Regd DA-1722

Vol. XIX April 2014

Mobile : 017-1168-8860
Tel : 935-3649; 832-2271

The

Bangladesh Law Chronicles

(A Monthly Law Journal)

Editor : Nahid Mahtab, Advocate, *Supreme Court*

Reporters : Md Hedeyet Hossain, Advocate, *Supreme Court*

: KM Hafizul Alam Hafiz, Advocate, *Supreme Court*

Fourth Issue

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

Contents

Appellate Division 105-128 High Court Division 185-256

Appellate Division

1 Agrani Bank vs Anwarul Bashir Khan *(Civil)* 20
2 Aysha Siddiqua vs Fazilatunnesa *(Civil)* 117
3 Harun-or-Rashid vs Gulaynoor Bibi *(Civil)* 123
4 Kartic Das Gupta vs Election Commission of Bangladesh *(Civil)* 113

High Court Division

1 Abdul Matin Sarker vs People's Republic of Bangladesh *(Spl. Original)* ... 186
2 Abdul Mazed Vaaty (Md) @ Yusuf Vatt vs State *(Criminal)* 189
3 Abul Kashem vs State *(Criminal)* 195
4 Afzal Hossain (Md) vs Government of Bangladesh *(Spl Original)* 230
5 HRBC-Intraco (BD) Joint Venture vs Bangladesh *(Spl Original)* 219
6 Khandaker Nazrul Islam Khokan vs Mustaba Kuli Khan *(Criminal)* 211
7 Mirza Mohammad Mohiuddin vs State *(Criminal)*... 226
8 Saidul Haque Shamim (Md) vs Anti-Corruption Commission *(Spl. Original)* ... 201
9 Saiful Islam Firoz (Md) vs State *(Criminal)* 205
10 Tahamina Amin Chowdhury vs Deputy Commissioner, Chittagong *(Civil)* ... 239
11 Titas Gas Karmachari Union vs Ministry of Labour and Manpower *(Spl. Original)* 213

For 2014—(1) Annual subscription paid in advance is Taka 500 for 12 issues. (2) Annual subscription not paid in advance is Taka 600 for 12 issues. (3) For direct delivery price of current single issue is Tk. 40.

Appellate Division

Artha Rin Adalat Ain (VIII of 2003)

Section 33—Under the Ain, the Artha Rin Adalat was empowered to raise money for payment of the total amount by way of mortgage or lease or private sale of the property with the permission of the Court. The expression, 'the amount of the decree may be raised' used in sub-rule (1) means the total decretal amount and not an amount which could not satisfy the decree, and no Court can grant such permission unless the entire debt can be realized by private alienation. *Agrani Bank vs Anwarul Bashir Khan (Civil)* ... 120

Code of Civil Procedure (V of 1908)

Section 151—The main scope for section 151 of the Code furnishes the legislative recognition of the well-established principle that every court has inherent power to act *ex debito justitiae* to do that real and substantial justice between the parties or to prevent abuse of the process of the court for which it exists *ex debito justitiae* according to equity, justice and good conscience is concerned with sound judicial principle and fundamental laws and judicial procedure. *Harun-or-Rashid vs Gulaynoor Bibi (Civil)* 123

Code of Civil Procedure (V of 1908)

Order VI, rule17 *read with*

Sections 115 and 151—When a court has passed an order under Order VI, rule 17 read with section 151 of the Code any person aggrieved by that order may prefer a revisional application under section 115 of the Code before the High Court Division. Section 151 contemplates the inherent power of the court, in addition and complementary to the powers expressly governed under the Code. *Harun-or-Rashid vs Gulaynoor Bibi (Civil)* 123

Constitution of Bangladesh, 1972

Article 102(2)—Writ-petition in question could not be termed as a public interest litigation. The first and primary duty of the writ Bench is to see whether writ petition itself is maintainable in law or whether the writ petitioner has go-any interest in the matter which if not protected he shall suffer injury. *Kartic Das Gupta vs Election Commission of Bangladesh (Civil)* 113

Constitution of Bangladesh, 1972

Article 102(2)—After the election has been held the only way to challenge the same is by way of filing an election petition before the Election Tribunal. *Kartic Das Gupta vs Election Commis. of Bangladesh. (Civil)* 113

Voluntary Social Welfare Agencies (Registration and Control) Ordinance (XLVI of 1961)

Section 9—None of the circumstances and conditions stated in section 9 was prevailing and in that circumstances the registration authority had no power to dissolve the existing governing body of the samity and to form an ad-hoc committee and, as such, the formation of ad-hoc committee and the subsequent election of the governing body held by that ad-hoc committee and also the elected governing body of the samity were all illegal and all the activities of that ad-hoc committee were illegal. *Aysha Siddiqua vs Fazilatunnesa (Civ)*117

Voter List—Because of wrong description of a voter or wrong inclusion of a person in the voter list, the existing voter list shall not be rendered invalid, so election of the Pourashavas could very much be held under the old voter list prepared in 2007. *Kartic Das Gupta vs Election Commission of Bangladesh (Civil)* ...113

High Court Division

Arbitration Act (I of 2001)

Sections 42(2) and 43—Applications, filed in this court, do not fall within the ambit of "international commercial arbitration" hence none of these applications is maintainable. *HRBC-Intraco(BD) Joint Venture vs Government of the Peoples Republic of Bangladesh (Spl. Original)* 219

nizance of the offence against the petitioner on 12-3-2005, i.e. long after coming into force of the Ain, 2004 without any sanction from the Commission on the view that section 409 of the Penal Code is not an offence under the Ain, but mentioned in the schedule thereto and that there is clear difference between the offences under the Ain and the offences under other laws mentioned in the schedule thereto. He has further submitted that the High Court Division was absolutely wrong in holding that section 38 of the Ain, 2004 has no manner of application in the case as the offence under section 409 of the Penal Code was not an offence under the repealed Anti-Corruption Act, 1957 (the Act, 1957), which was repealed by the said section and this wrong view has resulted in an erroneous decision in discharging the Rule. He has lastly submitted that in the instant case, though FIR was lodged on 17-12-2003, the case was pending for investigation when the Ain, 2004 came into force on 9-5-2004 and after the coming into force of the Ain, 2004, the police or any other agency had no authority to proceed with the investigation of the case in view of sub-section (1) of section 20 thereof, the continuation of investigation of the case by the police was without jurisdiction and the report submitted by the police was no report in the eye of law and therefore, taking cognizance of the offence by the Senior Special Judge on such police report was illegal and without jurisdiction and, as such, continuation of the impugned proceeding is nothing but an abuse of the process of the Court and the same is liable to be quashed.

7. Mr Mvi. Md Wahidullah, learned Advocate-on-Record, for respondent No.2 and Mr Khurshid Alam Khan, learned Advocate, appearing for respondent No.3, however, supported the impugned judgment and order.

8. From the impugned judgment and order, the submissions of the learned Advocate for the petitioner, the learned Advocate-on-Record and the learned Advocate for the respondents respectively; the questions which have emerged for decisions are:

(i) Whether the provisions of the Ain, 2004 were applicable in respect of the investigation of the case in question in view of the provisions of sub-section (3) of section 38 thereof though the FIR was lodged on 17-12-2003.

(ii) Whether continuation of investigation of the case giving rise to the special case in question by the police, other than the Commission or any of its officers authorized by it after the Ain, 2004 came into force on 9th day of May 2004, was illegal and without jurisdiction and whether the Senior Special Judge acted legally and within jurisdiction in taking cognizance of the offence under section 409 of the Penal Code against the petitioner on such police report.

(iii) Whether prior sanction of the Government or of the Commission was necessary to take cognizance of the offence under section 409 of the Penal Code against the petitioner by the Senior Special Judge in view of the repeal of section 6(5) of the Act, 1958 on 18-5-2004 by Act, XXII of 2004.

