HM Ershad) was in alliance with the 14-Party Alliance and a part of the "Moha Jote" formed for the purposes of election and running the country in case of it gaining majority seat in parliament and as per

understanding between the "Moha Jote" constituents the Narsingdi-4 constituency was allocated to Awami League, as such the present petitioner as an Awami League candidate contested and was returned with a resounding majority. The present petitioner challenges the respondent No.1 to prove that he was a "Moha Jote" candidate. The Election Tribunal (High Court Division) by the judgment and order dated 31-1-2010 rejected the petitioners application under Order XIV, rule 2 of the Code of Civil Procedure,1908. Being aggrieved by the impugned judgment and order passed by the High Court Division the petitioner preferred the instant civil petition for leave to appeal.

6. Mr Muhammad Mohsen Rashid, the learned Advocate appearing for the petitioner submits that the Election Petition is not maintainable as the present respondent No.1 was not a contesting candidate or a candidate at all pursuant to the amendments made in the Representation of the People Order,1972 and, as such, the respondent No.1 cannot be said to be a candidate. He submits that under the present scheme of law the symbols are registered with the party as opposed to the previous practice of reserved symbols, thus the symbols now are the property of the concerned political parties and in that view of the matter the prospective candidate is to follow the provisions of Article 12(3a) of the Representation of the People Order,1972 whereby a candidate must secure a letter from the party concerned. Mr Mohsen Rashid asserts that the party is empowered under the law and the rules to nominate more than one candidate but subsequently, one or all candidates as per the instructions of the said nominating party is or are to withdraw his / her or their candidature and that in case of failure of the candidate to withdraw the candidature the party can sent a letter withdrawing the nomination which would leave the candidate without a symbol as he is precluded from being an independent candidate because of the new requirement of 1% signatures of the total electorates of the constituency on the nomination paper. He then submits that in the case of the respondent No.1 the party (Jatiyo Party of the former President Gen HM Ershad) from which he claims to have secured nomination was in alliance with the 14-Party Alliance and a part of the "Moha Jote" formed for the purposes of election and running the country in case of its gaining majority seats in parliament and as per understanding between the "Moha Jote" constituents the Narsingdi-4 constituency was allocated to Awami League, as such the present petitioner as an Awami League candidate contested and was returned with a resounding majority.

7. The learned Advocate for the petitioner finally submits that the Election Tribunal (High Court Division) erred in law rejecting the petition of the present petitioner under Order XIV, rule 2 of the Code of Civil Procedure,1908 for determining the question of law as to whether in the present scheme of law, i.e. under Article 49(1) of the Representation of the People Order,1972 the respondent No.1 is a candidate who can call in question the very election in the Tribunal first and to settle the whole dispute on that point of law and therefore, the order of the Tribunal is liable to be set-aside.

8. We have heard the learned Counsel for both the parties, perused the civil petition for leave to appeal, the impugned order passed by the High Court Division and other materials available on record. Having considered the submissions of the respondent No.13-petitioner the High Court Division found that the respondent No.13 petitioner has admitted that the petitioner-respondent No.1 was nominated by a registered political party named Jatiyo Party and the respondent No.13-petitioner has not denied the validity of his nomination nor did he deny the claim of the respondent No.1 that his nomination was declared valid and legal by the Returning Officer.

9. In this case the High Court Division was required to decide whether under Article 49(1) of the Representation of the People Order,1972 and the amendments made thereto the respondent No.1 is a candidate for the election to a seat of Parliament who can call in question the election of the returned candidate of Narsingdi-4 constituency by way of an election petition and secondly whether this issue of determination of a candidature be disposed of first closing the settlement of the issue of fact until the issue of law on standing of the petitioner-respondent No.1 has been determined. The general Rule of judicial procedure is that a suit should not be disposed of in-part on an issue only causing delay in disposing the same. It is expected that in a suit all issues should be heard together and disposed of by one judgment so that there may not be any necessity of remand of the suit for the disposal of undisposed of issues. But the provisions of Order XIV, rule 2 of the Code of Civil Procedure,1908 is a kind of exception to the general Rule that issues in a suit shall not be tried in part but should be disposed of together. Order XIV, rule 2 provides that where issues both of law and facts arise in the same suit and the court is of opinion that the suit or any part thereof may be disposed of on the issue of law, the court shall try those issues first and may postponed the settlement of the issues of fact until after the issues of law have been determined. This Court in the case of *Fazlur Rahman vs Rajab Ali, 30 DLR (SC) 30* observed that the whole object of the provision of Order XIV, rule 2 seems to be that if there is any issue of law on which the entire suit may be disposed of it is the duty of the Court to try that issue first at the earliest opportunity so that the Court may not be unnecessarily bogged down in a complicated trial of the issue of fact requiring much time and involving heavy expenditure. The mandatory provision as contained in the aforesaid Rule clearly directs that if the Court is of opinion that the suit or any part thereof may be disposed of on an issue of law only, it shall try that issue first even without settling the issues of fact.

10. The main point of contention between the parties is the status of the respondent No.1 as a "candidate" after non-allocation of symbol for voting by the electors. According to respondent No.13 petitioner the determinant factor is the "Moha Jote" arrangement of 48 seats for the Jatiyo Party excluding Narsingdi-4 and the consequent non-allocation of that party's symbol or any other symbol to the petitioner-respondent No.1 by the Returning Officer. According to Article 49(1) of the RPO,1972 only a "candidate" can file an election petition and as per definition provided in Article 2(ii) of the RPO 1972 "candidate" means a person proposed as a candidate for election as a member. In view of the said provisions of law the High Court Division observed that the petitioner-respondent No.1 "having been admittedly a validly nominated or proposed person for the election in question, he has a right to file an election petition under Article 49(1)". The objection raised by the respondent No.13-petitioner with regard to the formation of "Maha Jote" and the allocation of 48 seats excluding Narsingdi-4 for Jatiyo Party, the legality of non-allocation of any symbol to the petitioner-respondent no.1 and his claim that neither he nor Jatiyo Party withdrew his candidature and the legal consequences of all these facts are evidently mixed question of law and facts and these are to be decided in the light of the evidence to be led by the parties and the relevant laws.

11. In the case of *Major SS Khanna vs Brig. FJ Dillon, AIR 1964 SC 497,* Supreme Court of India pointed out that on mixed issues of law and fact, and when the decision on issues even of law depends upon the decision of issues of fact the Court is to dispose of all the issues together. The Court observed as under:

> "Under Order XIV, rule 2 Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the Court is

of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court: not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lop-sided trial of the suit."

12. We endorse the above view that on mixed issues of law and fact, and when the decision on issues of law depends upon the decision of issues of fact the Court has to dispose of all the issues together.

13. Apart from that, observation by the Judicial Committee of the Privy Council in *Tara Kant Banerjee vs Puddo Money Dossee, (1865) 10 MIA 476: 5 WR 63,* (and other subsequent cases such as *Jugannath Rac-Dani vs Ram Bharosa, LR 60 IA 49; 37 CWN 321; AIR 1933 PC 33)* obliges us to discourage disposing of issues relating to law separating them from that of fact in appellable cases unless the issues relate to the maintainability of the suit which goes to the root of the litigation and raises the question of jurisdiction of the Court to try the dispute. In *Tara Kant Banerjee's case* Judicial committee of the Privy Council observed as under:

"The Court below, in appealable cases by forbearing from deciding on all the issues joined, not infrequently obliged this Committee to recommend that a case may be remanded which might otherwise by finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second Appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Court below should, as far as may be practicable, pronounce their opinion on all the important points."

14. What it follows is in appellable cases Courts below should, as far as may be practicable, pronounce their opinion on all the issues joined together whether they are related to fact or law or mixed question of fact and law unless the issues of law relate to the maintainability of the suit which goes to the root of the litigation and raises the question of jurisdiction of the Court to try the dispute as their Lordships held in *30 DLR (SC) 30* paragraph 23.

15. According to Article 62(3) of RPO, 1972 the instant case is appellable if this Division grants leave to appeal and there is no question of jurisdiction of the Court trying the dispute. As such, all the issues concerning the case should be decided together.

16. The High Court Division having considered all the aspect of the matter rejected the submission of the learned Advocate for the petitioner that the fate of this case depends merely on the question of law about the status of the petitioner as candidate. Having considered the material evidence on record the High Court Division rightly rejected the application of the respondent No.13 petitioner under Order 14, Rule 2 of the Code of Civil Procedure,1908 and rightly observed that maintainability of the case shall remain open as it is and it will be decided at the time of hearing of the case along with other issues.

17. From the aforesaid observations and findings of the High Court Division it transpires that the High Court Division considering the facts and circumstances of the case rightly passed the impugned order. In view of the

aforesaid findings and observations, we do not find any merit in the leave petition.

Accordingly, the leave petition is dismissed.

Ed.

Appellate Division
(Criminal)

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

Judgment
August 6th, 2012.

Shahjahan Khalifa and others.....Petitioners

vs

State.....Respondent*

Code of Criminal Procedure (V of 1898)
Section 161

Statement recorded under section 161 of the Code is not a substantive evidence. Mere delay in recording the statements of the witness under section 161 of the Code, cannot be considered fatal if the evidence adduced by them in court appears to be credible after sifting. .....(13)

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

Md Shohrowardi, Deputy Attorney-General, instructed by Madhu Maloti Chowdhury Barua, Advocate-on-Record—For the Respondent.

*Criminal Petition for Leave to Appeal No. 292 of 2009.

(From the judgment and order dated 16th July, 2008 passed by the High Court Division in Criminal Appeal No.3399 of 2001)

Judgment

Syed Mahmud Hossain J: This criminal petition is by the convict-petitioners for leave to appeal from the judgment and order dated 16-7-2008 passed by the High Court Division in Criminal Appeal No.3399 of 2001 dismissing their appeal and affirming the judgment and order on 5-7-2001 passed by the learned Additional Sessions Judge, Court No. 1, Pabna, in Sessions Case No.110 of 1994 arising out of Bhangoora PS Case No.2/31 dated 15-11-1993 convicting them under sections 302/34 of the Penal Code and sentencing them thereunder to suffer imprisonment for life and directing each of them to pay a fine of Taka 3,000 only, in default, thereof each to suffer further sentence of six months rigorous imprisonment.

2. The facts, leading to the filing of this criminal petition for leave to appeal, in short, are that on 15-11-1993, informant Md Ismail Hossain lodged First Information Report (FIR) with Bhangoora Police Station under sections 302/34 of the Penal Code.

3. Prosecution case, in short, is that there was a ditch behind the informant's house on the western side of the accused Shahjahan. The ditch was in ejmali and suitable for fishery. There was no demarcation of the respective shares of the ditch between the informant and accused Shahjahan. The informant put some branches of trees in his portion of the ditch about 15/20 days back. On 15-11-1993, at about 2-30 PM accused Shahjahan, Hariz Khalifa and Saidul Khalifa began putting the branches of trees in the portion of the informant. After that, the informant along with his younger brother came down to the ditch by a boat and showed the line of demarcation between them. Accused Shahjahan replied that since he (the informant) filled up the ditch with branches of trees the informant could not remove those if he dared to do so. At that time, Yunus Khalifa, Alefuddin Khalifa began throwing bricks aiming at the informant. At that point of time deceased

Korban came there and requested both the parties to stop quarrel assuring them that he would settle the dispute amicably. After that, Korban Ali proceeded towards the home of the accused and his son Golam Mowla had been returning from the paddy filed and Korban was ahead of his son and when they reached in front of the house of the accused, Shahjahan, Hafiz, Saidul, Alepuddin, Yunus, Gafur, Sohrab Pramanik, Ayub Pramanik and Torab Sarder, all of a sudden, in a preplanned manner, attacked the father and the son being armed with lathi, 'falah' etc. Accused-Shahjahan dealt of 'falah' blow on Korban Ali and as a result, he fell to ground and Saiful gave lathi blow on his head of the informant and he became senseless. The accused murdered Korban and his son Golam Mowla at the place of occurrence. Ayesha Khatoon wife of Korban Ali, Abdul Bari and Rowshan Ara Khatuan were seriously wounded by the accused. Hearing the hue and cry, the people living around rushed to the place of occurrence whereupon the accused fled away. Subsequently, an FIR was lodged with the Bhangoora Police Station resulting in Bhangoora PS Case No.2/31 dated 15-11-1993.

4. Police took up investigation of the case and recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure. On conclusion of the investigation, police submitted charge-sheet against nine accused under sections 302/34 of the Penal Code on 7-4-1994.

5. The case record was sent to the Court of the Sessions Judge, Pabna, where it was registered as Sessions Case No.110 of 1994. On receipt of the case record on transfer, the learned Additional Sessions Judge framed charge against the accused including the leave petitioners under sections 302/34 of the Penal Code. In presence of the accused including convict-petitioners in the dock, the charge was read over to them who pleaded not guilty and demanded trial. The prosecution examined 22 witnesses in support of its case while defence examined none.

6. After close of the prosecution case, the accused including the convict-petitioners in the dock were examined under section 342 of the Code of Criminal Procedure, to which, they pleaded not guilty and repeated their innocence. The defence did not, however, examine any witness.

7. The defence case as could be gathered from the trend of cross-examination of the prosecution witnesses is of total denial. The accused had been falsely implicated in this case out of enmity inasmuch as they were not responsible for/connected with the occurrence.

8. The learned Additional Sessions Judge, Court No.l, Pabna, on the basis of the evidence on record, found the leave petitioners guilty of the offence charged and by his judgment and order dated 5-7-2001 convicted the petitioners under sections 302/34 of the Penal Code and sentenced them to imprisonment for life and to pay a fine of Taka 3,000 each, in default, to suffer rigorous imprisonment six months more.

9. Being aggrieved by and dissatisfied with the judgment and order of the trial Court, the leave petitioners moved the High Court Division by filing Criminal Appeal No.3399 of 2001. The learned Judges of the High Court Division upon hearing both the sides by the judgment and order dated 16-7-2008 affirmed the conviction and sentence passed by the learned Additional Sessions Judge, Court No. 1, Pabna and dismissed the appeal of the petitioners.

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

11. Mr Md Nawab Ali, learned Advocate-on- Record, appearing on behalf of the leave-

petitioners, submits that the PW S made contradictory statements in their evidence and that the investigating officer recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure after about one month of the occurrence and that the High Court Division without taking into consideration those broad aspects of the case affirmed the judgment passed by the learned Additional Sessions Judge upholding the conviction and sentence imposed upon the leave-petitioners and as such, the impugned judgment should be set-aside. He further submits that the prosecution could not examine any independent witnesses to prove its case and that the High Court Division relying upon the evidence of the partisan witnesses affirmed the conviction and sentence passed by the trial Court and as such, the impugned judgment should be set-aside and the leave petitioners should be acquitted of the charge levelled against them. He lastly submits that the 'falah' used by the leave-petitioner, Shahjahan Khalifa was not made alamat and that the prosecution case that accused Shahjahan Khalifa dealt 'falah' blow on the person of the deceased Korban Ali was not proved and as such, the prosecution miserably failed to prove its case beyond reasonable doubt and that the High Court Division without considering this aspect of the case affirmed the conviction and sentence imposed on the leave-petitioners. We have considered the submissions of the learned Advocate, the impugned judgment and the materials on record. Admittedly, two persons, namely, Korban Ali and his son, Golam Mowla, were alone to death at the place of occurrence on the date and time as mentioned by the prosecution. The prosecution in total examined 18 witnesses of whom PW 2, Md Abdul Jabbar, PW 5 Md Abul Hossain, PW 8, Sufia Khatun, PW 9, Golam Hossain and PW 1 l, Jahanara Khatun, are eye-witnesses to the occurrence. The High Court Division having considered the evidence of the eye-witnesses, in particular, and the other prosecution witnesses, in general, came to the finding that the leave-petitioners murdered both the deceased, namely, Korban Ali and Golam Mowla.

12. The High Court Division also came to a finding that the leave-petitioners committed the offence in a premeditated manner and that while they were inflicting blows on deceased, Korban Ali and his son, Golam Mowla, proceeded to rescue his father and that he was brutally killed by the leave-petitioners.

13. It is contended that the prosecution witnesses were examined about one month after the occurrence under section 161 of the Code of Criminal Procedure and as such, for inordinate delay in recording their statements, the evidence adduced by them in Court should have been discarded. Admittedly, a statement recorded under section 161 of the Code of Criminal procedure is not a substantive evidence. Mere delay in recording the statements of the prosecution witness under section 161 of the Code of Criminal procedure cannot be considered fatal if the evidence adduced by them in court appears to be credible after sifting.

14. In the case in hand, both the trial Court and the High Court Division properly assessed the evidence of the witnesses adduced before the Court and found that there was no material contradiction or omission in their evidence.

15. Admittedly, soon after the occurrence, accused Shahjahan who was carrying the 'falah' fled away from the place of occurrence with the 'falah' and as such, the failure of the prosecution in making the 'falah' as material exhibit cannot make its case doubtful.

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

Accordingly, this criminal petition for leave to appeal is dismissed.

Ed.

Appellate Division
(Civil)

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

Judgment
November 17th, 2013.

Abdul Momen Bhuiyan and others .....Petitioners

vs

District Judge, Dhaka and others .....Respondents*

Constitution of Bangladesh, 1972
Article 104

This Division previously exercised the power of doing complete justice under 104 of the Constitution. The subject matter of the instant case represents an occasion to and demands exercise of this power by this Division for the purpose of protection of the dwelling house of the petitioners.

Civil Petition for Leave to Appeal is disposed of with the observation that the judgment-debtor will pay Taka 12,00,000 (twelve lakh) as compensation to the auction purchaser within 45 days of availability of the certified copy of this judgment, in default, the auction sale shall be deemed to have become absolute. .....(22 and 23)

MA Hye vs Trading Corporation of Bangladesh, 40 DLR (AD) 206; Ganyson Ltd. vs Sonali Bank, 37 DLR (AD) 42 and AFM Naziruddin vs Hameeda Banu, 45 DLR (AD) 38 ref.

Abdul Wadud Bhuiyan, Senior Advocate, instructed by Chowdhury Md Zahangir, Advocate-on-Record—For the Petitioners.

Munir Sharif, Advocate, instructed by Aftab Hossain, Advocate-on-Record—For Respondent No.3.

None represented—Respondent Nos.1-2.

*Civil Petition for Leave to Appeal No. 2228 of 2011.

(From the judgment and order dated 21-7-2011 passed by the High Court Division in Writ Petition No.6385 of 2010).

Judgment

Syed Mahmud Hossain J: This civil petition for leave to appeal is directed against the judgment and order dated 21-7-2011 passed by the High Court Division in Writ Petition No.6385 of 2010 discharging the Rule.

2. The facts relevant for the purpose of disposal of this civil petition for leave to appeal, in a nutshell, are:

The writ-petitioners obtained loan of Taka 4,82,011.20 from respondent No.1, HBFC (House Building Finance Corporation) payable within 12 years but the writ-petitioners failed to repay the loan amount within the stipulated period. After that, HBFC filed Miscellaneous Case No.17 of 2001 in the Court of the District Judge, Dhaka under Article 27 of the House Building Finance Order No. 1973 (PO No.7 of 1973) for realization of the loan amount along with interest, being an amount of Taka 16,57,483.12 as on 31-10-2000. The learned District Judge, Dhaka after hearing ex parte by his order dated 25-6-2003 allowed the miscellaneous case. After that, the HBFC as the decree-holder, put the decree in execution and accordingly, auction was held on 25-5-2010 and the highest bid of Taka 75,25,000 offered by respondent No.3 was accepted by order dated 25-5-2010. By the same order, the learned District Judge, Dhaka fixed 2-6-2010 for depositing the auction money. On that date, respondent No.3, the auction purchaser, prayed for time for depositing the auction money and the writ-petitioners as the judgment-debtors filed another application for staying all further proceedings of the execution process and expressed their intention to pay the dues of the HBFC The learned District Judge, Dhaka fixed 22-6-2010 for depositing the auction money and also for

hearing of the application filed by the judgment-debtor-petitioners. On 8-7-2010, they filed another application contending that the auction sale had stood cancelled because of failure of the auction purchaser to comply with Rule 84 of Order XXI of the Code of Civil Procedure by way of making deposit of 25% of the bid money. So, the writ-petitioners prayed for two months' time to pay the dues of the HBFC But the learned District Judge, Dhaka by his order dated 8-7-2010 rejected both the applications of the writ-petitioners.

3. Being aggrieved by and dissatisfied with the order dated 8-7-2010 passed by the learned District Judge, Dhaka, Abdul Momen Bhuiyan and others as the writ-petitioners moved the High Court Division by filing writ-petition and obtained Rule Nisi in Writ Petition No.6385 of 2010.

4. The writ-respondents contested the Rule by filing affidavits-in-opposition controverting the material statements made in the writ-petition.

5. The learned Judges of the High Court Division, upon hearing the parties, by the impugned judgment and order dated 21-7-211, discharged the Rule.

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

7. Mr Abdul Wadud Bhuiyan, learned Senior Advocate, appearing on behalf of the leave-petitioners, submits that the High Court Division erroneously came to the finding that a revisional application lies against the order impugned before the High Court Division and that availability of alternative remedy by way of revision will not stand in the way of invoking writ jurisdiction raising purely a question of law or interpretation of statute and, as such, the impugned judgment should be set-aside. He further submits that the High Court Division failed to consider the propriety of the order impugned and that it should have resolved the issue on merit so that this Division could decide the validity of the order impugned before the High Court division and, as such, the impugned judgment should be set-aside.

8. Mr Munir Sharif, learned Advocate, appearing on behalf of respondent No.3, on the other hand, supports that impugned judgment.

9. We have considered the submissions of the learned Advocates of both the sides, perused the impugned judgment and the materials on record.

10. The High Court Division came to a finding that the learned District Judge accepted the auction money deposited by the auction purchaser but did not record any order about confirmation of sale as contemplated in Rule 92(1) of Order XXI of the Code of Civil Procedure; rather fixed 8-8-2010 for further step. The High Court Division further held that there was no material on record to show that any subsequent order was passed and that the writ-petitioners did not wait for further order of the learned District Judge.

11. From the aforesaid findings of the High Court Division, it appears that the sale is yet to be confirmed as contemplated in Rule 92(1) of the Order XXI of the Code of Civil Procedure.

12. The High Court Division held that the order impugned before it is not appealable under Article 27 of PO 7 of 1973 and that the auction sale has not been confirmed nor has it become absolute because no formal order of confirmation of sale has been passed by the learned District Judge. The High Court further held that the judgment-debtors (petitioners) could not resort to the relief provided under Rule 90 of Order XXI of the Code of Civil

Procedure for setting aside the sale although a substantial part of the auction sale was completed as evident from the impugned order dated 8-7-2010 and the previous order. The High Court Division having considered all aspects of the case concluded that another efficacious remedy was available to the petitioners, which is a civil revision under section 115(1) of the Code of Civil Procedure and that Article 27(10) of PO 7 of 1973 providing for appeal against the disposal order-cum-decree cannot be taken as implied bar within the meaning of section 9 of the Code of Civil Procedure for the purpose of invoking revisional jurisdiction of the High Court Division. The High Court Division further held that PO 7 of 1973 does not prohibit a civil revision in a situation like the present one; rather Article 27(9) speaks of the application of the Code of Civil Procedure to sell matters.

13. The High Court Division observed that in revisional jurisdiction, it could look into the questions raised by the petitioners in their application filed before the learned District Judge and that the petitioners have resorted to a wrong forum by filing the writ-petition and therefore, it was not maintainable.

14. The findings arrived at by the High Court Division as to the maintainability of the writ-petition is based on proper appreciation of law. The petitioners should have filed a revisional application under section 115(1) of the Code of Civil Procedure against the order impugned before the High Court Division.

15. Mr Abdul Wadud Bhuiyan, learned Senior Advocate, appearing for the petitioner, cites the case of *MA Hye vs Trading Corporation of Bangladesh, 40 DLR (AD) 206*, in which, it has been held that availability of alternative remedy by way of appeal or revision will not stand in the way of invoking writ jurisdiction raising purely a question of law or interpretation of statute.

16. The case cited above is different from the case in hand and, as such, it has no manner of application. In addition the term "District Judge" according to section 3(15) of the General Clauses Act has to be taken as the principal civil Court of the original jurisdiction. The term 'District Judge' used in PO 7 of 1973 connotes the original civil jurisdiction of the District Judge as a civil Court and the provisions of the Code of Civil Procedure shall apply to matters relating to attachment and sale. Although Clause (9)of Article 27 provides for application of the Code of Civil Procedure to a sale or attachment and clause (10) provides for appeal only against the order of disposal of the case, PO No.7 of 1973 is silent about a situation like the present one arising from the sale proceeding. So, the Code of Civil Procedure shall apply to the present situation arising from sale, as per Article 27(9) itself. What is important to note here is that the proceedings initiated by HBFC is in the nature of a civil suit. So, the provisions of the Code of Civil Procedure shall generally apply to a proceeding initiated by the HBFC but subject to the provisions of PO No.7 of 1973, that is, to those aspects of the proceedings which are not provided for and not contradictory to the said PO.

17. Therefore, it appears to us that another equally efficacious remedy is available to the petitioners, which is civil revision under section 115(1) of the Code of Civil Procedure.

18. Admittedly, in the case in hand, the sale has not been confirmed or nor has it become absolute because no formal order of confirmation of sale has been passed by the learned District Judge.

19. In paragraph 8 of the Supplementary Affidavit, the petitioners stated that they paid total Taka 22,24,000 upto 2-11-2010 towards payment of loan payable to HBFC.

20. The auction took place in respect of 400 square feet of Government Plot No.8, Block-A,

Avenue-2, Section-11, Mirpur Housing Estate, Police Station-Mirpur, Dhaka, together with the building thereon.

21. On 22-6-2010, the auction purchaser, respondent No.3 deposited the entire auction money amounting to Taka 75,25,000.

22. In several cases including the cases of *Ganyson Ltd. vs Sonali Bank 37 DLR (AD) 42* and *AFM Naziruddin vs Hameeda Banu 45 DLR (AD) 38*, this Division previously exercised the power of doing complete justice under 104 of the Constitution. The subject matter of the instant case represents an occasion to and demands exercise of this power by this Division for the purpose of protection of the dwelling house of the petitioners. The petitioners stated to have paid the entire dues payable to the HBFC. Admittedly, the auction purchaser, respondent No. 3, deposited Taka 75,25,000 on 22-6-2010 and he should be compensated by the petitioners to retain their valuable house situated at Mirpur, Dhaka. Therefore, the petitioners are directed to pay Taka 12,00,000 (twelve lakh) to the auction-purchaser (respondent No.3) as compensation within 45 days, in default, this judgment shall be deemed to have been recalled and the auction shall be deemed to have been made absolute.

23. In the light of the findings made before, this civil petition for leave to appeal is disposed of with the observation that the judgment-debtor will pay Taka 12,00,000 (twelve lakh) as compensation to the auction purchaser within 45 days of availability of the certified copy of this judgment, in default, the auction sale shall be deemed to have become absolute. The impugned judgment delivered by the High Court Division is set-aside.

Ed.

Appellate Division
(Criminal)

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

Judgment
October 8th, 2012.

Kaisor-uz-Zaman (Md)....Petitioner

vs

State, represented by the Deputy Commissioner, Sylhet and another...Respondents*

Code of Criminal Procedure (V of 1898)
Section 173

Anti-Corruption Commission Rules, 2007
Rule 13(1)(2)

Report submitted by the police under section 173 of the Code on the basis of which the learned Special Judge took cognizance of the offence against the petitioner was not a report in the eye of law, there is no other alternative but to get the case investigated afresh by the Commission. .....(24)

Anti-Corruption Commission Act (V of 2004)
Section 20(1)

The moment the Ain, 2004 came into force, the police had lost its jurisdiction to continue with the investigation of the case and was legally obliged to stop the investigation of the case and send the same to the Commission to complete the investigation by it and submit the report accordingly. .....(22)

*Criminal Petition for Leave to Appeal No. 390 of 2011.

(From the judgment and order dated the 14th day of July, 2011 passed by the High Court Division in Criminal Miscellaneous Case No.2956 of 2005)

The case reported in 64 DLR 15 has been reversed with observations.

Penal Code (XLV of 1860)
Section 409
Anti-Corruption Commission Act (V of 2004)
Sections 26, 27, 32 and 38(3)

Section 409 of the Code was in the schedule to the Act, 1957, it was a part of it and had to be treated as an offence under the Act. Sub-section (3) of section 38 of the Ain, 2004 was applicable in respect of the investigation of offence under section 409 of the Code. Offences mentioned in the schedule to the Ain, 2004, be it an offence as contemplated in sections 26 and 27 thereof, or the offences under other laws as mentioned therein, section 32 of the Ain, 2004 shall be applicable. .....(19)

Anti-Corruption Commission Rules, 2007
Rule 13(1)(2)

Bidhi 13(1) of the Bidhimala, has clearly provided that prior sanction of the Commission or the authorized Commissioner of the Commission shall be necessary in case of submission of report in the competent Court (উপযুক্ত আদালতে) in case the allegation(s) of the commission of any mentioned in the schedule to the Ain, 2004 is proved against any person after completion of investigation. Sub-bidhi (2) of bidhi 13 has clearly provided that no Court shall take cognizance of an offence for trial if a copy of sanction given by the Commission or by the Commissioner as the case may be is not filed as a proof of such sanction against any person. .....(18)

Anti-Corruption Commission Act (V of 2004)
Section 17(ক)(ঞ)

One of the functions of the Commission is to prescribe the procedure as to the sanction to be given by it in respect of the enquiry, investigation and filing of a case in relation to corruption. Neither in clause (ক) nor in clause (ঞ) of section 17, any difference has been made about the offences under the Ain, 2004 or the offences under other laws mentioned in the schedule to the Ain. ...(17)

ASM Abdul Mobin, Advocate instructed by Nurul Islam Bhuiayn, Advocate-on-Record—For the Petitioner.

Mvi. Md Wahidullah, Advocate-on-Record—For Respondent No. 2.

Khurshid Alam Khan, Advocate instructed by Mahmuda Begum, Advocate-on-Record—For Respondent No. 3.

None represented—For Respondent No. 1.

Judgment

Md Abdul Wahhab Miah J: This petition for leave to appeal is directed against the judgment and order dated 14-7-2011 passed by a Division Bench of the High Court Division in Criminal Miscellaneous Case No. 2956 of 2005 discharging the Rule.

2. The above mentioned miscellaneous case arose out of an application filed by the petitioner before the High Court Division under section 561A of the Code of Criminal Procedure (the Code) for quashing the proceedings of Special Case No.1 of 2005 under sections 406/409/420 of the Penal Code arising out of Kotwali Police Station Case No.39 dated 17-12-2003 corresponding to GR No. 1144 of 2004 pending in the Court of Senior Special Judge, Sylhet.

3. The background of the special case is as follows:

The petitioner who was the Manager of

IFIC Bank, Tuliker Branch, Sylhet as informant lodged a First Information Report (FIR) with Kotwali Police Station on 18-11-2003 against Farid Uddin, Cashier of his branch, alleging, *inter alia*, that on 23-1-2003, he as the Cashier of the branch, received Taka 8,70,000 from one Juned Ahmed, the account holder of saving Account No.3385 and issued receipt putting his signature and giving seal of the bank therein. On 17-11-2003, when the account holder came to the bank to withdraw Taka 50,000 from his account, he found that though the cashier (Farid uddin) of the branch on 23-1-2003 received Taka 8,70,000 he did not enter the same in his account. Farid Uddin misappropriated the said money and thereby committed the offences under sections 406/409/420 of the Penal Code. On the basis of the said FIR, Kotwali Police Station Case No. 81 dated 18-11-2003 under sections 406/409/420 of the Penal Code was started against Farid Uddin. During investigation of the case, it was found that Farid Uddin in collusion with Iqbal Uddin Ahmed Chowdhury, Nasiruddin and Nasrin Chowdhury, Officers of the same Bank and informant, Kaisor-u-zzaman (the petitioner) received Taka 40,00,000 in total from different account holders, including Taka 8,70,000 from Juned Ahmed, which they deposited against their respective accounts. But the money had not been entered in the accounts. Accordingly, the final report was submitted in the case and a fresh FIR was lodged by Sabiur Rahman, Sub-Inspector of police of Kotwali Police Station against 6(six) persons, namely: (i) Kaisor-u-zzaman (the petitioner), (ii) Nasrin Chowdhury (iii) Ahmed Chowdhury (iv) Nasiruddin (v) Fariduddin and (vi) Iqbal Uddin alleging that they misappropriated the aforesaid money. Accordingly, Kotwali Police Station Case No.39 dated 17-12-2003 under sections 406/409/420 of Penal Code was started against them. During investigation of the case, accused Farid Uddin made a confessional statement implicating himself and the other accused including the petitioner with the defalcation of the aforesaid money. After investigation of the case, the police of Kotwali Police Station of Sylhet, submitted final report against four accused, namely: (i) Kaisor-u-zzaman (the petitioner), (ii) Nasrin Chowdhury (iii) Ahmed Chowdhury and (iv) Nasiruddin and charge-sheet against two accused, namely: Farid Uddin and Iqbal Uddin. The Magistrate concerned accepted the police report and sent the case records to the Sessions judge, Sylhet who registered the case as a Sessions case. Subsequently, on 12-3-2005, the Sessions Judge as Senior Special Judge took cognizance of the offences against Farid Uddin, Iqbal Uddin and Kaisor-u-zzaman (the petitioner) under sections 406/409/420 of the Penal Code and discharged accused Nasrin Chowdhury, Ahmed Chowdhury and Nasiruddin from the case and registered the case as Special Case No.1 of 2005. Then the petitioner filed the application under seciion 561A of the Code for quashing the proceedings against him and obtained the Rule.

4. In the application, it was contended, *inter alia*, that after the enactment of the Durnity Daman Commission Ain, 2004 (the Ain, 2004,) the initiation of any proceeding in respect of any offence described in the schedule thereto prior sanction of the Durnity Daman Commission (the Commission) under section 32 of the Ain, 2004 was necessary, but in the instant case, no such prior sanction was taken and the Senior Special Judge without seeking any sanction of the Commission also took cognizance of the offence against the petitioner; even under the repealed provisions of sub-section (5) of section 6 of the Criminal Law

Amendment Act, 1958 (the Act, 1958) before taking cognizance, the Special Judge, first of all, was required to comply with the provisions thereof by addressing letter to the Government immediately on receipt of the police report to accord , sanction to prosecute the accused if the police report were not accompanied by such sanction, but in the instant case, the learned Senior Special Judge look cognizance of the offence without writing any letter either to the Government or to the Commission though the police report did not accompany such sanction letter. Therefore, continuation of the impugned proceedings was nothing but an abuse of the process of the Court; the instant criminal proceeding is unjust as a civil suit being Money Suit No. 1 of 2005 is pending where liability of the petitioner will be determined and the issues being almost identical and same, in both the civil and the criminal case, there is every chance of conflicting decision if the criminal case is allowed to proceed; after-acceptance of the police report on 3-11-2004 by the Magistrate, the petitioner was deemed to have been discharged and unless the order of discharge was set-aside by a competent Court, fresh order of taking cognizance by the Senior Special Judge in the self-same case was illegal and unjustified and, as such, the impugned proceeding was an abuse of the process of the Court and the same was liable to be quashed.

5. A Division Bench of the High Court Division, on hearing the miscellaneous case by the impugned judgment and order discharged the Rule with the direction upon the Senior Special Judge, Sylhet to proceed with the case against the accused petitioner and the two other accused after complying with the requirements of upa-bidhis (3) and (5) of bidhi 15 of Durnity Daman Commission Bidhimala, 2007; hence this petition for leave to appeal.