(iv) Whether the High Court Division was correct in taking the view that section 32 of the Ain, 2004 was applicable only in respect of the offences under the Ain, 2004 and not in respect of the offences under the other laws mentioned in the schedule thereto.

(v) Whether there were materials to connect the petitioner with the defalcation of money of the bank

and thus made him liable for prosecution along with the other co-accused.

9. Question Nos.(i), (ii) and (iv) formulated hereinbefore are interlinked to each other and one shall have overlapping effect on the other. So, we shall discuss these questions together.

10. The Ain, 2004 came into force on 9-5-2004. The Ain, 2004 was enacted to establish an independent Commission for the enquiry into and investigation of the offences relating to corruption, to prevent the activities relating to corruption and other specified offences and to make provisions for other ancillary matters connected therewith. Prior to that the body which enquired into and investigated of the offences relating to corruption and also to make enquiry into the pecuniary resources of certain persons for more effective prevention of corruption was the Bureau of Anti-Corruption, in short, the Bureau, constituted under section 3 of the Act, 1957. And in the schedule to the Act, 1957, the offences, which shall be enquired into and investigated by the Bureau, were specified.

11. The Act, 1957 was repealed on the day, the Ain, 2004 came into force on 9-5-2004 by section 38 thereof. It will be beneficial if we have a look at section 38 of the Ain, 2004 which reads as follows:

৩৮। রহিতকরণ ও হেফাজত।-(১) এই আইন বলবৎ হইবার তারিখে the Anti-Corruption Act, 1957, অতঃপর উক্ত Act বলিয়া উল্লিখিত এবং the Anti-Corruption (Tribunal) Ordinance, 1960 অতঃপর উক্ত Ordinance বলিয়া উল্লিখিত রহিত হইবে।

(২) উক্ত Act হওয়া সত্ত্বেও, এই আইনের অধীন কমিশন প্রতিষ্ঠিত না হওয়া পর্যন্ত উক্ত Act এর কার্যকরতা, যতদূর সম্ভব, এমনভাবে অব্যাহত থাকিবে যেন উক্ত Act রহিত হয় নাই।

(৩) উক্ত Act রহিত হইবার অব্যবহিত পূর্বে উক্ত Act এর অধীন কোন অভিযোগের অনুসন্ধান, তদন্ত, মামলা দায়েরের অনুমোদন নিষ্পত্তির অপেক্ষাধীন থাকিলে এই আইনের বিধান অনুযায়ী উক্ত অনুসন্ধান, তদন্ত এবং অনুমোদন কমিশন কর্তৃক সম্পন্ন করিতে হইবে।

(৪) উক্ত Ordinance রহিত হইবার অব্যবহিত পূর্বে উক্ত Ordinance এর অধীন গঠিত ট্রাইব্যুনালে কোন মামলা নিষ্পত্তির অপেক্ষাধীন থাকিলে উহা তাৎক্ষনিকভাবে সংশ্লিষ্ট এলাকার এখতিয়ার সম্পন্ন স্পেশাল জজ এর নিকট স্থানান্তরিত হইবে।"

12. Sub-section (3) of section 38 is the saving provision and in this sub-section, it has been clearly provided that the enquiry, investigation of a case and the process of giving sanction to start a case under the Act, 1957, which were pending immediately before the repeal thereof, shall be completed by the Commission under the provisions of Ain, 2004. The language of sub-section (3) of section 38 is so clear that it does not admit of any ambiguity. The only thing to be seen is whether section 409 of the penal Code was an offence under the Act, 1957. In the whole of the Act, 1957, neither the offence has been defined nor has it been stated that the offence means the offence under the Act. In sub-section (l)of section 3 of the Act, it has been clearly stipulated that notwithstanding anything contained in the Police Act, 1861, the Government may constitute a Bureau for enquiry into and investigation of the offences specified in the schedule thereto and the offences notified by the Government. Sub-section (2) has provided that subject to any orders which the Government may make in this behalf, the Officers of the Bureau shall have throughout the country in relation to the inquiry into, and investigation of, such offences, all powers of seizure, search and arrest of persons concerned in such offences and all other powers, duties, privileges and liabilities, which the police officers have in connection with the investigation of such offences. Sub-section (3) has provided that notwithstanding anything contained in the Code, any Officers of the Bureau may, subject to any orders which the Government may make in this behalf, exercise any of the powers of an Officer-

in-Charge of a police station in the area in which he is for the time being and when so exercising such powers shall subject to any such orders as aforesaid, be deemed to be an Officer-in-Charge of a police station discharging the functions of such an officer within the limits of his station. And pursuant to the provisions of sub-section (1) of section 3, a schedule has been appended to the Act, 1957 and in clause (c) of the schedule, section 409 of the Penal Code has clearly been mentioned (in the schedule of the Act, 1957, in the book published by Dhaka Law Reports under the title as 'The Special Powers Act and Anti-Corruption Commission Act with some other allied laws, Eight Edition, 2007; section 409 of the Penal Code has not been printed, but in the East Pakistan Code, sections 403 to 409 of the Penal Code, have been clearly mentioned in the schedule. We have checked whether section 409 of the Penal Code was omitted subsequently from the schedule of the Act, 1957, but we have not found any such omission. It may be stated that in sections 4 and 5 of the Act, 1957, some offences have been contemplated and the punishments for commission of such offences have also been provided there; in the schedule, in clause (a), it has been mentioned "Offences under this Act," offences under other laws have been mentioned from clauses (b) to (j). From the impugned judgment, it appears that the learned Judges took the view that as the offence under section 409 of the Penal Code was not an offence under the Act, 1957, but specified in the schedule thereto, the provisions of sub-section (3) of section 38 of the Ain, 2004 was not applicable. The learned Judges took the further view that the provisions of sub-section (3) of section 38 of the Ain, 2004 was applicable only in respect of the cases under the Act, 1957 which were "under enquiry, investigation and pending for sanction" immediately before the repealing of the Act. In holding so, the learned Judges gave stress on the words "Offences under this Act" as specified in clause (a) of the schedule to the Act, 1957. The learned Judges totally failed to consider that schedule to the Act, 1957 was appended pursuant to section 3(1) of the Act. To us it appears that the words "Offences under this Act" were mentioned in the schedule as some offences were contemplated in sections 4 and 5 of the Act and punishments for such offences were also provided there. And, if in the schedule to the Act, 1957 "Offences under this Act" would not have been mentioned, the offences as contemplated in sections 4 and 5 of the Act, 1957, would have been left out of the purview of enquiry into and investigation by the Bureau, because of the language used in the sub-section (1) of section 3. And such an omission would have created a serious contradiction in between sections 3(1), 4 and 5 of the Act and the schedule appended thereto and would have also created confusion in the mind of the investigating authority, namely: the Bureau to enquire and investigate about the offences contemplated in sections 4 and 5 of the Act, 1957. Schedule appended to a statute cannot be isolated from the statute, particularly, when the same is appended pursuant to the provisions of the statute, here section 3(1) of the Act, 1957, so it must be treated as a part of the statute. In interpreting the words/ expression or a terminology used in a particular section of a statute or in the schedule appended thereto, the other provisions of the statute have to be taken into consideration so that such interpretation cannot make any part or provision of the statute meaningless, nugatory and ineffective. A cohesive reading of sections 3, 4 and 5 of the Act,1957 with the schedule thereto, it appears to us that the whole object of the legislature behind the enactment of the Act, was to enquire into and investigate of the offences effectively under sections 4 and 5 of the Act, 1957 and also under other laws as specified in the schedule thereto by the Bureau. And section 409 of the Penal Code being in the schedule to the Act, 1957, it was definitely a part thereof and an offence under the Act. Therefore, the

learned Judges were absolutely wrong in holding that sub-section (3) of section 38 of the Ain, 2004 was not applicable in respect of the investigation of the instant case as section 409 of the Penal Code was not an offence under the Act, 1957.