6. Mr ASM Abdul Mobin, learned Advocate, appearing for the petitioner, has submitted that the High Court Division found that the Senior Special Judge did not find any support of the confessional statement of accused Farid Uddin as to the complicity of Nasir Chowdhury and Ahmed Chowdhury, who were not sent up in the charge-sheet along with the petitioner, erred factually and legally in not quashing the impugned proceedings so far as it relates to the petitioner. He has further submitted that the learned Senior Special Judge took cognizance of the offence against the petitioner on mere guess that he as Manager of the bank had an obligation to look after the day to day work of the bank and check the misappropriation of the money of the bank though he stood on the same footing with other persons, namely: Nasiruddin Chowdhury and Ahmed Chowdhury' Mr Mobin has further submitted that though section 6(5) of the Act, 1958 was repealed on 18-5-2004, the sanction for prosecuting the petitioner either under the repealed law or under the new law, was necessary and since the police report did not accompany such sanction, the learned Senior Special Judge was under an obligation to write to the Commission to give sanction to prosecute the petitioner, instead he took cognizance of the offence under section 409 of the Penal Code straightaway and thus acted illegally and without jurisdiction, the learned Judges of the High Court Division on a wrong approach as to the effect of repealing of sub-section (5) of section 6 of the Act, 1958 on 18-5-2004 erroneously held that prior sanction of the Government for prosecuting the petitioner, was not necessary and that the Senior Special Judge committed no illegality in taking cognizance of the offence against the petitioner. He has further submitted that section 32 of the Ain, 2004 has made it mandatory to have sanction of the Commission to take cognizance of an offence under the Ain, 2004 and section 409 of the Penal Code being an offence in the schedule to the Ain, which came into force on 9-5-2004, the Senior Special judge acted illegally and without jurisdiction in taking cog-

providing other privileges for the Supreme Court Judges as its 'royal privilege' or prerogative. If such a process is allowed to continue, the independence of judiciary will remain a distant dream.

117. It is often forgotten why a Court and its Judges are so important in comparison to other state functionaries and why they must be independent even while remaining otherwise a co-equal organ of the State. The reason is that all rights are rights against the State. The Supreme Court Judges must be able to overturn unconstitutional law passed by Parliament, it must overrule the illegitimate actions of the police, the bureaucrats, and the Army and even the President or the Prime Minister if they go against the law of the land. Only when the Supreme Court Judges have this power they can protect the citizen from the arbitrariness of the State. Moreover, the Court must protect bureaucrats against the Parliament, the Parliament against undemocratic forces. The Court must be able to protect the Military so that it can preserve national security. The Court must protect the rights of policemen and so on.

118. In the case of *SP Gupta vs President of India AIR 1982 SC 149,* to describe the position and importance of the Judges and Judiciary, Justice PN Bhagwati articulated that :

> ".....The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armory of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The Judiciary stands between the citizen and the State as a bulwark against executive excesses and, misuse or abuse of power by the executive and therefore, it is absolutely essential that the judiciary just be free from executive pressure or influence and this has been secured by the Constitution makers by making elaborate provisions in the Constitution to which detailed reference has been made in the judgments is *Sankalchand Sheth's* case (AIR 1977 SC 2328) (supra). But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. It we may again quote the eloquent words of Justices Krishna Iyer:
>
> "Independences of the Judiciary is not genuflexion; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government's pleasure.....
>
> .....Judges should be of stern stuff and tough fibre, unbending before power, economic or political and they must uphold the core principle of the rule of law which says "Be you ever so high, the law is above you". This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy,

maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we must keep in mind while interpreting the relevant provisions of the Constitution."

119. Justice AR Cornelius in the case of *Fazlul Quader Chowdhury vs Muhammad Abdul Haque PLD 1963 SC 486 = 18 DLR (SC) 69* said about the duty of the Court:

"The duty of interpreting the Constitution is, in fact a duty of enforcing the provision of the Constitution in any particular case brought before the courts in the form of litigation."

120. In the case of *Secretary, Ministry of Finance vs Masdar Hossain (2000) 8 BLT (AD) 234 = 52 DLR (AD) 82* Chief Justice Mustafa Kamal said about the functions of the Judiciary:

"60.....When Parliament and the executive, instead of Chapter II of Part VI follow a different course not sanctioned by the Constitution, the higher Judiciary is within its jurisdiction to bring back the Parliament and the executive form constitutional derailment and give necessary directions to follow the constitutional course. This exercise was made by this Court in the case of Kudrat-e-Elahi Panir vs Bangladesh, 44 DLR (AD) 319. We do not see why the High Court Division or this Court cannot repeat that exercise when a constitutional deviation is detected and when there is a constitutional mandate to implement certain provisions of the Constitution.

121. It is, thus, fundamental for the establishment of the rule of law that the judiciary should be allowed to function uninterruptedly without being influenced by the executives.

122. The above threadbare examinations leads us to hold that presence of an alternative option in section 4(i)(a) of the Ordinance, 1978 in the event of failure by the respondents to provide the Judges with houses defeats the scheme of the law that "A Judge shall be entitled to, and provided with" in a three-fold way. Firstly, it paves the way for the concerned authorities to refrain from providing the Judges with furnished government houses, secondly, the residence allowance figured therein does not become of any use for the Judges to arrange for privately rented house and, thirdly, threatens the independence of the judiciary as the judiciary is pushed to be dependent upon the members of the executive for increase of the amount of the residence allowance by making overturns to them.

123. Thus, the facts and figures portrayed hereinbefore reveals that due to the aforesaid flaws and negative aspects of the incorporation of the impugned part of section 4(1)(a) of the Ordinance, 1978, the non-allottee Judges are being victim of unequal treatment. Now, the question is whether the said victimization of the deprived Judges may be a ground for declaring the impugned law *ultra vires*. To find the answer, we have to first search for the authority and power of this Court to declare a law void.

124. Article 7 of our Constitution heralds the Supremacy of the Constitution.

(1) All powers in the republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.

(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void".

(underlined by us)

125. Is the impugned law inconsistent with any provisions of the Constitution and thereby requires the same to be declared void under the authority and power of Article 7(2). Here, the impugned part of section 4(1)(a) of the Ordinance, 1978 has been branded to be contradictory with Articles 27, 29, 31 and 147(2) of the Constitution. Since Articles 27, 29 and 31 are grouped in the same Part (Part iii) of our Constitution and their modus operandi being same, for convenience of our discussion, we will take up those Articles later on.

126. We, therefore, undertake Article 147 (2), first, to see whether the impugned legislation is inconsistent with the same and thereby attracts the treatment of the scheme of Article 7(2) of our Constitution. We fancy to undertake the said scrutiny by examining the case laws of our jurisdiction and foreign jurisdiction with the spirit of Article 7(2) of our Constitution.

127. Article 147(2) of our Constitution declares that:

> (2) The remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which article applies shall not be varied to the disadvantage of any such person during his term of office" *(underlined by us)*

128. From a plain reading of Article 147(2) it appears that the State shall not make any legislation to the disadvantage of the Supreme Court Judges. But it has clearly been found by our minute examination and elaborate discussion made hereinbefore that the payment of house allowance of Taka 26,600 have been fixed to the disadvantage of the Supreme Court Judges.

129. In the case of *Marbury vs Madison (1803)*, Chief Justice Marshal recorded the supremacy of the Constitution in the following language:

> "Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."

130. In the *Special Reference Case No. 1 of 1964 (AIR 1965 SC 745)*, Chief Justice of India PB Gajendragadkar said :

> In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. It is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because Article 368 of the Constitution itself makes a provision in that behalf, and the amendment of the Constitution can be validly made only by following procedure prescribed by the said article. That shows that even when the Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers, and Judges all take oath of allegiance to the Constitution, for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by Parliament in England, cannot be claimed by Legislature in India in the literal by absolute sense.

131. In the case of *Asma Jihani vs Government of Punjab, PLD 1972 SC 139* (relevant page-199) Chief Justice Hamoodur Rahman said :

> ".....General Agha Mohammad Yahia Khan had, according to me, no authority to pass such legislation taking away the powers of the Courts in his capac-

ity as President under the Provisional Constitution Order. The Martial Law introduced by him was illegal and, therefore, even as Chief Martial Law Administrator he was not competent to validly pass such laws..."

132. In our jurisdiction also, scores of the judicial pronouncements are available where the vires of an Act of Parliament was challenged on the ground of the supremacy of the Constitution.

133. In the case of *AT Mridha vs State 25 DLR (1973) 335* (relevant page-344) Justice B. Haider Chowdhury noted the Supremacy of the Constitution in this way—

"10.....The Constitution is the supreme law and all laws are to be tested in the touch stone of the Constitution (vide article 7). It is the supreme law because it exists, it exits because the Will of people is reflected in it."

134. In the case of *Md Shoib vs Government of Bangladesh 27 DLR 315* (relevant page-325) Justice DC Bhattacharya, J commented—

"In a country run under a written Constitution, the Constitution is the source of all powers of the executive organs of the State as well as the other organs, the Constitution having manifested the sovereign will of the people. As it has been made clear in Article 7 of the constitution of the People's Republic of Bangladesh that the Constitution being the solemn expression of the will of the people, is the Supreme law of the Republic and all powers of the Republic and their exercise shall be effected only under, and by the authority of, the Constitution. This is a basic concept on which the modern states have been built up"

135. In the case of *Anwar Hossain Chowdhury vs Bangladesh* reported in *41 DLR (AD) 165* (the 8th Amendment case), Article 100, as amended by the 8th amendment of our Constitution, and the notification of the Chief Justice towards implementation of the said amendment were challenged as *ultra vires* by two writ petitions. Our Apex Court by a majority of 3 to 1 declared the 8th amendment of the Constitution so far as it relates to the creation of permanent benches outside the Dhaka by substitution of Article 100 to be void on the ground that the amended Article 100 changed the character and nature of the functions and jurisdiction of the High Court Division as envisaged in our Constitution changing the basic structure of the Constitution. Thus, it was held *ultra vires* the Constitution. Since the birth of Bangladesh, our Supreme Court for the first time struck down an amendment to the Constitution made by the Parliament, the supreme and sovereign law making body under the Constitution relying upon the ratio decidendi of the following Indian cases; *Keshavanda* reported in *AIR 1973 SC 1461, Indira Gandhi* reported in *AIR 1975 SC 1590, Minarva Mills* reported in *AIR 1980 SC 1789 and Woman Rao* reported in *AIR 1981 SCR 1* to base its decision. The Court held in particular:

"The Constitution stands on certain fundamental principles which are its structural pillars which the parliament cannot amend by its amending power for, if these pillars are demolished or damaged, then the whole constitutional edifice will fall down.

If any provision can be called the 'pole star' of the Constitution, then it is the preamble. The impugned Amendment is to be examined on the touchstone of the preamble with or without resorting to the doctrine of basic structure. The preamble is not only a part of the Constitution, it now stands as an entrenched provision that cannot be amended by parliament alone. When parliament cannot by itself amend the preamble, it cannot indirectly by amending a

provision of the Constitution impair or destroy the fundamental aim of our society. One of the fundamental aims of out society is to secure the rule of law for all citizens and in furtherance of that aim part VI and other provisions were incorporated in the Constitution. By the impugned Amendment that structure of the rule of law has been badly impaired and as a result the High Court Division has fallen into sixes and sevens-six at the seats of the permanent Benches and the seven at the permanent seat of the Supreme Court.

136. In the case of *Khandaker Delwar Hossain vs Italian Marble Company Limited* reported in *2010 BLD* Special, (the 5th amendment case), the Supreme Court declared all Martial Law Proclamations, orders, regulations, rules issued and executed under the first martial law regime, ratified by the 5th amendment of the Constitution, unconstitutional as it found that some basic structures of the constitution were destroyed through the 5th amendment of the Constitution.

137. In the 7th Amendment Case (the case of *Siddique Ahmed vs Bangladesh)* reported in *2013* Counsel (Special), our Supreme Court declared all Martial Law Proclamations, order, regulation, rules issued and executed under the second martial law regime, ratified by the 7th amendment of the Constitution, unconstitutional as it found that some basic structures of the constitution were destroyed through the 7th amendment of the Constitution.

138. In the case of *Md Abdul Mannan Khan vs Bangladesh* reported in the book "The 13th Amendment Judgment" published by the CCB foundation, the Appellate Division of the Supreme Court declared the provisions of the Amendment Act *ulrta vires* the Constitution.

139. In the case of *Sultana Kamal vs Bangladesh* reported in *14 BLC 141*, section 5 of the Emergency Power Ordinance, 2007 was declared to be *ultra vires* the Constitution.

140. In the case of *M. Samsul Haque vs Bangladesh* reported *in 17 BLT (HCD) 523 = 15 BLC 236* an Ordinance namely, আদালত অবমাননা অধ্যাদেশ, ২০০৮, was declared to be *ultra vires* the Constitution by the High Court Division as the impugned legislation was found to have been promulgated in contravention of Article 93 and 58 (D) of the Constitution.

141. Also, in the case of *Monzur Ahmed Bhuiyan vs Adilur Rahman Khan* reported in *18 BLC (AD) 47*, the Apex Court uphold the judgment of the High Court Division which declared the স্বপ্রনোদিত তথ্য প্রকাশ অধ্যাদেশ, ২০০৮ to be *ultra vires* the Constitution.

142. In the case of *Idrisur Rahman vs Bangladesh* reported in *60 DLR 714* where the vires of an ordinance namely, Supreme Judicial Commission Ordinance, 2008 was challenged and by a majority decision of a Special Bench of the High Court Division section 9(4) of the said Ordinance was declared to be *ultra vires* the Constitution.

143. In all these cases either an Act of Parliament or a particular section/provision thereof was challenged on the ground of being inconsistent to any Article of the Constitution and it was declared that there can be no Act/Law, be that an amendment of the Constitution or enactment of a statue, which defies the supremacy of the Constitution and destroys the basic feature of the Constitution.

144. Like the above-discussed cases, to here, in this case as well we find that the Supremacy of the said Article 147(2) has been flouted by incorporation of the impugned part of section 4(1) of the Ordinance, 1978. It follows that the second part of section 4(1)(a) of the Ordinance, 1978 is violative of Article 147(2) of the Constitution.

145. Above were the case laws involving the challenges of the various Acts of Parliament

for being inconsistent mainly with the scheme and spirit of the different provisions of the Constitution, other than Articles 27, 29 and 31.

146. Now let us now take up the said Articles in tandem with Article 26 of our Constitution and some case laws of our jurisdiction and foreign jurisdiction, where a number of Acts of Parliament were struck down for being inconsistent with the provisions of Part III of our Constitution.

147. Article 26 declares that Laws inconsistent with fundamental rights to be void.

(1) All existing laws inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.

(2) The State shall not make any law inconsistent with any provisions of this part, and any law so made shall, to the extent of such inconsistency, be void".

Article 27 :

All citizens are equal before law and are entitled to equal protection of law.

Article 29 :

(1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

(2) No citizens shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic.

(3) Nothing in this article shall prevent the State form—

(a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;

(b) giving effect to any law which makes provision for reserving appointments relating any religious or denominational institution to persons of that religion or denomination;

(c) reserving for members of one sex any class of appointment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.

(underlined by us)

148. Let us also consider the meaning and scope of Article 5(1) and Article 15 of the Constitution of Pakistan of 1956 and 1962 respectively and Article 14 of the Constitution of India (Corresponding Article 27 to our Constitution) which reads thus:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

149. This again corresponds to the last Clause of the first section of the Fourteenth Amendment of the American Constitution which reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person with its Jurisdiction the equal protection of the laws".

150. Now, the question before us is whether the above guarantees of the Constitution, as engraved in Articles 26, 27 and 29, have been disregarded in the impugned legislation, namely second part of section 4(1)(a) of the Ordinance, 1978.

151. Let us first understand what 'the equality before law' means.

152. Sir Ivor Jennings in his "The Law and the Constitution" has stated:

> "Equality before the law means that among equals the law should be equally administered, that like should be treated alike".

153. Dicey in his "law of the Constitution', stated:

> "Equality before the law does not mean absolute equality of men which is a physical impossibility, but the denial of any special privileges by reason of birth, creed or the like, in favour of any individual and also the equal subjection of all individuals and classes to the ordinary law of the land administered by the ordinary law Courts".

154. In the "Limitations of Government Power" by Rotundy and others "equal protection of the laws" has been described as:

> "The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government. It does not reject the government's ability to classify persons or draw lines in creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals. Such a classification does not violate the guarantee when it distinguishes persons as 'dissimilar' upon some permissible basis in order to advance the legitimate interest of society".

155. Professor Wills who in his book "Constitutional Law" Edn. 1 page 578, viewed the Fourteenth Amendment in the following expressions:

> "It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed'. The inhibition of the amendment was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation". It does not take from the States the power to classify either in the adoption of Police laws or tax laws,, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis".

156. Mahmudul Islam in his "Constitutional Law of Bangladesh" (3rd Edition, Page 227) comments that

> "Discrimination in the matter of condition of service of the same category of employees is a violation of Articles 27 and 29".

157. The sum and substances of the above commentaries by the distinguished Authors is that Articles 27 and 29 of our Constitution and Article 14 of Indian Constitution and the First section of the fourteenth Amendment mainly

mandates as to equality before law, meaning enjoying the guarantee of equal treatment with others with same footing in all the spheres of life, in particular, in enjoyment of equal opportunity in the event of entry in the public office/employment as well as after holding the public office or being employed therein.

158. Let us cite some American Cases on Articles 27 and 29 (therein First section of the fourteenth Amendment).

159. The *United States Supreme Court in Middleton vs Texas P&L Co, 248 US 152,* observed:

> "It must be presumed that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds".

160. Bruen J, in *Gulf Colorado Rly. vs Ellis, 165 US 150,* however, warned against carrying this presumption too far and observed:

> "To carry the presumption to the extent of holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory legislation is to make the protection clause of the 14th Amendment a mere rope of sand".

161. In *Southern Rly Co. vs Grane, 216 US 400* Day J observed:

> "Equal protection of the laws means subjection to equal laws, applying alike to all in the same situation".

162. American Judges regard this provision of 'equality before law, and 'equal protection of law' as the "basic principle of republicanism' and the American Judges and Jurists made 'a pledge of the protection of equal laws' as their subject of interest in numerous cases.

163. We may now refer to some case laws of Indian jurisdiction on Articles 14 and 16 of the Constitution of India being akin to Articles 27 and 29 of our Constitution.

164. Bhagawati J, in *Shujat Ali vs Union of India, AIR 1974, SC 1631* observed:

> "The doctrine of classification should not be carried to a point where instead of being a useful servant it becomes a dangerous master".

165. In *Lachmon Das vs State of Punjab (supra) Subha Rao J,* observed:

> "Over-emphasis on the doctrine of classification or an anxious and sustained attempt to find some basis for classification may gradually and imperceptivity deprive the article of its glorious content. That process would gradually and imperceptivity substitute the doctrine of classification for the doctrine of equality".

166. Chandrachud J, in *"Smt. Indira Gandhi vs Raj Narayan", AIR 1975 SC 2279* described his idea of equality as:

> "All who are equal are equal in the eye of law", meaning that it will not accord favoured treatment to persons within the same class".

167. In the Case of *Bhoomi Vikash Bank Ltd vs its workmen* reported in *AIR 1990 SC 495* it was held that payment of higher emolument to the staff of one unit as against that of other units is discriminatory.

168. In the case of *State of West Bengal vs Anowar Ali Sarkar, AIR 1952 SC 75,* the Supreme Court of India struck down sectopm 5(1) of the West Bengal Special Courts Act, 1950 as vocative of Article 14 of the Indian Constitution. The impugned section of the law provides that a special court shall try offences or classes of offences or cases or classes of cases as the State Government may direct. Contention of the

accused-respondent was that this provision gave arbitrary power to the Government to choose any accused person for trial before the Special Court which follows a harsher procedure than the ordinary courts and as such it offended Article 14 of the Constitution. This contention was upheld with the observation that "the Act has completely ignored the principle of classification followed in the CrPC and has laid down a new procedure without making any attempt to particularize or classify the offences or cases to which it is to apply".

169. In *Dhirendra Kumar vs Government of West Bengal, AIR 1954 SC 424,* a similar question arose and the Supreme Court upheld the contention of the accused-applicant that the impugned Notification of the State Government revoking its previous Notification, by which the accused was granted trial by Jury under section 269(1) CrPC, and directing his trial with the aid of Assessors, offended the equality provision in Article 14 given that the classification of cases and offences to be tried with the aid of Assessors as per Government Notification was not based on any substantial distinction.

170. In *Panduranga Rao vs Andhra Pradesh Public Service Commission, AIR 1963, SC 268,* a rule made by the Government of the Province laying down certain special qualifications for recruitment of District Munsifs was challenged on the ground that it made arbitrary classification between Advocates of one High court and those of other High Courts of India. The rule says that a candidate for the post of District Munsif, among other things, must be an advocate of the High Court of Andhra Pradesh. The Supreme Court found that this rule introduced a classification between one class of advocates and the rest and that this classification was irrational inasmuch as there was no nexus between the basis of the classification and the object intended to be achieved by the relevant rule. The Court observed:

> "When any impugned rule or statutory provision is assailed on the ground that it contravenes Art, 14, its validity can be sustained if two tests are satisfied. The classification... must be based on an intelligent differentia which distinguished persons or things grouped together from others left out of the group, and the second is that the differentia must have a reasonable relation to the object sought to be achieved by the rule of statutory provision."

171. In the case of *Bank Nationalization* reported in *AIR 1970 SC 564,* the Supreme Court, while deciding the question of violation of the right to equal treatment in Article 14 of the Indian Constitution, struck down section 15(2) of Banking Companies (Acquisition and Transfer of Undertaking) Act, 1969. Under the aforesaid enactment undertakings of fourteen Commercial Banks in India were taken over by the State and vested in the Union of India, and the Banks were prohibited from engaging in the business of banking in India. The Supreme Court of India struck down the offending provision of the Act on the ground that there was hostile discrimination against the Banks in that they were prohibited from carrying on banking business whereas other banks, Indian and foreign, were permitted to carry on the banking business. It was termed by their Lordships as a flagrant hostile discrimination against the fourteen named Banks.

172. The case of *Indira Gandhi vs Raj Narayan (AIR 1975 SC 2299)* is a glaring instance of discriminatory legislation offending "equality before law". There, amended Art. 329-A(4) of the Indian Constitution was assailed, among other things, on the ground of arbitrary classification. Indira Gandhi's election to Lokshabha held in March 1971 was held void by the Allahabad High Court and against that decision she preferred an appeal before the Supreme Court. During pendency of the appeal, Indian Parliament amended the

Constitution inserting therein Article 329A. Clause (4) of this Article made the existing Election Laws retrospectively inapplicable to Parliamentary elections of the Prime Minister and the Speaker; it kept the election of these two personages, who are members of Parliament, beyond the reach of any law past or present; it declared the disputed election of Indira Gandhi valid.

173. And further declared that the judgment of the Allahabad High Court was void and the election petition challenging her election abated. Existing election laws were however kept alive to be applicable to elections of all other members of the Parliament. The Supreme Court struck down clause (4) as grossly discriminatory.

174. The above Indian cases are some illustrations where the Courts found the impugned legislations to be inconsistent with provisions akin or similar to those in Part III of the Bangladesh Constitution and declared the same to be void under authority vested in a manner similar to Article 26 of our Constitution.

175. The broad principles governing the application and extent of the Article 14 (ours in Articles 27 and 29) have been interacted and reiterated in so many Indian cases that "it would be an idle parade of familiar learning to review the multitudinous cases in which the constitutional assurance of equality before the law has been applied" observed Mathew, J. in AIR 1974 SC 1300. In later decisions AIR 1979 SC 478 and AIR 1981 SC 2138 Chandrachud CJ and Bhagwati, J (as he then was) respectively observed that the propositions applicable to cases arising under Article 14 have been repeated so many times during the last 30 years in course of "the avalanche of the cases which have flooded this court" since the commencement of the Constitution that they now sound almost platitudinous.

176. From the discussions of the above laws and cases on Article 14 of Indian Constitution and the last Clause of the first section of the Fourteenth Amendment of the American Constitution (which are similar to Article 27 of our Constitution), it can be summed up that there cannot be a single law to be applied uniformly to all persons disregarding their basic differences with others. Once the differences are indentified, then the persons or things may be classified into different categories according to those distinctions, which are known as 'permissible criteria' or "intelligible differentia". The legislatures in the process of making law with certain object in view, which is either to remove some evil or to confer some benefit, are empowered to make classification on reasonable basis. Class legislation is forbidden but classification of persons for the purpose of legislation is permitted. To pass the test of 'equality' a classification, besides being based on intelligent differentia, must have logical relation with the object the legislature intends to achieve by making the classification. A classification is reasonable if it aims at giving special treatment to a backward section of the population. It is also permissible to deal out distributive justice by taxing the privileged class and subsidizing the poor section of the people. What is of fundamental importance in law-making is that while making a classification the legislature shall not act arbitrarily but make selection on rational basis.

177. In our Jurisdiction, in the case of *Hamidul Huq Chowdhury vs Bangladesh* reported in *34 DLR 190*, section 6 of the Government-owned Newspapers (Management) Act, 1975 was declared to be inconsistent with Article 27 of the Constitution as the impugned section had granted unfettered and arbitrary power to enlist the printing and press companies for vesting their ownerships in the Government among the similarly situated companies.

178. In the case of *Zainul Abedin vs Bangladesh* reported in *34 DLR 77*, the Government Servants (Seniority of Freedom Fighters) Rules, 1979 was knocked down on the ground of being violative of Articles 27 and 29 of the Constitution.

179. On the other hand, there are innumerable cases of our jurisdiction where the challenges to the vires of specific laws were found to be without merit and substance by the Courts such as the case of *Bangladesh Krishi Bank vs Meghna Enterprise* reported in *50 DLR (AD) 194, SA Sabur vs Returning Officer 41 DLR (AD) 30, Chandpur Textile Mills Ltd vs Subordinate Judge* reported in *2 BLC 50, Anisur Rahman vs Bangladesh 12 BLC 22* and so on.

180. In the case of *SA Sabur vs Returning Officer* reported in *41 DLR (AD) 30*, the vires of section 7(2)(g) of the local Government Ordinance, 1983, was challenged on the ground that the said section 7(2)(g) is discriminatory and thereby violative of Article 27 of the Constitution inasmuch as the said section though makes a provision disqualifying the loan defaulters to be a candidate of the Union Parishad but there being no such provision for disqualifying the MP candidates, the law was blamed to be discriminatory and our Appellate Division after reviewing a number of cases from India, Pakistan and USA rejected the contentions of the petitioners on the ground that the impugned piece of legislation had not been hit by Article 27 of the Constitution inasmuch as the Union Parishad Chairmans and the Members of Parliament are not similarly situated persons and the provision of equal treatment is applicable only when there will be unequal treatment among the same class being at par.

181. But, in the case at hand, all the Judges of the High Court Division are similarly situated dignitaries, irrespective of their age or date of elevation in the Bench and, as such, they being the members of same class deserve to be treated equally and no law should make any discriminatory provision for which one judge will enjoy some benefit and other Judge will be deprived of the same.

182. In the said *SA Sabur's case* at page 55 (Para 69), his Lordship ATM Afjal, J (as he then was) elaborated the principles governing the scope, nature and parameters of Article 27 in the following language.

1. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons require separate treatment.
2. It requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.
3. it forbids class legislation but it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical or according to objects or occupations or the like, what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.
4. The State, in the exercise of its government power, has of necessity to make laws operating differently on different

groups or classes of persons to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws. The laws can make and set apart the classes according to the needs and exigencies of the Society and as suggested by experience. It can recognize even degree of evil, but the classification should never be arbitrary, artificial or evasive.

5. To overdo classification, however, is to undo equality. The doctrine of classification should not be carried to a point where instead of being an useful servant, it becomes a dangerous master, for otherwise, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well marked classes characterized by different and distinct at attainments.

6. The Courts should not insist on delusive exactness or classification in any given case. Classification is justified if it is not palpably arbitrary.

7. There is always a presumption in favour of the Constitutionality of a Statute and the burden is upon him who attacks it to show that there has been a clear transgression of the Constitutional principles. This rule is based on the assumption, Judicially recognized and accepted, that the Legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

183. Upon consideration of the philosophies propounded by these noble Judges and Philosophers as to the meaning of the "equality before law and equal protection of the law" it is this Court's considered view that "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, as engraved in our Constitution, guarantees that similar people will be dealt with in a similar way and people of different circumstances will be treated in a dissimilar way.

184. In the instant cases, the main ground for challenging the constitutionality of the second part of 4(1)(a) of the Ordinance, 1978 is that the Judges of the Supreme Court are being unequally treated albeit all of them are similarly situated. It appears to be a startling provision of law that while a Supreme Court Judge being provided with government accommodation is without any worries about maintaining the costs of accommodation, the non-allottee Judges are pushed in a situation to strive mitigating the awful state of affairs as to the same given that it is not possible for a non-allotee Judge to manage his accommodation affairs with a cost of Taka 26,600, which is a grossly discriminatory part of the Ordinance, 1978 and, thus, repugnant to the object intended to be achieved by the relevant law.

185. From the above threadbare examination it appears that the presence of the second part of section 4(1)(a) "...and until such residence is provided....." makes the deprived Judges victim of hostile and unequal treatment, thus, being the same inconsistent with Articles 27 and 29 of the Constitution is required to be declared to be void for being *ultra vires* the Constitution.

186. Furthermore, in enactment of any legislation, the test of reasonableness is to be passed. Article 31 prohibits Parliament from passing an unreasonable or arbitrary law, both from the substantive and procedural points of view. From the substantive point of view 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. In view of our findings made hereinbefore that the amount of Taka 26,600 as residence allowance is clearly to the disadvantage of the privileges of a Judge, the fixation of the said amount is, thus, an unreasonable and arbitrary law.

187. In the case of *Malpe Viswanath vs Moharashtra (1998) 2 SCC 1*, it was held that a law when passed may be justified, but may later on become arbitrary or unreasonable with the lapse of time and change of circumstances.

188. Here, in these cases, 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.

189. Accordingly, 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 ultravires of Articles 27, 29, 31 and 147(2) of our Constitution.

190. It, thus, emerges from the discussions and observations made hereinbefore as well as from the mandates of the Constitution and other laws of the land that all the three Rules are destined to be made absolute.

191. Before we part with this judgment, we wish to quote the last Para of the case of *Sayeda Rizwanna Hasan vs Bangladesh* reported in *18 BLC (AD) 54* which reads as follows:

> "Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice-often referred to as the duty to vindicate and uphold the majesty of law. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted by reason of improper application. It is recognized in the public interest that the authority acting by virtue of statutory powers cannot exceed his authority".

192. Having been enlightened by the ratio decidendi of the above case, we feel it appropriate to make some directions in this case upon the concerned authorities in order to ensure that the painstaking efforts of the petitioners do not go in vain. As in the case above, we make the following directions upon the respondents and others authorities;

(1) Respondent Nos. 1 and 2 are directed to vacate all the bungalow type houses which are being occupied by the persons below the serial 9 of the Warrant of Precedence within thirty days from the date of receipt of this judgment and order and allot the same to the dignitaries positioned above serial No.16 of the Warrant of Precedence as per their exigencies as may be ascertained from the date of receiving their applications taking an exception to the case of Mr. Justice Md Jahangir Hossain for being recommended by the Hon'ble President of the Republic.

(2) Since it is apparent that there is an acute shortage of bungalow type of houses and superior type flats and the respondents previously have not hired required number of flats/houses of 4,200 square feet (the size of flats which are being constructed for the Judges) to house the Supreme Court Judges temporarily until completion of the project of construction of 76 flats of 4,200 square feet for the Judges, therefore, in order to cope with the prevailing situation, respondent Nos. 1 and 2 are further directed to hire the required number of flats/houses of 4,200 square feet within the secured residential areas such as, Kakrial, Siddheshwari, Bailey Road, Eskaton Road, Dhanmondi, Gulshan, Banani and Baridhara and thereby allot the same in favour of the Judges of the Supreme Court at their earliest convenience.

(3) In the event that the Government wishes to replace the impugned part of section 4(1)(a) of the Ordinance, 1978, "The Committee on Pay and Privilege of the Judges of the Supreme Court" should be made a perpetual statutory body, which must be constituted consisting of (i) Auditor & Comptroller General of Bangladesh, (ii) Secretary, Ministry of Finance (iii) Secretary, Ministry of Law and Justice, (iv) Secretary, Ministry of Housing and Works, (v) Registrar of the Supreme Court and (vi) the Chief Executives of both the Dhaka City Corporations. They will sit at least twice a year and the duty of the said Committee will be, among others, to approve the rent agreements of the non-allottee Judges with their landlords, to assess and approve the rental value of their property as claimed by the Judges who live in their own houses/flats upon submission of a written letter/invoice by the concerned judges and to okay the service charges, bills of electricity, gas and water incurred. The rough draft of the proposed law in the sum and substance may be in the following language: and until such residence is provided, a Judge of the Supreme Court shall be paid a monthly residence allowance of an amount of Taka as agreed with the land lord or the rental value of the properties of the Judges who live in their own properties and the bills of electricity, gas, water and service charges at actual under the approval of the "Committee on Pay and Privilege of the Supreme Court Judges".

(4) Until the required number of superior types of flats are hired for the Supreme Court Judges or the second part of section 4(1)(a) of the Ordinance, 1978 is reenacted in the light and form of the above Direction No. 3, the non-allottee Judges shall be entitled to claim their house allowance at actual, which will include their respective house rent as per their respective rent agreement with their landlords, service charges and bills of electricity, gas and water. Their invoices and vouchers would be submitted through the Registrar of the Supreme Court to the Auditor and Comptroller General of Bangladesh who, upon making an assessment on the prevailing costs of house rents together with bills and charges with assistance from the Dhaka City Corporations (South and North), will approve the same.

(5) In the absence of the aforesaid statutory Committee, for the Judges who live in their own properties the residence allowance should be fixed by the judges themselves in collaboration

with the Dhaka City Corporation and concerned Ward Councilor. The maximum claimed allowance would be equivalent to the rent of a house of 4,200 square feet in their respective areas together with all charges and bills at actual. After verifying the assessment of the house rent by the Dhaka City Corporation, the invoice of the rental value of the property together with charges and bills may be submitted through the Registrar of the Supreme Court to the Office of the Auditor and Comptroller General for his approval.

(6) The respondents are directed to comply with the aforesaid directions within one month from the date of receipt of this order and file affidavit of compliance before this Court within one week of the said compliance.

With the above directions all the three Rules are made absolute.

193. The Office is directed to send a copy of this judgment and order to (i) the Auditor and Comptroller-General of Bangladesh, (ii) the Secretary, Cabinet Division, (iii) the Secretary, Ministry of Finance, (iv) the Secretary, Ministry of Law and Justice (v) the Registrar of the Supreme Court and (vi) the Chief Executives of both the City Corporations of Dhaka in order to apprise them with their duties and responsibilities which have been conferred upon them by the above directions of this judgment and order and, thereby, to enable them to comply with these directions.

There will, however, be no order as to costs.

Ed.

High Court Division
(Criminal Miscellaneous Jurisdiction)

Sheikh Rezowan Ali J
AFM Ali Asgar J

Judgment
August 1st, 2004.

Juboraj Goula.....
.....Petitioner

vs

State.....
.....Opposite Party*

Code of Criminal Procedure (V of 1898)
Section 94(1)(b)
Evidence Act (I of 1872)
Section 162

Section 162 of the Evidence Act gives a wide power to the court to summon any person as a witness to produce a document in his possession or power, whatever objection he may have in producing the document.

Section 162 is mandatory. It is equally applicable to a private person or a public servant. He is bound to bring the document in his possession to court or send it through some other person even though he may have any legal objection to its admissibility or production. After having brought the document in court, the witness claim privilege or prefer any other objection that he may have against disclosure of its contents. It is again for the court to decide the validity of such objection. But a witness cannot withhold such document. .....(13 & 14)

AKM Foez with Parvin Hannan, Advocate—For the Petitioner.

Md Shamsul Hussain, Advocate—For the Opposite No. 1.

Md Abdul Baset, Assistant Attorney-General—For the State.

*Criminal Miscellaneous Case No. 3090 of 1996.

Judgment

Sheikh Rezowan Ali J: On an application by the accused petitioner Juboraj Goala under section 561A of the Code of Criminal Procedure, a rule was issued calling upon the opposite parties to show cause as to why the order dated 30-5-96 passed by the learned Additional Sessions Judge, 1st Court, Sylhet in Criminal Motion No. 3(3)/95 setting aside the order dated 7-6-95 (passed by the Magistrate of the 1st Class, Sylhet in CR Case No. 43/94) should not be set-aside and/or such other or further order or orders passed as to this Court might seem fit and proper.

2. Facts, relevant for the purpose of disposal of this rule, iii short, are that opposite party No. 1 Rajindar Kumar Das as complainant lodged a complaint petition before the learned Magistrate of the 1st, Class and cognizance Court. Sylhet on 29-3-94 alleging that on a promise to send his bhatiza to Dubai through his (accused-petitioner's) son Audhoya Goala means of free visa within 6 months of receipt of money from him, accused petitioner received a sum of Taka 50,000 by means of a cheque bearing No. 393857 dated 2-7-87 drawn on his (complainant's) Savings A/C. No. 22 at Sonali Bank, Balagonj Branch. But inspite of the time limit having expired and on his repeated approach to the accused-petitioner he kept on deferring the matter on different pretext. Finding no other alternative, the complainant asked him on 27-3-94 to refund him the money in presence of the witnesses. But he denied any such transaction have taken place between them at all and also threatened to finish him in life.

3. On the complaint petition containing the aforesaid allegation learned Magistrate examined the complainant on solemn affirmation and took cognizance against the accused-petitioner of the offence punishable under sections 406/420 of the Penal Code. On his appearance he was released on bail. Learned Magistrate, however, framed charge against him for the offence punishable under section 420 of Penal Code 7-6-95 was fixed for examination of witnesses. Learned Magistrate examined 3 witnesses. At this stage complainant submitted a petition for examination of the local Union Parishad Chairman and the local Manager of Sonali Bank as witnesses and prayed for issuing summons upon them. Learned Magistrate by his order passed on the same day (7-6-95) allowed complainant's prayer for examination of the local UP Chairman as a witness but rejected his prayer for examination of the Manager of the local Sonali Bank expressing that there was bar under section 94 of the Code of Criminal Procedure to call such Bank Manager as a witness.

4. Being aggrieved by the order of the learned Magistrate refusing to call the Manager as a witness, complainant preferred before the learned Sessions Judge, Sylhet a Criminal Motion being No. 3(3)/95 which was ultimately heard by the learned Additional Sessions Judge, 1st Court, Sylhet who by his impugned judgment and order dated 30-5-96 allowed the revisional application and set-aside the order of the learned Magistrate and directed him to consider the application of the complainant for examination of the local Sonali Bank Manager in terms of the provision of section 94 (1) (b) of the Code of Criminal Procedure and thereafter dispose of the case in accordance with law.

5. Mr AKM Foez, the learned advocate for the accused-petitioner has submitted that the learned Magistrate rightly held that there was a, bar of examination of the Bank Manager as a witness under section 94 of the Code of Criminal Procedure. Therefore, the order of the learned Sessions Judge directing the learned Magistrate to proceed in terms of section

94(l)(b) of the Code of Criminal Procedure was quite illegal inasmuch as section 94(l)(b) of the Code of Criminal Procedure related to production of certain bank documents before an investigating officer during the course of investigation with the prior permission of the High Court Division. So, according to him the order passed by the learned Additional Sessions Judge is liable to be set-aside making the rule absolute.

6. Mr Md Shamsul Hussain Kamal, the learned advocate for the complainant opposite party No. 1, on the other hand, has supported the order of the learned Additional Sessions Judge and has submitted that there was no legal bar of examination of the Manager in order to prove that the complainant, in fact, issued a cheque in favour of the accused petitioner for a sum of Taka 50,000 drawn on the local Sonali Bank Branch. So, according to him the rule is liable to be discharged.

7. We have considered the submissions made by the learned advocates for both the sides. We have not before us the petition submitted by the complainant before the learned Magistrate seeking to examine the local Sonali Bank Manager as a witness in the case; nor do we find from the order of the learned Magistrate dated 7-6-95 the, precise grounds on which the complainant sought to examine the Bank Manager as a witness. We simply find that the learned Magistrate refused the prayer by raising bar of section 94 CrPC. However, on reference to the impugned judgment and order dated 30-5-96 passed by the learned Additional Sessions Judge we find that the ground was as under "বাদী উক্ত টাকা তাহার ২২ নম্বর ব্যাংক একাউন্টে ৩৯৩৮৫৭ নং চেকের মাধ্যমে প্রদান করিয়াছেন বিধায় ব্যাংক ম্যানেজারকে সাক্ষী মানিয়া উক্ত এস,সি রুল বুক তলবের প্রার্থনা করেন।

8. It is thus clear to us that the Bank Manager was required by the complainant to be examined as a witness for the purpose of production of the SC Roll book in order to prove that he paid a sum of Tk 50,000 to the accused-petitioner vide cheque No. 393857 on his Savings A/C No. 22 maintained by him at the local Sonali Bank. Now a pertinent question is involved whether the court had the jurisdiction under section 94 of the Code of Criminal Procedure to call the local Sonali Bank manager as a witness with production of the said SC Roll book or the Bank or whether permission of the High Court Division was necessary for the learned Magistrate to call for the bank papers by having recourse to the provision of section 94 (1)(b) of the Code of Criminal Procedure. Let us reproduce below section 94 of the Code,"

> 94. Summons to produce document or other thing:— (1) Whenever any court, or, any officer in charge of a police station (underlining is ours) considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order; Provided that no such officer, (underlining is ours) shall issue any such order requiring the production of any document or other thing which is in the custody of a bank or (banker as defined in the Bankers' Books Evidence Act, 1891 (XVIII of 1891) and relates, or might disclose any information which relates, to the bank account of any person except-
>
> (a) for the purpose of investigating an offence under sections 403, 406, 408 and 409 and sections 421 to 424 (both inclusive) and sections 465 to 477A (both inclusive) of the Penal Code with the prior permission in

writing of a Sessions Judge; and

(b) in other cases, with the prior permission in writing of the High Court Division.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the Evidence Act, 1872, sections 123 and 124, or to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities."

9. Perusal of section 94(1) does not show that any legal bar has been imposed upon the court to call for any document for the purpose of trial of a proceeding before it. The proviso to the section which contains clause (a) and (b) does not relate to an court holding trial, of a proceeding but is relatable to an officer in charge of a police station holding investigation into certain offences which requires production of bank papers. In case of investigation into offences as specified in clause (a) to the proviso of section 94(1) Officer-in-charge of a police station is required to obtain prior permission of the Sessions Judge in writing to ask for production of bank papers or any other thing as defined in Banker's Books Evidence Act, 1891. In other cases, as the clause (b) says, prior permission in writing of the High Court Division is necessary.

10. In the instant case before us we find that the matter did not relate to any investigation at all. It related to production of certain bank document as evidence during the course of trial. Thus neither the learned Magistrate was correct in holding that section 94, in effect, barred examination of the Bank Manager as a witness; nor the learned Additional Sessions Judge was correct in holding that the learned Magistrate could call for bank papers with the permission of the High Court Division by following the provision of clause (b) to the proviso of section 94(1). We have already mentioned that embargo contained in clause (a) and (b) to the proviso of section 94(1) relates to an officer-in-charge of a police station requiring production of any bank document etc for the purpose of investigation of certain offences.

11. Both the courts below also lost sight of the provisions of the Bankers' Books Evidence Act 1891, which relates to manner of production and proof of entries in Bankers Books and examination of bank officials as witnesses. The Act is a very small one. For better appreciation the same is reproduced below:—

1. (1) This Act may be called the Bankers' Books Evidence Act, 1891.

(2) It extends to the whole of (Bangladesh);

2. In this Act, unless there is something repugnant in the subject or context, —

(1) "Company" means a company regitered under any of the enactments relating to companies for the time being in force in Bangladesh or incorporated by any Bangladesh Law.

(2) "bank" and "banker" mean—

(a) any company carrying on the business of bankers.

(c) any post office savings bank or money order office.

(3) "bankers books" include ledgers, day books, cash-books, account-books and all other book used in the ordinary business of a bank:

(4) "legal proceeding" means any proceeding or inquiry in which evidence is or may be given, and includes an arbitration:

(5) "the Court" means the person orpersons before whom a legal proceeding is held or taken:

(6) "Judge" means a Judge of (the High Court Division)

(7) "trial" means any hearing befor the Court at which evidence is taken: and

(8) "certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.

4. Subject to the provisions of this Act, a certified copy of any entry in a bankers book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible but not further or otherwise.

5. No officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any bankers book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause.

6. (I) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a bankers book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies,

(2). An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

(3). The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same not be enforced without further order.

7. (I) The costs of any application to the Court or a Judge under or for the purposes of this Act and the costs of anything done or to be done under an order of the Court or a Judge, made under or for the purposes of this Act shall be in the discretion of the Court or Judge, who may further order such costs or any party thereof to be paid to any party by the bank if they have been

incurred in consequence of any fault or improper delay on the part of the bank.

(2). Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3). Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself:

Provided that nothing in this sub-section shall be construed to derogate from any power which the Court or Judge making the order may possess for the enforcement of its or his directions with respect to the payment of costs."

12. Section 4 of the Act provides that a certified copy of any entry in a banker's book is admissible in evidence in all legal proceedings without production of the original. Section 6 of the Act vests jurisdiction upon the court or a Judge to obtain certified copy of the relevant entries from the concerned bank at the instance of a party. Section 5 of the Act exempts bank official's personal attendance as a witness unless required by the court or a Judge as a special cause. Under such circumstances it appears to us it was within the competence of the learned Magistrate to cause production of certified copy of the concerned SC Roll required by the complainant to prove that he issued a cheque drawn on his account which was encashed by the accused petitioner. But he failed to excise his jurisdiction. He should have recourse to the provisions of the Bankers' Books Evidence Act for proper adjudication of the proceeding before him. On the other hand section 94 of the Code of Criminal Procedure has not laid any embargo upon the court to call for any document for the purpose of an on going trial of a proceeding before it. Learned Sessions Judge, as observed by us earlier, was mistaken in holding that the required bank document could be called for by the learned Magistrate with the prior permission of the High Court Division only by having recourse to the provision of section 94(l)(b)of the Code.

13. It further deserves mention here that section 162 of the Evidence Act gives a wide power to the court to summon any person as a witness to produce a document in his possession or power, whatever objection he may have in producing the document. For better appreciation the provision is reproduced below :

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court. The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Penal Code."

14. The aforesaid provision of section 162 is mandatory.Its equally applicable to a private person or a public servant. He is bound to bring me document in his possession to court Or send it through some other person even though he may have any legal objection to its admissibility or production. After having brought the document in court, the witness claim privilege or prefer any other objection that he may have against disclosure of its contents. It "is again for

the court to decide the validity of such objection. But a witness cannot withhold such document.

15. The court must exercise its discretion with circumspection in directing to cause production of any document and must not compel any person to appear as a witness unless it be so required as a special case in the interest of administration of justice. In the instant case before us production of the hank document was vitally necessary for proof of the complainant's case. Under the circumstances we consider it desirable for the learned Magistrate to cause production of the bank document required for proof of the complainant's case by having recourse to the provisions of the Bankers' Books Evidence Act, 1891.

16. In the result, the rule is made absolute. The impugned order dated 30-5-1996 passed by the learned Additional Sessions Judge 1st, Court, Sylhet in Criminal Motion No. 3(3)/95 directing the learned Magistrate to follow the provision of section 94(l)(b) of the Code of Criminal Procedure is hereby set-aside. The order of the learned Magistrate refusing to summon local Sonali Bank Branch Manager as a witness and thereby refusing to call for the necessary bank document is also hereby set-aside. The learned Magistrate is directed to cause production of the necessary bank papers for the purpose of the trial by following the provisions of the Bankers' Books Evidence Act as observed by us in the body of the judgment. Stay granted earlier by this court is hereby vacated.

Communicate the order to the learned Sessions Judge, Sylhet and the learned Magistrate of the 1st, Class and cognizance Court, Sylhet for information and necessary action.

Ed.

High Court Division
(Criminal Miscellaneous Jurisdiction)

Md Miftah uddin Choudhury J
Soumendra Sarker J

Judgment
September 13th, 2012.

Shahadat Hossain (Md)..
.....Petitioner

vs

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

Money Laundering Protirodh Ain (VIII of 2009)
Section 4(2)

The law relates to Money Laundering does not provide any provision to make investigation by the police in case of any offence committed under the Act, rather the Anti-Corruption Commission is authorized to make such investigation. .....(12)

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

Money Laundering Protirodh Ain (VIII of 2009)
Sections 2(Ta) and 4(2)

This sort of interference is nothing but illegal harassment amounts to high handedness of the police and creation of anarchy amongst the passengers travelling from one city to another city within the country and apparently an attempt of the police personnel to make themselves illegally benefited......(12)

Nasiruddin Mahmud vs Momtazuddin Ahmed, 36 DLR (AD) 14; Abdul Quader Chowdhury vs State, 28 DLR (AD) 38; Manik (Md) @ Md Akkash Khan (Manik) vs State, 2 BLC 418 and Sunil Kumar vs Messer's Escorts Yamaha Motors Ltd., AIR 2000 (SC) 27 ref.

Belayet Hussain, Advocate—For the Petitioner.

Md Habibullah, Advocate—For the Anti-Corruption

*Criminal Miscellaneous Case No.14236 of 2009.

Commission, Dhaka as Opposite-Party No.2.

Md Shohrowardi, Deputy Attorney-General, with Md Ishaque Momin, Assistant Attorney-General

Israt Jahan, Assistant Attorney-General—For the Opposite-Party.

Judgment

Md Miftah Uddin Choudhury J: This Rule was issued calling upon the opposite party to show cause as to why the proceeding of GR Case No. 249 of 2009 arising out of Narshingdi Police Station Case No.30 dated 11-4-2009 under section 4(2) of the Money Laundering Protirodh Ain, 2009, now pending in the Court of Chief Judicial Magistrate, Narshingdi should not be quashed, and or such other or further order or orders as to this Court may seem fit and proper should not be passed.

2. It is stated that, the petitioner is, a citizen of Bangladesh hails from a respectable family of Sylhet city, a reputed businessman, a member of Sylhet Chamber of Commerce and Industry, owner of two big shops in Sylhet city named Furniture Mahal and Jabir Metal wherein invested huge amount of money. Alongwith the application for quashment the petitioner annexed his Membership Certificate issued by the Sylhet Chamber of Commerce and Industry, and copies of his Trade Licenses issued by Sylhet City Corporation. On 13-4-2009 at eight he started from Dhaka for Sylhet by a bus under management of renowned transport company named "Green Line Paribahan". On the highway at 2-35 AM the police restrained the bus carrying him and started checking. In course of such checking police found Taka 47,45,600 (forty seven lakh forty five thousands and six hundreds) in his bag and compelled him to leave the bus and took him to the police camp at Madhobdi. Thereafter, the police seized the said money and other goods contained in his bag and forwarded him to Court, on 5-4-2009 showing him as arrested by making General Diary being Madhobdi Inspection Centre General Diary No. 148 dated 05-4-2009 under section 54 of the Code of Criminal Procedure and took him on remand. Thereafter on 11-4-2009 an FIR being Madhobdi Police Station Case No.30 dated 11-4-2009 was lodged against him and he was again taken on remand for further 5(five) days. After such remand he was sent to custody and Sub-Inspector KMAzizul Haque was entrusted for investigation. Thereafter by order dated 3-6-2009 passed in Criminal Miscellaneous Case No.385 of 2009, learned Sessions Judge, Narshingdi enlarged him on bail. After obtaining bail he moved this Court under section 561A of the Code of Criminal Procedure and obtained the instant Rule.

3. In the FIR lodged against him that it is alleged that on 4-4-2009 the informant ASI poritosh Chandra Sarker alongwith some constables of Madhobdi Inspection Centre on the basis of Madhobdi Inspection Centre General Diary No.133 dated 4-4-2009 while had been checking the vehicles running through the area under Madhobdi Inspection Centre from 18-00 PM to 6-00 AM of the next day on Dhaka-Sylhet highway in the night at 2-35 hours stopped the bus being numbered Dhaka Metro-Ba-14-2787 managed by "Green Line Paribahan". During checking of the luggage they became suspicious about a black coloured bag and made query about its owner, but none of the passengers claimed its ownership and the guide (Supervisor) of the bus after checking tickets and luggage tags said that the said bag belonged to the passenger sitting on Seat No.B-4. Thereafter, in one stage the petitioner, the passenger of that seat named Md Shahadat Hossain, son of Fazlul Karim and Shahanara, of 27/B Naya Sarak, Police Station Kotwali, District- Sylhet identified the said bag as of him. On query, he said that the said bag contained Taka 47,45,600 forty seven lakh forty five

thousands and six hundreds but could not show any document in support of that amount, he claimed himself as a man dealing with hundi business. In presence of witness named Parvez Ahmed, of Village-Paschim Burulia PS Joydebpur, District-Gazipur Supervisor of the said bus, Md Salim of Jatrabari, Dhaka, Ripon Ahmed, of Pagla Bazar, Dakhkhin Sunamgonj, at present-22/A, Rajar Gali, Daroga Gate, Sylhet and in presence of Mr Kazi Md. Hasan, Executive Magistrate, Narshingdi seized the money alongwith the ticket, bag, one genji, lungi, chador, pant and mobile set from him. In the said seizure list the said Executive Magistrate and the said witnesses put their signatures. The said accused person said that the amount of money carried by him is related to hundi business, he took the same from Dhaka for handing over to a person of Sylhet. Subsequently, regarding that money in front of various medias including print and electronic, and in front of the learned Magistrate and other High Officials he admits that the said money is related to hundy business. His such information was circulated by various media. He further informed that a person in Green Line counter at Arambagh, Dhaka gave him the said money contained in the bag with direction to hand over the same to another person in Green Line counter at Supanighat, Sylhet. He knows those persons, but do not know their names and addresses. Thereafter he was arrested by making Madhobdi Inspection Centre General Diary No. 148 dated 5-4-2009 under section 54 of the Code of Criminal Procedure and produced before the Court. To find out the clue by making interrogation Sub-inspector KM Azizul Islam, in-charge of Madhobdi Inspection Centre prayed for 10 (ten) days police remand but the Court a1lowed (five) days. During the period of remand while he was in custody of Narshingdi Model Police Station the Officer-in-Charge of the police station as wel1 as the investigation officer asked him so many questions. In such situation, it is apparent that the accused committed offence under section 4(2) of the Money Laundering Protirodh A in, 2009, and hence the case.

4. In the application for quashment the Anti-Corruption Commission has been added as opposite party No.2 by making an application and ultimately to contest the Rule the commission filed an affidavit-in-opposition.

5. Mr Belayet Hussain, learned Advocate appearing for the petitioner submits that carrying money of any amount from Dhaka to Sylhet by any citizen of Bangladesh is not an offence and there is no prohibition or any prescribed Rule in respect of any amount of money, so the police arrested the petitioner from the bus by which he had been travelling from Dhaka to Sylhet without any reason. The petitioner was arrested on 5-4-2009 under section 54 of the Code of Criminal Procedure, taken on police remand for 5 (five) days, and thereafter on 11-4-2009 the FIR was lodged under Money Laundering Protirodh Ain, but the said Act does not provide any law to initiate any case by the police as it made in the instant case. He referred the definition of Money Laundering as provided in section 2 (Ta) of the said Act and also mentioned the sections 9 and 12 of the said Act.

6. In section 2(Ta), the Money Laundering was define as follows:

"(ট) "মানিলন্ডারিং" অর্থ–

(অ) সম্পৃক্ত অপরাধ সংঘটনের মাধ্যমে প্রাপ্ত অর্থ বা সম্পত্তির অবৈধ উৎস গোপন বা আড়াল করিবার উদ্দেশ্যে উহার হস্তান্তর, রুপান্তর, বিদেশে প্রেরণ বা বিদেশ হইতে বাংলাদেশে প্রেরণ বা আনয়ন করা বা বৈধ ও অবৈধ উপায়ে অর্জিত অর্থ বা সম্পত্তি বিদেশে পাচার।

(আ) কোন আর্থিক লেনদেন এইরুপভাবে সম্পন্ন করা বা সম্পন্ন করিবার চেষ্টা করা যাহাতে এই অধ্যাদেশের অধীন উহা রিপোর্ট করিবার প্রয়োজন হইবে না।

(ই) এইরুপ কোন কার্য করা যাহার দ্বারা উক্তরুপ অর্থ বা সম্পত্তির অবৈধ উৎস পোপন বা আড়াল করা হয় বা এইরুপ

কার্যসম্পাদনের চেষ্টা করা বা অনুরুপ কার্যসম্পাদনে স্বজ্ঞানে সহায়তা বা ষড়যন্ত্র করা।"

7. Section 9 of the said Act provides the procedures of investigation and trial of such offence which are as follows:

"৯। অপরাধের তদন্ত ও বিচার ঃ (১) এই আইনের অধীন অপরাধসমূহ দুর্নীতি দমন কমিশন আইন, ২০০৪ (২০০৪ সনের ৫নং আইন) এর অধীন তফসিলভূক্ত অপরাধ গণ্যে দুর্নীতি দমন কমিশন বা কমিশন হইতে তদুদ্দেশ্যে ক্ষমতাপ্রাপ্ত কোন কর্মকর্তা কর্তৃক তদন্তযোগ্য হইবে।

(২) এই আইনের অধীন অপরাধসমূহ Criminal Law Amendment Act, 1958 (Act XL of 1958) এর section 3 এর অধীন নিযুক্ত স্পেশাল জজ কর্তৃক বিচার্য হইবে।

(৩) এই আইনের অধীন অপরাধসমূহের তদন্ত, বিচার ও সংশ্লিষ্ট অন্যান্য বিষয়ে এই আইনের বিধানাবলীর সহিত বিরোধের ক্ষেত্রে, দুর্নীতি দমন কমিশন আইন, ২০০৪ এবং Criminal Law Amendment Act, 1958 এর বিধানাবলী প্রাধান্য পাইবে।"

8. Section 12 of the Said Act provides that:

"দুর্নীতি দমন কমিশনের অনুমোদন অপরিহার্যতাঃ (১) ফৌজদারী কার্যবিধি বা আপাততঃ বলবৎ অন্য কোন আইন যাহা কিছুই থাকুক না কেন, দুর্নীতি দমন কমিশন কর্তৃক কোন আইন প্রয়োগকারী সংস্থাকে প্রদত্ত অনুমোদন বা দুর্নীতি দমন কমিশনের সরাসরি আবেদন ব্যতিরেকে কোন আদালত এই আইনের অধীন কোন অপরাধ বিচারার্থ আমলে গ্রহণ (cognizance) করিবেন না।

(২) এই আইনের অধীন কোন অপরাধের তদন্ত সমাপ্ত হইবার পর তদন্তকারী কর্মকর্তা আদালতে প্রতিবেদন দাখিল করিবার পূর্বে কমিশনের পূর্বানুমোদন গ্রহণ করিবেন এবং কমিশন কর্তৃক প্রদত্ত অনুমোদন পত্রের একটি কপি প্রতিবেদনের সহিত আদালতে দাখিল করিবেন।"

9. By referring the aforesaid provisions of the law Mr Hussain submits that any case under Money Laundering Protirodh Ain, 2009 can be initiated by the Anti-Corruption Commission but not by the ordinary police as it made in the instant case. In the instant case the FIR does not disclose any offence under the definition of Money Laundering Protirodh Ain or under any law of the land. The petitioner as a citizen of Bangladesh had the right to move from one city to another city with any amount of money, but on his way from Dhaka to Sylhet the police on deep night with evil intention arrested him and took him from the bus to the police camp and created pressure upon him to give the money to them without any reason, but being refused arrested him without any reason under section 54 of the Code of Criminal Procedure and took him on remand, made torture, and thereafter lodged the FIR with such allegation which does not disclose any offence, rather finding no offence or no cause to make any allegation lodged the instant FIR mentioning the law which is not at all applicable in the instant case. As per Mr Hussain, this sort of attempt by the police is nothing but harassment and in the cases like the instant one whore the FIR does not disclose any offence this Court under section 561A of the Code of Criminal Procedure can interfére even before submission of any charge-sheet or taking cognizance by the Court. In support, he has cited the decisions of this Court in the cases of, *Nasiruddin Mahmud vs Momtazuddin Ahmed* reported in *36 DLR (AD) 14*, *Abdul Quader Chowdhury vs The State*, reported in *28 DLR (AD) 38*, *Manik (Md) @ Md Akkash Khan (Manik) vs State*, *2 BLC 418*, *Sunil Kumar vs Messer's Escorts Yamaha Motors Ltd.*, reported in *AIR 2000 (SC) 27*.

10. Mr Md Habibullah learned Advocate appearing for the opposite party No.2 (the Anti-Corruption Commission) submits that this application is not maintainable, he contended that as per section 12 of the Money Laundering Protirodh Ain, 2009 any order passed by the Court is appealable the Commission has already took initiative to make investigation of the instant case, hence the Rule is liable to be discharged.

11. Mr Md Shohrowardi, learned Deputy Attorney-General, appearing for the State submits that he has got instruction that the investigation of the case has already been completed

but due to existing stay order of this Court no charge sheet could be submitted. As such, the stay order may be vacated and Rule may be discharged to allow the investigation agency to submit the charge-sheet, after submission of charge-sheet the petitioner may come with the application for quashment since apparently the FIR does not disclose any offence. Learned Deputy Attorney-General a1so can not claim that the FIR disclosed any offence rather he admits that carrying of any amount of money from one city to another city of the country is not an offence and our law does not provide any limitation about the amount of money carrying personally by any citizen.

12. We have gone through the relevant law as well as the FIR and the decisions cited above. On perusal of the FIR it appears that it does not disclose any offence and there is nothing to take cognizance against the petitioner rather it is his right to carry money or any goods not forbidden by law from one place to any place within the country and the police has got no right to interfere with his such unfettered right. This sort of interference is nothing but illegal harassment amounts to high handedness of the police and creation of anarchy amongst the passengers travelling from one city to another city within the country and apparently an attempt of the police personnel to make themselves illegally benefited. We find no reason for the police to restrain and check the bus on the highway at dead night as it made in the instant: case. We find that from that bus except money nothing was recovered by the police from anybody else. No contraband item was recovered from the bus by which the petitioner was going to Sylhet. Arrest of the petitioner by the police appears to us as an illegal act of them which appears as an illegal attempt to realize some money from the passengers by creating pressure upon them and by making torture. We find no reason of granting remand as it granted in the instant case. The law relates to Money Laundering as mentioned above does not provide any provision to make investigation by the police in case of any offence committed under the said Act, rather the Anti-corruption Commission is authorized to make such investigation. The petitioner did not prefer any appeal against any order of any court rather he filed the application and obtained the instant rule for quashment under section 561A of the Code of Criminal Procedure. The High Court Division has got the inherent power to pass any order to prevent abuse of the process of Court or to secure ends of Justice. So the contention of Mr Habibullah is irrelevant.

13. in the instant case we have already observed that the FIR lodged by the informant does not disclose any offence, hence the instant case against the petitioner is nothing but harassment to the petitioner through the abuse of process of Court. Though no charge-sheet, has yet been submitted and no cognizance was taken by any Court but on reading the decisions cited above we find no barrier, to quash the instant proceeding pending for no offence committed by the petitioner.

14. Accordingly, this Rule is hereby made absolute and the proceeding of GR No. 249 of 2009, arising out of Narshingdi Police Station Case No.30 dated 11-4-2009 under section 4(2} of the Money Laundering Protirodh Ain, 2009, now pending in the Court of Chief Judicial Magistrate, Narshingdi, is hereby quashed. The learned Chief Judicial Magistrate, Narshingdi is hereby directed to pass necessary order to ensure return of the money, bag arid other goods seized by the police from the petitioner to him within 1 (one) month from the date of receipt of this order and to report such return to this Court within next 7 (Seven) days.

15. The copy of this judgment shall be transmitted to the Inspector General of Police to take necessary action to stop such harassment.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Shahidul Islam J
Abdur Rob J

Judgment
September 17th, 2013.

State.....Applicant
vs
Abul Bashar.....
.....Condemned-Prisoners*

Code of Criminal Procedure (V of 1898)
Sections 164(3) and 342

There is no certificate given by the Magistrate certifying the fact that the confessional statement was recovered without making physical assault. After being examined under section 342 of the Code the condemned-prisoner stated that the said statement was recorded from him after penetrating iron nail (পেরাগ) into his hands and compelling him to include the name of other accused-persons, showing fear to push iron nail (পেরাগ) into his legs. Considering the evidence of PW-9 and the statement made by the condemned-prisoner at the time of examining him under section 342 of the Code it appears that, the statement under section 164 of the Code is not a voluntary statement and that is inadmissible in evidence. .....(35)

Towahid Alam vs State, 38 DLR 289 ref.

Bishmadev Chakrabortty, DAG with Nizamul Haque Nizam, AAG and Md Atiqul Hoque, AAG [In Death Reference No. 43 of 2008]—For the State.

Md Abdun Nur, Advocate [In Criminal Appeal No. 2977 of 2008]—For the Appellant.

Md Helal Uddin Mollah with Syeda Farah Helal, Advocate [In Criminal Appeal No. 3004 of 2008]—For the Appellants.

Md Hatem Ali, Advocate [In Jail Appeal No. 531 of 2008]—For the Appellant.

Md Khabir Uddin Bhuiyan, Advocate [In Jail Appeal No. 533 of 2008]—For the Appellant.

*Death Reference No. 43 of 2008 *with* Criminal Appeal No. 2977 and 3004 of 2008. Jail Appeal No. 531 , 532 and 533 of 2008.

Judgment

Shahidul Islam J : This Death Reference No. 43 of 2008, Criminal Appeal No. 2977 of 2008, Criminal Appeal No. 3004 of 2008, Jail Appeal No. 531 of 2008, Jail Appeal No. 532 of 2008 and Jail Appeal No. 533 of 2008 having being arisen out of the same judgment and order those have been taken up together for disposal by a single judgment.

2. This death sentence has been referred to by the learned Additional Sessions Judge, 2nd Court, Noakhali for confirmation of death sentence awarded upon the condemned-prisoner 1. Abu Bashar @ Badsha Chora, son of Mohsin Ali, Village-Megha (Gazi Bari), Police Station-Chatkhil, District Noakhali. 2. Mainuddin @ Ashru, son of late Abul Kalam Master, of village South Bodal Court (Kashem Master House), Police Station-Chatkhil, District- Noakhali and 3. Abu Sayed @ Liton, son of Abul Kalam, of village-Dashani Tabga (Choukider Bari), Police Station-Chatkhil, District-Noakhali finding them guilty under sections 302/201/34 of Penal Code and sentencing them to death by hanging in Sessions Case No. 68 of 2002 arising out of GR Case No. 235 of 2001 and connecting Chatkhil Police Station Case No. 4 dated 25-2-2001. The prosecution case in short is that the decomposed dead body of two unknown male persons were found floating in the pond of Ahmad Bhuiyan of village Abu Torab under Police Station Chatkhil, Noakhali and receiving such information the PW1 Sub-Inspector A. Kuddus Sarkar registered a General Diary being No. 845 dated 25-2-2001, recover the dead body from the pond, prepared inquest upon the dead bodies, sent those dead bodies to the morgue for autopsy and started investigation. In course of

investigation the police seized a diary dated 11-3-2001 which belonged to condemned-prisoner Abul Bashar and found some cash memo issued by the M/s Gangchill filing Station Mithachara, Mirswarai, Chittagang against purchased of fuel for truck No. 3280 and found an account showing purchased of sand by accused Abul Bashar. Thereafter, Abul Bashar was arrested on 10-3-2001 at about 11-30 AM and was taken to Chatkhil Police Station on the same date and thereafter was produced before Magistrate, Ist Class wherein said Abul Bashar made a confessional statement impleading the other condemned-prisoners to have engaged with the killing of truck driver Shafikul Islam and truck Helper Zakir Hossain of truck No. 5557.

3. Soon after recovery of dead bodies the police started Chatkhil Police Station Case No. 4 dated 25-2-2001. After procuring the confessional statement the Investigating Officer submitted a charge-sheet under sections 302, 201 and 34 of the Penal Code against the condemned-prisoners and one Abdul Hannan (@), Masud @ Bahar.

4. After submissions of charge-sheet the case record was transmitted to the Court of learned Sessions Judge for trial and was registered as being Sessions Case No. 68 of 2002. Thereafter the learned Sessions Judge framed charge against the accused-persons under sections 302, 201 and 34 of the Penal Code and the charges were read over to them to which they pleaded not guilty and claimed to be tried. Thereafter the learned Sessions Judge transferred the case to the court of learned Additional Sessions Judge, 2nd Court Noakhali. The prosecution with a view to bring home the charges to the doors of the accused-persons examined 19 witnesses out of 21 charge-sheeted witness and they were cross-examined. Thereafter the prosecution closed its adducing evidence and the accused-persons were examined under section 342 of the Code of Criminal Procedure to which they again reiterated their innocence. Accused Bashar after being examined under section 342 of the Code of Criminal Procedure gave out to the Court that the police had recover the 164 statement after penetrating his hands by a piece of iron nail and also managed to include the names of the other accused into the said statement.

5. The defence did not examine any witness. The defence case, in short, was that, the accused were innocent and did not commit the murder as claimed by the prosecution.

6. The learned Additional Sessions Judge after considering the evidence on record has passed the impugned judgment and order and sentenced the condemned-prisoner as aforementioned by the impugned judgment and order and acquitted co- accused Habib from the charge levelled against him.

7. Mr Bishamodev Chakrabortty, the learned Deputy Attorney-General with Mr Nizamul Haque Nizam and Mr Md Atiqul Hoque, the learned Assistant Attorney-General appeared to support the death sentence. Mr Helal Uddin Mollah with Ms Syeda Farah Helal, the learned Advocates appeared in Criminal Appeal No. 3004 of 2008 preferred by condemned-prisoner Abul Bashar @ Badsha Chora and Abu Sayed Liton. Mr Md Abdun Nur, the learned Advocate appeared in the Criminal Appeal No. 2977 of 2008 preferred by condemned-prisoner Mainuddin @ Ashru. Mr Hatem Ali the learned Advocate appeared in Jail Appeal Nos. 531 of 2008 and 532 of 2008 preferred by condemned-prisoner Mainuddin @ Ashru and Abul Bashar Mr. Muhammad Khabir Uddin Bhuiyan, the learned Advocate, appeared in Jail Appeal No. 533 of 2008 preferred by condemned-prisoner Abu Sayed @ Liton.

8. Initially Mr Md Atiqul Hoque Salim, the learned Assistant Attorney-General, took us through the FIR, inquest report, post-mortem

report, seizure list and evidences of the prosecution witness as well as the impugned judgment and order. Thereafter, the learned Deputy Attorney-General made the substantial argument on behalf of the state. The learned Deputy Attorney-General, submitted that the whole case has been founded upon the confessional statement made by condemned-prisoner Abul Bashar and the cash memo showing purchase of fuel, recovered from the diary of the Abul Bashar. He submitted that there is no direct evidence in the case but the circumstances which have been brought on record by adducing the prosecution witness are enough to hold that the condemned-prisoners have commitied the murder upon the truck driver Shafikul Islam and truck helper Zakir Hossain of truck No. 5557 with a view to grab the truck. He gave more emphasis upon the 161 statement made by condemned-prisoner Abul Bashar and submitted that the statement is an inculpatory in nature and the said statement was recovered lawfully and within a very shortest possible time from date of his arrest and the maker of the statement has implicated him as well as other condemned-prisoners admitting the fact of heinous killing of victim Shafikul Islam and Zakir Hossain. He further submitted that the confession recording Magistrate was examined as PW 11 who proved the confessional statement to be voluntary and true and, as such, the learned Additional Sessions Judge has passed the impugned judgment and order lawfully and there is nothing to interfere with the same. He prayed for acceptance of the reference and dismissal of the Criminal Appeals as well as Jail Appeal.

9. Mr Md. Abdun Nur, the learned Advocate, appearing in Criminal Appeal No 2977 of 2008 submitted that there is not a single piece of evidence adduced by the prosecution to connect the condemned-prisoner Mainuddin @ Ashru with the killing of the victims as claimed by the prosecution. He submitted that the confessional statement made by Abul Basher being self exculpatory in nature that cannot be made applicable to convict any of the co-accuseds in the case. He submitted that the learned Additional Sessions Judge has imposed death sentence upon the condemned-prisoner Mainuddin without being based upon any legal evidence. He prayed for setting aside of thee impugned judgment and order and prayed for acquittal of condemned-prisoner Mainuddin @ Ashru.