13. The learned Judges took similar view as to the applicability of section 32 of the Ain, 2004 in case of an offence under section 409 of the Penal Code. The learned Judges held that section 409 of the Penal Code is not an offence under the Ain, 2004, but an offence under other laws specified in the schedule thereto and that there is "clear difference between the offences under the Ain and the offences under other laws specified in the schedule of the Ain."

14. Section 32, as it stands today, is not the one when the Ain, 2004 was enacted, it had been substituted by the Act VII of 2004 with effect from 18th April, 2007. We consider it beneficial to quote both the forms of the section, i.e. original 32 and substituted section 32 to see whether the learned Judges were correct in taking the said view.

Original section 32:

"৩২। মামলা দায়েরে কমিশনের অনুমোদনের অপরিহার্যতা।-(১) ফৌজদারি কার্যবিধিতে বা আপাততঃ বলবৎ অন্য কোন আইনে যাহা কিছুই থাকুক না কেন, এই আইনের অধীন মামলা দায়েরের ক্ষেত্রে কমিশনের পূর্বানুমোদন গ্রহণের প্রয়োজন হইবে এবং এই আইনের অধীন মামলা দায়েরের ক্ষেত্রে কমিশন কর্তৃক প্রদত্ত অনুমোদন পত্রের একটি কপি মামলা দায়েরের সময় আদালতে দাখিল করিতে হইবে।

(২) অনুমোদন প্রদান পদ্ধতি বিধিদ্বারা নির্ধারিত হইবে।"

The substituted section 32:

"৩২। কমিশনের অনুমোদন অপরিহার্যতা।-(১) ফৌজদারি কার্যবিধি বা আপাততঃ বলবৎ অন্য কোন আইনে যাহা কিছুই থাকুক না কেন, কমিশনের অনুমোদন (sanction) ব্যতিরেকে কোন আদালত এই আইনের অধীন কোন অপরাধ বিচারার্থ আমলে গ্রহণ (cognizance) করিবে না।

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

15. From a reading of original section 32 of the Ain, 2004 shows that necessity of prior sanction of the Commission in order to file a case in respect of an offence under the Ain was mandatory and it was also mandatory to file a copy of the sanction of the Commission at the time of filing the case. And except original section 32 as quoted hereinbefore, there was no other provision in the Ain, 2004 as to the necessity of the sanction of the Commission for taking cognizance of an offence under the Ain, 2004 by a Special Judge. It is needless to mention that the Act, 1958 was enacted for more speedy trial and more effective punishments of certain offences and the petitioner and the other accused being bank officials are public servants and the offence allegedly committed by them being under section 409 of the Penal Code was exclusively cognizable and tribale by the Special Judge under the Act, 1958. Section 6(5) of the Act, 1958 clearly provided that notwithstanding anything contained in the Code or any other law, previous sanction of the Government shall be required for the prosecution of a public servant for an offence under the Act, and such, sanction shall be sufficient for the prosecution of a public servant for an offence tribale under the act. The section further provided that in case, where the complaint or report referred in sub-section (1) of section 4 of the Act, 1958 was not accompanied by such sanction, the special judge shall, immediately, on receipt of the complaint or report, address, by letter, to the Government, in the matter, and if the required sanction is neither received nor refused within sixty days of the receipt of the letter by the Government, such sanction shall be deemed to have been duly accorded. This provision was repealed on 18-5-2004 by Act, XX11 of 2004. This was repealed rightly because with the coming into force of the Ain, 2004 on 9-5-2004,

the Act, 1957 by which the Bureau was created to enquire into, and investigate of, offences relating to corruption and subsequently, inserted words "and certain other offences" by Act 1 of 1974 and for making provisions for enquiry into the pecuniary resources of certain persons for more effective prevention of corruption stood repealed on 9-5-2004. And after the repeal of the Act, the Government could not have any control in any manner whatsoever over the Commission which would in effect destroy its independence. When the FIR was lodged by the police on 17-12-2003 giving rise to the instant case, original section 32 of the Ain, 2004 was not in existence, so the question of application of original section 32 to the instant case does not arise at all. Original section 32 was substituted on 18th April, 2007 by Act, VII of 2007. In sub-section (1) of the substituted section 32, it has been provided that notwithstanding anything contained in the code or any other law for the time being in force, no Court shall take cognizance of any offence under the Ain, 2004 without the sanction of the Commission. Sub-section (2) of the section has further provided that after completion of investigation of an offence under the Ain, 2004 and before submission of the report the investigation officer shall obtain prior sanction of the Commission and a copy of such sanction of the Commission shall be filed with the report.

16. In the Ain, 2004, only sections 26 and 27 have spoken about the commission of some offences under the circumstances stated therein and punishments have been also provided for such offences. In the schedule to the Ain, 2004, the offences have been mentioned about which only the Commission shall have the right to enquire and investigate. Like the Act, 1957, in the Ain, 2004, neither the offence has been defined nor has it been sailed that the offence means the offence under the Ain. If it is interpreted that prior sanction of the Commission to take cognizance by the Special Judge and to submit report by the investigation officer after completion of investigation shall be necessary only in respect of the offences as contemplated in sections 26 and 27 of the Ain, 2004 because of the language used in section 32 thereof to the effect "এই আইনের অধীন" Then the mentioning of offences under other laws in the schedule to the Ain, 2004 becomes absolutely meaningless and nugatory as well. From the substituted section 32 of the Ain, 2004 and the schedule appended thereto it is clear that like the schedule to the Act, 1957 the words "----কোন আদালত এই আইনের অধীন কোন অপরাধ বিচারার্থ" "এই আইনের অধীন কোন অপরাধের তদন্ত পরিসমাপ্ত হইবার পর" "এই আইনের অধীন অপরাধ সমূহ," respectively have been used in sub-sections (1), (2) thereof and the schedule thereto. For the same reasons as assigned by us in discarding the view taken by the High Court Division that section 409 of the Penal Code was not an offence under the Act, 1957, but the offences under other laws specified in the schedule thereto, we also discard the view of the High Court Division that section 32 of the Ain, 2004 is applicable only in case of an offence under the Ain, 2004 and not in respect of the offences under other laws mentioned in the schedule thereto. Further reason is the language used in clause (ক) of section 17 of the Ain, 2004 which the learned Judges totally failed to consider. Section 17 of the Ain, 2004 reads as follows:

"১৭। কমিশনের কার্যাবলী।–কমিশন নিম্নবর্ণিত সকল বা যে কোন কার্য সম্পাদন করিতে পারিবে, যথাঃ–

(ক) তফসিলে উল্লেখিত অপরাধসমূহের অনুসন্ধান ও তদন্ত পরিচালনা;

(খ) অনুচ্ছেদ (ক) এর অধীন অনুসন্ধান ও তদন্ত পরিচালনার ভিত্তিতে এই আইনের অধীন মামলা দায়ের ও পরিচালনা;

(গ) দুর্নীতি সম্পর্কিত কোন অভিযোগ স্বউদ্যোগে বা ক্ষতিগ্রস্ত ব্যক্তি বা তাহার পক্ষে অন্য কোন ব্যক্তি কর্তৃক দাখিলকৃত আবেদনের ভিত্তিতে অনুসন্ধান;

(ঘ) দুর্নীতি দমন বিষয়ে আইন দ্বারা কমিশনকে অর্পিত যে কোন দায়িত্ব পালন করা;

(ঙ) দুর্নীতি প্রতিরোধের জন্য কোন আইনের অধীন স্বীকৃত ব্যবস্থাদি পর্যালোচনা এবং কার্যকর বাস্তবায়নের জন্য রাষ্ট্রপতির নিকট সুপারিশ পেশ করা;

(চ) দুর্নীতি প্রতিরোধের বিষয়ে গবেষণা পরিকল্পনা তৈরী করা এবং গবেষণালব্ধ ফলাফলের ভিত্তিতে করণীয় সম্পর্কে রাষ্ট্রপতির নিকট সুপারিশ পেশ করা;