10. Mr Md Helal Uddin Mollah with Ms Syeda Farah Helal appearing in Criminal Appeal No. 3004 of 2008 took us through the 164 statement recovered from condemned-prisoner Abul Bashar and submitted that, the said statement is exculpatory in nature and that the said statement was recovered after making in human torture upon the condemned-prisoner Abul Bashar and by fixing a piece of iron nail (লোহার পেরেক) into his hand and also under threat. He submitted that the said statement is not admissible in evidence. He further submitted that the said statement was not recorded satisfying the mandatory requirement as provided in section 164(3) of the Code of Criminal Procedure and, as such, the said statement although has been recovered from the convict appellant Abul Bashar but the same being not a valid piece of evidence the impugned judgment and order is liable to be set-aside and the condemned-prioner Bashar is liable to be acquitted. He pointed out the statement made by Abul Bashar under section 342 of the Code of Criminal Procedure and submitted that the condemned-prisoner Abul Bashar after being examined under section 342 of the Code of Criminal Procedure has stated clearly as to how did that statement was recorded from the condemned-prisoner Bashar. Thereafter he submitted with regard to the condemned-prisoner Abu Sayed (a) Liton that there is not a single piece of evidence available on record to support death sentence or any kind of sentenced. He submitted that the prosecution has hopelessly failed to prove the case beyond doubt and, as

such, the whole judgment is liable to be set-aside and the condemned-prisoners are liable to be acquitted from the charge levelled against them.

11. Mr Md Hatem All, appearing in Jail Appeal No. 531 of 2008 and 532 of 2008 has adopted the submissions made by Mr Abdun Nur and Mr Helal Uddin Mollah. Mr Md Khabir Uddin Bhuiyan, the learned Advocate, appearing in Jail Appeal No. 533 of 2008 has adopted the submissions made by Mr Helal Uddin Mollah.

12. To appreciate the points put forward before this Court by the learned councels for the parties let us go through the evidence on record. The informant Sub-Inspector Abdul Kuddus was examined as PW1 who testified in his examination-in-chief that he was stationed at Chalkhil Police Station on 25-2-2001 and recovered the floating dead bodies of two unknown persons on 25-2-2001 from the pond of Ahammed Ullah. He recovered the dead bodies, prepared inquest upon the dead bodies in presence of witnesses, sent the dead bodies to the morgue for autopsy and thereafter lodged the FIR. He was trusted with the task of investigation and during investigation he prepared sketch map and index and seized alamats. Since the dead bodies were unknown and, as such, he informed all the police stations about the recovery of dead bodies on 26-2-2001 Shakwat Hossain (PW17) went to the Noakhali General Hospital Morgue and identified the dead body of Shafikul Islam. Shakwat Hossain disclosed to him that the victim was the driver of truck being Dhaka- Tha- 5557. He collected post mortem reports. Prove the post-mortem report of Shafikul as exhibit-9 and the post-mortem report of Zakir Hossain as exhibit-8 the inquest as exhibit 1 and 2 Chalans for sending the dead bodies to morgue as exhibit-11 and 11-Ka.He arrested the accused-persons.

13. He was cross-examined by the defence to which he admitted that during investigation he was transferred and could not be complete investigation. He added that the FIR does not disclose the names of accused-persons. He could not remember as to whether he examined any relation of the victims. The relations of the victims did not indentify them. He arrested accused Badsha on 11-3-2001 and produced him before the Court. Not a fact that, the confession was recorded after torture on the maker.

14. One Munir Hossain, was examined as PW2 who testified that, in about 9/9-30 AM on 25-2-2001 he heard that two dead bodies were floating in the pond of Abu Torab. He went there and found the chairman as well as the police personel. The dead bodies were lifted and inquests were prepared. He put his signature as a witness to the inquest. He prove the inquest as exhibit-2 and his signature as exhibits-2/1 and 2/2. The dead body's hands and legs were fastened by nylon rope. He seized five pieces of nylon rope and one handkerchief one Secko wrist watch and a pair of shoes. He proved the seized alamats as material exhibit-1 series. He was not cross-examined.

15. PW3 Mostafa Khan testified that at about 7-00/7-30 AM on 25-2-2001 he went to the pond of Ahammed Bhuiynn and found two floating dead bodies. He lifted those dead bodies from water. The hands and legs of the dead persons were lied with rope, handkerchief was poured into the mouth of the victims. Those dead bodies were lifted in presence of police. Police prepared inquest upon the dead bodies. He proved the inquest as exhibit 1/2 and his signature as exhibit 1/3 and exhibit 2/3. He also proved the fact of seizure of alamats and those were marked as exhibit I, II, III, IV series. He was not cross-examined.

16. One Abdul Mannan was examined as PW4. Who testified that he found two floating dead bodies in the pond of Ahmed Bhuiyan. He had visited the said place after the arrival of chairman. The hands and legs of the dead bodies were fasten with ropes and handkerchief

were poured into their mouth. Inquest was prepared upon the dead bodies. This PW 4 was not cross-examined.

17. One Abu Sayed was examined as PW 5 who simply supported the fact of lifting the dead bodies from the pond and he was not cross-examined.

18. Mizanur Rahman was examined as PW-6 who testified that, at about 2-30/3-00 PM on 22-2-2001, one Abul Bahsar came to purchase sand from Satota Enterprise and loaded sands in the truck being No, Dhaka-Tha-5557 and started towards Chatkhil. After two or three months said Abul Bashar along with four persons were taken to them by a Microbus. He identified Abul Bashar as sand purchaser.He produced a photocopy of Memo towards purchase of sand and a receipt in support of purchase of sand. He identified Abul Bashar in the dock. In cross -examination he added that Abul Bashar purchased sand on 22-2-2001. He did not put any signature in the receipt or ledger of Satota Enterprise. Not a fact that the fact of purchase of sand by Abul Bashar is false. Not a fact that he desposed false. He proved the seizure list as exhibit-5 and his signature contained therein as exhibil-5/1.

19. One Abdul Barek was examined as PW-7 who testified that he served as a Manager of Satota Enterprise. Abul Bashar came to purchase sand from Satota Enterprise at about 2-00 PM on 22-2-2001 and carried sand by truck No. 5557. He proved the photocopy of register. He identified Abul Bashar in the dock. This PW-7 was cross-examined, who admitted that the receipt produced by him did not contain the fathers's name of Abul Bashar. He denied the suggestion of the defence that Abul Bashar did not purchase any sand from him. Abul Bashar was brought to him by police on 2-5-2001.

20. One Abul Khair Choukidar was examined as PW-8 who added that Abul Bashar was arrested on 11-3-2001 by him as well as by village police from a Rickshaw. One diary belonging to Abul Bashar was recovered from Khaza Ahammed where from a slip showing purchase of fuel was recovered. The photocopy of which was marked as exhibit- 4. In cross-examination he denied the defence suggestion that no diary as well as fuel purchasing slip was recovered from his possession. This PW-8 was recalled by the prosecution and he added that after causing arrest of Abul Bashar on 11-3-2001 the diary and fuel purchasing slip was recovered. Those were recovered from a Rickshaw. He was accompanied by a Choukidar named Bacchu. He prove the seizure list as exhibit-12. He was cross-examined to which he added that he seized the diary and oil purchasing slip from Khaza Ahammed. Abul Bashar handed over the diary and oil purchasing slip from Khaza Ahammed in his presence.

21. One Md Bachu was examined as PW 9 who claimed him to be a village police of Bodor Court Union. He added that he arrested accused Abul Bashar on 11-3-2001 from a Rickshaw and took him to the police station by Babi Taxi. Accused was holding a diary in his hands. Who handed over the said diary to the Rickshaw puller and requested him to hand over the diary to Khaza Ahammed. Police seized the diary and oil purchasing slip from Khaza Ahammed. He proved the seizure list as exhibit-6 and his signature as exhibit-6/2. He was cross-examined to which he added that not a fact that he did not disclosed to the police about the seizure of diary and oil purchasing slip. The seizure list was prepared in shop adjacent to the place of seizure.

22. One Khaza Ahammed was examined as PW-10 who added that Choukider Abul Khair and Bachu arrested Abul Bashar. At that time Abul Bashar handed over diary to the Rickshaw Puller and told him to hand over the diary to Anawar Hossain, Daraga, Khair Choukidar and Bachu recovered the diary from under the seat of Rickshaw. He indentified

Abul Bashar in the dock. He was cross-examined to which he added that, the police examined him. The diary was recovered from under the seat of Rickshaw. The confessional statement recording Magistrate named Khodeja Akter was examined as PW 11 who added that she was stationed at Noakhali on 11-3-2001 and was performing the functions of a Magistrate 1st Class. Accused Abul Bashar was produced before her at 10-00 AM on 11-3-2001 and she recorded a statement under section 164 after complying with the mandatory requirement as provided in law. She proved the said confessional statement as exhibit-7 and her signatures contain therein as exhibits 7/1, 7/2, 7/3, 7/4, 7/5. She was cross-examined to which she admitted that there is no seal used in the confessional statement. Not a fact that she did not record the statement complying with the mandatory requirement of section 164 of the Code of Criminal Procedure. The Officer-in-Charge, Chatkhil produced the accused before her. Not a fact that the Officer-in-Charge was present at the time of recording statement. Not a fact that the accused disclosed to her about physical torture upon him for recording the statement. She started recording statement 14.50 hours.

23. One Shahjahan was exaimined as PW 12 who added the following evidence in his examination chief and cross-examination;

"বর্তমান ঠিকানা-শ্যামপুর, থানা শ্যামপুর, জেলা-ঢাকা। আমি ট্রাক ড্রাইভার, মৃত শফিকুল ইসলাম ঢাকা-থ-৫৫৫৭ নং ট্রাকের চালক ছিলেন। ঢাকা এক মালিকের অধীনে আমরা উভয়ে ৭/৮ বৎসর যাবৎ ট্রাক চালাতাম। ফলে তার সাথে আমার ঘনিস্টতা ছিল। ঢাকায় একই বাসায় থাকতাম ঘটনার সময় তিনি অন্য মালিকের ট্রাক চালাতেন।

২২-২-২০০১ইং উক্ত সফিকুল ইসলাম তার উক্ত ট্রাক চালিয়ে ঢাকার কাঁচপুর হতে চাঁদপুর যাবেন উল্লেখে রওয়ানা হয়েছেন সাথে হেলপার জাকির হোসেন ছিলেন। একদিন বাড়ীতে থেকে শনিবার ফিরবেন বলেও জানিয়েছিলেন।

২৩-২-২০০১ ইং আমি আমার গাড়ীতে লোড করতে গিয়ে কাঁচপুর ডেনিশ কোম্পানীর সাথে শফিকুল ইসলামের ৫৫৫৭ নং ট্রাকটি দাড়ানো অবস্থায় দেখি। তখন বেলা দুপুর ১২-৩০ ঘটিকা, আমি কাছে গিয়ে দেখি একজন অপরিচিত ২২/২৩ বৎসর বয়সী লোককে গাড়ীর ভিতর শোয়া অবস্থায় দেখি। আমি ঐ লোককে উক্ত ট্রাকের ড্রাইভার ও হেলপার কোথায় জিজ্ঞাসা করলে ঐ লোক জানান যে, ড্রাইভার নামাজ পড়তে ও হেলপার ভাত খেতে গিয়েছেন। আমি কিছুক্ষন খোজা খোজি করে তাদেরকে না পেয়ে অনুমান $^1/_2$ ঘন্টা পর আমার ট্রাকের কাছে যাই। আবার ৫৫৫৭ নং ট্রাকের নিকট গিয়ে ঐ লোকটিকে ট্রাকের সামনে দাড়ানো অবস্থায় দেখি। ড্রাইভার ও হেলপার ফিরে এসেছেন কিনা জিজ্ঞাসা করলে ঐ লোক ফেরেনি বলে জানান। ২য় বার যখন শফিকের ৫৫৫৭নং ট্রাকের নিকট যাই তখন আমি শফিকের ভায়রার ছেলে ফিরোজকে সাথে নিয়ে যাই। ৫৫৫৭ নং ট্রাকের পাশে থাকা ঐ লোককে বলি ফিরোজকে নিয়ে গিয়ে শফিকুল ইসলাম ও হেলপার জাকিরের সাথে যোগাযোগ করিয়ে দিত। তখন ঐ লোক ফিরোজকে পাশ্বস্থ হোটেলের নিকট রাস্তায় যান। কিছুক্ষন পর ফিরোজ ফেরত আসায় জানান সে ঐ লোক কিল ঘুষি, ধাক্কা দিয়ে তাকে রাস্তার পার্শ্বে ফেলে লোকটি ১টি রানিং বাসের পিছনে উঠে চলে গেছে।

১ম বার যখন ঐ লোকের সাথে আমার দেখা হয় তখন আমি তার পরিচয় জিজ্ঞাসা করেছিলাম। তখন ঐ লোক নিজেকে গাটি (মালের মালিক) ও তার নাম বাশার বলে জানিয়েছিলেন। তার বয়স ২২/২৩ বৎসর হবে। তার মুখে ১টি দাগের মত ছিল। ঐ লোক নোয়াখালীর আঞ্চলিক ভাষায় কথা বলছিলেন।

এর ২ দিন পর পত্রিকায় চাটখিলে ২টি লাশ পাওয়া গিয়েছে। মর্মে সংবাদ পাই। আপনি শফিকের ভাগ্নী জাকির তাদের আত্নীয় খালেক ১টি ট্রাক নিয়ে চাটখিল থানায় যাই। থানায় গিয়ে জিজ্ঞাসাবাদ করে লাশের বর্ণনা শুনে আমরা উক্ত লাশদ্বয় ড্রাইভার শফিক ও হেলপার জাকির হোসেনের বলে ধারনা করি। থানা কর্তৃপক্ষ আমাদেরকে জানান যে, লাশ তখন নোয়াখালী জেনারেল হাসপাতালের মর্গে। আমরা তখন নোয়াখালী জেনারেল হাসপাতালে গিয়ে ড্রাইভার শফিকুল ইসলাম ও হেলপার জাকির হোসেনের লাশ সনাক্ত করতঃ ময়না তদন্তের জন্য চাটখিল থানায় ফেরত নেয়া হয় টেম্পুতে করে। থানার সামনে হতে পরে লাশ বুঝি নিয়ে আমরা ট্রাকে করে শফিকুল ইসলামের লাশ নিয়ে ও জাকীর শফিকের বাড়ী রামগঞ্জ যাই। হেলপারের জাকির হোসেনের লাশ তার আত্মীয় খালেক তার বাড়ী বরিশাল নিয়ে যান।

৩ বৎসর আগে কিছুক্ষন দেখে ছিলাম বিধায় এখন ডকে দাড়ানো ৪ জন আসামীর মধ্যে কাঁচপুরে ট্রাকে দেখা সে লোক আছে কিনা সনাক্ত করতে পারছিলে।

ডকে দাড়ানো আসামী আবুল বাশারকে ডকের কাছে গিয়ে দেখে আমি দেখতে পাচ্ছি যে তার মুখে একটি দাগ আছে; তবে ঘটনার সময় দেখা লোকটির মুখের দাগটি আরো কালো ছিল।

লোকের মুখের দাগটি আরো কালা ছিল।

×××

কাঁচপুরে শফিকের ট্রাকে যে লোককে আমি দেখেছিলাম সে লোক এখন ডকে আসামীদের মধ্যে আছেন কিনা তা পুরা পুরি সনাক্ত করতে পারছিনা তখন ঐ লোকের মুখে যে দাগ দেখেছিলাম এখন আমি বাশারের মুখে হালকা দাগের চেয়ে আরো বড় ও আরো কালো ছিল।

নিহত শফিকুল ইসলাম ও জাকির হোসেনও কি ভাবে মারা গিয়েছেন, কে বা কারা তাদেরকে মেরেছেন তা আমি দেখিনি।"

24. One Abdul Khaleque was examined as PW 13 who added that he heard on 26-2-2001 that, the dead body of truck helper Zakir Hossain was lying at Maijdee within Noakhali. He went to Noakhali. After holding post-mortem examination the dead body of Shafikul and Zakir was carried to Chatkhil Police Station. He took over the dead bodies from the custody of police through Chalan number exhibit-7(Ka) and 7(Ka)/1. He was not cross-examined.

25. Truck driver Badar Ali was examined as PW14 who testified the following in his examination-chief and cross-examination :

"আমি ট্রাক ড্রাইভার। আমি কাঁচপুর দরবার ট্রান্সপোর্টে চাকরী করি। ২৩-২-২০০১ ইং সকাল ১০-৩০ ঘটিকার সময় লুঙ্গি পরা, শ্যামলা রংঙ্গের মুখে দাগ আছে (ডান চোখের নীচে দাগ আছে) ২০-২২ বৎসর বয়স্ক একজন লোক কাঁচপুরে আমার কাছে গিয়ে ৫৫৫৭ নং ট্রাকটি রাস্তা থেকে ডেনিশ কোম্পানীর সামনে নিয়ে যাওয়ার জন্য বলেন আমি ঐ লোকসহ উক্ত ট্রাকটি রাস্তা হতে ডেনিশ কোম্পানীর সামনে নিয়ে যাই। লোকটি আমাকে ১০০ টাকা দিয়ে ছিলেন। ডকে দাড়ানো ৪ জন আসামীর মধ্যে দক্ষিণ দিকে হতে উত্তরে ২নং আসামীই সে দিন আমার কাছে গিয়ে ৫৫৫৭ নং ট্রাকটি আমাকে দিয়ে রাস্তা থেকে ডেনিশ কোম্পানীর সামনে নিয়েছেন। উক্ত আসামী হচ্ছেন আবদুল বাশার।

ঐ দিনে বেলা ১৪-০০ ঘটিকার সময় আমি শুনেছি ড্রাইভার শফিকুর ভায়রার ছেলে ফিরোজের সাথে মারামারি করে উক্ত আসামী চলে গিয়েছেন। পরে শুনেছি ড্রাইভার ও তার হেলপার খুন হয়েছে।

চানমিয়া নামক ব্যক্তি ট্রাকটি ডেনিশ কোম্পানীর সামনে নিয়ে যেতে বলেছেন। চান মিয়া ও আমি উক্ত ট্রাকে করে ডেনিশ অফিসে গিয়েছি। ৬/৭ দিন পর পুলিশ আমাকে জিজ্ঞাসাবাদ। ডকে দাড়ানো আসামী আবুল বাসারই আমাকে দিয়ে ট্রাকটি রাস্তা থেকে ডেনিশ কোম্পানীর সামনে গিয়েছিলেন। আমি আগে লোকটিকে চিনতাম। চান মিয়া আমার ট্রান্সপোর্টের মালিক। আসামী আবুল বাসার ট্রাকটি নিয়ে দেবার কথা বলার পর চান মিয়া আমাকে ট্রাকটি লোকটিকে কথামত নিয়ে যেতে বলেছিলেন। আসামী আবুল বাসার ঐ দিন আমার কাছে না যাওয়া, বা ট্রাকটি রাস্তা ডেনিশ কোম্পানীর সামনে নিয়ে যেতে না বলা বা আমি চান মিয়ার পরিবর্তে উক্ত আসামীকে মিথ্যা ভাবে সনাক্ত করা অথবা আমি মিথ্যা সাক্ষ্য দান করা সত্য নহে।

26. One Nurul Amin being Manager of Shiraj Transport was examined as PW 15 who added the following evidence in his examination-chief and cross-examination:

"২৩-২-২০০১ ইং সকাল ৯-৩০ ঘটিকার সময় আমি আমার উক্ত ট্রান্সপোর্টের অফিস থাকাকালে ২০-২১ বৎসর বয়স্ক সাদা লুঙ্গি সাদা শার্ট পরিহিত একজন লোক আমার কাছে গিয়ে উত্তর বঙ্গের কোন ট্রিপ আছে কিনা জানতে চান বগুড়ায় যাবার একটি ট্রিপ আছে বলে আমি তাকে জানাই লোকটি নোয়াখালীর আঞ্চলিক ভাষায় কথা বলছিলেন। ঐ লোক তখন ২,১০০ টাকা ভাড়া দেবার শর্তে তার মালামাল বগুড়া নেবার মৌখিক চুক্তি হয়। তখন ঐ লোক জানান যে, তার গাড়ী রাস্তায় আছে কিন্তু হেলপার নেই। একজন বদলী ড্রাইভার দেবার জন্য আমাকে অনুরোধ করেন। আমি তখন ফজল ড্রাইভারকে তার সাথে দেই। তখন ফজল ড্রাইভার ঐ লোক সহ ঢাক-থ-৫৫৫৭ ট্রাকটি রাস্তা ডেনিশ মিলের সামনে নিয়ে আসে। মালামাল লোড করতে দেরী হওয়ায় ঐ লোকটি তখন গাড়ীতে (ঐ ট্রাকে) শুয়ে পড়েন। বেলা ১২-০০ ঘটিকার দিকে শাহজাহান ড্রাইভার তথায় গিয়ে জানান যে, উক্ত ট্রাকটি শফিকুল ইসলাম কোথায় জিজ্ঞাসা করলে তিনি জানান যে, শফিকুল ইসলাম নামাজ পড়তে ও হেলপার ভাত খেতে গিয়েছেন। ঐ লোক ঐ কথা বলার পর ট্রাক থেকে বের হয়ে চলে যেতে থাকেন। তখন শাহজাহান ড্রাইভার ও শফিকুল ইসলাম ড্রাইভারের ভায়রার ছেলে ঐ লোককে ধরার জন্য ধাওয়া করে তখন ঐ লোক উক্ত শাহজাহান ড্রাইভার ছেলেকে কিল ঘুষি মারে এবং একটি চলন্ত বাসের পিছনে উঠে পলায়ন করেন।

শফিক ড্রাইভারকে আঃ পূর্ব হতে চিনিতাম। ২৬-২-২০০১ ইং জানতে পারি যে, শফিকুল ইসলাম ড্রাইভারের লাশ নোয়াখালী জেলার চাটখিল থানার একটি পুকুরে পাওয়া গিয়েছে। তথায় হেলপারের লাশ পাওয়া গিয়েছে বলে জানতে পারি। আমাকে তদন্তকারী দারোগা জিজ্ঞাসাবাদ করেছেন।

এখন ডকে যে ৪ জন আসামী আছেন তন্মধ্যে কাঁচপুর দেখা ঐ লোক আছেন কিনা এতদিন পর সনাক্ত করতে পারছিনা।

(বৈরী ঘোষিত)

××× বাদী রাষ্ট্র পক্ষেঃ

ডকে দাড়ানো ৪ জনের মধ্যে সর্ব উত্তরে দন্ডায়মান আসামী আবদুল বাশার প্রকাশ বাদশা আমার জবানবন্দিতে কথিত সে লোক কিনা বলতে পারছিনা। এ লোক ই সে লোক হওয়া বা আমি এখন আসামীর দ্বারা ভীত ও বাধ্য হয়ে দোনো মতে তাকে সনাক্ত না করা সত্য নহে।

× ×× কাঁচপুরে দৌড়ে পালিয়ে যাওয়া লোককে আমি ধাওয়া করিনি।"

27. Dr Kamal Uddin executed autopsy on the dead bodies of the victims who added the following evidence in his examination-chief and his cross-examination:

"২৬-২-২০০১ ইং তারিখে আমি নোয়াখালী জেনারেল হাসপাতালে কর্মরত থাকা কালে অজ্ঞাতনামা ২টি লাশের ময়না তদন্তের জন্য ১টি বোড গঠন হয়। আমি উক্ত বোর্ডের সভাপতি ছিলাম। সদস্য ছিলেন ডাক্তার মফিজুল আলম ও ডাক্তার এ,বি,এম, আঃ মোতালেব।

আমরা ৬০৬ নং কনস্টবল মোঃ বাচ্চু মিয়া কর্তৃক আনীত ও সনাক্তকৃত ৪০ বৎসর বয়স্ক পুরুষ মুসলিম ব্যক্তির লাশের ময়না তদন্ত করে তার দেহে নিম্নলিখিত জখম ও অবস্থা পেয়েছি।

1) One continuous ligature mark around the neck low lying encircling the neck with perchentization skin.

2) Echymosis both wrist and both legs. One deep desection: Echymosis found above, below and under the ligature mark with ante-mortem blood clots found both wrist and both legs which resited on washing.

Opinion: In our opinion death was due to Aspesia as result of strangulation which was ante-mortem and homicidal in nature.

উক্ত মর্মে আমরা বোর্ডের সকল সদস্য স্বাক্ষর করে আমাদের প্রতিবেদন দাখিল করেছি। এটিই আমাদের ময়না তদন্ত প্রতিবেদন প্রদর্শন-৮, এতে থাকা সর্ব ডানের স্বাক্ষরটি আমার প্রদর্শনী-৮/১ এবং আমার স্বাক্ষরের সাথে থাকা স্বাক্ষরটি ডাক্তার মো- মফিজুল আলমের প্রদর্শনী ৮/২ এবং সর্ব বামে থাকা স্বাক্ষরটি ডাক্তার এ,বি,এম, আবদুল মোতালেবের। প্রদর্শনী ৮/৩। একই দিন আমার অপর অজ্ঞাত ব্যক্তির লাশ বয়স ৪৫ বৎসর, পুরুষ, মুসলিমের লাশের ময়না তদন্ত করেছি। উক্ত লাশের ময়না তদন্ত করে আমার নিম্ন লিখিত জখম ও অবস্থা পেয়েছি।

(1) One continuous ligature mark around the neck low lying encircle the neck with perehelitigation skin.

(2) Echymosis both wrist and both legs.

On deep desection: Echymosis found above, below & under the ligature mark with ante-mortem blood clots found both legs and both wrist which resiled on washing.

Opinion: In our opinion death was due to asphysia as result of strangulation which was ante-mortem and homicidal in nature.

আমার উক্ত জখম সমূহের বিষয়ে ময়না তদন্ত প্রতিবেদন দাখিল করেছি এটিই আমাদের সে ময়না তদন্ত প্রতিবেদন প্রদর্শন-৯ এবং এতে থাকা সর্ব ডানের স্বাক্ষরটি আমরা প্রদর্শনী-৯/১ মধ্য খানেরটি ডাক্তার মফিজুল আলমের প্রদর্শনী-৯/২ এবং সর্ব বামেরটি ডাক্তার এ,বি,এম, আবদুল মোতালেবের প্রদর্শনী-৯/৩"। This witness was not cross-examined.

28. One Shawkat Hossain was examined as PW-17 who testified the following:

"মৃত শফিকুল ইসলাম আমার আপন চাচা। তিনি ঢাকা-ন-৫৫৫৭ নং ট্রাকের চালক ছিলেন। মোঃ জাকির হোসেন উক্ত ট্রাকের হেলপার ছিলেন। ২৬-২-২০০১ইং আমার নোয়াখালী জেনারেল হাসপাতালের মর্গ হতে উক্ত শফিকুল ইসলামের এবং মোহাম্মদ খালেক উক্ত জাকির হোসেনের লাশ বুঝে নিয়েছি।

উক্ত ট্রাকের মালিকের নাম আবুল কাশেম, পিতা আবুল হাসেম, গ্রাম জগন্নাথপুর বেপারী বাড়ী, থানা-হাজীগঞ্জ, জেলা-চাঁদপুর।

মোঃ আবদুল খালেক যখন জাকির হোসেনের লাশ বুঝে নেয় তখন রশিদ সাক্ষী হিসাবে আমি স্বাক্ষর করেছি। এটি সে রশিদ প্রদর্শনী ৭ক এবং এতে থাকা এ স্বাক্ষর প্রদর্শনী-৭ক/২ আমার।

আমি জাকির হোসেনকে ব্যক্তিগত ভাবে চিনতামনা লাশটি জাকির হোসেনের ছিল বলে আমার কোন ধারনা নেই।

স্বাঃ/সাখাওয়াত হোসাইন স্বাঃ/অস্পষ্ট

২১-৬-২০০৫ ২১-৬-২০০৫

Re-call by the prosecution:

আমি যে রশিদ মূলে আমার চাচা শফিকুল ইসলামের লাশ নোয়াখালী জেনারেল হাসপাতালে মর্গ থেকে গ্রহন করেছি এটি সে রশিদের কার্বন কপি প্রদর্শনী-১০ এবং এত থাকা এ স্বাক্ষর আমার স্বাক্ষরের কার্বন কপি প্রদর্শনী-১০/১।" This witness was not cross-examined.

29. The PW-18 Abul Kashem is a hearsay a witness about the fact of death of the victims. Sub-Inspector Abdul Kuddus Sarker the Investigating Officer was examined and cross-examined as PW-19 to which he added the following evidence:

"গত ২৫-২-২০০১ ইং তারিখ চাটখিল থানার ভারপ্রাপ্ত কর্মকর্তা থানার মামলা নং -৪। তারিখ ২৫-২-২০০১ইং ধারা-৩০২/২০১/৩৪ দঃ বিঃ তে রুজু করিয়া তদন্তভার আমাকে দেওয়া হইলে আমি তদন্তভার গ্রহন করি। আমি মামলার তদন্তকালে ঘটনাস্থলে পরিদর্শন ও মানচিত্র ও সূচী, সূচীর ব্যাখ্যা তৈরী করি। আসামী গ্রেফতার। আসামীর জবানবন্দি সহ সকল কার্যক্রম গ্রহন করি। পরবর্তীতে গত ১৬-৮-২০০১ ইং তারিখ অত্র জেলা হইতে অন্যত্র বদলী হওয়ায় মামলার পরবর্তী তদন্তের জন্য ডকেট ১৯-৮-২০০১ইং তারিখ ভারপ্রাপ্ত কর্মকর্তার নিকট হস্তান্তর করিলে আমার সহকর্মী হাবিবুর রহমান তৎকালীন চাটখিল থানায় কর্মরত থাকাবস্থায় মামলার পরবর্তী তদন্ত সমাপ্ত করিয়া চাটখিল থানায় অভিযোগ পত্র নং-৮৬, তারিখ ৩১-১২-২০০১, ধারা ৩০২/২০১/১৩৪ দঃ বিঃ মতে আসামী গনের বিরুদ্ধে অভিযোগ প্রমানিত হওয়ায় অত্র অভিযোগপত্র দাখিল করেন। সহকর্মী হিসাবে উক্ত আই/ও হাবিবুর রহমানের দস্তখত আমি চিনি। এই আমার জবানবন্দি।

××× উপস্থিত আসামী পক্ষে।

আমি এই মামলার বাদীও আই/ও এই মামলায় অভিযোগ পত্রে মোট ২৭ জন সাক্ষীর নাম উল্লেখ আছে। এই ২৭ জন সাক্ষীর সঙ্গে কেহ মৃত ব্যক্তির আত্মীয় হিসাবে কোন বাদী হইয়া আমাকে দরখাস্ত দেয় নাই। সত্য নহে যে, আমি যে সব সাক্ষীকে ১৬১ মতে জবানবন্দি গ্রহন করেছি কোন সাক্ষী এই ৪ জন আসামীদের নাম বলে নাই। আমি সকল সাক্ষীর ১৬১ ধারা মতে সাক্ষ্য গ্রহন করেছি। ঘটনার তারিখ ২৫-২-২০০১ ইং তারিখের পূর্বে যে কোন সময় হইতে পারে। ২৫-২-২০০১ইং তারিখে এজাহারটা lodge করেছি। আমার জানামতে হাবিবুর রহমান চাকুরীতে আছে। তবে কোথায় আছে তাহা সঠিক জানা নাই। হাবিবুর রহমান কোন সাক্ষীকে পরীক্ষা করেছেন কিনা জানি না। হাবিবুর রহমন সাহেবের তদন্ত সম্পর্কে কোন প্রশ্ন করিলে আমার পক্ষে উত্তর দেওয়া সম্ভব নহে। এই মোকদ্দমার কোন আসামীর নাম এজাহারে নাই। সত্য নহে যে, আমি সঠিক তদন্ত করলে ফাইনাল report দিতাম। সত্য নহে যে, তাই মোকদ্দমার আসামীদের বিরুদ্ধে কোন evidence নাই। সত্য নহে যে, অভিযোগ পত্রে অভিযোগ দেয়ার কোন meterials ছিল না। সত্য নহে যে, তাই সঠিক তদন্ত না করে ডকেট O/C এর কাছে প্রেরণ করি। সত্য নহে যে, সঠিক তদন্ত করি নাই।"

30. These are the evidence adduced by the prosecutions.

31. We have gone through the evidences as discussed above. It is the only question got to be decided by this Court as to whether the impugned judgment and order is sustainable in law?.

32. Upon going through the evidence on record it appears to us that, the whole case of the prosecution has been founded upon circumstantial evidence as there is neither eye-witness to the case nor any evidence available save and except the confessional statement made by condemned-prisoner Abul Bashar. By a numerous decisions of our Apex Court it has been settled that conviction and sentence if be made upon any accused upon circumstantial evidence it is the prosecution who is required to prove the motive of such killing or murder. The prosecution also is required to prove that each and every chain of circumstance have been linked up to bring home the chain of circumstances to constitute the offence of murder. Let us take up the point No. 1 as to whether the prosecution has been able to prove the motive for killing the victims by the condemned-prisoners?

33. Upon going through the evidences as discussed above it appears to us that the prosecution has hopelessly failed to adduce any evidence in support of the motive of killing the victims by the accused-persons. In the case of *Towahid Alam vs State, 38 DLR page 289* it has been held that though motive is normally irrelevant in a criminal case, but the question motive which is based on circumstantial evident is an important element to prove the guilt of the appellant. In the instant case we have

seen that prosecution by adducing evidence has failed to prove the motive of the accused-persons in killing the victims. During argument the learned Deputy-Attorney-General tried to canvass that, the accused-persons have committed murder upon the victims with an intention to grab the truck being No. Dhaka-Tha-5557. It appears to us that, as per the prosecution the commission of murder was taken place in the night following 22-2-2001 while accused Abul Bashar loaded some sand on truck No. Dhaka-Tha- 5557. As per the evidence of PW-12 the said Truck was found at Kachpur on 23-2-2001. Whereas the 164 statement made by condemned-prisoner Bashar disclosed that he left the truck on 22-2-2001 at night. There is no evidence available on record to show that after leaving the truck said Abul Bashar again went to the place of occurrence and hired the truck. There is no evidence available on record to show that the sand loaded in the truck was unloaded or that was taken elsewhere by condemned-prisoner Abul Bashar along with other accused-persons. From the record it appears that the truck being No. Dhaka-Tha-5557 was not seized by the Investigating Officer nor any explanation was furnished before the court at the trial as to the custody of the truck. In absence of seizure of the truck and explanation furnished towards the custody of the truck, the submissions made by learned Deputy Attorney-General does not bear any merit. In view of the above, we have no hesitation but hold that the prosecution has hopelessly failed to prove the motive of killing of the victims by the accused-persons.

34. Now let us take up the second question as to whether the prosecution has been able to link up each and every chain of circumstances to prove the fact that the condemned-prisoners have killed the victims? As per the prosecution case the condemned-prisoner Bashar hired the truck for carrying sand and sand was loaded, There is no evidence to show that after loading the truck with sand those were carried by Abul Bashar to his house or anywhere. From the evidence of PW l-19 it appears that the dead body of two unknown persons were found floating in a pond and the decomposed dead bodies were recovered by PW-1. As per the inquest report the dead bodies were not identifiable. After going through the post-mortem report it appears that, the doctor executed autopsy on two unidentified dead bodies. Not a single witness came forward to depose that the dead bodies were identified before holding autopsy. Not a single piece of evidence have been adduced in the case to prove the fact that the victims were the driver and helper of the truck being No. Dhaka-Tha-5557. There is not a single piece of evidence available to show as to what had happened on the night following 22-2-2001 till 25-2-2001 and till recovery of dead bodies of victims. The 164 statement made by Abul Bashar if be believed and taken to be a voluntary statement that, disclosed the fact that he left the truck in the night following 22-2-2001. The doctor did not mention as to the age of death. There is no evidence on record to show that the death was committed in the night following of 22-2-2001. Since there is no evidence to link up the chain of events took place in the commission of murder as alleged by the prosecution, it is very difficult to believe the prosecution case. From the evidence on record it appears that, the prosecution tried to say that a diary belonging to Bashar was seized and from the said diary a receipt showing purchase of fuel was seized. We have gone through the said receipt which have been marked as exhibil-6. From the exhibit-6 it appears that a cash memo being No. 37151 dated 13-1-2001 was allegedly seized showing purchase of fuel for truck No. Dhaka-Na-3280. The date of occurrence was 25-2-2001 and the said fuel was purchased on 13-1-2001 for another truck but not for truck No. 5557. In view of the above, it is crystal clear that the prosecution case have been founded upon the facts without having any foundation. The exhibit-6 casted a

serious upon the *bonafide* of the prosecution case. We are of the view that the prosecution has failed to link up each and every chain of circumstances to bring home the charges of murder as against the accused-persons.