(ছ) দুর্নীতি প্রতিরোধের লক্ষ্যে সততা ও নিষ্ঠাবোধ সৃষ্টি করা এবং দুর্নীতির বিরুদ্ধে গণসচেতনতা গড়িয়া তোলার ব্যবস্থা করা;

(জ) কমিশনের কার্যাবলি বা দায়িত্বের মধ্যে পড়ে এমন সকল বিষয়ের উপর সেমিনার, সিম্পোজিয়াম, কর্মশালা ইত্যাদি অনুষ্ঠানের ব্যবস্থা করা;

(ঝ) আর্থ-সামাজিক অবস্থার প্রেক্ষিতে বাংলাদেশে বিদ্যমান বিভিন্ন প্রকার দুর্নীতির উৎস চিহ্নিত করা এবং তদনুসারে প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য রাষ্ট্রপতির নিকট সুপারিশ পেশ করা;

(ঞ) দুর্নীতি অনুসন্ধান, তদন্ত, মামলা দায়ের এবং উক্তরূপ অনুসন্ধান, তদন্ত ও মামলা দায়েরের ক্ষেত্রে কমিশনের অনুমোদন পদ্ধতি নির্ধারণ করা; এবং

(ট) দুর্নীতি প্রতিরোধের জন্য প্রয়োজনীয় বিবেচিত অন্য যে কোন কার্য সম্পাদন করা।"

17. In section 17, the functions of the Commission have been enumerated. In clause (ক) thereof, it has been clearly stated that the enquiry into and the investigation of, offences mentioned in the schedule to the Ain, 2004 shall be conducted by the Commission. Therefore, it would be an absurd interpretation that no prior sanction of the Commission would be required in taking cognizance of an offence mentioned in the schedule to the Ain, 2004 by the Special Judge as provided in sub-section (1) of section 32 and that no sanction would be required before submitting any report by the investigation officer after completion of investigation of the offences mentioned in the schedule to the Ain as provided in sub-section (2) of section 32 other than the offences under the Ain, 2004.If the view of the High Court Division is accepted, it will give an anomalous situation. Not only that another authority has to be established to give sanction to take cognizance by the Special Judge constituted under the Act, 1958 and also to give sanction for submission of the report by the investigation officer in respect of the offences under other laws mentioned in the schedule to the Ain, 2004 within the meaning of substituted section 32, though those offences shall be enquired into and investigated by the Commission or by any of its authorized officer, as presently there is no such other authority. In this regard, clause (ঞ) of section 17 of the Ain, 2004 may also be referred to which shows that 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. Then, how come that without sanction of the Commission the Special Judge shall take cognizance of an offence under other laws mentioned in the schedule to the Ain, 2004 and the investigation officer shall submit his report without the sanction of the Commission as well.

18. Our view gets much more strength from the fact that pursuant to the provisions of section 34 of the Ain, 2004, the Commission framed bidhi and published the same in the official gazette on 29th March, 2007 corresponding to I5th chaitra, 1413 BS under the nomenclature Durnity Daman Commission Bidhimala, 2007, in short, the Bidhimala and in the Bidhimala, detailed procedures have been laid down as to the filing of complaint in respect of the offences mentioned in the schedule to the Ain, 2004 in the district or the Divisional office of the Commission or in its head office and as to how that shall be disposed of, how a complaint lodged with the police station about the commission of an offence mentioned in the schedule to the Ain, 2004, shall be disposed of, the

sorting out (যাচাই বাছাই) of the complaint in respect of the offences mentioned in the schedule to the Ain, 2004, the procedure of enquiry, time limit for the completion of enquiry by the officer of the Commission and extension thereof if enquiry cannot be completed within the time, the procedure for holding investigation and the submission of report by the investigation officer. 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 offence mentioned in the schedule to the Ain, 2004 is proved against any person after completion of investigation. Subbidhi (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. In the Bidhimala, no difference has been made as to the offences under the Ain, 2004 and the offences under other laws mentioned in the schedule thereto in the matter of prior sanction of the Commission in taking cognizance of an offence by a Special Judge or filing of report by an investigation officer.

19. We conclude by saying that since section 409 of the Penal 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. Therefore, sub-section (3) of section 38 of the Ain, 2004 was applicable in respect of the investigation of offence under section 409 of the Penal Code. And in the case of the 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.

20. Now, the next question is whether the offences mentioned in the schedule to the Ain, 2004 shall be investigated only by the Commission and it came into force on 9-5-2004 or by the police who had been investigating the case prior to the coming into force of the Ain, 2004.

Section 20 of the Ain, 2004 reads as follows:

"২০। তদন্তের ক্ষমতা।

(১) ফৌজদারি কার্যবিধিতে যাহা কিছুই থাকুক না কেন, এই আইনের অধীন ও উহার তফসিলে বর্ণিত অপরাধসমূহ কেবলমাত্র কমিশন কর্তৃক তদন্তযোগ্য হইবে।

(২) উপ-ধারা (১) এ উল্লিখিত অপরাধসমূহ তদন্তের জন্য কমিশন, সরকারি গেজেট প্রজ্ঞাপন দ্বারা, উহার অধঃস্তন কোন কর্মকর্তাকে ক্ষমতা প্রদান করিতে পারিবে।

(৩) উপ-ধারা (২) এর অধীন ক্ষমতাপ্রাপ্ত কর্মকর্তার, অপরাধ তদন্তের বিষয়ে, থানার ভারপ্রাপ্ত একজন কর্মকর্তার ক্ষমতা থাকিবে।

(৪) উপ-ধারা (২) ও (৩) এর বিধান সত্ত্বেও, কমিশনারগণেরও এই আইনের অধীন অপরাধ তদন্তের ক্ষমতা থাকিবে।"

21. The learned Judges as it appears from the impugned judgment without considering the provisions of section 20 simply observed that "As the Ain came into force at the later stage of investigation of the case, the provision of section 20 of the Ain relating to investigation of the offence by the Commission or by any officer authorized by the Commission had no application."

22. Sub-section (1) of section 20 starts with a non-obstante clause that notwithstanding anything contained in the Code, the investigation of the offences under the Ain, 2004 and the offences mentioned in the schedule thereto shall be investigated only by the Commission. In sub-section (2) of the section, it has been clearly spelt out that the Commission shall have the authority to empower any of its subordinate

officers by a Gazette notification to investigate into any of the offences mentioned in sub-section (1). Sub-section (3) of the section has further provided that the officer so empowered shall have the powers of an Officer-in-Charge of a Police Station to investigate the case. Section 409 of the Penal Code is very much in the schedule to the Ain, 2004. The language used in sub-section (1) of section 20, is so clear that there is no scope of making any difference as to the stage in respect of investigation of a case, which is in the schedule to the Ain, 2004 dividing it as at initial stage or "at the later stage" as observed by the learned Judges. Admittedly, the case was under investigation when the Ain, 2004 came into force. In this regard, it is also necessary to point out that the Ain, 2004 came into force on 9-5-2004 and the police report under section 173 of the Code was submitted on 29-10-2004, i.e. long after 5(five) months of coming into force of the Ain, 2004. In taking the view as quoted hereinbefore, the learned Judges totally failed to consider the language used in sub-section (1) of section 20 to the effect "ফৌজদারি কার্য বিধিতে যাহা কিছুই থাকুক না কেন, এই আইনের অধীন ও উহার তফসিলে বর্ণিত অপরাধসমূহ কেবলমাত্র কমিশন কর্তৃক তদন্তযোগ্য হইবে।" In view of the unambiguous and clear language used in sub-section (1) of section 20 of the Ain, 2004 read with sub-section (3) of section 38 thereof, 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, instead the police continued with the investigation and submitted the report on 29-10-2004 under section 173 of the Code in flagrant violation of the said provisions of the Ain. Therefore, the report submitted by the police was not a report in the eye of law and on such report, the Senior Special Judge could not take cognizance of the offence under section 409 of the Penal Code against the petitioner and the two other accused.