35. Let us address about the genuineness of 164 statement made by the condemned-prisoner Abul Bashar. We have gone through the said statement very carefully. From the evidence of PW1 it appears that the victims were killed with a view to misappropriate the truck and to fulfill the said desire the truck was unloaded and was taken to the side of Kachpur Bridge for loading condensed milk produced by Danish Company. The 164 statement made by the condemned-prisoner Abul Bashar does not support the said fact. Upon perusal of the said statement it appears that he left the said truck at night following 22-2-2001 and, as such, it is clear like sun shine of broad day light that the said statement was recorded not in usual course of business. Upon perusal of the said statement it appears that the condemned-prisoner Bashar was arrested on 10-3-2001 at about 11-30 hour and was taken to the Police Station. Thereafter, he was sent to the cognizance Court No. 3 on 11-3-2001 and the statement was recorded on 11-3-2001. Whereas the PW 9 a village police of Bodol Court Union Parisad deposed before the Court that, he had arrested the condemned-prisoner Abul Bashar on 11-3-2001. That evidence remained undisturbed. If we believe the evidence of PW-9 the fact of recording Confessional Statement of Abul Bashar on 11-3-2001 becomes doubtful and unbelievable. Further it appears that the Magistrate cannot record the statement on 11-3-2001 that is on the date of arrest. There is no certificate given by the Magistrate certifying the fact that the confessional statement was recovered without making physical assault. After being examined under section 342 of the Code of Criminal Procedure the condemned-prisoner stated that the said statement was recorded from him after penetrating iron nail (পেরাগ) into his hands and compelling him to include the name of other accused-persons showing fear to push iron nail (পেরাগ) into his legs. Considering the evidence of PW-9 and the statement made by the condemned-prisoner Bashar at the time of examining him under section 342 of the Code of Criminal Procedure it appears to us that the statement under section 164 of the Code of Criminal Procedure is not a voluntary statement and that is inadmissible in evidence. The very basis of conviction does not support the prosecution case. Moreover, the alleged truck being No. Dhaka-Tha- 5557 could not be seized by the Investigating Officer and could not be produced at the trial. The prosecution having had failed to produced the truck at the trial the whole prosecution case became doubtful and, as such, we have no hesitation but to hold that the impugned judgment and order has been recorded without being based upon any legal evidence. The impugned judgment and order is nothing but a moral conviction and, as such, the same is liable to be set-side.

36. Accordingly, the Death Reference is rejected, Criminal Appeal No, 2977 of 2008, Criminal Appeal No. 3004 of 2008, Jail Appeal No. 531 of 2008, Jail Appeal No. 532 of2008 and Jail Appeal No. 533 of 2008 are allowed. The condemned-prisoners are round not guilty of the charge framed against them. They are acquitted from the charge levelled against them The Jail authority of Kashempur is directed to release the condemned-prisoners 1.Abul Bashar @ Badsha Chora, son of Mohsin Ali, Village-Megha (Gazi Bari), Police Station-Chatkhil, District Noakhali. 2. Mainuddin @ Ashru, son of late Abul Kalam Master, of village South Bodal Court (Kashem Master House), Police Station-Chatkhil, District-Noakhali and 3. Abu Sayed @ Liton, son of Abul Kalam, of village-Dashani Tabga (Choukider Bari), Police Station-Chatkhil, District-Noakhali at once it not wanted in connection with any other cases. Send a

copy of the judgment along wilh case record to the Court of learned Additional Sessions Judge, Noakhali for taking necessary steps towards the early release of the condemned-prisoners.

Ed.

High Court Division
(Statutory Original Jurisdiction)

Md Rezaul Hasan J

PEB Steel-Asia Limited .....Petitioner

vs

The Registrar, Office of the Registrar of Joint Stock Companies and Firms and others.....Respondents*

Judgment
October 8th, 2013.

Arbitration Act (I of 2001)
Section 10(1)

Once the hearing of a matter has been commenced there would remain no scope to file written statement and section 10(1) of the Act will not be applicable. .....(11)

Arbitration Act (I of 2001)
Section 2(b)

The word 'Adalat' (Court) used in the Act exclusively means the Court of District Judge (জেলা জজ আদালত) and shall include, the Court of Additional District, if he is appointed to perform the function of the Adalat. .....(9)

Arbitration Act (I of 2001)
Section 155(1)

Provision under sub-section (1) of section 155 of the Act has been made to enable them to subscribe in proportion to the shares held by each member and that cannot be denied to them under the excuse that the company has earned lot of benefit or profit or on any other excuse, as because violation of statutory provision cannot be cured by showing any excuse whatsoever or even on the ground of dire necessity or equity. Any other decision, contrary to such view, will expose corporate sector to corrupt practices that would ultimately hamper national economy and the much uttered corporate governance. .....(21)

Maharastra State Board of Secondary vs Paritosh Bhupeshkumar Sheth, AIR 1984 SC 1543: (1984) 4 SCC 35; Dr Monjurul Islam vs Al-Rajihi Hospital (Pvt) Limited, 2003 (XI) BLT 474, ref.

Rokanuddin Mahmud with Assaduzzaman, Md Anisul Hassan, Adavocates—For the Petitioner/Opposite Party.

Imtiaz Mahmud, Advocate—For the Respondent No. 2 Tanjib-ul Alam, with Tarana Afroz, Advocates—For the respondent No. 3

Ahsanul Karim with Mejbahur Rahman, Advocate—For the Respondent No.4.

Judgment

Rezaul Hasan J: The substantive petition filed under section 43 of the Companies Act, 1994 (the Act) has been taken for hearing alongwith two applications filed by the respondents No.4 and 2, respectively, under section 7 read with section 10 of the Arbitration Act, 2001 with a prayer to stay all further proceedings of the instant Company Matter No. 91 of 2010 and to allow the parties to refer the very dispute to arbitration in terms of Article 78 of the Articles of Association of the Company.

*Company Matter No. 91 of 2010.

2. The substance of both the applications are all most similar. Main contention of the applications is that the petitioner has filed the substantive application under section 43 of the Act, for rectification of share Register of Members. But, Article 78 of the Articles of Association of the Company (PEB Steel-Asia Limited) provides for referring any dispute to the Arbitrators and, as such, the proceeding initiated by filing the application under section 43 is liable to be stayed as per provision of section 7 read with section 10 of the Arbitration Act. The petitioner/opposite party has submitted two sets of affidavits in opposition against these two applications, denying the allegation made therein and further stating that the matter and the dispute raised in the petition filed under section 43 does not bar this court's jurisdiction to hear and dispose of the substantive application. It has been stated that in the affidavits in opposition, that these two applications are *malafide* and that Article 78 of the Articles of Association (AoA) does not restrict power of the court to proceed under section 43 of the Companies Act, 1994.

3. It further appears from record that application under section 43 was filed and admitted on 10-6-2010 and registered as Company Matter No. 91 of 2010. Thereafter several dates were fixed and the matter has been heard in par. At this stage two applications have been put in by the respondent Nos. 2 and 4, seeking stay of the substantive matter.

4. Learned advocate Mr Ahsanul Karim appearing for the respondent No. 4 company, referred to sub-clause (1) of clause (3) of the Memorandum of Association and submits that the company has been formed with the object, amongst other to achive the objectives set forth in the agreement dated 2-9-2005, signed amongst the petitioner and the respondents. The said agreement, at clause 13, keeps provision for referring any dispute to arbitration. Next, referring to section 10 of the Arbitration Act, the learned advocate further submits that they have filed this application for stay before submitting a written statement. The learned advocate submits that the proceeding is liable to be stayed since the agreement, which has been incorporated in the Memorandum of Association by reference, containing arbitration clause.

Learned advocate Mr Imtiaz Mahmud appeared for the respondent No. 2, who has filed another application under section 7 read with section 10 of the Arbitration Act, 2001 with similar prayer as did by the respondent No.4.

5. However, neither the respondent No. 2, nor the respondent No. 4 has filed any affidavit--in-opposition controverting the contentions made by the petitioner until after the date when the substantive petition has been heard in part and a period more then 3(three) years has passed in the meantime.

6. Learned advocate Mr Rokonuddin Mahmud appearing alongwith learned advocates Mr Asaduzzaman and Mr Md Anisul Hassan, for the petitioner/opposite party, on the other hand, submits that the company has not authorized, nor taken any board resolution authorizing any body to file this application under section 7 read with section 10 of the Arbitration Act, 2001. He further submits that the company (PEB Steel-Asia Limited) is not a party to this agreement dated 2-9-2005 and, as such, the applications filed under section 7 read with section 10 of the Arbitration Act is wholly misconceived. He then submits that the word 'Adalat' i.e. 'Court', has been defined in section 2(b) of the Arbitration Act, that expressly refers to the court of the 'District Judge' (and Additional District Judge), not to the High Court Division of the Supreme Court of Bangladesh. Hence, this application filed before the High Court Division is not maintainable. He emphatically submits that, indeed this respondents have resorted to dilatory tactics

and have come up with two applications when the substantive application has already been heard in part. He also submits that the proceeding before the court has been initiated to implement statutory right of the petitioner, secured to them by sub-section (1) section 155 of the Companies Act, which cannot be over rided or nullified by any agreement or Articles of Association (AoA). He, therefore, has prayed for remedy provided under sub-section (3) of section 43 of the Act, which cannot be the subject matter of any Arbitratral Tribunal. Accordingly, he has prayed for rejection of this applications.

7. I have heard the learned advocates, pursued the two applications filed under section 7 read with section 10 of the Arbitration Act, as well as the substantive application and the documens annexed therewith.

8. The language of clause (b) of section 2 is very much clear and it does not of admit of any other interpretation or meaning except that the word 'Adalat' (Court), that exclusively means 'Court of District Judge' (জেলা জজ আদালত) and includes a Court of Additional District Judge, not the High Court Division. There is no ambiguity in the language used in defining 'adalat'.

9. In my considered view, when a statute defines any 'word' then no other meaning, except that as attributed to the said word under the defining section, shall be accepted. Besides, an word, thus defined shall have same meaning through out the entire statute. An word so defined cannot have different meaning under different sections, as argued by the learned advocate for the respondents No.2 and 3. Such approach, if accepted, would lead absurdity and conflicting situation, and shall also frustrate the rule of harmonious interpretation. Hence, I hold that the word 'Adalat' (court) used in the Arbitration Act 2001 exclusively means the Court of District Judge (জেলা জজ আদালত) and shall include, the Court of Additional District, if he is appointed to perform the function of the Adalat.

10. Besides, when section 7 of the Arbitration Act, 2001 has made special provision (authoring stay of proceedings) then such special provision will exclude the applicability of general provision contained in section 10(1) of that Act, as the canon of interpretation "generalia specialibus non derogant" shall apply in this case. I should in this respect, refer to the case of *Maharastra State Board of Secondary vs Paritosh Bhupeshkumar Sheth,* reported in *AIR 1984 SC 1543: (1984) 4 SCC 35,* wherein it has been held that, "where under a special section or rule a particular subject has received a special treatment, such special provision will exclude the applicability of any general provision which might otherwise cover the said topic". It has further been held in that case that, "The provisions contained in a statutory enactment or in rules/regulations framed thereunder have to be construed as to be in harmony with each other", as I have opined in this case as well to adhere to the rule of harmonious construction.

11. In his connection, the learned advocate for respondent No.2 has posed a hypothetical question, to substantiate his argument, that if a suit is filed before the court of Assistant Judge and the dispute raised in the suit is also covered by an arbitration agreement then whether the court of Assistant Judge should be competent to entertain an application under section 7 of the Arbitration Act 2001 and to stay all further proceeding of the suit pending before it, although it (the court of Assistant Judge) does not come within the definition of 'Adalat.' His view is that, the Assistant Judge Court can entertain such an application as well as can stay the proceedings pending before it, if the same dispute is also covered by an arbitration agreement, even though it (the court of Assistant Judge) does not come within the definition of 'Adalat',

under section 2(b) of the Arbitration Act. I find such argument as misleading, misconceived and fallacious. The proper course, in such situation, would be to file an application before the 'Adalat' (Court of District /Additional District Judge) under section 7 of the Arbitration Act and to seek stay of the proceeding pending before the Court of Assistant Judge. The mere fact that the dispute pending before a court is also covered by an arbitration agreement will not *ipso-facto* authorize that court (the Assistant Judge Court) to entertain or to allow an application under section 7 of the Arbitration Act, unless it is a 'Court' as defined under section 2(b) of the Arbitration Act. Besides, when the hearing of a matter has been commenced, in default of the written statement, the situation is not one similar to 'at any time before filing written statement' as mentioned in section 10(1) of the Arbitration Act, 2001. Once the hearing of a matter has been commenced there would remain no scope to file written statement and section 10(1) of the Arbitration Act will not be applicable.

12. I also find the substance in the submission of the learned advocate Mr Mahmud that, the petitioner has come up before this court, by filing petition under section 43 of the Act, to enforce statutory right vested in them under sub-section (1) of section 155 and prayed for remedy laid down in sub-section (3) of section 43 of the Act and this court has clear jurisdiction to entertain and disposed of this petition. Accordingly, for the reasons stated above, I am of the view that these two applications, filed after the matter has been heard in part, are not maintainable and the High Court Division not being an 'Adalat' as defined in section 2(b) of the Arbitration Act, 2001, both these petitions are rejected.

13. As has been recorded earlier, the substantive application was heard in part and the learned advocate for the petitioner continued the hearing of the substantive application. Main contention of the petitioner is that the petitioner company (PSAL) is one of the sponsor shareholders, as evident from the Memorandum of Association (MoA) of the company, that clearly shows that the petitioner alone holds 50% of the paid up share, while the respondent Nos. 2 and 3, are jointly holding the rest 50% of the shares. He next submits that, as per provision of subsection (1) of section 155 of the Act, their was no decision of the board of directors to increase the subscribed capital of the company by allotting further shares, nor any share was offered to the petitioner as required by sub-section (1) of section 155 of the Act. As such the allotment of further 8,70,000 shares on 30-3-2009, as evident from the return of allotment (Form XV), Annexure-H1, has been made in clear violation of subsection (1) of section 155 and the Register of Members, showing allotment of 8,70,000 shares, made on 30-3-2009, to the respondent Nos. 2 and 3, on equal proportion, are liable to be omitted. He has also referred to Article 52 of the Articles of Association (AoA) that required presence of at lest $3\ ^{1}/_{4}$ members of the board to constitute quorum in a board meeting. Neither any board meeting was called, nor was held, nor any quorum was present in any meeting where any decision was ever taken to increase the paid up capital, he continues. As such, the decision of the respondent Nos. 2 and 3 to increase the shares capital and to allot further shares to them, in violation of sub-section (1) of section 155, is totally contrary to the provisions of law. Hence respondent Nos. 2 and 3 have not acquired any legal title in 8,70,000 shares allotted to them, in equal proportion. Therefore, this allotment is illegal and the Register of Members is to be rectified by omitting the shares shown to have been allotted to the respondent Nos. 2 and 3 by striking out names of the respondent Nos. 2 and 3, each shown to have been allotted 4,35,000 shares.

14. The learned Advocate Mr Ahsanul Karim, appearing for respondent No. 4, along-

with the learned Advocate Mr Mejbahur Rahman, submits that inspite of repeated reminder about the shortage of paid up capital of the company, the petitioner did not come forward to infuse further capital in the company, as would be evident from several correspondence between the parties, that the respondent No.2 has attached to its affidavit-in-opposition. He next submits that, at no point of time the petitioner has shown any interest to subscribe further capital in the company. As such, this application is filed for collateral purpose and made only to jeopardize interest of the company and of the respondents who have obtained loan from the Bank encumbering their personal property, in the interest of the company. He therefore prayed that the petition should be rejected.

15. The learned Advocate Mr Tanjib-ul-Alam, having placed the affidavit-in-opposition and the supplementary affidavit as well as the documents filed therewith, made submissions almost in the similar line as was made by the learned Advocate for the respondent No. 4. He also drawn my attention to audit report annexed to the supplementary affidavit for the year ended in 2009 as well as for the year ended in 2012 and has shown that the respondent No.3 has mortgaged his personal property to secure Bank loan in order to meet capital requirement of the company. He also submits, referring to (Annexure-P8-11), that the petitioner has clearly admitted their inability to make any further finance in this company and that the contents of the e-mails is very much clear as to the purpose of sending the e-mails. Inspite of that, the petitioner did not come forward. Hence these respondents No.2 and 3 had no alternative but to allot further shares to infuse further capital in order to meet the capital requirement as well as to meet the Bank's precondition regarding loan and equity ratio. All these, he submits, have created compelling situation to make further issue of shares to the respondent Nos.2 and 3. Besides, he adds, that bank loan had to be obtained by encumbering personal property of the respondent No.3 as well as by giving personal guarantee of both the Directors (Respondent Nos. 2 and 3) and by furnishing corporate guarantee. He next submits that a mere reading of sub-section (2) of section 155 clearly shows that sub-section (2) give ample power to the board of directors to allot further shares, which is independent of sub-section (1) of section 155. Besides, contradiction between sub-section (1) and (2) has been recorded in the case of *Dr Monjurul Islam vs Al-Rajihi Hospital (Pvt) Limited & Ors*, reported in *2003 (XI) BLT 474*, cited by him to support the contention. Hence, indeed, there is no scope to place reliance on subsection (1) of section 155 of the Act. Moreover, he continues, the petitioner even did not refer to sub-section (1) of section 155 of the Act to secure their right to proportionate allotment to the shares allotted. Besides, referring to the prayer portion of the petition, the learned Advocate submits that the petitioner has never prayed for the relief provided under sub-section (3) of section 43 of the Act, nor they have made any prayer to allot further shares in proportion to their share holding. As such, he argues, the petition itself is not maintainable and is the petitioner has come at this stage, the learned Advocate adds, only to take advantage of the present profitable situation made at the cost the respondents. Hence, he prayed that the petition is liable to be rejected.

16. I have heard the learned Advocate for both the sides and perused the application, supplementary affidavits referred to hearin above and the documents annexed to them.

17. In my considered view, the decision referred to above, *BLT (HCD) 474*, so far as relates to showing contradiction between sub-sections (1) and (2) is a mere ratio or observation made in that case. In this respect section 155 of the Act (Bangla authenticated version

needs to be quoted here:

"১৫৫। অতিরিক্ত মূলধন ইস্যুকরন।-(১) যে ক্ষেত্রে পরিচালকগণ অধিকতর শেয়ার ইস্যু দ্বারা কোম্পানীর অনুমোদিত মূলধনের সীমার প্রতিশ্রুত মূলধন (subscribed capital) বৃদ্ধি করার সিদ্ধান্ত গ্রহণ করেন, ক্ষেত্রে—

(ক) কোম্পানীর সকল সদস্যকে, অবস্থা বিবেচনায় যতদুর সম্ভব প্রস্তাবের তারিখে তাহাদের বিদ্যমান শেয়ারের পরিশোধিত মূলধনের অনুপাতে, উক্ত অধিকতর শেয়ার চাঁদাদানের প্রস্তাব দিতে হইবে এবং এই ব্যাপারে উক্ত বিদ্যমান শেয়ারের শ্রেণীর ভিত্তিতে কোন তারতম্য করা যাইবে না;

(খ) এইরূপ প্রস্তাব নোটিশের মাধ্যমে দিতে হইবে এবং উহাতে প্রস্তাব প্রদত্ত শেয়ারের সংখ্যা উল্লেখ করতঃ প্রস্তাবের তারিখ হইতে অন্যূন পনের দিনের সময়-সীমা নির্দিষ্ট করিয়া দিতে হইবে এবং জানাইয়া দিতে হইবে যে, নির্দিষ্টকৃত সময়ের মধ্যে উক্ত প্রস্তাব গ্রহন করা না হইলে উহা প্রত্যাখ্যান করা হইয়াছে বলিয়া গণ্য হইবে; এবং

(গ) উক্ত নোটিশে নির্দিষ্ট সময় অতিক্রান্ত হওয়ার পর অথবা যে সদস্যের নিকট অনুরূপ নোটিশ দেওয়া হইয়াছে তাহার নিকট হইতে ঐ সময়ের পূর্বে প্রস্তাব গ্রহণের অস্বীকৃতি জ্ঞাপক সংবাদ প্রাপ্তির পর পরিচালকগণ কোম্পানীর জন্য যেভাবে সর্বাধিক লাভজনক মনে করিবেন সেইভাবে ঐ সব শেয়ার সম্পর্কে ব্যবস্থা গ্রহণ করিতে পারিবেন।

(২) উপ-ধারা (১) এ যাহা কিছু থাকুক না কেন, পূর্বোক্ত অধিকতর শেয়ারসমূহে চাঁদা দানের জন্য উপ-ধারা (১) (ক)তে বর্ণিত নহে এমন যে কোন ব্যক্তির নিকটও যে কোন পদ্ধতিতে প্রস্তাব করা যাইবে।"

18. A plain reading of section 155 makes it clear that following formalities have to be complied with by the board of directors to increase the subscribed capital by issuing further shares, namely—

(1) the of directors will take decision to increase subscribed capital by issuing further shares within the limit of the authorized capital, and

(2) Board of Directors is bound—

(I) to issue notices in writing on all shares holders offering further shares, in proportion to the shares held by them,

(II) the numbers of share to be subscribed by each share-holder (member) has to be specified in the notice,

(III) 15 days clearly time is to be given to communicate the decision about the shares offered,

(IV) it shall be mentioned in the notice that if the concerned share holder (member) fails to subscribe the shares offered to him then it shall be deemed that he/she has declined the offer, as provided in sub-section (1) of section 155 of the Act.

19. Once these shares, offered as per sub-section (1) of section 155, remains unsubscribed, after compliance of the formalities mentioned above, then the unsubscribed shares shall be vested under the control and disposal of the Board of Directors and they shall allot the shares in a manner as they may think most beneficial to the company, either to the persons named in sub-section (1) or to any other person, as has been authorized by sub-section (2) of section 155.

20. Besides, having examined the materials on record, I do not find any decision of board decision to increase the subscribed capital or any notice required to be issued as per section 155 (1). Rather, notice dated 5-3-2009 (annexure-J) keeps agenda for allotment of 8,70,000 shares to respondent Nos. 2 and 3 only. As such, evidently no notice, required by sub-section (1) of section 155 of the Act, was at all served upon the petitioner. Consequently, the allotment made pursuant to notice dated 5-3-2009 (Annexure-G) has been made in clear violation of the provisions of subsection-(1) of section 155

of the Act.

21. In my considered view, this power to increase the subscribed capital conferred upon the board is the statutory power and must be exercised in the manner as laid down in the statute i.e. as per provision of section 155 of the Act. Similarly, right to receive offer letter, in respect of the further shares to be allotted, is statutory right of the members. Provision under sub-section (1) of section 155 of the Act has been made to enable them to subscribe in proportion to the shares held by each member and that cannot be denied to them under the excuse that the company has earned lot of benefit or profit or on any other excuse, as because violation of statutory provision cannot be cured by showing any excuse whatsoever or even on the ground of dire necessity or equity. Any other decision, contrary to such view, will expose corporate sector to corrupt practices that would ultimately hamper national economy and the much uttered corporate governance.

22. Having read the provision of subsection-(2) of section 155 of the Act, I find that the expression "notwithstanding anything" contained in sub-section (1), as incorporated in sub-section (2), has only authorized the Board of Directors to allot the un-subscribed shares to the persons named in clause (a) of sub-section (1) as well as to any other person not mentioned in clause (a) of sub-section (1). As such, I find no contradiction between sub-section (1) and subsection (2) of section 155 of the Act, which contains provision in clear and unambiguous language to provide an exist in respect of the shares not subscribed by the persons mentioned in clause (a) of subsection (1) of section 155 the Act. Hence, in my considered view, the decision referred to in *2003 (XI) BLT 474* does not help the respondent in any way.

23. Mr Tanjib-ul-Alam, while taking last attempt in his further submission, proposed that if the petitioners are so interested to take proportionate shares in the company, then a direction may be given to offer similar number of shares to the petitioner. But, I cannot accept such an absured submission as because the very allotment of the disputed shares was made in violation of statute, hence the same cannot be given the seal of validity by accepting such proposal.

24. In view of the deliberation made above I find merit in this application. In the result the application is allowed.

I therefore, hold that the respondent Nos. 2 and 3 did not acquire any legal title in 8,70,000 shares, of which 4,34,000 number of shares have been shown to have allotted to the respondent Nos. 2 and 4,34,000 number of share to 3, in equal proportion. However, the respondents should be directed to re-allot this 8,70,000 shares in proportion to their respective share holding of each share-holder. Accordingly, the representative of respondent No.3 Mr Newaj Khan is directed to issue offer letters to each of the share-holders within 7 days of receiving the certified copy of the judgment and order or within 7 days from sending this file to the concerned section, whichever earlier. In case of default or; if the shares offered are deemed to have been declined, then the unsubscribed share shall be allotted to the respondents Nos. 2 and 3 in equal proportion. The requirement to hold meeting to decide about the increase of subscribed capital is dispensed with, as required sub-section (1) of section 155 of the Act, because there may arise stalemate, since the contending parties are holding 50:50 shares and there is likelihood of no quorum.

Cost will be borne by the parties respectively.

Ed.

High Court Division
(Special Original Jurisdiction)

Moyeenul Islam Chowdhury J
AKM Abdul Hakim J

Judgment
August 10th & 11th, 2014.

Kazi Md Akhtaruz-zaman and others.....Petitioners

vs

Bangladesh and others.....Respondents*
(In Writ Petition No. 2252 of 2009)

Constitution of Bangladesh, 1972
Article 102(2)

Order to entitle a person to ask for performance of a public duty by Mandamus, it is necessary to show that he has a legal right for claiming such performance, apart from the fact that he is interested in the performance of the duty. .....(97)

Constitution of Bangladesh, 1972
Article 102(2)

One could only avail oneself of the forum by way of Mandamus for enforcement of any legal right or to redress the violation thereof.

Petitioners have no legal right for automatic absorption in the service of the Jagannath University for enforcement and Jagannath University authority has no legal duty for performance to that effect Such being the legal position, our definite conclusion is that the petitioners cannot enforce their claimed wholesale automatic absorption in the service of the Jagannath University through issuance of Writs of Mandamus. .....(98 & 100)

Legitimate Expectation

A promise made in the shape of a statement of policy or a procedure regularly adopted by the authority may give rise to what is called 'legitimate expectation', that is, expectation of a kind which the Court now enforces. Legitimate expectation gives the applicant sufficient "locus standi" for judicial review. The doctrine operates in the domain of public law and in an appropriate case constitutes substantive as well as procedural rights. The statement or practice giving rise to the legitimate expectation must be sufficiently clear and unambiguous, and expressed or carried out in such a way as to show that it was intended to be binding. .....(91)

Director General, NSI vs Md Sultan Ahmed, 1 BLC (AD) 71; Hamidul Huq Chowdhury vs Bangladesh represented by the Secretary, Ministry of Information and Broadcasting, Government of the People's Republic of Bangladesh, 34 DLR 190; Sheikh Abdus Sabur vs Returning Officer, District Education Officer-in-Charge, Gopalganj, 41 DLR (AD) 30; Bangladesh Agricultural Development Corporation represented by the Chairman, Krishi Bhaban, 49-51, Dilkusha Commercial Area, Dhaka vs Md Shamsul Haque Mazumder, 14 MLR (AD) 197; Jibendra Kishore Achary vs Province of East Pakistan, 9 DLR (1957) SC 21; Mohammad Hanif Quareshi vs State of Bihar, AIR 1958 SC 731; EP Royappa vs State Tamil Nadu, 4 SCC 366; DS Nakara vs Union of India, AIR 1983 SC 130; AKM Fazlul Karim vs Bangladesh represented by the Secretary, Ministry of Law; Mr Shri Ram Krishna Dalmia vs Shri Justice SR Tendolkar, CDJ 1958 SC 21 = 1958 AIR (SC) 538; S. Azeez Basha vs Union of India, CDJ 19 67 SC 28-1968 AIR (SC) 662; J. Pandurangarao etc vs The Andhra Pradesh Public Service Commission, Hyderabad, AIR 1963 SC 268; Southern Rly Co. vs Greane, 216 US 400; Smt. Indira Gandhi vs Raj Narayan, AIR 1975 SC 2279; EP

*Writ Petition Nos. 2252 & 1222 of 2009 *with* 8117 of 2005 *with* 1182 of 2010.

Royappa vs TN (AIR 1974 SC 555); Maneka Gandhi vs India, AIR 1978 SC 597; Romana Shetly vs International Airport Authority, AIR 1979 SC 1628; Ajay Hashia vs Khalid Mujib, AIR 1981 SC 487; AL Kalra vs P and E Corporation of India, AIR 1984 SC 1361; Shri Ram Krishna Dalmia vs Shri Justice SR Tendolkar, CDJ 1958 SC 021= AIR 1958 SC 538; Budhan Choudhury vs State of Bihar, [1955] 1 SCR 1045; President Kafiluddin Mahmood vs Bangladesh represented by the Secretary to the Ministry of Finance, Finance Division, Government of Bangladesh, 46 DLR 426; Kerala Hotel and Restaurant Association vs State of Kerala, AIR 1990 SC 913; Punjab vs Khanna, AIR 2001 SC 343; Council of Civil Service Union vs Minister for the Civil Service 1985 AC 374; Hazerullah vs Assistant Commissioner, Board of Management of Abandoned Property, 55 DLR (AD) 15; Queen vs Guardian of the Lewisham Union, (1897) 1 QB 498;

Abdul Wadud Bhuiyan with KS Salahuddin Ahmed and AB Siddique, Advocates—For the petitioners in Writ Petition No.2252 of 2009.

Abdur Rab Chaudhury, Advocate—For the petitioners in Writ Petition No. 8117 of 2005.

AF Hassan Ariff with Md Ramzan Ali Sikdar and Md Motahar Hossain, Advocates—For the petitioners in Writ Petition No, 1222 of 2009.

AJ Mohammad AM with Rubaiyat Hossain, Advocates—For the petitioners in Writ Petition No. 1182 of 2010.

M. Amir-ul-Islam, Rokanuddin Mahmud, Tanjib-ul Alam with Tarana Afroz, Advocates—For the Respondent Nos. 3 & 4 in Writ Petition Nos. 2252 of 2009, 1222 of 2009, 1182 of 2010 and the Respondent Nos. 3 & 5 in Writ Petition No. 8117 of 2005 respectively.

Korunamoy Chakma, DAG with Md Eunus Ali, AAG and Nazibur Rahman, AAG—For the Respondent Government in all the Writ Petitions.

Judgment

Moyeenul Islam Chowdhury J: As the questions of laws and facts involved in Writ Petition Nos. 2252 of 2009, 8117 of 2005, 1222 of 2009 and 1182 of 2010 are identical, those have been heard together and this consolidated judgment disposes of all of them.

2. In all the Writ Petitions, Rules Nisi were issued calling upon the respondents to show cause as to why sub-sections (2) (chha) and (3) of section 56 of the Jagannath University Act, 2005 (Annexure-'RR') should not be declared to be *ultra vires* Articles 27, 29 and 31 of the Constitution and why the said sub-sections of section 56 of the Act should not be struck down as being without lawful authority and of no legal effect and why the respondents should not be directed to appoint and absorb the petitioners as teachers of the Jagannath University and/or such other or further order or orders passed as to this Court may seem fit and proper.

3. The case of the petitioners, as set out in the Writ Petitions, in short, is as follows:

The petitioners are Lecturers, Assistant Professors, Associate Professors and Professors of the Jagannath University on deputation. Previously they either joined or were transferred to the now-defunct Government Jagannath College. All of them are members of the Bangladesh Civil Service (BCS) (General Education) Cadre. The background of the Jagannath University is that in 1884 the Jagannath School was transformed into Dhaka Jagannath College. In 1968 the Government nationalized the said college. In 1975 graduation with honours and post-graduation degree courses were introduced in the college. Anyway, in view of the assurance of the Government, the Jagannath University Act, 2005 (hereinafter referred to as the Act of 2005) was enacted and the Government Jagannath

College was upgraded to a university, namely, Jagannath University. Section 56 of the Act of 2005 was enacted with an ulterior motive to hold the university authority as hostage and to make money for a certain vested quarter who had close ties with the then Government. The impugned provisions embodied in sub-sections (2)(chha) and (3) of section 56 the Act of 2005 are violative of the fundamental rights of the petitioners enshrined in Articles 27, 29 and 31 of the Constitution. That being so, the impugned provisions are *ultra vires* the Constitution.

4. The Institute of Post-Graduate Medicine and Research (IPGMR) was established as the only institute for imparting higher education and extending research facilities on medical science. At one stage, the Government transformed the IPGMR into Bangabandhu Sheikh Mujib Medical University (BSMMU) by dint of the Bangabandhu Sheikh Mujib Medical University Act, 1998. After transformation, the teachers and doctors of the IPGMR were absorbed in the service of the BSMMU as a matter of course. Likewise, after conversion of the Sher-e-Bangla Agricultural Institute, Dhaka into Sher-e-Bangla Agricultural University, Dhaka by Act No. 46 of 2001 (Sher-e-Bangla Agricultural University Act, 2001), the teachers of the Sher-e-Bangla Agricultural Institute were automatically absorbed in the service of the Sher-e-Bangla Agricultural University, Dhaka. Besides, the Bangladesh Institutes of Technology (BITs), Dhaka, Rajshahi, Khulna and Chittagong were transformed into Engineering and Technology Universities by promulgation of separate Acts and the erstwhile teachers of the BITs were absorbed in services of the Engineering and Technology Universities concerned automatically.

5. Be that as it may, after enactment of the Act of 2005, the services of the petitioners were placed at the disposal of the Ministry of Education. Some provisions were made therein with a view to providing a chance to the petitioners to remain as teachers of the newly-established Jagannath University for a limited period, that is to say, for a period not exceeding five years on deputation and after expiry of that period, their fate would depend upon the sweet will of the Ministry of Education. During the period of deputation, the petitioners holding the posts of Lecturers, Assistant Professors, Associate Professors and Professors with extra-ordinary educational qualifications are being treated as qualified enough to teach the students of different levels of the Jagannath University; but after the expiry of the said period of deputation, they will be disqualified to remain as teachers thereof. This is absolutely arbitrary and irrational. Apart from teaching the students, they have to discharge the functions of question-setters, moderators, examiners and so on and so forth. As teachers, they also function as Deans, Chairmen, Proctor and Assistant Proctors of the Jagannath University. Some of them are members of the Academic Council and Syndicate of the University. As deputationists, the petitioners have been imparting quality education to the students of different tiers of the same. Against this back-drop, they have the legitimate expectation of being absorbed in the service of the University. But the impugned provisions of section 56 of the Act of 2005 are a stumbling-block to their wholesale absorption therein. So the impugned provisions are liable to be struck down.