23. In view of the discussions made above, our answers to question No.(i) and first part of question No.(ii) as formulated hereinbefore are in the affirmative and second part of question Nos. (ii) and (iv) are in the negative.

24. The learned Judges further held that since sub-section (5) of section 6 of the Act. 1958 was repealed on 18-4-2004 by Act XXII of 2004, therefore" at the time of submission of police report, on 29-10-2004 prior sanction of the Government for prosecuting the accused was not required under the law in existence." So, taking of cognizance of the offence under section 409 of the Penal Code against the petitioner by the Senior Special Judge on 12-3-2005 in the absence of any sanction was not illegal or without lawful authority. In view of our findings that continuation of the investigation of the case in question by the police after coming into force of the Ain, 2004 was illegal and without jurisdiction, the question as to whether prior sanction of the Government or the Commission was required for taking cognizance by the Senior Special fudge against the petitioner in view of the repeal of sub-section (5) of section 6 of the Act, 1958 as formulated in question No.(iii) has become academic in view of the substituted section 32 of the Ain, 2004 as discussed earlier, therefore, we are not inclined to waste our time in deliberating upon the same. As we have held that the 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, now there is no other alternative but to get the case investigated afresh by the Commission, no answer to question No.(v) is called for.

25. For the discussions made hereinbefore, we hold that the learned Senior Special Judge,

Sylhet acted illegally and without jurisdiction in taking cognizance of the offence under section 409 of the Penal Code against the petitioner and other two accused, on the basis of the report, filed by the police under section 173 of the Code and the High Court Division also erred in affirming the same. However, in view of the fact that the case was initiated as back as on 17-12-2003, we instead of granting leave in the matter, consider it proper to dispose of the petition finally.

Accordingly, this petition is disposed of the following terms:

(a) The order dated 12-3-2005passed by the Senior Special Judge Sylhet in Special Case No.l of 2005 taking cognizance against the petitioner and the other accused under section 409 of the Penal Code and the impugned judgment and order passed by the High Court Division in affirming the same are set-aside.

(b) The report submitted by Sub-Inspector of police, Md Moinul Islam of Kotwali police station on 29-10-2004 in the case under section 173 of the Code of Criminal Procedure is declared to be no report in the eye of law and the same is quashed.

(c) The Senior Special Judge, Sylhet is directed to send the case records to the District office of the Durnity Daman Commission, Sylhet for investigating of the case afresh by it as per the provisions of the Ain, 2004 and the Bidhimala framed thereunder keeping in view of the observations and the findings given by this Court in the judgment.

Ed.

Appellate Division
(Civil)

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

Judgment
April 3rd, 2011.

Kartic Das Gupta .....Petitioner

vs

Election Commission of Bangladesh and others .....Respondents*

Constitution of Bangladesh, 1972
Article 102(2)

Writ-petition in question could not be termed as a public interest litigation. The first and primary duty of the writ Bench is to see whether writ petition itself is maintainable in law or whether the writ petitioner has go-any interest in the matter which if not protected he shall suffer injury. .....(12)

Voter List

Because of wrong description of a voter or wrong inclusion of a person in the voter list, the existing voter list shall not be rendered invalid, so election of the Pourashavas could very much be held under the old voter list prepared in 2007. .....(12)

Constitution of Bangladesh, 1972
Article 102(2)

After the election has been held the only way to challenge the same is by way of filing an election petition before the Election Tribunal. .....(12)

Kazi Mukhlesur Rahman vs Bangladesh, 26 DLR (AD) 44 ref.

*Civil Petition for Leave to Appeal No.511 of 2011

(From the judgment and order dated the 15th day of February, 2011 passed by the High Court Division in Writ Petition Nos. 9748 of 2010 and 601 of 2011).

Ahsanul Karim, Advocate instructed by AKM Shahidul Huq, Advocate-on-Record—For the Petitioner.

Fida M Kamal, Senior Advocate instructed by Syed Mahbubar Rahman, Advocate-on-Record—For Respondent Nos. 11-13.

AJ Md Ali, Senior Advocate instructed by Taufique Hossain, Advocate-on-Record—For Respondent No. 10.

None Represented—For Respondent Nos.1-9 & 14-16.

Judgment

Md Abdul Wahhab Miah J: This petition for leave to appeal is directed against the judgment and order dated the 15th day of February, 2011 passed by the High Court Division in Writ Petition No.9748 of 2010 disposing of the same along with Writ Petition No.601 of 2011 with certain directions upon the Election Commission.

2. The petitioner filed the above mentioned writ petition before the High Court Division making the following prayer:

> "(A) Issue a Rule Nisi calling upon the respondents to show cause as to why the notification under Notification (sic) vide Memo No. নিকস/(১/১(২৪)/২০১০/১৬৯ dated 2-12-2010 issued by the respondent No.1 under the sign (sic) of respondent No.8 for holding Pourashava Election including the names of Pourashavas namely Cox's Bazaar Sadar, Chakoria, Tecknaf and Moheshkhali for holding election fixing the date on 19-1-2011 without preparation of fresh voter list excluding the Rohingas should not be declared to have been included without lawful authority and is of no legal effect and why the respondents should not be directed to prepare a fresh voter list excluding the names of the Rohingas."

3. The writ-petitioner claimed in the writ petition that he was a voter of Cox's Bazaar Municipality with voter No.2213-7336-2050. The cause of action to file the writ petition as it appears from the statements made in the writ petition was that in exercise of power as conferred by section 17 of the Local Government (Pourashava) Act, 2009 and rule 4 of the Local Government (Pourashava) Election Rules, 2010 a final voter list was required to be prepared and published by the Election Commission for every Pourashava for holding election but the Election Commission without preparing and publishing such voter list announced the election schedule for the election of 4(four) Pourashavas, namely, Cox's Bazaar Sadar Pourashava, Chakoria Pourashava, Tecknaf Pourashava and Moheshkhali Pourashava by the impugned notification dated 2-12-2010 (Annexure-F to the supplementary affidavit filed by the writ petitioner). Further grievance of the petitioner was that many Rohingas who are not Bangladeshi citizens were included in the voter list prepared in the year, 2007 under which the elections of the Pourashavas in question were going to be held, so he felt aggrieved and filed the writ petition.

4. From the impugned judgment it appears that another writ petition being No.601 of 2011 was filed by one Mazbah Uddin complaining same grievance.

5. A Division Bench of the High Court Division after hearing the writ petitions analogously disposed of both the Rules by the impugned judgment and order directing the Election Commission to initiate process immediately under section 7(2) of Act No.6 of 2009 towards deletion of the names of the Rohingas from the finally published Electoral Rolls of 2007-2008 of Cox's Bazaar Sadar Pourashava, Chakoria Pourashava, Tecknaf Pourashava and Maheshkhali Pourashava under the District of Cox's Bazaar and also the Electoral Rolls of 2009-2010 of Moheshkhali Pourashava in accordance with law and to complete the said process within a period of 6(six) months from the date of receipt of the judgment. The High Court Division further directed the Election Commission to intimate the fact of completion

of the said process through the office of the Registrar. The High Court Division also observed that the qualified persons who are, however, entitled to be enlisted in the electoral roll may have their names included in the electoral roll in compliance with section 10 of Act No.6 of 2009.

6. The petitioner being aggrieved by the disposal of Writ Petition No.9748 of 2010 in the above terms has filed this Civil Petition for Leave to Appeal before this Court.

7. Before considering the submissions of the learned Counsel for the petitioner we like to state about the development which took place in the matter before final hearing of the writ petition in question.

8. From the judgment it is clear that at the time of issuance of the Rule operation of the impugned notification declaring the election schedule for holding the election of the above mentioned 4(four) Pourashavas was stayed by the High Court Division. Subsequently, this Court stayed operation of the said *ad-interim* order passed by the High Court Division in the writ petition and then the Election Commission announced fresh election schedule and as per the fresh schedule elections of all the 4(four) Pourashavas mentioned above have already been held on 27-2- 2011.