6. The Jagannath University Authority has contested the Rules issued in all the Writ Petitions by filing Affidavits-in-Opposition. Their case, in brief, runs as follows:

7. Admittedly, the petitioners are in the service of the Republic by virtue of section 4 of the Services (Re-organization and Conditions) Act, 1975. It is also admitted that they belong to the BCS (General Education) Cadre and are on deputation in the service of the Jagannath University after its upgradation. The Act of 2005 transforming the now-defunct Govern-

ment Jagannath College into a full-fledged University, that is to say, Jagannath University came into force on 20-10-2005. The Act of 2005 is a self-contained piece of special legislation. The Jagannath University is a statutory authority having its own seal. The petitioners were placed on deputation in the Jagannath University by an order of the President issued under Notification No. শিঃশ/২প-১১/২০০৫/৩৪৯ dated 19-4-2006. The impugned provisions of section 56 (2) (chha) and (3) of the Act of 2005 are designed to attract meritorious and talented teachers to the Jagannath University. The period of deputation is a mere stop-gap arrangement. The petitioners who have the requisite qualifications and experiences may apply for appointment to the posts of Lecturers, Assistant Professors, Associate Professors and Professors, as the case may be, and if they are found competent, they will be appointed thereto by the University Authority. The objective of the embargo imposed upon wholesale absorption of the deputationists in the service of the Jagannath University is to maintain high standard of academic excellence with a view to competing with other universities of the world. It cannot be said that the petitioners have been totally debarred from being appointed to various scholastic posts in the Jagannath University by the impugned provisions of section 56 the Act of 2005. The Legislature in its wisdom enacts laws with specific intentions and objectives. Every university as an educational institution is a class by itself. Certain provisions in a statute creating one educational institution being different from certain provisions in another statute creating another educational institution, cannot mean that there is discrimination. The petitioners being in the service of the Republic fail to show how and in what manner their legal rights, if any, have been curtailed or infringed by the impugned provisions of section 56 the Act of 2005. Moreover, the impugned provisions are not violative of Articles 27, 29 and 31 of the Constitution. As members of the BCS (General Education) Cadre, the service conditions of the petitioners are regulated and controlled by Part IX of the Constitution. The service of the Jagannath University is altogether a new service. It has no nexus with any service of the Republic. In public interest, a duty is cast upon the Jagannath University Authority to appoint the most suitable persons as teachers thereof. The purpose and intention of appointment in the service of the Education Cadre and in the service of the Jagannath University being not same and similar, the petitioners, as of right, cannot claim to be the teachers of the Jagannath University. Being in the service of the Republic, their controlling authority is the Ministry of Education. The order of deputation dated 19-4-2006 was made under the authority of the Act of 2005. The deputationists cannot invoke the doctrine of legitimate expectation for their automatic wholesale absorption in the service of the Jagannath University in order to defeat or invalidate the relevant provisions of the Act of 2005. The impugned provisions of the Act of 2005 are very much constitutional. The bar to automatic wholesale absorption of the petitioners in the service of the Jagannath University slapped by the impugned provisions is not discriminatory. They have not stated in the Writ Petitions as to how they have been deprived of equal protection of law within their own class. All members of the BCS (General Education) Cadre including the petitioners form a separate and distinct class by themselves. The impugned provisions of the Act of 2005 have not made any discrimination or provided for any inequality amongst the members of that class. The wholesale absorption of teachers in the services of other universities or educational institutions cannot be equated with the demand of the wholesale absorption of the petitioners in the service of the Jagannath University. The question of discrimination can only be raised within the class itself, but it cannot be raised beyond its periphery. As the impugned provisions are not

violative of Articles 27, 29 and 31 of the Constitution, the Rules issued in the Writ Petitions are liable to be to be discharged with costs.

8. In the Supplementary Affidavit dated 7-3-2010, it has been stated that the Jagannath University Authority issued a notification contained in Reference JU/AD-13(08)/4112 dated 9-5-2009 for appointment of Professors, Associate Professors, Assistant Professors and Lecturers in various departments of the university. According to the said notification, amongst others, Professor Dr Md Hasan Sorwardi, Dr Nasima Banu, Dr Md Rafiqul Islam, Dr Arun Kumar Goswami, SM Anwara Begum and others applied for the post of Professor in the department of political science. To utter dismay of all the petitioners, SM Anwara Begum who has an academic qualification of 2 class at every stage of her academic career was offered the post of Associate Professor in the department of political science. This conduct of the University Authority be tokens that it is working with an ulterior motive in derogation of the provisions of the Act of 2005. The University Authority is whimsically and arbitrarily appointing teachers of their own choice without following proper procedure. This exercise is making the entire appointment process a fishy one.

9. In the Supplementary Affidavit dated 26-4-2010, it has been averred that the petitioners have been teaching the students of Honours and Masters classes for several years to the satisfaction of all concerned. But the statutory bar to their automatic absorption as teachers in the service of the Jagannath University is unreasonable, arbitrary and preposterous.

10. In the Affidavit-in-Reply dated 31-5-2010, it has been mentioned that the Chittagong Veterinary College was dissolved and re-established as Chittagong Veterinary and Animal Sciences University by the Chittagong Veterinary and Animal Sciences University Act. 2006. As per the Act, the teachers of the dissolved Chittagong Veterinary College were absorbed, on certain terms and conditions, in the service of the Chittagong Veterinary and Animal Sciences University.

11. In the Supplementary Affidavit-in-Opposition dated 10-8-2008, it has been asserted that in accordance with the provisions of section 56(3) (ka) of the Act of 2005, a number of teachers on deputation like the petitioners applied to the University Authority in response to open advertisements for appointment to various posts on numerous occasions. Having been found qualified, they were given fresh appointments on regular basis in the service of the Jagannath University pursuant to section 56 (3) (ga).

12. At the outset, Mr Abdul Wadud Bhuiyan, the learned Advocate appearing on behalf of the petitioners of Writ Petition No. 2252 of 2009 and Mr AF Hassan Ariff, the learned Advocate appearing on behalf of the petitioners of Writ Petition No. 1222 of 2009, submit that the petitioners did not have a square deal in the matter of enactment of the impugned provisions of section 56(2) (chha) and (3) of the Act of 2005 in view of the fact that the teachers of the erstwhile Muhammadan Anglo-Oriental College, Aligarh, IPGMR, Sher-e-Bangla Agricultural Institute and BITs, Dhaka, Rajshahi, Khulna and Chittagong were automatically absorbed in the services of the upgraded universities concerned; but curiously enough, the petitioners being the teachers of the now-defunct Government Jagannath College have been meted out discriminatory treatment by the impugned provisions and that being so, the same are liable to be struck down as being *ultra vires* Articles 27, 29 and 31 of the Constitution.

13. Both Mr Abdul Wadud Bhuiyan and Mr AF Hassan Ariff further submit that there are no 'intelligible differentia' or permissible crite-

ria' between the teachers of the Jagannath University and those of the BSMMU and the Technical Universities and in such view of the matter, the petitioners should have been absorbed in the service of the Jagannath University as a matter of course and this having not been done by reason of the impugned provisions, the same are without lawful authority and of no legal effect.

14. Mr Abdul Wadud Bhuiyan as well as Mr AF Hassan Ariff also submit that in the facts and circumstances of the case, the petitioners are entitled to invoke the doctrine of legitimate expectation for their automatic absorption as teachers in the service of the Jagannath University.

15. Both Mr Abdul Wadud Bhuiyan and Mr AF Hassan Ariff next submit that prior to upgradation of the Government Jagannath College, the petitioners were similarly situated like those of the IPGMR, Sher-e-Bangla Agricultural Institute and BITs, Dhaka, Khulna, Rajshahi and Chittagong and in the absence of any distinguishing yardstick between the ex-teachers of the Jagannath College and those of the IPGMR, Sher-e-Bangla Agricultural Institute and BITs, the non-absorption of the petitioners in the service of the newly- established Jagannath University is absolutely unreasonable, illogical and arbitrary.

16. Both Mr Abdul Wadud Bhuiyan and Mr AF Hassan Ariff further submit that the impugned provisions of section 56 of the Act of 2005 have been made with the malafide intention of depriving the petitioners of their automatic absorption in the service of the Jagannath University.

17. Both Mr Abdul Wadud Bhuiyan and Mr AF Hassan Ariff also submit that the teachers of the Jagannath University and those of the BSMMU and the Technical Universities form a class by themselves and since they are similarly situated, they cannot be treated dissimilarly or differently; but in the instant case, the petitioners, though belonging to the same class of teachers, have been meted out differential treatment infringing the provisions enshrined in Articles 27, 29 and 31 of the Constitution and this being the position, the impugned provisions must be knocked down.

18. Both Mr Abdul Wadud Bhuiyan and Mr AF Hassan Ariff next submit that there may be classifications, but the classifications must have a reasonable and just relation to the objective sought to be achieved by the Act of 2005.

19. Mr Abdul Wadud Bhuiyan also submits that even without striking down the impugned provisions of section 56 of the Act of 2005, the petitioners may get the reliefs sought for, if the Court so desires.

20. In particular, Mr AF Hassan Ariff submits that the automatic non-absorption of the petitioners in the service of the Jagannath University is an exception and this exception has been made by the Legislature without any rational basis and given this scenario, they cannot be victimized by the impugned discriminatory provisions of the Act of 2005.

21. In support of the above submissions, both Mr Abdul Wadud Bhuiyan and Mr AF Hassan Ariff rely upon the decisions in the cases of the Director General, *NSI vs Md Sultan Ahmed, 1 BLC (AD) 71; Hamidul Huq Chowdhury vs Bangladesh represented by the Secretary, Ministry of Information and Broadcasting, Government of the People's Republic of Bangladesh, 34 DLR 190; Sheikh Abdus Sabur vs Returning Officer, District Education Officer-in-Charge, Gopalganj, 41 DLR (AD) 30; Bangladesh Agricultural Development Corporation represented by the Chairman, Krishi Bhaban, 49-51, Dilkusha Commercial Area, Dhaka vs Md Shamsul Haque Mazumder, 14 MLR (AD) 197; Jibendra Kishore Achary vs Province of East Pakistan, 9 DLR (1957) SC 21; Mohammad Hanif Quareshi vs State of Bihar, AIR 1958 SC 731; EP Royappa vs State Tamil*

Nadu, 4 SCC 366; DS Nakara vs Union of India, AIR 1983 SC 130 and an unreported decision of this Court rendered in the case of *AKM Fazlul Karim vs Bangladesh represented by the Secretary, Ministry of Law,* Justice and Parliamentary Affairs and another in Writ Petition No. 2874 of 2008.

22. Mr Abdur Rab Chaudhury, the learned Advocate appearing for the petitioners of Writ Petition No. 8117 of 2005, contends that the petitioners have decades of teaching experience and from that standpoint, there is no earthly reason for their non-absorption in the service of the Jagannath University.

23. Mr Abdur Rab Chaudhury further contends that the Act of 2005 has the effect of implied retrospectivity, though purportedly it has been given prospective effect and in that view of the matter, the impugned provisions have no legs to stand upon.

24. Mr Abdur Rab Chaudhury also contends that in the facts and circumstances of the case, the question of applicability of the doctrine of legitimate expectation cannot be ruled out at all.

25. Mr AJ Mohammad Ali, the learned Advocate appearing on behalf of the petitioners of Writ Petition No. 1182 of 2010, argues that the petitioners who are already in the service of the Jagannath University on deputation should be protected by issuance of writs of *mandamus* and indisputably the students of the now-defunct Jagannath College have become the students of the Jagannath University as a matter course, but the teachers have been denied that opportunity to their great prejudice.

26. Mr AJ Mohammad Ali also submits that it does not stand to reason and logic as to why the impugned provisions have been enacted to deprive the petitioners of their right to automatic absorption in the service of the Jagannath University and this is why the impugned provisions are unreasonable and arbitrary.

27. Per contra, Mr Korunamoy Chakma, the learned Deputy Attorney-General appearing on behalf of the Government, submits that the Jagannath University cannot be placed on a par with the BSMMU and the Technical Universities of the country in view of the fact that the Jagannath University has been imparting general education only.

28. Mr Korunamoy Chakma next submits that all the Writ Petitions are incompetent in view of Article 47 of the Constitution inasmuch as the Act of 2005 has been enacted for implementation of one of the state principles enshrined in Part II of the Constitution.

29. Mr Tanjib-ul-Alam, the learned Advocate appearing on behalf of the Jagannath University Authority, submits that it is an indisputable fact that the petitioners being members of the BCS (General Education) Cadre are persons in the service of the Republic and admittedly no discrimination has been meted out to them within their class and in that view of the matter, they have no case at all.

30. Mr Tanjib-u!-AIam further submits that every university is a class by itself and that being so, the Jagannath University is a class by itself and, as such,, it does not stand comparison with other universities of the country and the impugned provisions of section 56 of the Act of 2005 cannot be struck down with reference to other legislations.

31. Mr Tanjib-ul-Alam next submits that the petitioners have not been completely debarred from being appointed as teachers of the Jagannath University and the duly qualified ones having necessary experience may make applications for appointment to various posts and they may be appointed accordingly by the University Authority and such being the position, the embargo embodied in section 56(3) of

the Act of 2005 is a qualified embargo, to all its intents and purposes and given this state of affairs, the petitioners have no genuine grievances thereagainst.

32. Mr Tanjib-ul-Alam also submits that the classification is university- wise and, as such, the petitioners cannot take any exception to the impugned provisions of the Act of 2005.

33. Mr Tanjib-ul-Alam next submits that the doctrine of legitimate expectation cannot be called in aid against a statute (Act of 2005) and by that reason, the petitioners' reliance on that doctrine is misconceived.

34. Mr Tanjib-ul-Alam further submits that no vested right has accrued to the petitioners for automatic absorption in the service of the Jagannath University and, as such, the impugned provisions are intra vires the Constitution.

35. Mr Tanjib-ul-Alam next submits that there is a fundamental difference between a university and a college and a university is the highest seat of learning and in that highest seat of learning, quality education is imparted and research work is carried on by highly qualified teachers and if there is a blanket provision for wholesale absorption of the petitioners in the service of the Jagannath University irrespective of their qualifications and experiences, the same will suffer and as a sequel to that, the standard of education and research will go down affecting the greater public interest.

36. Mr Tanjib-ul-Alam further submits that each Cadre of the BCS is a distinct and separate Cadre and the petitioners and others manning the BCS (General Education) Cadre are a class by themselves and no occasion has arisen to go for their wholesale absorption in the service of the Jagannath University simply on the score that they are the teachers of the now-defunct Jagannath College.

37. In support of the above submissions, Mr Tanjib-ul-AIam refers to the decisions in the cases of *Shri Ram Krishna Dalmia vs Shri Justice SR Tendolkar, CDJ 1958 SC 21 = 1958 AIR (SC) 538; S. Azeez Basha, vs Union of India, CDJ 19 67 SC 28-1968 AIR (SC) 662; J. Pandurangarao etc vs The Andhra Pradesh Public Service Commission, Hyderabad, AIR 1963 SC 268* and *Sheikh Abdus Sabur vs Returning Officer, District Education Officer-in-Charge, Gopalganj, 41 DLR (AD) 30.*

38. Mr Rokanuddin Mahmud, another learned Advocate appearing on behalf of the Jagannath University Authority, argues that regard being had to the facts and circumstances of the case, the provisions of Article 29 of the Constitution cannot be invoked in that admittedly there is no infringement of equality of opportunity for the petitioners in respect of employment or office in the service of the Republic.

39. Mr Rokanuddin Mahmud next argues that a university teacher is not a 'public servant' within the meaning of the Public Servants (Retirement) Act, 1974 and, as such, a public servant is not on a par with a university teacher and this distinguishing feature cannot be disregarded in the least and as every university is a class by itself, the Legislature has thought it prudent to enact the impugned provisions in order to safeguard the quality of the teachers of the Jagannath University.

40. Mr M. Amir-Ul-Islam, another learned Advocate appearing on behalf of the Jagannath University Authority, contends that the impugned provisions have not offended the equality clause of Article 27 of the Constitution in that it is a settled proposition that every university is a class by itself.

41. We have heard the submissions of Mr Abdul Wadud Bhuiyan, Mr AF Hassan Ariff, Mr Abdur Rab Chaudhury, Mr AJ Mohammad Ali and the counter-submissions of Mr Tanjib-ul-AIam, Mr Rokanuddin Mahmud and Mr M Amir-ul-Islam and perused the Writ Petitions,

Affidavits-in- Opposition, Affidavit-in-Reply, Supplementary Affidavits, Supplementary Affidavit-in-Opposition and relevant Annexures annexed thereto.

42. It is the definite case of the petitioners that the impugned provisions of section 56 of the Act of 2005 are violativc of Articles 27, 29 and 31 of the Constitution. It is a well-settled principle of law that there is a presumption of constitutionality in favour of the impugned provisions. Of course, that presumption is a rebuttable presumption. Now let us see whether the petitioners have succeeded in rebutting the presumption of constitutionality in favour of the impugned provisions to the satisfaction of this Court.

43. The impugned provisions embodied in section 56 (2) (chha) and (3) of the Act of 2005 are reproduced below for convenience of our discussion:

"৫৬(২)(ছ) বিলুপ্ত কলেজের অধ্যক্ষ ও উপাধ্যক্ষসহ অন্যান্য শিক্ষক, কর্মকর্তা ও কর্মচারীর চাকুরী তাৎক্ষনিক শিক্ষা মন্ত্রণালয়ে ন্যস্ত হইবেঃ

তবে পুনরাদেশ না দেওয়া পর্যন্ত তাঁহাদের শিক্ষা জীবনের কোন স্তরে তৃতীয় শ্রেণী না থাকিলে অনধিক ৫(পাঁচ) বৎসর পর্যন্ত তাঁহারা প্রেষণে বিশ্ববিদ্যালয়ের কর্মরত থাকিতে পারিবেন।

(৩) এই আইনের অন্যান্য ধারায় যাহা কিছুই থাকুক না কেন,

(ক) বিলুপ্ত কলেজের শিক্ষক ও কর্মকর্তাগণ স্বয়ংক্রিয়ভাবে বিশ্ববিদ্যালয়ের শিক্ষক কিংবা কর্মকর্তা হিসাবে আত্তীভূত হইবেন না;

তবে তাহারা যোগ্যতা থাকা সাপেক্ষে তাহাদের বয়স শিথিল ও বেতন সংরক্ষণসহ বিশ্ববিদ্যালয়ের নিয়োগের জন্য প্রার্থী হইতে পারিবেন;

(খ) বিলুপ্ত কলেজের কর্মচারীগণ ইচ্ছা করিলে দীর্ঘমেয়াদী প্রেষণ কিংবা আত্নীকরণের মাধ্যমে বিশ্ববিদ্যালয়ের কর্মচারী হিসাবে বহাল থাকিতে পারিবেনঃ

তবে শর্ত থাকে যে, এইরুপ প্রেষণ কিংবা আত্নীকরণ পদ্ধতি বিশ্ববিদ্যালয়ের সংবিধি দ্বারা নির্ধারিত হইবে;

(গ) বিপুপ্ত কলেজের–

(অ) কোন শিক্ষকের শিক্ষা জীবনের কোন পর্যায়ে তৃতীয় শ্রেণী থাকিলে তিনি বিশ্ববিদ্যালয়ের শিক্ষকতা করিবার যোগ্য হইবেন না;

(আ) কোন শিক্ষকের স্নাতক বা স্নাতকোত্তর পর্যায়ে প্রথম শ্রেণী না খাকিলে তিনি বিশ্ববিদ্যালয়ের শিক্ষকতা করিবার যোগ্য হইবেন না;

তবে শর্ত থাকে যে, উপ-ধারা (২)(ছ) এ উল্লিখিত প্রেষণে নিয়োজিত শিক্ষকের ক্ষেত্রে ইহা প্রযোজ্য হইবে নাঃ

আরো শর্ত থাকে যে, কোন শিক্ষকের পিএইচডি, এমফিল বা অনুরুপ কোন ডিগ্রী থাকিলে তাহার ক্ষেত্রে এই বিধান প্রযোজ্য হইবে না।"

44. Article 27 of our Constitution provides that all citizens are equal before law and are entitled to equal protection of law. Sir Ivor Jennings in h is "The Law and the Constitution" stated:

> "Equality before the law means that among equals, the law should be equal and should be equally administered, that like should be treated alike".

45. AV Dicey in his "Law of the Constitution" mentioned:

> "Equality before the law does not mean absolute equality of men which is a physical impossibility, but the denial of any special privileges by reason of birth, creed or the like, in favour of any individual and also the equal subjection of all individuals and classes to the ordinary law of the land administered by the ordinary law Courts."

46. In the "Limitations of Government Power" by Rotundy and others, the phrase "equal protection of the law" was described in the following manner:

> "The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the Government. It does not reject the Government's ability to classify persons or

draw lines in creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or be arbitrarily used to burden a group of individuals. Such a classification does not violate the guarantee when it distinguishes persons as 'dissimilar' upon some permissible basis in order to advance the legitimate interest of society."

47. In the case of *Southern Rly Co. vs Greane, 216 US 400*, Day-J observed:

"Equal protection of the law means subjection to equal laws, applying alike to all in the same situation."

48. Chandrachud-J, in the case of *Smt. Indira Gandhi vs Raj Narayan, AIR 1975 SC 2279* described his idea of equality in the following words:

"All who are equal are equal in the eye of law, meaning thereby that it will not accord favoured treatment to persons within the same class."

49. On consideration of the views expressed by these distinguished Judges and Authors as to the meaning of the phrase "equality before law and equal protection of law", we do not think that we will be able to define this term in a better way. "Equality before law" is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others. The term "equal protection of law" is used to mean that all persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same.

50. The Indian Supreme Court gave a new dimension to the equality clause when it delivered the judgment in *EP Royappa vs TN (AIR 1974 SC 555)*. In that judgment, Bhagwati J observed:

"The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle? It is the founding faith, to use the words of Bose J, 'a way of life', and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a Republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to the political logic and constitutional law and is therefore violative of Article 14...."

51. The principle of equating discrimination with arbitrariness was affirmed by the Indian Supreme Court in a number of subsequent decisions such as *Maneka Gandhi vs India, AIR 1978 SC 597; Romana Shetly vs International Airport Authority, AIR 1979 SC 1628, Ajay Hashia vs Khalid Mujib, AIR 1981 SC 487; DS Nakara vs India, AIR 1983 SC 130; AL Kalra vs P* and *E Corporation of India, AIR 1984 SC 1361* etc.

52. The expression 'intelligible differentia' or 'permissible criteria' has been interpreted in the landmark decision in the case of *Sheikh Abdus Sabur vs Returning Officer, District Education Officer-in-Charge, Gopalganj* reported

in *41 DLR (AD) 30*. Let us examine whether there are 'intelligible differentia' or 'permissible criteria' between the teachers of the Jagannath University and those of the BSMMU and the Technical Universities of the country.

53. Admittedly the petitioners are in the service of the Republic being members of the BCS (General Education) Cadre. They stand on the same footing with other members of the Cadre. From that angle, they are a class by themselves. It goes without saying that no discrimination has been meted out to them as members of the Cadre. As members of the Cadre, they are equal in the eye of law.

54. It also admitted that the petitioners are in the service of the Jagannath University on deputation as teachers of the now-defunct Jagannath College. In this context, the paramount question is whether a university is a class by itself. If the answer is in the positive, there will be one kind of legal position and if the answer is in the negative, there will be another kind of legal position. So the answer to this question is very vital for proper and effectual adjudication of the Rules issued in the Writ Petitions.

55. In the case of *Shri Ram Krishna Dalmia vs Shri Justice SR Tendolkar* reported in *CDJ 1958 SC 021= AIR 1958 SC 538*, it was held:

> "The provisions of Article 14 of the Constitution have come up for discussion before this Court in a number of cases, namely, *Chiranjit Lal Choudhuri vs The Union of India ([1950] SCR 869), The State of Bombay vs FN Balsara ([1951] SCR 682), The State of West Bengal vs Anwar Ali Sarkar ([1952] SCR 284), Kathi Baning-Rawat vs State of Saurashtra ([1952] SCR 433), Lachmandas Kewalram Ahuja vs State of Bombay ([1952] SCR 710), Qasim Razvi vs State of Hyderabad ([1953] SCR 581)* and *Habeeb Mohamad vs State of Hyderabad 9[1953] SCR 661)*. It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the Article in question. It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

56. The decision in Dalmia's case is virtually predicated upon that rendered in the case of *Budhan Choudhury vs State of Bihar* reported in *[1955] 1 SCR 1045.*

57. In the case of *S. Azeez Basha vs Union of India* reported in *CDJ 1967 SC 028= AIR 1968 SC 662*, it was held:

> "The next Article of the Constitution on which reliance is placed is Article 14. Here again we are not able to appreciate what the discrimination is which has been brought about by the amendments of the 1965-Act. It seems that the charge of discrimination is based on the provisions of the Benaras Hindu University Act, which University is established by an Act of its own. We do not think that Article 14 requires that the provisions in every University Act must always be the same.

Each University has problems of its own and it seems to us that it is for the Legislature to decide, what kind of constitution should be conferred on a particular university established by it. There can be no question of discrimination on the ground that some other University Acts provide for some different set up. Each university must be taken to be a class by itself and the Legislature has a right to make such provision for its constitution as it thinks fit subject always to the provisions of the Constitution. The mere fact that certain provisions in a statute creating one university are different from provisions in another statute creating another university cannot mean that there is discrimination. It has been urged in this connection that other universities, such as, Delhi, Agra, Allahabad, Patna and Benaras, have certain elective element while the amendment of 1965 has done away with the elective element so far as the Aligarh University is concerned. We have already said that we are not concerned with the policy of the Legislature in enacting the 1965-Act; nor are we concerned with the merits of the provisions of the 1965-Act. All that we need say is that simply because there is no elective element in one university while there is such element in another university, it cannot be said that there is discrimination, for, as we have said already, each university is a class by itself and may require a different set-up according to the requirements and needs of a particular situation. We, therefore, see no force in the attack on the constitutionality of the 1965-Act on the ground that it is hit by Article 14 of the Constitution."

(Underlinings are ours)

57A. In the case of *J Pandurangarao etc. vs The Andhra Pradesh Public Service Commission, Hyderabad* reported in *AIR 1963 SC 268,* it was held, amongst others, in paragraph 7:

"7.....

.....

.....It is well-settled that though Article 14 forbids class legislation, it does not forbid reasonable classifications for the purposes of legislation. When any impugned rule or statutory provision is assailed on the ground that it contravenes Article 14, its validity can be sustained if two tests are satisfied. The first test is that the classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group; and the second is that the differentia in question must have a reasonable relation to the object sought to be achieved by the rule or statutory provision in question. As the decisions of this Court show, the classification on which the statutory provision may be founded may be referable to different considerations. It may be based on geographical considerations or it may have reference to objects or occupations or the like. In every case, there must be some nexus between the basis of the classification and the object intended to be achieved by the statute, vide *Ram Krishna Dalmia vs Justice SR Tendolkar, 1959 SCR 279: (AIR 1958 SC 538).*"

58. Both the petitioners and the contesting respondents have relied upon the decision in the case of *Sheikh Abdus Sabur vs Returning Officer, District Education Officer-in-Charge, Gopalganj,* reported in *41 DLR (AD) 30.* In that decision, our Appellate Division has opined that there are 'intelligible differentia' or 'permissible criteria' between a Member of Parliament and a Member of a Local Government body; albeit both are elected representatives of the people.

59. In the case of Bangladesh Retired Government Employees' Welfare Association represented by its *President Kafiluddin Mahmood*

vs Bangladesh represented by the Secretary to the Ministry of Finance, Finance Division, Government of Bangladesh reported in *46 DLR 426*, it was held in paragraph 38:

> "38. It, therefore, appears that the equality clause does not necessarily mean that every law or governmental action must always have similar application to all persons irrespective of differences of circumstances and the principle does not take away from the Legislature or the Government the power of classifying persons for the purpose of the applicability of a law or governmental action provided the classification meets the twin tests of rationality and nexus with the object of legislation or governmental action. The plain meaning of this clause is that for classification, two conditions must be fulfilled and the first of these conditions is that the classification must be founded on an intelligible differentia that distinguish the persons who are grouped together from others who are left out of the group and, secondly, that the differentia must have a rational relation or nexus with the object sought to be achieved by the legislative enactment or the governmental action in question."

60. The 'ratio' enunciated in the case of *Kerala Hotel and Restaurant Association vs State of Kerala* reported in *AIR 1990 SC 913* is that it is settled that classification founded on intelligible differentia is permitted provided the classification made has a rational nexus with the object sought to be achieved.

61. Both Mr Abdul Wadud Bhuyian and Mr AF Hassan Ariff have relied upon the decision in the case of the *Director-General, NSI vs Md Sultan Ahmed* reported in *1 BLC (AD) 71*. In that decision, the Appellate Division has deprecated double-standard on the part of the executive Government giving a benefit to a particular person and denying the same to another, although they are otherwise equal. In the facts and circumstances of the present case, this proposition has no applicability at all.

62. In the case of *Hamidul Huq Chowdhury vs Bangladesh represented by the Secretary, Ministry of Information and Broadcasting, Government of the People's Republic of Bangladesh* reported in *34 DLR 190*, it has been held that in a welfare state, individuals have no absolute or unfettered right under Fundamental Rights. Right to equality under Article 27 of the Constitution does not confer absolute right under the Constitution. Various provisions embodied in the Constitution are to be interpreted so as to create harmony between the fundamental rights and the collective interests of the community. In respect of some 'rights', the Constitution itself has placed limitations. Equal protection under the Constitution means right to equal treatment in similar circumstances and that there should be no discrimination between one person and another if as regards the subject-matter, they stand on the same footing.

63. In particular, Mr Abdul Wadud Bhuiyan has relied on paragraph 33 of the decision in the case of *Bangladesh Agricultural Development Corporation represented by the Chairman, Krishi Bhaban, 49-50 Dilkusha Commercial Area, Dhaka vs Md Shamsul Haque Mazumder* reported in *14 MLR (AD) 197*. It was held in paragraph 33:

> "33. In the instant case, the vires of 55(2) though challenged the High Court Division declined to declare the regulation as *ultra vires* as the High Court Division thought it prudent to dispose of the case otherwise than by striking down the regulation. The approach of the High Court Division is appreciated because when a case can be decided without striking down the law but giving the relief to the petitioners, that course is always better than striking down the law,".

64. Reverting to the case in hand, undeni-

ably the petitioners have challenged the vires of section 56(2) (chha) and (3) of the Act of 2005 and no action of the Jagannath University Authority has been challenged therein. From this point of view, the reliance of Mr Abdul Wadud Bhuiyan on paragraph 33 of the above-mentioned decision does not seem to be of any avail to him.

65. In the case of *Jibendra Kishore Achary vs Province of East Pakistan* reported in *9 DLR (SC) 21* relied on by Mr AF Hassan Ariff, it was held in paragraph 34:

> "34. One of these propositions is that equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes, in like circumstances, in their lives, liberty and property and in pursuit of happiness. Another generalization, more frequently stated, is that the guarantee of equal protection of the laws requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. In the application of these principles, however, it has always been recognized that classification of persons or things is in no way repugnant to the equality doctrine, provided the classification is not arbitrary or capricious, is natural and reasonable and bear a fair and substantial relation to the object of the legislation. It is not for the Court, in such cases, it is said, to demand from the Legislature a scientific accuracy in the classification adopted. If the classification is relevant to the object of the Act, it must be upheld unless the relevancy is too remote or fanciful. A classification that proceeds on irrelevant consideration, such as differences in race, colour or religion, will certainly be rejected by the Courts."

66. In the case of *Mohammad Hanif Quareshi vs State of Bihar, AIR 1958 SC 731* adverted to by Mr AF Hassan Ariff, it was held in paragraph 22:

> "22. The meaning, scope and effect of Article 14, which is the equal protection clause in our Constitution, has been explained by this Court in a series of decisions in cases beginning with *Chiranjitlal Choudhury vs The Union of India MANU/SC/0009/1950: [1950] 1 SCR 869* and ending with the recent case of *Ram Krishna Dalmia vs Sri Justice SR Tendolkar MANU/SC 0024/1958:[1959] 1 SCR 279.* It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation and that in order to pass the test of permissible classification, two conditions must be fulfilled: namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification, it has been held, may be founded on different bases, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles."

67. From an overview of the above- mentioned decisions of various jurisdictions, it leaves no room for doubt that equality does not mean absolute equality and classification is permissible upon *'intelligible differentia'* or 'permis-

sible criteria' and the basis of classification must have a nexus with the object of the statute sought to be achieved.

68. As already observed, admittedly the petitioners are the members of the BCS (General Education) Cadre. There is no discrimination among the members of that Cadre. It is the definite assertion on the part of the petitioners that after transformation of the Government Jagannath College into Jagannath University by virtue of the Act of 2005, they ought to have been absorbed in the service of the University as a matter of course. In this regard, both Mr Abdul Wadud Bhuiyan and Mr AF Hassan Ariff have emphatically relied upon the Bangabandhu Sheikh Mujib Medical University Act, 1998, Sher-e-Bangla Agricultural University Act, 2001, Dhaka Engineering and Technology University, Gazipur Act, 2003, Rajshahi Engineering and Technology Univer-sity Act, 2003, Khulna Engineering and Technology University Act, 2003, Chittagong Engineering and Technology University Act, 2003 and Chittagong Veterinary and Animal Sciences University Act, 2006.

69. It has already been found in the case of *S Azeez Basha (CDJ 1967 SC 28= AIR 1968 SC 662)* that every university is a class by itself. However, section 4(vi) of the Aligarh Muslim University Act, 1920 provides that subject to the provisions of the Act, every person employed immediately before its commencement in the Muhammadan Anglo-Oriental College, Aligarh, shall hold employment in the university by the same tenure and upon the same terms and conditions and with the same rights and privileges as to pension and gratuity as he would have held the same under the Muhammadan Anglo-Oriental College, Aligarh, as if this Act had not been passed.

70. According to Mr AF Hassan Ariff and Mr Abdul Wadud Bhuiyan, although it has been held in the case of S Azeez Basha that every university is a class by itself; but the fact remains that the teachers of the erstwhile Mohammadan Anglo-Oriental College, Aligarh were automatically absorbed in the service of the Aligarh Muslim University by operation of section 4(vi) of the Aligarh Muslim University Act, 1920. In their opinion, by this analogy, the teachers of the former Government Jagannath College should have been absorbed automatically in the service of the Jagannath University by operation of law (Act of 2005).

71. In this context, Mr Tanjib-ul Alam argues that the Muhammadan Anglo-Oriental College, Aligarh was a private college and the jobs of the teachers of that college were non-transferable and in this view of the matter, the teachers of the Muhammadan Anglo-Oriental College, Aligarh were absorbed automatically in the service of the Aligarh Muslim University by operation of law.

72. Having regard to the facts and circumstances of the instant case, we find a good deal of force in the above argument of Mr Tanjib-ul Alam. So we are of the opinion that the erstwhile Muhammadan Anglo-Oriental College, Aligarh does not stand comparison with the erstwhile Government Jagannath College, Dhaka.

73. Likewise, the jobs of the teachers of the now-defunct BITs were non-transferable and they were appointed only for those BITs. Since the BITs were transformed into Technical Universities at subsequent stages, the teachers of those BITs were automatically absorbed in the services of the newly-established Technical Universities by operation of the relevant laws. The teachers of the ex-Sher-e-Bangla Agricultural Institute are no exception as well.

74. By dint of enactment of the Chittagong Veterinary and Animal Sciences University Act, 2006, the Chittagong Veterinary College was dissolved and re-established as Chittagong Veterinary and Animal Sciences University.

Section 58(2) (জ) of the said Act provides, *inter alia*, that the teachers of the dissolved Veterinary College will be absorbed, on certain terms and conditions, in the Veterinary University. The said terms and conditions, amongst others, are that the teachers must have at least one first class degree at undergraduate or post-graduate level, or that they must hold a post-graduate diploma or M. Phil or PhD degree, and further that any person not fulfilling these requirements may nevertheless continue to serve as a teacher of the university subject to an undertaking that he will obtain a post graduate diploma or M Phil or PhD degree within five years. So it is seen that the teachers of the erstwhile Chittagong Veterinary College are not to be absorbed in the service of the Chittagong Veterinary and Animal Sciences University automatically or as a matter of course. Their absorptions are hemmed in by certain conditions. In other words, there are no blanket provisions for their automatic absorption in the service of the said university.

75. The BSMMU is a specialized university. So it cannot be compared with a general university like the Jagannath University. As every university is a class by itself, the relevant provisions for automatic absorption of the teachers of the ex-IPGMR in the service of the BSMMU in the Bangabandhu Sheikh Mujib Medical University Act, 1998 will not place the petitioners with them on the same footing. Therefore, the invocation of the relevant provisions for automatic absorption of the teachers of the ex-IPGMR in the said Medical University Act is of no help to the petitioners.

76. In the facts and circumstances of the case and in the light of the above discussions, we feel at one with the argument of Mr Tanjib-ul-Alam that no vested right has accrued to the petitioners for their automatic absorption in the service of the Jagannath University.