9. Mr Ahsanul Karim, learned Advocate, appearing for the petitioner, has submitted that when the High Court Division found that it was necessary to prepare a fresh voter list after excluding the names of the Rohingas pursuant to the provisions of section 11(2) of Act No.6 of 2009 the election of the Pourashavas in question having been held under the voter list prepared in 2007 the elections of all the Pourashavas have been vitiated and, as such, the result of the elections of the 4(four) Pourashavas in question was bound to be declared to have been held without lawful authority and is of no legal effect, but the High Court Division on an erroneous approach of the case declared the election of the 4(four) Pourashavas, namely, Cox's Bazaar Sadar, Teknaf, Moheshkhali and Chokaria as valid and lawful and, as such, the impugned judgment and order calls for interference by this Court by way of granting leave.

10. Mr Fida M Kamal, learned Counsel, appearing for respondent Nos.11-13 and Mr AJ Mohammad Ali, learned Counsel, appearing for respondent No. 10, on the other hand, have contended that the whole purpose to file the writ petition by the petitioner was to stop the process of election of the 4(four) Pourashavas, namely, Cox's Bazaar Sadar Pourashava, Chakoria Pourashava, Tecknaf Pourashava and Maheshkhali Pourashava, and in the meantime the election of all the four Pourashavas having been held the writ petition became infructuous, consequently, the petitioner has no reason to be aggrieved by the impugned judgment and order to file the Leave Petition, therefore, the leave petition does not deserve any consideration on merit. Mr Fida M Kamal has further contended that on merit also the petitioner had no cause to move the High Court Division against the impugned notification on the ground of invalidity of the voter list, as section 14 of Act No.6 of 2009 has made it very clear that a voter list shall not be declared illegal on the ground of wrong description of a person or inclusion of someone who is not entitled to be included therein.

11. From the judgment of the High Court Division it appears that the learned Judges mooted the following question for their consideration, namely, "Whether Pourashava election of Cox's Bazaar held by the Election Commission allegedly with defective electoral roll without publishing final voter list as is required under section 7(4) of the Act No.6 of 2009; for having included Rohingas as voters in the respective areas in violation of section 7(l)(ka) of the Act No.6 of 2009, and also for having not prepared separate electoral roll for Pourashava

in compliance of "স্থানীয় সরকার (পৌরসভা) নির্বাচন আইন (Act 58 of 2009) can be termed as lawful" and after answering the question in the affirmative spent much of their energy on the point raised by the petitioner that without preparing a fresh voter list excluding the Rohingas who are not citizens of the country the holding of elections of the 4(four) Pourashava was illegal. The High Court Division also took the view that although the elections of the 4(four) Pourashavas were held because of the order of stay passed by this Court first part of the Rule did not become infructuous and then decided the question of *locus standi* of the petitioner in maintaining the writ petition in the affirmative. This view of the High Court Division is not correct. From the prayer of the writ petition as has been quoted hereinbefore it is clear that the petitioner challenged the notice dated 2-12-2010 issued by the Election Commission announcing the election schedule of all the 4(four) Pourashavas in question. The second part of the prayer is absolutely corollary to the first part of the prayer. It is also an admitted fact that in the meantime elections of all the 4(four) Pourashavas had already been held on 27-2-2011 on the new election schedule announced by the Election Commission after the order of stay passed by this Court. We are of the view that the moment elections of the 4(four) Pourashavas were held as per the new schedule announced by the Elector Commission the writ petition became infructuous and the High Court Division should not have wasted its time deliberating on the issue of the voter list. The High Court Division failed to consider that in fact, it is the election schedule of the 4(four) Pourashavas which was challenged in the writ petition with the sole purpose to stop the holding of election but the election having been held there was no reason to proceed further with the writ petition. From the writ petition it further appears that though the petitioner claimed to be a voter of Cox's Bazaar Pourashava, he challenged the notification issued by the Election Commission for holding election in respect of 3(three) other Pourashavas as well under the Cox's Bazaar District. We are of the view that such kind of prayer in writ jurisdiction was not entertain able. In the four corners of the writ petition the petitioner did not show how he was going to be affected if election of the said four Pourashavas were held as per the schedule announced by the Election Commission.

12. From the writ petition it appears that the petitioner filed the writ petition as" public interest litigation, but we find no infringement of any fundamental right guaranteed by the Constitution of the People's Republic of Bangladesh or any other vested legal rights affecting the people at large or a section of the people. Therefore, the writ-petition in question could not be termed as a public interest litigation. In this regard the learned Judges of the High Court Division misconceived the concept of *locus standi* as observed by this Court in the case of *Kazi Mukhlesur Rahman vs Bangladesh,* reported in *26 DLR (AD) 44.* Before going into the merit of a writ petition the first and primary duty of the writ Bench is to see whether writ petition itself is maintainable in law or whether the writ petitioner has got any interest in the matter which if not protected the shall suffer injury, but in the instant case the petitioner failed to make out any such case. It is also necessary to state that in the election of Cox's Bazaar Pourashava of which the petitioner is a voter did not offer himself as a candidate for any post. Therefore, the High Court Division ought not to have entered into the merit of writ petition, thus, to waste its valuable time. Further as it appears, the High court Division totally failed to consider section 14 of Act No. 6 of 2009 which has clearly provided that because of wrong description of a voter or wrong inclusion of a person in the voter list, the existing voter list shall not be rendered invalid, so election of the pourashavas could very much be held under the old voter list prepared in 2007. We also like to add that after the election has been held the only way to challenge the same is

by way of filing an election petition before the concerned Election Tribunal.

13. For the discussions made above, we 'find no reason on the part of the petitioner to file this leave petition before this Court, consequently we find no merit in the submissions of Mr Ahsanul Karim.

Accordingly, the petition is dismissed.

Ed.

Appellate Division
(Civil)

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

Judgment
July 15th, 2012.

Aysha Siddiqua .....Petitione

vs

Fazilatunnesa and others..... ....Respondents*

Voluntary Social Welfare Agencies (Registration and Control) Ordinance (XLVI of 1961) **Section 9**

None of the circumstances and conditions stated in section 9 was prevailing and in that circumstances the registration authority had no power to dissolve the existing governing body of the samity and to form an ad-hoc committee and, as such, the formation of ad-hoc committee and the subsequent election of the governing body held by that ad-hoc committee and also the elected governing body of the samity were all illegal and all the activities of that ad-hoc committee were illegal. .....(9)

*Civil Petition for Leave to Appeal No.1326 of 2009

(From the judgment and order dated 25-3-2009 passed by the High Court Division in Civil Revision No.2944 of 2006.)

Sigma Huda, Advocate instructed by Md. Taufique Hossain, Advocate-on-Record—For the Petitioner.

Qumrul Haque Siddique, Advocate instructed by Aftab Hossain, Advocate-on-Record—For the Respondents.

Judgment

Nazmun Ara Sultana J: This Civil Petition for leave to appeal has been directed against the judgment and order dated 25-3-2009 passed by the High Court Division in Civil Revision No.2944 of 2006 discharging the rule affirming the judgments and decrees of the trial court as well as of the appellate court.