77. There is undoubtedly a fundamental difference between a university teacher and a college teacher. All teachers cannot form a class by themselves, whether or not they are posted in General Universities or Technical Universities or in Colleges. According to the Public Servants (Retirement) Act, 1974, the petitioners would retire from service at the age of 57 years whereas as per Article 18 of the First Statute of the Jagannath University, the age of retirement of a teacher is 60 years, though his service may be extended up to 65 years in phases. It transpires that Mr Tanjib-ul Alam has rightly contended that all teachers of all the educational institutions cannot form a class by themselves owing to the 'intelligible differentia' or 'permissible criteria' between them.

78. We find substance in the argument of Mr Rokanuddin Mahmud that a university teacher is not a 'public servant' within the meaning of the Public Servants (Retirement) Act, 1974 and, as such, a public servant is not on a par with a university teacher. The petitioners are, no doubt, public servants. As members, of the BCS (General Education) Cadre, admittedly they have not been subjected to inequality because of the impugned provisions of section 56 of the Act of 2005. Secondly, as every university is a class by itself, the question of contravention of the equality clause of Article 27 of the Constitution does not arise at all, as rightly contended by Mr M. Amir-ul-Islam.

79. Anyway, the preamble of the Act of 2005 is as follows:

> "যেহেতু উচ্চশিক্ষার বিভিন্ন ক্ষেত্রে অগ্রসরমান বিশ্বের সাথে সঙ্গতি রক্ষা ও সমতা অর্জন এবং জাতীয় পর্যায়ে উচ্চশিক্ষা, গবেষণা, আধুনিক জ্ঞানচর্চা ও পঠন-পাঠনের সুযোগ সৃষ্টি ও সম্প্রসারণের উদ্দেশ্যে সরকারী জগন্নাথ কলেজকে রূপান্তরপূর্বক উক্ত কলেজ ক্যাম্পাসে জগন্নাথ বিশ্ববিদ্যালয় নামে একটি বিশ্ববিদ্যালয় স্থাপন করা সমীচীন ও প্রয়োজনীয়....."

80. Keeping this preamble of the Act of 2005 in view, it can be safely said that the Legislature has visualized the establishment of the Jagannath University as a centre of academ-

ic excellence and research work at the national level. Furthermore, to keep pace with the advanced world in different areas of higher education, the setting up of the Jagannath University has been found to be expedient and necessary. So this university should be manned by the best available teachers. Precisely speaking, we find a nexus between the preamble and the impugned provisions of section 56 of the Act of 2005. In addition to that, the 'intelligible differentia' in the said preamble cannot be ignored. On top of that, the Jagannath University is a general university. In any event, the public interest far outweigh the personal interest of the petitioners vis-a-vis their claimed wholesale absorption in the service of the Jagannath University. What we are driving at boils down to this: the public interest must have priority over the personal interest of the petitioners.

81. We have already held that as all the members of the BCS (General Education) Cadre are a class by themselves, no discriminatory treatment has been meted out to them within that class. Article 29(1) of the Constitution provides that there shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic. There is no gainsaying the fact that the petitioners are in the service of the Republic and that they are in the service of the Jagannath University on deputation for a fixed period. Equality of opportunity as postulated by Article 29(1) of the Constitution in respect of employment or office in the service of the Republic has not been affected or curtailed in any manner by the placement of the petitioners in the service of the Jagannath University on deputation. Accordingly, we are in agreement with the contention of Mr Rokanuddin Mahmud that Article 29(1) of the Constitution is not applicable to the petitioners.

82. We fail to understand the contention of the petitioners that they have not been treated in accordance with law as contemplated by Article 31 of the Constitution. As held earlier, their placement in the service of the Jagannath University on deputation does not confer any vested right on them to be automatically absorbed. Since there is no violation of any law as regards placement of the petitioners on deputation in the service of the Jagannath University, it cannot be said by any stretch of imagination that they have not been dealt with in accordance with law. In such a posture of things, we are led to hold that the impugned provisions with regard to placement of the petitioners in the service of the Jagannath University on deputation have not offended Article 31 of the Constitution.

83. It is the view of this Court that the appointment process of the teachers of the Jagannath University, or for that matter, any university of the country should be open to ail. In the impugned provisions, there is scope for brilliant and meritorious members of the BCS (General Education) Cadre to apply for appointment to various scholastic posts of the Jagannath University. According to the impugned provisions, the qualified and experienced deputationists in the service of the Jagannath University are not debarred from participating in open competitions for appointment of teachers of the university. We fully endorse the submission of Mr Tanjib-ul-Alam that the embargo imposed by section 56(3) of the Act of 2005 is virtually a qualified embargo, and not an absolute one and by that reason, the petitioners have no genuine grievances thereagainst.

84. The impugned provisions indicate that those have been enacted to ensure imparting of quality education and carrying on of research work of high order by the talented teachers of the university. The competent teachers among the petitioners may qualify in the competitive examinations for appointment as teachers of the Jagannath University on regular basis. In

this connection, Annexure-'1' to the Supplementary Affidavit dated 10-8-2010 filed on behalf to the Jagannath University Authority unerringly shows that in the meantime, some deputationists like the petitioners have already been appointed to various scholastic posts of the Jagannath University on regular basis following the usual appointment process. The petitioners could have applied and got appointment in the similar fashion in the service of the university depending upon their statutory suitability and fitness. The petitioners, we feel constrained to say, chose not to apply for various scholastic posts of the Jagannath University at their own peril. The Jagannath University Authority cannot be blamed therefor. However, options are always open to them to participate in the future appointment process of the teachers of the university. Such being the state of affairs, no exception can be taken to the impugned provisions of section 56 of the Act of 2005.

85. It transpires that the petitioners have taken a serious exception to the appointment of one SM Anwara Begum as Associate Professor in the department of political science. According to them, she has 2nd class at every stage of her academic career for which she is unfit for appointment as such. But Mr Tanjib-ul-Alam says that the appointment of SM Anwara Begum as Associate Professor is very much in accordance with law in that she is a Ph. D degree-holder. However, the appointment of SM Anwara Begum is not under challenge in any of the Writ Petitions. So no observation or finding is necessary thereon.

86. According to Mr AF Hassan Ariff, there was *mala fides* or bad faith in respect of placement of the petitioners on deputation in the service of the Jagannath University for five years instead of absorbing them by operation of law. It is a truism that *mala fides* or bad faith vitiates everything and a mala fide act is a nullity. To render an action malafide, "There must be existing definite evidence of bias and action which cannot be attributed to be otherwise bona fide; actions not otherwise bona fide, however, by themselves would not amount to be mala fide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the act" *(Punjab vs Khanna, AIR 2001 SC 343).*

87. Regard being had to the facts and circumstances of the case, it is manifestly clear that the placement of the petitioners in the service of the Jagannath University on deputation is a mere temporary or stop-gap arrangement. We do not find any *mala fides* or bad faith on the part of the Authority in placing them on deputation. In that view of the matter, the contention of Mr AF Hassan Ariff on this point stands negatived.

88. Besides, no *malafide* intention is discernible in the matter of enactment of the impugned provisions of section 56 of the Act of 2005 so as to allegedly deprive the petitioners of their automatic absorption in the service of the Jagannath University.

89. In view of the aforesaid discussions, we find that there are distinguishing yardsticks between the ex-teachers of the Jagannath College and those of the IPGMR, Sher-e-Bangla Agricultural Institute and BITs and in this perspective, the non-absorption of the petitioners in the service of the newly-established Jagannath University is neither unreasonable nor arbitrary nor illogical.

90. As the facts and circumstances of the present case are quite distinguishable, the decision in the case of *AKM Fazlul Karim vs Bangladesh represented by the Secretary, Ministry of Law,* Justice and Parliamentary Affairs and another, given Writ Petition No. 2874 of 2008 has no manner of application.

91. The petitioners have relied upon the

doctrine of legitimate expectation for their automatic absorption in the service of the Jagannath University. Now a pertinent question arises: what is meant by 'legitimate expectation'? A promise made in the shape of a statement of policy or a procedure' regularly adopted by the authority may give rise to what is called 'legitimate expectation', that is, expectation of a kind which the Court now enforces. Legitimate expectation gives the applicant sufficient *"locus standi"* for judicial review. The doctrine operates in the domain of public law and in an appropriate case constitutes substantive as well as procedural rights. The statement or practice giving rise to the legitimate expectation must be sufficiently clear and unambiguous., and expressed or carried out in such a way as to show that it was intended to be binding.

92. In the case of the *Council of Civil Service Union vs Minister for the Civil Service 1985 AC 374*, the House of Lords observed:

> "Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

93. So it is our considered opinion that the legitimate expectation must stem from a promise in the shape of a statement of policy or a procedure regularly adopted by the authority. It seems that Mr Tanjib-ul-Alam has rightly submitted that there cannot be "any legitimate expectation against a statute (The Act of 2005). Furthermore, as we have already held that every university is a class by itself, the question of invocation of the doctrine of legitimate expectation does not arise at all. Against this backdrop, the submissions of Mr Abdul Wadud Bhuiyan, Mr AF Hassan Ariff and Mr Abdur Rab Chaudhury on the question of legitimate expectation falls to the ground.

94. It is an admitted fact that the Act of 2005 came into force on 20th October, 2005 by a Gazette Notification dated 27th September, 2005. This being the position, we are simply astounded by the submission of Mr Abdur Rab Chaudhury that the Act of 20005 has the effect of retrospectivity. In this context, our clear observation is that the Act of 2005 was given prospective operation with effect from 20th October, 2005. So the above submission of Mr Abdur Rab Chaudhury is devoid of any substance.

95. As to the contention of Mr Korunamoy Chakma that the Writ Petitions are incompetent in view of Article 47 of the Constitution, we find that the Legislature in the Act of 2005 does not expressly declare that the Act has been enacted to give effect to any of the Fundamental Principles of State Policy set out in Part-II of the Constitution. So the above contention of Mr Korunamoy Chakma is rejected out of hand.

96. From the foregoing discussions and having regard to the facts and circumstances of the case, the Jagannath University, as we see it, is a class by itself and that it has its own peculiar problems, difficulties and characteristics and in order to tackle the same, the impugned provisions of section 56(2)(chha) and (3) have been framed. As such, we hold that the impugned provisions not being violative of Articles 27, 29(1) and 31 of the Constitution are *intra vires*.

97. It is undisputed that the present Writ Petition is an admixture of Certiorari and *Mandamus*. In the case of *Talekhal Progressive Fishermen Co-operative Society Limited vs Bangladesh* reported in *1981 BLD (AD) 103*, it has been held that in order to entitle a person to ask for performance of a public duty by Mandamus, it is necessary to show that he has a legal iight for claiming such performance, apart trom~the fact that he is interested in the performance of the duty.

98. In the case of *Hazerullah vs Assistant*

Commissioner, Board of Management of Abandoned Property reported in *55 DLR (AD) 15*, the principle that has been enunciated is that one could only avail oneself of the forum by way of *Mandamus* for enforcement of any legal right or to redress the violation thereof.

99. In the case of the *Queen vs Guardian of the Lewisham Union* reported in *(1897) 1 QB 498*, it was held:

> "This Court would be far exceeding its proper functions if it were to assume jurisdiction to enforce performance by public bodies of all their statutory duties without requiring clear evidence that a person who sought its interference had a legal right to insist upon its performance."

100. From the foregoing discussions, there cannot be any iota of doubt that in order to invoke the prerogative Writ of *Mandamus*, the petitioners must have a legal right for enforcement and the Jagannath University Authority must have a legal duty for performance. One of the components of the Rule- issuing order dated 6-4-2009 is that the respondents were asked to show cause as to why they should not be directed to appoint and absorb the petitioners in the service of the Jagannath University. In the facts and circumstances of the case, we have no hesitation in holding that the petitioners have no legal right for automatic absorption in the service of the Jagannath University for enforcement and the Jagannath University Authority has no legal duty for performance to that effect Such being the legal position, our definite conclusion is that the petitioners cannot enforce their claimed wholesale automatic absorption in the service of the Jagannath University through issuance of Writs of *Mandamus*.

101. Having regard to the facts and circumstances of the case and the discussions made hereinbefore, we find no merit in the Rules. The Rules, therefore, fail.

102. Accordingly, the Rules Nisi issued in writ Petition Nos. 2252 of 2009, 8117 of 2005, 1222 of 2009 and 1182 of 2010 are discharged without any order as to costs.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Moyeenul Islam Chowdhury J
Kazi Md Ejarul Haque Akondo J

Judgment
October 6th, 2013.

Jahangir Hossain Molla.....Petitioner
vs
State and another...
.....Opposite-Parties*

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

Penal Code (XLV of 1860) **Section 109**

Whether the petitioner had any 'mens rea' or not in the commission of the alleged offence is a question of fact and that can only be gone into during the trial of the case. ...(14)

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

Yusuf Hossain Humayun with Md Motiur Rahman, Advocates—For the Petitioner.

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

Md Khurshid Alam Khan, Advocate—For the Anti-Corruption Commission- added opposite-party No. 2.

*Criminal Miscellaneous Case No. 47105 of 2012.

Judgment

Moyeenul Islam Chowdhury J : On an application under section 561A of the Code of Criminal Procedure, 1898 filed by the petitioner, a Rule was issued calling upon the opposite-parties to show cause as to why the proceedings of Metro Special Case No. 63 of 2012 arising out of ACC GR Case No. 100 of 2010 corresponding to Motijheel Police Station Case No. 60 dated 29-11-2010 under Sections 409/420/467/471/109 of the Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947, now pending before the Metropolitan Senior Special Judge, Dhaka, should not be quashed and/or such other or further order or orders passed as to this Court may seem fit and proper.

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

On 29-11-2010, one Md Monirul Hayder Khan, Deputy Director (Accounts) of Bangladesh Inland Water Transport Authority (BIWTA) lodged an ejahar with Motijheel Police Station, Dhaka Metropolitan Police, Dhaka against the accused Abdus Salam Khan, Assistant Accounts Officer, Accounts Division, BIWTA, Dhaka on the allegations, *inter alia*, that upon scrutiny of the Current Bank Account No. 001024193 of the BIWTA Workers' Union, it transpired that some unusual transactions took place by forging the signatures of the authorized President and Treasurer of the Trustee Board of the Workers' Group Insurance Scheme of the BIWTA and the accused Abdus Salam Khan withdrew a huge amount of Taka 3,50,00,000 in collusion with the concerned bank officials. After the commencement of the investigation of the case pursuant to the lodgment of the ejahar, the accused Abdus Salam Khan made a confessional statement before a Metropolitan Magistrate on 12- 1-2011 wherein he confessed that he had withdrawn a prodigious sum of money by 30/32 cheques/pay orders from 2008 to October, 2010 and embezzled the same. During investigation, a *prima facie* case was made out against the said accused Abdus Salam Khan and others including the present accused-petitioner. During investigation, it transpired from the seized records that through Janata Bank, Purana Paltan Branch, Dhaka, the present accused-petitioner abetted the alleged offence of misappropriation of money committed by the accused Abdus Salam Khan. In due course, the learned Metropolitan Senior Special Judge, Dhaka took cognizance against the accused-petitioner and others and charged them under Sections 409/420/467/471/109 of the Penal Code, 1860 read with section 5(2) of the Prevention of Corruption Act, 1947. Anyway, the accused-petitioner invoked the jurisdiction of the High Court Division under Section 561A of the Code of Criminal Procedure with a view to quashing the proceedings of the case pending in the Court below and obtained the instant Rule.

3. At the outset, Mr Yusuf Hossain Humayun, learned Advocate appearing on behalf of the accused-petitioner, submits that the accused-petitioner is not named in the FIR and the FIR-named accused is Abdus Salam Khan and it is on record that the FIR-named accused Abdus Salam Khan made a judicial confession under Section 164 of the Code of Criminal Procedure on 12-1-2011; but he did not implicate the accused-petitioner in the commission of the offence.

4. Mr Yusuf Hossain Humayun further submits that not a single witness has implicated the accused-petitioner in the commission of the offence in his statement recorded under Section 161 of the Code of Criminal Procedure; but

curiously enough, the accused-petitioner has been charge-sheeted by the Anti-Corruption Commission through no fault of his own and in this perspective, the proceedings of the case are an abuse of the process of the Court and, as such, the same are liable to be quashed.

5. Per contra, Mr Md Khurshid Alam Khan, learned Advocate appearing on behalf of the Anti-Corruption Commission-opposite-party No. 2, submits that the FIR-named accused Abdus Salam Khan withdrew and misappropriated the huge amount of money through Janata Bank, Purana Paltan Branch, Dhaka by resorting to forgery in collusion with the accused-petitioner and other bank officials and in this view of the matter, the accused-petitioner can not skirt around his *prima facie* criminal liability.

6. Mr Md Khurshid Alam Khan also submits that the abetment of the offence by the accused-petitioner is *prima facie* evident on the face of the record in view of the seizure of the relevant documents and papers by the Anti-Corruption Commission, though not a single prosecution witness has implicated the accused-petitioner in the commission of the offence in his statement under Section 161 of the Code of Criminal Procedure.

7. We have heard the submissions of the learned Advocate Mr Yusuf Hossain Humayun and the counter-submissions of the learned Advocate Mr Md Khurshid Alam Khan and perused the application and relevant Annexures annexed thereto.

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

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

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

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

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

(d) In a case where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged and in such cases, no question of weighing and appreciating evidence arises; and

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

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

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

12. Coming back to the present case, it is admitted that the petitioner is not FIR named. It is further admitted that not a single witness in his statement recorded under Section 161 of the Code of Criminal Procedure has implicated the petitioner as an abettor of the alleged substantive offence punishable under Section 409 of the Penal Code. But none the less, the petitioner has been charge-sheeted as an abettor. In this context, the relevant portion of the charge-sheet as regards the petitioner may be quoted below verbatim:

"গত ১৫-২-২০১১ খ্রিঃ তারিখে জনতা ব্যাংক লিঃ, পুরানা পল্টন শাখা, ঢাকা হতে জব্দকৃত রেকর্ডপত্র পর্যালোচনায় দেখা যায় যে, আসামী মোঃ আবদুস সালাম খান কর্তৃপক্ষের অনুমোদন অথবা রেজুলেশন ছাড়াই জনতা ব্যাংক লিঃ, পুরানা পল্টন শাখা, ঢাকার কর্মকর্তাদের যোগসাজসে বিআইডব্লিউটিএ কর্মচারী দলীয় বীমা ট্রাস্টি বোর্ডের চলতি হিসার নং-০০১০২৪১৯৩ এর দুটি এস, এস কার্ড পরিবর্তন করেছেন। গত ২৪-৬-২০০৯ খ্রিঃ তারিখে বিআইডব্লিউটিএ কর্তচারী দলীয় বীমা ট্রাস্টি বোর্ডের সভাপতি মোঃ আবদুল আউয়াল এবং কোষাধ্যক্ষ মোঃ মমিনুল হায়দার খানের জাল স্বাক্ষর সম্বলিত এস, এস কার্ড সংযোজন করা হয়েছে। একই ভাবে গত ১৮-৫-২০১০ খ্রিঃ তারিখে বিআইডব্লিউটিএ কর্মচারী দলীয় বীমা ট্রাস্টি বোর্ডের সভাপতি হিসেবে গোপালচন্দ্র সাহাকে জাল স্বাক্ষর সম্বলিত আরও একটি এস এস কার্ড যুক্ত করা হয়েছে। আসামী মোঃ আবদুস সালাম খান পরিকল্পিতভাবে অর্থ আত্মসাতের অভিপ্রায়ে উক্ত এস, এস কার্ড সমূহ পরিবর্তন করেছেন। উল্লেখ্য, গত ১৮-৫-২০১০ খ্রিঃ তারিখে বা তৎপরবর্তী সময়ে গোপাল চন্দ্র সাহা বিআইডব্লিউটিএ কর্মচারী দলীয় বীমা ট্রাস্টি বোর্ডের সভাপতির দায়িত্বে ছিলেন না। জনতা ব্যাংক লিঃ, পুরানা পল্টন শাখা, ঢাকার কর্মকর্তাগন যথাক্রমে (১) আলাউদ্দিন আহমেদ, এসিস্ট্যান্ট এক্সিকিউটিভ অফিসার, (২) মোঃ জমশের আলী, এসিস্ট্যান্ট এক্সিকিউটিভ অফিসার এবং (৩) মোঃ জাহাঙ্গীর হোসেন মোল্যা, ম্যানেজার প্রমুখ বিআইডব্লিউটিএ কর্মচারী দলীয় বীমা ট্রাস্টি বোর্ডের সভাপতি ও কোষাধ্যক্ষের স্বাক্ষর জাল জেনেও এবং কর্তৃপক্ষ কর্তৃক কোন রেজুলেশন বা অনুরোধপত্র না থাকা সত্বেও আসামী মোঃ আবদুস সালাম খানকে অর্থ আত্মসাতে সহায়তার জন্য এস, এস (স্পেসিমেন সিগনেচার) কার্ড সমূহ পরিবর্তন করে মূল আসামী মোঃ আবদুস সালাম খানকে অর্থ আত্মসাতে সহায়তা করে দন্ড বিধির ১০৯ ধারায় এবং ১৯৪৭ সনের দুর্নীতি প্রতিরোধ আইনের ৫(২) ধারায় শাস্তিযোগ্য অপরাধ করেছেন।"

"……

উক্ত আবেদনে ৩.৫০ কোটি টাকার চেকের বিপরীতে বিআইডব্লিউটিএ হিসাব নং ৮৪৪, সোস্যাল ইসলামী ব্যাংক লিঃ, বৈদেশিক বাণিজ্য শাখা ঢাকা এর নামে ৩.৫০ কোটি টাকার পে- অর্ডার করার জন্য আবেদন করেন। জনতা ব্যাংক লিঃ, পুরানা পল্টন শাখা, ঢাকার ম্যানেজার মোঃ জাহাঙ্গীর হোসেন মোল্যার নির্দেশে এসিস্ট্যান্ট এক্সিকিউটিভ অফিসার আলাউদ্দিন আহমেদ চেক নং সিডিএ ১২৫৮৭৩২ তাং ১৫-১১-২০১০ খ্রিঃ পাশ করে পে-অর্ডার ইস্যুর জন্য রেমিট্যান্স শাখায় প্রেরণ করেন।"

"……

আসামী মোঃ আবদুস সালাম খান পে-অর্ডারটি বাংলাদেশ কমার্স ব্যাংক লিঃ, খিলগাঁও শাখা, ঢাকায় তার নিজস্ব ব্যবসায়িক প্রতিষ্ঠান এয়ার প্লাস ট্রাভেল এজেন্ট এর হিসার নং-৮৪৪ তে জমার উদ্দেশ্যে দাখিল করেন। বাংলাদেশ

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

13. From the above averments made in the charge-sheet, it is crystal clear that *prima facie* the petitioner abetted the alleged offence.

14. In this connection, we would like to observe that whether the petitioner had any 'mens rea' or not in the commission of the alleged offence is a question of fact and that can only be gone into during the trial of the case. What we are driving at boils down to this: since there are allegations of abetment of the alleged offence against the accused-petitioner, he will have to go through the process of trial. At this stage, we do not find any reason whatsoever to quash the proceedings of the case. In the result, we do not find any merit in the Rule. The Rule, therefore, fails.

15. Accordingly, the Rule is discharged.

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

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

Ed.

High Court Division
(Criminal Miscellaneous Jurisdiction)

Sheikh Hassan Arif J
Mustafa Zaman Islam J

Judgment
November 18th, 2013.

Abdus Samad (Md) alias Badsha.....Convict-Appellant-Petitioner

vs

State and others.....Opposite-Parties*

Nari-o-Shishu Nirjatan Daman Ain (8 of 2000) **Section 9(1)**

Since a child under the age of sixteen is not in a position to give consent to sexual intercourse or sodomy, the sodomy committed by a man even on a consenting male-child will also come under the mischief of rape punishable under section 9(1) of the Ain. The criminal proceeding in such cases must be instituted and proceeded against the perpetrator-man under the provisions of the Ain. .....(15)

AKM Enayetullah Chowdhury, Advocate—For the Opposite Party Nos.1-5.

Kazi Md. Arifur Rahman, Advocate—For the Opposite Party No.6.

KM Zahid Sarwar, DAG with Md. Ali Jinnah, AAG and Yesmin Begum Bithi, AAG—For the State.

Judgment

Sheikh Hassan Arif J : At the time of hearing and disposal of an application for bail under section 426(2) of the Code of Criminal procedure, for the convict-appellant in Criminal Appeal No. 29 of 2013 pending before the Sessions Judge, Feni, the *prima-facie* view of this Bench was that the victim of the case (being GR No. 19 of 2012 corresponding to Fulgazi Police Station Case No. 8 dated 16-12-2012 under section 377 of the Penal Code), though a boy child,

*Criminal Miscellaneous *Suo moto* Rule No. 23508 of 2013.

would come under the definition of 'শিশু' (child) as appearing in section 9(1) of the Nari-o-Shishu Nirjaton Daman Ain, 2000 (hereinafter called 'the said Ain') and, as such, the criminal proceedings concerned should have been initiated and proceeded against the appellant under the provisions of the said Ain. However, since the case against the convict-appellant had been initiated and proceeded under general law, namely under section 377 of the Penal Code, and conviction and sentences were also handed down under the said provision of general law, this Court, by order dated 09-6-2013, issued a Suo moto Rule under section 561A of the Code of Criminal Procedure in the following terms:—

> "Let a *Suo-Moto* Rule under section 561A of the Code of Criminal Procedure be issued calling upon 1) Miss Maksuda Khanam, Additional Chief Judicial Magistrate, Feni, 2) Public Prosecutor, Feni, 3) Mr Syed Abul Hossain, Assistant Public Prosecutor, Feni 4) Mr Mohiuddin Ahmed, Police Inspector, Officer-in-Charge, Fulgazi Police Station, Feni and 5) Mr Md Kowsar Hamid, SI Fulgazi Police Station, Feni to show cause as to why appropriate legal actions should not be taken against them for the aforesaid deliberate mistakes and illegality leading to the interference and manipulation of the criminal justice system of this country in the aforesaid case and/or such other or further order or orders be passed as to this Court may seem fit and proper".

2. Five opposite parties of the Rule have in the meantime entered appearance through learned advocates and some of them filed applications tendering apology for mistake, if any, on their part. Subsequently, this Court, by order dated 25-9-2013, added the convict-appellant of the said Criminal Appeal No. 29 of 2013 as opposite party No. 6 and directed to ensure service of the notice of the *Suo moto* Rule on him.

3. Since the matter involved interpretation of law, we heard two senior members of the Bar, namely Mr Khandker Mahbub Hossain and Mr Monsurul Haque Chowdhury, learned advocates, who opined that since the victim in the case in question was a male child, the case correctly proceeded under the general law as the provision of the said Ain, namely section 9 of the said Ain, would not be attracted.

4. The said convict-appellant (Opposite Party No. 6) also entered appearance through a learned advocate, Mr Kazi Md Arifur Rahman, who has submitted that in view of the explanation to section 9(1) of the said Ain, there is no scope for attracting the provisions of the said Ain in respect of rape of a male child or sodomy committed on a mail child. Mr AKM Enayetullah Chowdhury, learned advocate for the other opposite parties as well as Mr KM Zahid Sarwar, learned Deputy Attorney General present in Court, have presented relevant provisions of law before this Court in order to assist this Court to reach a proper conclusion on the interpretation of the relevant laws.

5. We have carefully considered the submissions of the learned advocates and perused the materials on record, in particular section 164 statement of the victim boy as annexed to the said application under section 426(2) as Annexure-B. This statement of the victim boy is quoted below for ready reference and for realizing the gravity of the offence involved in the case:

> সূত্রঃ ফুলগাজী থানার মামলা নং ৮ তাং ১৬-২-১২ ইং ধারা ৩৭৭ দঃ বিঃ ভিকটিম পক্ষের জবাব বন্দি সি, আর পি সি এর ১৬৪ ধারা অনুসারে লিপি বদ্ধ করা হল।
>
> নামঃ মোঃ ইউছুফ
>
> পিতাঃ জাহাঙ্গীর আলম,
>
> গ্রামঃ উত্তর কোলাপাড়া,
>
> থানাঃ পরশুরাম, জেলা-ফেনী।
>
> বয়স ১২ (ভিকটিমের বর্ণনানুসারে)
>
> পেশাঃ ছাত্র (হেফজ খানা)

অত্র মামলার আসামী আমাদের হুজুর। আমি সে হেফজখানাতে পড়ি উনি সে মাদ্রাসার হুজুর। যা ১৫ তারিখ (ফেব্রুয়ারী মসের) রাত ১০ টায় আমরা চারজন ছাত্র হুজুরের রুমে ঘুমিয়ে পড়ি। হুজুর উনার খাটে ঘুমিয়ে পড়েন। হুজুরের রুমে আমরা থাকতামনা। অন্য ছাত্ররা সে রুমে থাকত। তাদের গ্রামে মাহফিল শুনতে যাওয়াতে সে রাতে তারা হুজুরের রুমে ছিল না। ১৫ইং ফেব্রুয়ারী দিবাগত রাত অর্থাৎ ১৬ তারিখ আমাকে ও আরেকটি ছেলেকে প্রশ্রাব করানোর জন্য জাগিয়া তোলে। আমার পার্শ্বের ছাত্র নামের রবিউল হক। সে আগে আগে প্রশ্রাব করে ঘুমিয়ে পড়ে। অতঃপর হুজুর ও আমি প্রশ্রাব করে রুমে এসে শুয়ে পড়তে গেলে হুজুর বলে, আমার সাথে খাটে আস, অতঃপর তাহাকে তার মাথার চুল টানি। অতঃপর আমাকে হুজুর কম্বল দিয়ে ঢেকে দেয়। অতঃপর আমার লুঙ্গি খুলে ফেলে। অতঃপর আমাকে উপুর করে শুইয়ে আমার পায়খানার রাস্তায় হুজুর তার লিঙ্গ ঢুকিয়ে দেয়। আমি ব্যাথা পাই। আমি নড়া চড়া করতে গেলে হুজুর বলে নড়াচড়া কর কেন? অন্যদের সাথে করলে তো তারা নড়াচড়া করেনা। আমি হুজুর কে বলি আমি সভাপতিকে বলে দেব। এরপর হুজুর আমাকে ছেড়ে দেয়। আমাকে হুজুর বলে তোমার বয়স কত? আমি বলি বার। তখন হুজুর বলে শিখে ফেল। দুই বছর পর কাজে লাগবে। আমি বলি, হুজুর আমি নাপাক হয়ে গেছি। গোসল করব। হুজুর বলে আমি নাপাক হইনি? গোসল করা লাগবেনা।

হুজুর ঐ দিন ভোরে ও এবং সকালে কোরআন শরীফ ধরেনি এবং ছাত্রদেরকে ও ঠিকমত কোরআন পড়ায়নি। ১৬ তারিখ বিকেলের দিকে আমার আব্বু আসলে আমি আব্বুকে ঘটনা খুলে বলি। আব্বু মাদ্রাসার সভাপতিকে খবর দেন। তিনি মোবাইলে আব্বুকে আইনের আশ্রয় নেওয়ার কথা বলেন। হুজুরের নাম আবদুল সামাদ। তিনি এই মাদ্রাসাতে ১ মাস যাবত আছেন। এই আমার জবান বন্দি।

6. It appears from the above statement of the victim boy aged 08 (eight) at the time of occurrence (as per the Investigating Officer) that the convict-appellant, a madrasha teacher, who was in an authoritative position, committed sodomy on him in a fearful circumstance. Now the question is whether, after enactment of the said Ain, in particular section 9 of the said Ain, this offence constituted the offence of rape as defined by the said Ain.

7. The definition of rape and its punishment in the general law are provided by sections 375 and 376 of the Penal Code respectively, and the definition of un-natural offences are given under section 377. For our ready reference, the said provisions are also quoted below:-

Of Rape

375. A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions—

First—Against her will.

Secondly—without her consent.

Thirdly—With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly—With or without her consent, when she is under [fourteen] years of age.

Explanation—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Explanation—Sexual intercourse by a man with his own wife, the wife not being under [thirteen] years of age, is not rape.

376. Whoever commits rape shall be punished with [imprisonment] for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, [unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]

Of Unnatural Offences

377. Whoever voluntarily has carnal intercourse against the order of nature with

any man, woman or animal, shall be punished with [imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

8. It appears form the above provisions that as per the general law defining the offence of rape, the victim has to be a woman, and that if the said woman, below the age of 14, gives consent to sexual intercourse with a man, that will also constitute rape. At the same time, section 377 gives a general definition of un-natural offences saying that whoever voluntarily has carnal intercourse against the order of the nature with any man or women or animal shall be punished with certain offences. Consent is no defence to an offence under section 377 of the Penal Code and no difference is made in the said provision regarding age.

9. According to Oxford Advanced Learner's Dictionary, New 7th Edition, 'Carnal' means "connected with the body or with sex". The word "unnatural" has not been defined in the Penal Code which was drafted by Lord Macaulay and came into force in the then British India including the parts of our country in 1861. Black's Law Dictionary, however, refers to 'Sodomy' while giving the definition of unnatural offence. According to Black, Sodomy means oral or anal copulation between humans, especially those of same sex [Black's Law Dictionary 8th Edition, Thomson, West]. The words 'un-natural' and unnatural offences are described by the Judicial Dictionary, 13th Edition, K J Aiyar in the following way:

"Unnatural—Against the order of nature.

Offence—Sodomy, buggering, bestiality etc are considered to be unnatural offences and are punishable under section 377 IPC. The offences consist of a carnal knowledge committed against the order of nature, by a man with a man or, in the same unnatural manner with a woman, or by a man or a woman in any manner with a beast."

10. Besides, what is unnatural or against the order of the nature depends on the social value and norms of a particular society, which is also ever changing. Under Buggery Act, 1933, the act of sodomy was punishable by hanging in England. However, with change of the social value, English law was reformed by the Sexual Offences Act, 1967, which de-criminalized homosexuality and acts of sodomy between consenting adults (above age of 21) pursuant to the report of Wolfenden Committee. Even in 2009, the Delhi High Court of India declared section 377 of the Penal Code unconstitutional in so far as the same criminalizes homosexuality between the consenting adults. The matter is now pending before the Indian Supreme Court.

11. Be that as it may, according to the general law in our country, namely the provisions under section 375 of the Penal Code, to constitute an offence of rape, the victim has to be a woman, and it applies to child victim as well. Nevertheless, we find some major changes in the Nari-o-Shishu Nirjaton Daman Ain, 2000, which is a special law enacted to effectively suppress or prevent the offences involving the torture on women and children. section 9(1) of the said Ain made provisions for punishment of the offence of rape on women and children. Sub-section (1) of section 9 along with the explanation thereto is quoted below:—

৯। ধর্ষন, ধর্ষনজনিত কারণে মৃত্যু, ইত্যাদির শাস্তি।-(১) যদি কোন পুরুষ কোন নারী বা শিশুকে ধর্ষন করেন, তাহা হইলে তিনি যাবজ্জীবন সশ্রম কারাদন্ডে দন্ডনীয় হইবেন এবং ইহার অতিরিক্ত অর্থদন্ডেও দন্ডনীয় হইবেন।

ব্যাখ্যা।-যদি কোন পুরুষ বিবাহ বন্ধন ব্যতীত [ষোল বৎসরের] অধিক বয়সের কোন নারীর সহিত তাহার সম্মতি ব্যতিরেকে বা ভীতি প্রদর্শন বা প্রতারণামূলকভাবে তাহার সম্মতি

আদায় করিয়া, অথবা [ষোল বৎসরের] কম বয়সের কোন নারীর সহিত তাহার সম্মতিসহ বা সম্মতি ব্যতিরেকে যৌন সঙ্গম করেন, তাহা হইলে তিনি উক্ত নারীকে ধর্ষন করিয়াছেন বলিয়া গণ্য হইবেন। *(Underlines supplied)*

12. It appears from the above provisions that the minimum punishment of life imprisonment has been provided for a man who commits rape on woman or child. The explanation thereto further provides that if sexual intercourse is done by a man with a woman of above sixteen years of age without her consent or by coercion or such consent is obtained by cheating, and sexual intercourse is done by a man on a woman below sixteen years of age with or without her consent, those would be deemed to be rape. Besides, unlike section 9(1) of the said Ain, no minimum punishment for unnatural offences has been provided by the general law, namely section 377 of the Penal Code. Which means the punishment may be of life imprisonment or for any term up to ten years of any description. Needless to mention, the procedure of investigation and trial under the general law is much more lenient and liberal than the ones under the said Ain.

13. Since section 9 of the said Ain is a provision of special law enacted for a particular purpose, the same has to be interpreted applying the principle of strict interpretation of law, and if it appears that there is a conflict or potential conflict between the said special law and the general law, the provisions of special law will prevail over the general law. Accordingly, since sub-section (1) of section 9 provides that rape may be committed on woman or child, we have to take the letter of the law as it is. Therefore, according to this provision, a woman as well as a child, irrespective of the gender of the child, can be victim of rape under the said Ain, though the same is not possible under the general law, namely under the definition of rape as provided by section 375 of the Penal Code. This proposition is strengthened when we see the definition of the words 'ধর্ষন' (rape), 'নারী' (woman) and 'শিশু' (child) as provided by Clauses-(Uma), (Chha) and (Ta) respectively of section 2 of the said Ain. While Clause-(Chha) of section 2 defines 'নারী' (woman) as a female of any age, Clause (Ta) defines 'শিশু' (child) as an individual or person below the age of sixteen, irrespective of gender. On the other hand, Clause (Uma) of section 2 has even modified the definition of 'ধর্ষন' (rape) as provided by the general law, namely section 375 of the Penal Code. It says 'rape' means rape as defined by section 375 of the Penal Code subject to the provisions of section 9 of the said Ain. If we read this definition of 'rape' as provided under Clause-(Uma) of section 2 along with section 9(1) of the said Ain, we have no option but to conclude that the Nari-o-Shishu Nirjaton Daman Ain, 2000 has modified the definition of rape as provided by section 375 and widened its scope by including a male-child as a victim of rape.

14. The intention of the Legislature to that effect is clear when we see the definition of the word 'শিশু' (child) and deliberate use of the word 'শিশু' (child) in sub-section (1) of section 9. Had it been the intention of the Legislature that only the female child would be the victim of rape as submitted by Mr Kazi Md Arifur Rahamn, learned advocate and the said learned senior members of the Bar, the Legislature would have used the word 'নারী' (woman) in place of the word 'শিশু' (child) under sub-section (1) of section 9. When the word 'শিশু' (child) has been used under sub-section (1) of section 9 and the said definition of the word 'শিশু' (child) being an individual below the age of sixteen irrespective of the gender of the said individual, we are of the view that the Legislature, by this special provision of law, has intended to include the mail-child as rape victim. This being so, we are of the view that the offence committed by the convict-appellant, as evident from the 164 statement of the victim, is an offence of rape as defined by section 9 of the Nari-o-Shishu Nirjaton Daman Ain, 2000 read with Clauses-

(Uma) and (Ta) of section-2 of the said Ain. If we read it otherwise, the use of the word 'শিশু' (child) in section 9(1) of the said Ain will be rendered redundant.

15. Since a child under the age of sixteen is not in a position to give consent to sexual intercourse or sodomy, the sodomy committed by a man even on a consenting male-child will also come under the mischief of rape punishable under section 9(1) of the said Ain. Thus, the criminal proceeding in such cases must be instituted and proceeded against the perpetrator-man under the provisions of the said Ain.

16. Regard being had to the above discussions of relevant provisions of law, we are of the view that the case in question ought to have initiated and/or proceeded against the convict-appellant under section 9(1) of the Nari-o-Shishu Nirjaton Daman Ain, 2000. However, since the trial has already been completed, and the appeal preferred by the convict-appellant is pending before the learned Sessions Judge, Feni against his conviction under the general law, we are of the view that this interpretation of us should not apply to the said case as it would create further complications. Since the offences under Nari-o-Shishu Nirjaton Daman Ain, 2000 can only be tried by the Tribunal constituted under the said Ain, which has not been done in the case in question, we do not, at this stage, want to disturb the already concluded trial of the convict-appellant, and, as such,, our this interpretation will only apply prospectively in case of sodomy committed on male-child.

17. Again, since the issue dealt with by us in this Suo-moto Rule involves interpretation of law, and it appears that even at least two senior members of the Bar are of the view that the proceedings commenced and completed in the said case were not illegal, which we have held to the contrary, we want to give the benefit of doubt as regards the interpretation of the relevant provisions of law to the Opposite Parties in this Rule, and, accordingly, they are exempted from this *Suo-moto* Rule in so far as their contributions to the above illegality are concerned.

18. With the above observations and directions, the Suo-moto Rule is disposed of.

Let a copy of this judgment be communicated to the Offices of the learned Attorney General, Solicitor General of Bangladesh, Inspector General of Police, Registrar, Supreme Court of Bangladesh and Secretary, Ministry of Law and Parliamentary Affairs to take immediate necessary steps in their respective fields in line with the above interpretation of law given by us.

Ed.

High Court Division
(Civil Appellate Jurisdiction)

Md Anwarul Haque J AKM Shahidul Huq J	Sadharan Bima Corporation .....Plaintiff Appellant vs
Judgment October 9th, 2012.	Ceylone Shipping Corporation and others..... ...Defendant-Respondents*

Damage

No damage is found to have been occurred during the course of carrying of the goods for which defendant No.l and 2 as a carrier can be held responsible. .....(10)

Tafilur Rahman with Sk Taimur Reza Hassan with Sufia Ahmed, Advocate—For the Plaintiff -Appellant.

ABM Golam Mostafa with Md Ohiullah, Advocate—For the Defendant-Respondents.

Judgment

Md Anwarul Haque J: This appeal, preferred by plaintiff-appellant, Sadharon Bima Corporation of Money Suit No.123 of 1994, is

*First Appeal No.411 of 1996

directed against the judgment and decree passed by the then learned subordinate Judge, now Joint District Judge, 3rd Court, Chittagong on 27-3-1996 and 5-6-1996 respectively. In fact, the then subordinate Judge dismissed the suit filed by plaintiff No.l Eastern Cables Limited and plaintiff No.2 Sadharon Bima Corporation who has subsequently been transformed from defendant No.3 with a positive observation that the claim of damage of machinery's parts carried by defendant No.l, the present respondent, was not occurred during the course of carrying goods from port of embarkation and delivery of the same in the port of Chittagong.

2. Being aggrieved by and dissatisfied with the impugned judgment and order of dismissal passed by the court below plaintiff No.2, Sadharon Bima Corporation has preferred this appeal alleging *inter alia* that since damage is found to have caused as per survey report Ext. l and l(Ka) during the course of carrying imported goods by defendant No.l and damage as caused is to be compensated by the carrier defendant No.l and the agent of defendant No.2 Sadharon Bima Corporation as a Insurer has already paid such claim of the plaintiff No.l which is now payable to the Sadharon Bima Corporation by the carrier defendant No 1.

3. In short, the case of the plaintiff-appellant is as follows :

Plaintiff No.l opened LC in order to import machineries and parts of machineries from Germany and accordingly imported goods were shipped in a vessel known as 'MV Lanka Aruna' in order to transport from Hamburg, West Germany to, Chittagong sea port which was arrived on 11-12-89 and delivered to the port authority since neither plaintiff nor his CRF agent received the goods on the arrival of the ship 'MV Lanka Aruna'. However at the initial stage it was delivered to port authority and C&F agent of plaintiff No.l who received it from the port authority and asked defendant No.l on 1-1-90 for joint survey with an apprehension and possibility of damage of imported parts of machineries but ultimately defendant No.2 did not pay heed to it and C&F agent of the plaintiff No.l took delivery of the goods on 2-1-1990 in presence of the representative of the Port Authority and plaintiff's Engineer. Ultimately on physical verification survey was conducted by National Cargo Surveyor who identified the cause of damage "Exhuast Box and its base for bolting". It was again surveyed by M/s Atlantic Surveyors who also filed report subsequently Ext.2 and claim amount was realized from plaintiff No.2 which was under Insurance Policy and the right of plaintiff No.l also handed over to plaintiff No.2, Sadharon Bima Corporation to run the suit on receipt of the payment of claim amount allowing to step into the shoes of the plaintiff No.l on the basis of "subrogation".

4. However, considering both the parties' case as made out in the pleading and the evidence of both orals and documentary; the court below has dismissed the suit stating that the survey report was made beyond the knowledge of the carrier, the defendant Nos.l and 2 and also no damage was found to be caused during the course of carrying the imported goods rather it is evident that after arrival of such goods damage may be caused during the course of carrying the same to the Wire house of the plaintiff No.l; as such carrier, defendant No.l, can not made responsible and ultimately dismissed the suit on the ground as discussed in the judgment which is very lucid one.

5. Mr Md Tofailur Rahman the learned advocate appearing on behalf of the plaintiff-appellant No.2 has brought to our notice that on payment of claimed amount to plaintiff No.l, importer, the defendant No. 4 has transformed himself as plaintiff No. 2 under section 135A of the Transfer of the Property Act by way of sub-

rogation who is entitled to realize the compensation if it is proved that damage as alleged by plaintiff No.1 in the machineries is found to have been occured during the course of carrying by Ship belonging to the defendant No.1. The learned advocate clearly admits that though at the initial stage defendant No.4, the present plaintiff No. 2 and the appellant did not agree to pay the claimed amount against the Marine Insurance policy but subsequently having been satisfied he paid the entire amount to the plaintiff No.1 who has also left the suit even without being examined as PW 1. Ultimately one Md. Mojibur Rahman has been examined as PW 1, being an employee of the Sadharon Bima Corporation to support the case of the plaintiff as made out in the plaint.

6. On the other hand, defendant No.1 has not examined any witness in support of his case rather he has filed a series of documents Ext. Ka -Gha in support of his defence.

7. Mr Md Ohiullah the learned advocate appearing on behalf of the defendant Nos.1 and 2, the present respondent has drawn our attention in the paragraph 6 of the plaint where it has clearly been stated that the very report made by National Cargo Surveyors Ext. 1 and Atlantic Surveyors Ext. 1(ka) clearly go to say that the imported machineries were subject-matter of damage at the time of transportation from Chittagong Port to Ware house of the plaintiff; as such defendant Nos.1 or 2, being a carrier cannot be made responsible to pay any damage for alleged negligent handling during the course of carriage by sea. Moreover, two survey reports Ext. 1 and 1(ka) do not stand to speak in favour of causing service of notice upon the carrier defendant Nos.1 and 2 in order to make a joint survey; as such those survey reports will not go to identify the damage alleged to have been caused during the course of carriage of the goods. The survey reports Ext. 1 and 1(ka) also clearly stand to support this contention for non-service of the summon upon the carrier. Moreover, the survey reports which were done in the Jetty of the Chittagong Port Authority and report prepared on the arrival in the Wire house of the plaintiff are found to be different one; as such this decision of the court below over the matter that damage may be caused during the course of transportation from Jetty to Ware house deserves no interference.

8. It will not be out of place mention that plaintiff No.2 on 9-10-90 himself admitted that at the time of delivery, the imported goods was found in healthy and sound condition which was communicated to the plaintiff No.1 M/s Eastern Cable Ltd. on 9-10-90 under his Office Memo No.CML-88/BO/90/1614 (Ext. 11Kha); as such there can be no scope at this moment to say that imported goods were found damaged for alleged mishandling or negligent handling during the course of carriage. It will be clear if we go to quote this recital of the letter address to M/s Eastern Cable Ltd. by the Manager of the plaintiff No.2.

9. Let us quote which is as follows:

"সূত্র সিএমঃ এল-৮৮/বিও/৯০ তারিখঃ ৯-১০-১৯৯০ইং

মেসার্স ইষ্টার্ন কেবলস লিঃ

পতেঙ্গা,

চট্টগ্রাম। ইউদাউট প্রিজুডিস

বিষয়ঃ বীমা পত্র নং-সিটিজি/সার্ট/ফেক্স-৩০৩/৯/৮৯ ও এনডোর্সমেন্ট নং সিটিজি/ইবনডিটি/ ফেক্স-৩-১-৯০ এর অধিনে নৌ দাবী প্রসংগে। জাহাজ-বংকা অরবনা।

আপনার উপরোক্ত দাবীর নথিমালা আমরা আমাদের চট্টগ্রাম অফিস হইতে পাইয়াছি। নথি পরীক্ষান্তে দেখা যায় যে, আপনাদের আমদানীকৃত পন্য দুই স্থানে অর্থাৎ চট্টগ্রাম বন্দরে ও আপনাদের নিজস্ব গুদামে জরীপ করানো হইয়াছে। চট্টগ্রাম বন্দরে অনুষ্ঠিত জরীপ রিপোর্ট হইতে দেখা যায় যে, জাহাজ হইতে পন্য ভাল অবস্থায় অবতরন করিয়াছে। তবে জরীপকারী উল্লেখ করিয়াছেন 'Exhaust box and its base for bolting broken otherwise found same" যাহা খুবই সামান্য ক্ষতি বলিয়া আমরা মনে করি। অপরদিকে গুদামে অনুষ্ঠিত জরীপ রির্পোট হইতে দেখা যায় যে, মেশিনটি ভাংগা অবস্থায় পাওয়া গিয়াছে এবং উহা কোন কাজে আসিবেনা। ক্ষতির কারন

"poor &/or rough handling in transit" বলিয়া উল্লেখ করা হইয়াছে। এই ক্ষতি বন্দর হইতে গুদামে আনার সময় হইয়াছে বলিয়া আমাদের ধারনা এবং উহার জন্য আভ্যন্তরীন পরিবহনকারীই দায়ী। বন্দর হইতে কিভাবে উক্ত মেশিন আনা হইয়াছিল সে তথ্য নথিতে নাই।

অতএবং, আমাদের পরবর্তী পদক্ষেপ গ্রহনার্থে নিম্নলিখিত তথ্য/দলিলাদি সত্তর অত্র কার্য্যালয়ে প্রেরনের জন্য আপনাদিগকে অনুরোধ করা যাইতেছে।

১। বন্দর হইতে যে মাধ্যমে আলোচ্য মেশিন আনা হইয়াছে (নিজস্ব পরিবহন যোগে নাকি অন্য কোন পরিবহন যোগে) উহার দলিলাদি সহ প্রমান।

২। তৃতীয় পক্ষের পরিবহন যোগে আনা হইয়া থাকিলে তাহাদের নিকট কোন দাবী পেশ করা হইয়াছে কিনা, করা হইয়া থাকিলে উহার বর্তমান অবস্থা (দলিলিক প্রমান সহ)।

ধন্যবদান্তে,

আপনার বিশ্বস্ত

স্বাঃ অস্পষ্ট

ম্যানেজার (দাবী)".

10. On the face of the report, admittedly made by the plaintiff No.2, we also find no way but to echo the voice of the court below about the facts as has been proved that no damage is found to have been occurred during the course of carrying of the goods for which defendant No.l and 2 as a carrier can be held responsible.

11. In the light of the above observation and discussion we are of the opinion that this appeal bears no substance and accordingly we find no scope to interfere in the decision of the courts below.

12. In the a result, the appeal is dismissed on contest with cost of Taka 5,000 (five thousand) only. The judgment and decree of the court below is hereby affirmed.

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

Ed.

High Court Division
(Civil Appellate Jurisdiction)

Farid Ahmed J
Md Kamruzzaman J

Judgment
November 7th, 2012.

Jamal Ahmed.....
...Plaintiff-Appellant
vs
Md Humayan Kabir & others.....Defendant-Respondents*

Acquisition & Requisition of Immovable Property Ordinance (II of 1982)
Section 16

LA proceeding cannot be challenged in Civil Jurisdiction but the title of the parties who are entitled to compensation that can be decided by the civil court.

The plaintiff has filed the suit for declaration of title and further declaration that the BS record in the name of the defendants are wrong and that they are entitled to compensation. The plaintiff never challenged the LA proceeding. They have only challenged the title of the defendants, in such circumstances the learned Joint District Judge was wrong in holding that the plaintiff has no right to claim compensation before the Civil Court and that the plaintiffs claim of compensation only can be decided by the concerned authority. .....(17)

Md Zakir Hossain, Advocate—For the Appellant.

Fida M Kamal, Senior Advocate with Khizir Ahmed and Abdul Momen Chowdhury, Advocate—For the Respondent Nos. 5, 6 and 27.

Moudud Ahmed, Senior Advocate with MA Awal, Advocate—For the added Respondent No. 28.

Md Motaher Hossain (Sazu), DAG with Purabi Saha, AAG—For the Respondent Nos. 9-11.

*FMA No. 140 of 2012.

Judgment

Farid Ahmed J : This First Miscellaneous Appeal has been preferred by the plaintiff-appellant against the judgment and order dated 8-2-2012 passed by the learned Joint District Judge, 2nd Court, Chittagong in Other Suit No. 238 of 2010 rejecting the plaintiff's application for temporary injunction.

2. The petitioner as plaintiff instituted the aforesaid Title Suit No. 238 of 2010 against the respondents for declaration of title in the suit land described in the schedule to the plaint and for further declaration that the defendants are not entitled to get compensation of LA Case No. 5 of 2010-2011.

3. The case of the plaintiff-appellant in brief are that:

The suit land originally belonged to Gyanada Ranjan Datta and Ananda Charan and accordingly RS record was prepared in their names; that Gyanada Ranjan Datta died leaving behind two sons namely Sudhir Ranjan Datta and Samir Ranjan Datta and that while said two sons of Gyanada Ranjan Datta were in possession of their inherited land they appointed Ajit Kumar Datta as their Constituted Attorney who entered into a bainapatra with the plaintiffs in the year 2000; that being refused by the attorney to register the sale deed in favour of plaintiff he instituted a suit for Specific Performance of Contract being Title Suit No. 8 of 2003 and the same was decreed; that the plaintiffs got the sale deed registered through Court being deed No. 1470 dated 26-7-2003 ; that the BS record was published wrongly in the name of some of the defendants and in such circumstances, the plaintiff was compelled to institute the present suit.

4. The plaintiff further stated that the Government acquired the suit property for establishing "Asian University for Women" through LA Case No. 5 of 2010-2011 and that being emboldened by the wrong BS record, the defendants have been trying to receive the compensation money; that thereafter the plaintiff amended the plaint and inserted the prayer that the defendants are not entitled to get compensation of LA Case No. 5 of 2010-2011.

5. In the suit the plaintiff filed an application under Order XXXIX, rule 1 of the Code of Civil Procedure for temporary injunction restraining the defendants from receiving or disbursing the compensation money of LA Case No. 5 of 2010-2011.

6. The defendant Nos. 5-7, 9-11 and 27 contested the said application for temporary injunction by filling written objection alleging that the plaintiff on the basis of a collusive bainanama instituted Title Suit No. 8 of 2003 for Specific Performance of Contract and obtained an ex parte decree; that the predecessor of the vendor of the plaintiff had no right, title or interest in the suit land and that on the basis of a collusive bainanama the attorney instituted the suit and obtained a decree but the possession of the suit property was not delivered to the plaintiff. These defendants further stated that the land of RS Khatian No. 775/1 was sold-in-auction for realization of arrear rents and the same was purchased by the Government; that thereafter the Government re-settled the suit land in favour of Azizul Haque and Tofail Ahmed and accordingly jote No. 189 and jote khatian No. 775/34 was created in their names; that PS Khatian in respect of the suit land was prepared in the name of defendants' predecessor; that the defendants have purchased the suit land from the heirs of Azizul Haque and Tofail Ahmed through different registered sale deeds and BS khatian No. 833 has been correctly prepared in their name; that the defendants have filed a suit challenging the Exparte decree passed in a suit for Specific Performance of Contract in favour of the present plaintiff; that the plaintiff has no possession in any part of the

suit land; that the plaintiff is not entitled to get any injunction and the same is liable to be rejected.

7. The respondents-government contested the said application for temporary injunction by filing written objection admitting the case of the defendants.

8. The learned Joint District Judge after-hearing both the sides by his judgment and order dated 8-2-2012 rejected the said injunction petition. Being aggrieved thereby,the plaintiff has preferred this appeal.

9. Mr Md Zakir Hossain, learned Advocate appearing for the appellant has submitted that the plaintiff-appellant has acquired title in the suit land by virtue of a decree passed in a suit for Specific Performance of Contract and as such he is entitled to an injunction restraining the defendants from receiving or disbursing the compensation money. He further has submitted that the preparation of PS and BS record in the name of defendants or their predecessors are baseless and the learned Joint District Judge committed illegality in refusingto grant injunction holding that the defendants are in possession of the suit land on the basis of PS and BS record. He also has submitted that the defendants have no title or possession in the suit land as the land of the original owner Gyanada Ranjan Datta was never sold-in-auction and the Government never purchased the same in auction and re-settled the same in favour of defendants, in such circumstances the learned Joint District Judge committed illegality in not granting injunction restraining the defendants from receiving or disbursing the compensation money. He thereafter has submitted that since long time an order of injunction was operating against the defendants from receiving or disbursing the compensation money so, the injunction should be continued against the defendants till disposal of the suit. He lastly has submitted that if temporary injunction is not granted in favour of the plaintiff as he has acquired title by virtue of a decree passed by the Civil Court, the suit shall become infructuous.

10. On the other hand Mr Fida M. Kamal, learned Senior Counsel, Mr Khizir Ahmed and Mr Abdul Momen Chowdhury, learned Advocates appearing on behalf of respondent Nos. 5, 6 and 27 have submitted that the suit property was sold-in-auction for realization of arrear rents which was purchased by the government and that subsequently Government re-settled the same in favour of predecessors of the defendants and accordingly PS record of the suit land had been prepared in their name and the defendants have purchased the suit land from PS recorded tenant or from their heirs and their name have been correctly prepared in BS Khatian, the plaintiff having no valid right and title in the suit land is not entitled to any injunction. Mr Fida M Kamal further has submitted that the BS record have been correctly prepared in the name of the defendants as subsequent purchasers, they have been paying rents against their respective suit land and, as such, the trial Court" rightly refused to grant injunction. He also has submitted that the right, title and possession of plaintiffs so-called vendor Gyanada Ranjan Datta having been extinguished by the auction purchase of the suit land by the Government, the plaintiff has not acquired valid title on the basis of his alleged deed executed and registered by the heirs of Gyanadra Ranjan Datta.

11. Mr Moudud Ahmed learned Senior Counsel appearing on behalf of the added respondent No. 28 has adopted the submission of Mr Fida M. Kamal.

12. It is admitted by both the parties that Gyanada Ranjan Datta and Ananda Charan were the RS recorded tenants. The plaintiff-appellant claims that Gyanada Ranjan Datta died leaving behind two sons namely Sudhir

Ranjan Datta and Samir Ranjan Datta and that while they were in possession of their inherited land they appointed Ajit Kumar Datta as their Constituted Attorney who entered into the bainapatra with the plaintiff in the year 2002 and that while the said attorney refused to execute and register the sale deed in favour of plaintiff he instituted a suit for Specific Performance of Contract and obtained a decree and that since purchase he has been in possession of the suit land. The preparation of PS and BS record in the name of defendants or their predecessors are wrong.

13. On the other hand defendants claim that the right, title and interest of the RS recorded tenants were sold-in-auction due to nonpayment of arrear rents which was purchased by the Government and subsequently Government re-settled the same in favour of defendants' predecessor. The heirs of settlement holders had transferred the suit land to the defendants and since purchase they have been in possession of the suit land. In support of claim of re-settlement of the suit land by the Government the defendant has filed the certified copy of order sheet of Re-settlement Case No. 77/1943-44 with their application for vacating the order of injunction and the same has been annexed as Annexure-X-5. It appears from the said order sheet that the Government on 18.3.1943 had purchased 107.30 acres of land including the suit land. Thereafter by creating re-settlement Case No. 77/1943-44 the suit land was settled in favour of predecessors of these defendants. The learned Advocate for the appellant though has submitted that all these documents are forged and fabricated and that the defendants have created the same for the purpose of receiving the compensation money depriving the plaintiff from his rightfully claim of compensation. The appellant also has filed the certified copy of order sheet of re-settlement Case No. 77/1943-44, in such circumstances, we have no doubt that the land of RS recorded tenants were sold-in-auction and Government purchased the same and subsequently re-settled the same in favour of predecessors of the defendants.

14. The PS and BS record of the suit land prepared in the name of the defendants and their predecessor long before. The plaintiff-appellant has filed the instant title suit challenging the BS record only in the year 2004 just after obtaining the decree in their suit for Specific Performance of Contract in the year 2003. After re-settlement of the suit property in favour of the defendants' predecessors, the PS record had been prepared in their names and they have mutated their names and Mutation Khatian No. 774/34 was opened in their names. The defendants in support of their claim of mutation in favour of their vendor has filed certified copy of the said mutation khatian as Annexure-X-7 in the application for vacating the order of injunction. Referring an information slip issued by the revenue office, the learned Advocate for the appellant has submitted that there is no existence of mutation khatian No. 774/34, because the information slip shows that mutation khatian No. 774/22 was the last mutation as per record and, as such, the claim of the defendants is totally false that mutation khatian No. 774/34 in respect of the suit land was opened in favour of them. The submission of the learned Advocate for the appellant that there is no existence of mutation khatian No. 774/34 does not in any way help the plaintiff-appellant when the BS record has already been prepared in the name of defendants on the strength of their settlement. The defendants have filed their title deeds and also rent receipts showing their payment of rent to the Government. Though the appellant has challenged the BS record but we find that the defendants got the settlement from Government long before and in support of their possession of the suit property they have paid rents. In such circumstances, we are to hold that

the balance of convenience and inconvenience are heavily in favour of the defendants.

15. It has been argued on behalf of appellant that since long time the application for temporary injunction was not disposed of by the trial Court. Then the appellant moved the High Court Division by way of revision and obtained an order of temporary injunction and that till disposal of the injunction petition by the trial Court the said temporary injunction was in force and, as such, the order of injunction should continue till disposal of the suit. We find that the appellant has failed to show a strong *prima-facie* case to get an order of injunction, in such situation we cannot accept this submission of the learned Advocate for the appellant.

16. The learned subordinate Judge, though found that the plaintiff-appellant has no *prima-facie* case to get injunction but he has wrongly held that the " The question of acquisition and awarding compensation is absolutely within the domain of the authority who acquired the land, will get the compensation that will be determined by the Deputy Commissioner not by the court "and that the plaintiff cannot pray for compensation before the Civil Court.

17. It is true, that the LA proceeding cannot be challenged in Civil Jurisdiction but the title of the parties who are entitled to compensation that can be decided by the civil court. The plaintiff has filed the suit for declaration of title and further declaration that the BS record in the name of the defendants are wrong and that they are entitled to compensation. The plaintiff never challenged the LA proceeding. They have only challenged the title of the defendants, in such circumstances the learned Joint District Judge was wrong in holding that the plaintiff has no right to claim compensation before the Civil Court and that the plaintiffs claim of compensation only can be decided by the concerned authority (LA department).

18. Considering the above facts, we find no merit is appeal.

19. In the result, the appeal is dismissed without any order as to costs. The judgment and order dated 8.2.2012 passed by the Joint District Judge, 2nd Court, Chittagong in other Suit No. 238 of 2010 is affirmed.

The respondents are permitted to take back the original Annexures on furnishing attested photo-state copies thereof.

Ed.

High Court Division
(Criminal Revisional Jurisdiction)

ANM Bashir Ullah J
Mustafa Zaman Islam J

Judgment
June 24th, 2013.

Abdul Kader Bepary...
.....Convict-petitioner

vs

State...Opposite Party*

Code of Criminal Procedure (V of 1898)
Sections 410/561A
Limitation Act (IX of 1908)
Section 5

Since there is efficacious relief in preferring the appeal with a prayer for condonation of delays of any day under section 5 of the Act, the very filing of a petition under section 561A of the Code for quashing the conviction and sentence of the petitioner passed by Sessions Judge is not at all maintainable.

.....(11)

No one Appears—For the Petitioner.

ASM Nazmul Haque, DAG with Md Mamunur Rashid, AAG—For the Opposite Party.

*Criminal Revision No. 576 of 1999.

Judgment

ANM Bashir Ullah J: This Rule on an application under section 561A of the Code of Criminal Procedure (in short, the Code) was issued calling upon the Deputy Commissioner, Madaripur to show cause as to why the proceeding in GR No. 51 of 1986 arising out of Shibchar Police Station Case No. 4 dated 17-8-1986 and the conviction and sentence passed by the Sessions Judge, Madaripur in Sessions Case No. 33 of 1987 convicting the petitioner under section 302/34 of the Penal Code and sentencing him to suffer imprisonment for life shall not be quashed and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The facts leading to the issuance of the Rule, in short, is that in the night following 16-8-1986 corresponding to 30th Srabon, 1393 BS deceased Chand Miah and his daughter Monjura Begum were sleeping in their north-sided chowchilla tin shed house and at about 2-00 AM some unknown miscreants numbering 4-5 entering into the said tin shed house tied up the hands, legs and putting cloth in the mouth of Chand Miah took away him from the house. The miscreants also in order to suspend the whole activities of Monjura Begum had put cloth in her mouth but Monjura Begum some how removing the cloth from her mouth cried out, upon which neighbouring Abdul Kader Bepary came into the place of occurrence. The nearest and dearest one of Chand Miah searched him hither to thither but failed to trace him out and accordingly First Information Report (in short, the FIR) was lodged at 15-00 hours on 17-8-1986 with Shibchar Police Station and the same was recorded as Shibchar Police Station Case No. 4 dated 17-8-1986 under section 364 of the Penal Code.

3. Later on the dead body of Chand Miah was recovered from a ditch contiguous east of his own house. Police on completion of the investigation submitted charge-sheet against the petitioner and others. Charge was framed against the present petitioner and three others under section 302/34 of the Penal Code. At the time of framing of charge the petitioner Abdul Kader Bepary was an absconding accused though the three others were present at the time of framing charge.

4. The prosecution in order to prove the charge examined 13 witnesses but the defence examined none. The learned Sessions Judge, Madaripur upon consideration of the evidence and other materials on record convicted the petitioner Abdul Kader Bepary and another accused Monjura Begum under section 302/34 of the Penal Code and sentenced him to suffer imprisonment for life though acquitted the two other accused from the charge.

5. Another convict Monjura Begum preferred Criminal Appeal No. 242 of 1988 in this Court and she has been acquitted from the charge by the judgment dated 14-7-1993 passed in the said appeal. After a long gap of at about 10 years of the occurrence of this case the petitioner was arrested on 30-10-1996 from Chittagong and since then he is in jail. The same footing accused Monjura Begum has been acquitted by this Court in the said criminal appeal and the present accused should have been given the same benefit also. The convict petitioner being not acquitted in the said appeal moved this Court and obtained the present Rule.

6. The Rule is taken up for hearing today but no one appears to support the Rule on behalf of the petitioner.

7. Mr ASM Nazmul Haque, the learned Deputy Attorney-General with Mr Md Mamunur Rashid, the learned Assistant Attorney-

Penal Code (XLV of 1860)

Section 409—Section 409 of the Code was in the schedule to the Act, 1957, it was a part of it and had to be treated as an offence under the Act. Sub-section (3) of section 38 of the Ain, 2004 was applicable in respect of the investigation of offence under section 409 of the Code. Offences mentioned in the schedule to the Ain, 2004, be it an offence as contemplated in sections 26 and 27 thereof, or the offences under other laws as mentioned therein, section 32 of the Ain, 2004 shall be applicable. *Kaisor-uz-Zaman vs State, DC, Sylhet (Criminal)* 101

High Court Division

Acquisition & Requisition of Immovable Property Ordinance (II of 1982)

Section 16—LA proceeding cannot be challenged in Civil Jurisdiction but the title of the parties who are entitled to compensation that can be decided by the civil court. *Jamal Ahmed vs Md Humayan Kabir (Civil)* 179

Arbitration Act (I of 2001)

Section 2(b)—The word 'Adalat' (Court) used in the Act exclusively means the Court of District Judge (জেলা জজ আদালত) and shall include, the Court of Additional District, if he is appointed to perform the function of the Adalat. *PEB Steel-Asia Ltd vs The Registrar, Office of the RJS Companies and Firms (Statutory Original)* ... 141

Section 10(1)—Once the hearing of a matter has been commenced there would remain no scope to file written statement and section 10(1) of the Act will not be applicable. *PEB Steel-Asia Limited vs The Registrar, Office of the Registrar of Joint Stock Companies and Firms (Statutory Original)* 141

Code of Criminal Procedure (V of 1898)

Section 94(1)(b)—Section 162 of the Evidence Act gives a wide power to the court to summon any person as a witness to produce a document in his possession or power, whatever objection he may have in producing the document. *Juboraj Goula vs State (Criminal)* 119

Sections 164(3) and 342—There is no certificate given by the Magistrate certifying the fact that the confessional statement was recovered without making physical assault. After being examined under section 342 of the Code the condemned-prisoner stated that the statement was recorded from him after penetrating iron nail (পেরাগ) into his hands and compelling him to include the name of other accused-persons, showing fear to push iron nail (পেরাগ) into his legs. Considering the evidence of PW-9 and the statement made by the condemned-prisoner at the time of examining him under section 342 of the Code it appears that, the statement under section 164 of the Code is not a voluntary statement and that is inadmissible in evidence. *State vs A Bashar (Cri)* 130

Sections 410/561A—Since there is efficacious relief in preferring the appeal with a prayer for condonation of delays of any day under section 5 of the Act, the very filing of a petition under section 561A of the Code for quashing the conviction and sentence is not at all maintainable. *Abdul Kader Bepary vs State (Criminal)* 183

Section 561A—This sort of interference is nothing but illegal harassment amounts to high handedness of the police and creation of anarchy amongst the passengers travelling from one city to another city within the country and apparently an attempt of the police personnel to make themselves illegally benefited. *Shahadat Hossain (Md) vs State (Criminal)* 125

Section 561A—Whether the petitioner had any 'mens rea' or not in the commission of the alleged offence is a question of fact and that can only be gone into during the trial of the case. *Jahangir Hossain Molla vs State (Criminal)* 167

Constitution of Bangladesh, 1972

Article 102(2)—Order to entitle a person to ask for performance of a public duty by Mandamus, it is necessary to show that he has a legal right for claiming such performance, apart from the fact that he is interested in the performance of the duty. *PEB Steel-Asia Limited vs The Registrar, Office of the Registrar of Joint Stock Companies and Firms (Statutory Original)* 148

Evidence Act (I of 1872)

Section 162—Section 162 of the Evidence Act gives a wide power to the court to summon any person as a witness to produce a document in his possession or power, whatever objection he may have in producing the document. *Juboraj Goula vs State (Criminal)* 119

Limitation Act (IX of 1908)

Section 5—Since there is efficacious relief in preferring the appeal with a prayer for condonation of delays of any day under section 5 of the Act, the very filing of a petition under section 561A of the Code for quashing the conviction and sentence is not at all maintainable. *Abdul Kader Bepary vs State (Criminal)* 183

Money Laundering Protirodh Ain (VIII of 2009)

Sections 2(Ta) and 4(2)—This sort of interference is nothing but illegal harassment amounts to high handedness of the police and creation of anarchy amongst the passengers travelling from one city to another city within the country and apparently an attempt of the police personnel to make themselves illegally benefited. *Shahadat Hossain (Md) vs State (Criminal)* 125

Section 4(2)—The law relates to Money Laundering does not provide any provision to make investigation by the police in case of any offence committed under the Act, rather the Anti-Cor-ruption Commission is authorized to make such investigation. *Shahadat Hossain (Md) vs State (Criminal)* 125

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

Section 9(1)—Since a child under the age of sixteen is not in a position to give consent to sexual intercourse or sodomy, the sodomy committed by a man even on a consenting male-child will also come under the mischief of rape punishable under section 9(1) of the Ain. The criminal proceeding in such cases must be instituted and proceeded against the perpetrator-man under the provisions of the Ain. *Abdus Samad vs State (Criminal)* 171

Penal Code (XLV of 1860)

Section 109—Whether the petitioner had any 'mens rea' or not in the commission of the alleged offence is a question of fact and that can only be gone into during the trial of the case. *Jahangir Hossain Molla vs State (Criminal)* 167

Damage—No damage is found to have been occurred during the course of carrying of the goods for which defendant No.1 and 2 as a carrier can be held responsible. *Sadharan Bima Corporation vs Ceylone Shipping Corporation (Civil)* 176

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