2. The respondent No.1 Ms Fazilatunnesa, as plaintiff, filed Title Suit No.132 of 1993 in the court of Senior Assistant Judge, Dumuria, Khulna against the present petitioners and others for declaration and mandatory injunction. The plaint case, in short, was that the Banachhaya Mahila Kallayan Samity was a Women Welfare Organization. The plaintiff was the first General Secretary and coordinator of the said samity since its incorporation in 1989. The said samity was registered under the Department of Women Affairs of the Government of Bangladesh and got government as well as foreign grants. The said samity was an autonomous body and had its own constitution. As per its constitution, there was a procedure for formation of General, Executive and Advisory Committees. But there was no provision for formation of any ad-hoc committee under that constitution. The General Secretary was authorised to convene any meeting. But on 14-6-1992 the District Women's Affairs officer most illegally convened an emergency meeting of the Executive Committee and formed an ad-hoc committee of five members with defendant No.l as president and defendant No.2 as general secretary. The formation of the said committee without election was illegal. The said illegal committee by holding a farce election on 28-11-

1992 formed an Executive Committee, wherein the defendant No.1 was shown as elected President, defendant No.2 as Vice President, defendant No.3 was shown as General Secretary and defendant Nos.6 and 7 were shown as members of the Executive Committee. That the said newly formed committee was absolutely illegal and the plaintiff was not bound by any decision taken by that illegal committee. That the plaintiff raised an objection against the activities of that illegal Executive Committee and as a result, at the initiative of the donors association an enquiry was held and the plaintiff was recommended to be kept as a non-voting member of the executive committee. That the defendant No.3 treating herself as General Secretary took steps for shifting the office of the samity to her own residence without the permission of the donors association which was also illegal. That the defendant No.1 as the president of that illegal committee issued a letter on 3-3-1992 suspending the plaintiff and thereafter issued a show cause notice on 7-3-1993 for her dismissal on some false allegations. That the said notice was illegal as the defendant No.1 had no authority to issue such show cause notice upon the plaintiff. That the previous committee wherein the plaintiff was General Secretary was still in existence as per law and the defendant did not have any right to amend the constitution of the association. That the formation, activities and the orders passed by that illegal committee were all illegal and, as such, the plaintiff filed the suit for declaration that she was still the General Secretary of the committee and also for mandatory injunction for her reinstatement to her previous office.

3. The defendant Nos.1 and 3 contested the suit by filing written statement denying all the allegations made in the plaint. The material case of these contesting defendants was that Banachhaya Mohila Kallayan Samity was registered under Voluntary Social Welfare Agencies (Registration and Control Ordinance) 1961 (Ordinance No. XLVI of 1961) in the year 1989. That as per section 9 of that Ordinance No. XLVI of 1961, the executive committee of any organization could be suspended and an ad-hoc committee could be formed and as per section 9(3) of the said ordinance the said ad-hoc committee would have power to run the organization. That since four members of the previous committee of Banachhaya Mohila Kallayan Samity resigned and the plaintiff was removed from the post of General Secretary for the mismanagement created by her in the samity an ad-hoc committee was formed and this ad-hoc committee held election on 28-11-1992 and the new executive committee was formed on 30-11-1992 with six members. Thereafter on 28-2-1992 this executive committee held its first meeting wherein the plaintiff was present. That plaintiff's son Kamrul Islam as the project co-ordinator of WDP project obtained salary as well as house rent from the fund of the samity which was illegal. That the newly formed committee obtained a number of allegations against the plaintiff and accordingly a meeting was held on 28-2-1993 and a decision was taken to take action against the plaintiff and accordingly a show cause notice was issued against her and since her reply was not satisfactory the plaintiff was suspended from the office of the samity on 3-3-1999. Thereafter a show cause notice was served upon the plaintiff on 7-3-1993 and an enquiry was held into allegations against the plaintiff and considering the report of the enquiry committee together with the unsatisfactory reply of the plaintiff, she was finally dismissed on 1-6-1993. That the suit was filed on false allegations and, as such, was liable to be dismissed with cost.

4. The trial court decreed the suit by the judgment and order dated 30-6-1996. The appellate court affirmed that judgment and decree of the trial court.

5. Being aggrieved the contesting defendants preferred the above mentioned Civil Revision No. 2944 of 2006 before the High Court Division and obtained rule. A Single Bench of the High Court Division, after hearing both the parties, discharged that rule holding that though under section 9 of Voluntary Social Welfare Agencies (Registration and Control Ordinance), 1961 registration authority has got power to suspend the governing body and to form an ad-hoc committee of any such organization but in the present case there was no circumstances as mentioned in this section 9 of this Ordinance of 1961 prevailing for suspending the governing body of the samity and for forming an ad-hoc committee and, as such, the suspension of the governing body of the samity and the formation of the ad-hoc committee was illegal and consequently all the activities of this newly formed illegal committee of the samity including the removal of the plaintiff from the samity were illegal.

6. Mrs Sigma Huda, the learned advocate for the petitioner has made submissions to the effect that since the previous committee of the samity failed to run the affairs of the samity and there occurred serious mismanagement in the functions of the samity, the registration authority rightly suspended that committed and formed the ad-hoc committee in accordance with the provision of Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961; that the registration authority was very much empowered to suspend the executive committee of the samity and to form an ad-hoc committee under that provision of law and that for the greater interest of the organization and the beneficiaries, the registration authority rightly suspended the executive committee and rightly formed the ad-hoc committee as per provision of law. The learned counsel has contended that the High Court Division as well as the courts below have committed serious error of law and also injustice in decreeing the suit without considering the legal aspects and without assessing the evidence on record properly; the learned advocate has argued to the effect also that if the impugned judgments of the courts below are allowed to stand this Banachhaya Mohila Kallayan Samity will be prejudiced seriously and the very existence of this samity will be at stake.

7. Mr Qumrul Haque Siddique, the learned advocate for the respondents has made submissions supporting the impugned judgment.

8. We have considered the submissions of the learned advocates of both the sides and gone through the impugned judgment of the High Court Division as well as those of the courts below.

9. It appears that all the three courts, on proper consideration of the facts, circumstances and evidence on record and also examining the relevant law held the concurrent view that none of the circumstances and conditions stated in section 9 of voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961 was prevailing and in that circumstances the registration authority had no power to dissolve the existing governing body of the samity and to form an ad-hoc committee and, as such, the formation of ad-hoc committee and the subsequent election of the governing body held by that ad-hoc committee and also the said elected governing body of the samity were all illegal and therefore, all the activities of that ad-hoc committee were illegal.

10. Considering the facts and circumstances and evidence on record we find no error in this concurrent findings of all the three courts below.

So, we find no merit in this leave petition and hence it is dismissed.

Ed.

Appellate Division
(Civil)

Md MuzammelHossain CJ
Surendra Kumar Sinha J
Md. Abdul WahhabMiah
Syed Mahmud Hossain J
Muhammad Imman Ali J
Md. Shamsul Huda J

Judgment
October 3rd, 2012.

Agrani Bank.....
.....Appellant

vs

Anwarul Bashir Khan and others...
.....Respondents*

Code of Civil Procedure (V of 1908)
Order XXI, rule 83(1)
Artha Rin Adalat Ain (VIII of 2003)
Section 33

Under the Ain, the Artha Rin Adalat was empowered to raise money for payment of the total amount by way of mortgage or lease or private sale of the property with the permission of the Court. The expression, 'the amount of the decree may be raised' used in sub-rule (1) means the total decretal amount and not an amount which could not satisfy the decree, and no Court can grant such permission unless the entire debt can be realized by private alienation. This provision should be read subject to the provision of sub-rule (3). .....(5)

Md Zafar Ullah Chowdhury, Advocate, instructed by Sufia Khatun, Advocate-on-Record—For the Appellant: (In CA No. 105-106 of 2008).

Mahbubey Alam, Senior Advocate, instructed by Sufia Khatun, Advocate-on-Record— For the Appellants: (In CA No.107-108 of 2008).

Md Aftab Hossain, Advocate-on-Record—For Respondent No. 1 (In CA No. 105 of 2008)

None Represented—For Respondent Nos.2-4 (In CA No.105 of 2008)

Rokanuddin Mahmud, Senior Advocate, instructed by Syed Mahbubur Rahman, Advocate-on-Record—For Respondent No. 1 (In CA No. 106 of 2008).

NI Bhuiyan, Advocate-on-Record—For Respondent No.3 (In CA No.106 of 2008)

None Represented—For Respondent Nos.2 and 4 (In CA No.106 of 2008).

Rokanuddin Mahmud, Senior Advocate, instructed by Syed Mahbubur Rahman, Advocate-on-Record—For Respondent No.l (In CA No.107 of 2008)

NI Bhuiyan, Advocate-on-Record—For Respondent No.3: (In CA No.107 of 2008)

None Represented—For Respondent Nos.2 and 4 (In CA No.107 of 2008)

Md Aftab Hossain, Advocate-on-Record—For Respondent No. 1 (In CA No. 108 of 2008).

None Represented—For Respondent Nos.2-4 (In CA No. 108 of 2008)

Judgment

SK Sinha J: These appeals arise out of the same judgment and therefore they are disposed of by this judgment.

Agrani Bank obtained a preliminary decree against writ petitioner Anwarul Bashir Khan and others in Writ Petition No.5539 of 2005 on 7th May, 2001 in a suit for foreclosure being Mortgage Suit No.49 of 1997. The decree was made final on 2nd August, 2001 for a sum of Taka 24,97,31,573. In pursuance thereof, the decree holder bank put the decree into execution in Title Execution Case No.74 of 2001. In the said execution case Anwarul Bashir Khan filed an application under Order XXI, rule 83 of the Code of Civil Procedure for issuing a sale certificate in his favour in order to enable him

*Civil Appeal Nos. 105-108 of 2008.

(From the judgment and order dated 7-3-2007 passed by the High Court Division in Writ Petition Nos.5590 and 5539 of 2004).

to repay the decretal amount by selling one of the mortgaged properties situated at Gulshan. The Artha Rin Adalat rejected the prayer by order dated 14th November, 2002. Thereupon he challenged the said order in the High Court Division in Writ Petition No.6891 of 2002. The High Court Division summarily dismissed the writ petition by judgment and order dated 24th November, 2002 with a direction to the executing Court to "allow the petitioner to sell his Gulshan property first by granting necessary certificate to that effect within 3(three) months from the date of granting such certificate and for that the Court shall not be required to return the mortgage deed and/or the title documents to the petitioner before such sale."

2. Pursuant thereto the executing court issued a sale certificate on 4th April, 2004 enabling the judgment debtor to make the proposed sale of the mortgaged property. It was claimed that the judgment debtor entered into an agreement with Ragib Ali, the respondent No.l in Civil Appeal No.106 of 2006, for transfer of the said mortgaged property at a consideration of Taka 1,95,00,000 on 16th June, 2004 and a sale deed was also executed on 7th July, 2004. Ragib Ali in turn prayed in the executing Court for confirmation of the sale and to accept the value. In the mean time one Kutub Uddin, the appellant in Civil Appeal No.108 of 2008, filed an application expressing his eagerness to purchase the mortgaged property at Taka 4,00,46,250. The executing Court rejected the Ragib Ali's application and accepted the offer of Kutub Uddin. Kutub Uddin thereupon obtained a deed and prayed for delivery of possession. At this stage the judgment debtor moved Writ Petition No. 5539 of 2004 and Ragib Ali also moved Writ Petition No. 5590 of 2004 against that order. The High Court Division heard both the writ petitions analogously and made the rules absolute without, however, making any direction and/or making any declaration in terms of the rules. The decree-holder Agrani Bank and Kutub Uddin Ahmed thereupon sought leave from the judgment of the High Court Division. The leave was granted to consider whether the High Court Division was justified in making the rule absolute relying upon the judgment passed in earlier Writ Petition No. 6891 of 2002 which was apparently made in contravention of Order XXI, rule83(3) of the Code of Civil Procedure and also in violation of the principle of natural justice, inasmuch as, the direction was made without affording the Agrani Bank any opportunity of being heard.

3. The High Court Division observed that the earlier direction made by the High Court Division having not been challenged before this Division and in pursuance of that direction a sale deed having been registered, the executing Court fell in an error in not according permission of the sale in favour of Ragib Ali, and that too, without canceling the sale deed in accordance with law. It has further been observed that Ragib Ali has acquired right in the property and such right cannot be denied since he has purchased the property with prior permission of the Court; that the sale certificate reached its finality; that the acceptance of Kutub Uddin offer for purchase of the same property was also without jurisdiction and that the executing Court was under obligation to accept the sale of the mortgaged property in favour of Ragib Ali.

4. It is argued on behalf of the Agrani Bank that the bar imposed in sub-rule (3) of rule 83 of Order XXI denudes the jurisdiction of the Court or in the alternative, takes away the power of the Court to issue certificate to the judgment debtor for private sale of mortgaged-property; the executing Court is under no obligation to accord permission for sale in favour of Ragib Ali. On the other hand, it is urged on behalf of Kutub Uddin that the facts revealed that as the transaction between the judgment

debtor and Ragib Ali is far from being bonafide, the High Court Division committed fundamental error in interfering with the order of sale made in favour of Kutub Uddin which was made with prior permission of the Court and that as the price was much higher than the price said to have been offered by Ragib Ali, the High Court erred in law in not affirming the executing Court's order of sale of the mortgaged property in his favour.

5. When the judgment-debtor prayed for issuance of the sale certificate, the Artha Rin Adalat Ain, 1990 was in force under the said Ain, the Artha Rin Adalat was empowered to exercise all powers given to a Civil Court under the Code of Civil Procedure. Naturally, the provisions of the Code were applicable to a proceeding of the Artha Rin Adalat so far as they were not inconsistent with the Ain. There was no provision under the repealed Ain to issue any sale certificate of the mortgaged property in favour of a judgment-debtor. Order XXI, rule 83(1) provided for postponement of the sale for enabling the judgment-debtor to raise money for payment of the total amount by way of mortgage or lease or private sale of the property with the permission of the Court. The expression, 'the amount of the decree may be raised' used in sub-rule (1) means the total decretal amount and not an amount which could not satisfy the decree, and no Court can grant such rests on the decree. If the judgment-debtor effected the alienation with the consent of the decree-holder, the implication of such sale would be otherwise. This is because by giving consent to the private sale the decree-holder does not become a holder of the decree for payment of money which is an essential condition for the applicability of section 73 of the Code. Therefore, there is no doubt that in case of a decree for foreclosure, be it the High Court Division, or any other superior Court, it has no power to issue certificate to alienate the mortgaged property for enabling the judgment-debtor to raise money for payment of the total decretal amount by private sale without the consent of the decree-holder. The High Court Division had totally overlooked this bar and erroneously directed for the issuance of sale certificate in favour of the judgment-debtor. The direction was also exercised without affording the decree-holder bank an opportunity to defend the order and therefore, this order had no sanctity of law and the decree holder — as not bound by the said direction. Similarly, no right, title and interest in respect of the mortgaged property was conferred upon the purchaser Ragib Ali on the strength of the deed which was allegedly executed by the judgment debtor on the strength of an illegal sale certificate; it was issued in total violation of law.

7. True, the executing Court issued a sale-

was made collusively, which is apparent from the fact that it was sold at Taka 1,95,00,000 against the total decretal amount of Taka 24,97,31,573. Even if it is assumed that only one property was sold leaving aside the other two properties, in view of sale of the same property at Taka 4,00,46,250 during the relevant time it is apparent that the market value of the property was much higher than the amount shown inthe deed.

8. There is no doubt that the executing Court without following the procedures for sale oft he mortgaged property accepted the offer of Kutub Uddin and a sale deed was also executed and registered in his favour. Learned counsel failed to satisfy us the *modus operandi* of the order of the Court in accepting his offer. Though we agree with the High Court Division that the acceptance of Kutub Uddin offer was without any sanction of law, we are unable to accept the other observation that the executing Court should have proceeded in compliance the parameters set by it. There is no doubt that the appellant Kutub Uddin Ahmed is a stranger purchaser of the mortgaged property. The executing court accepted his offer ignoring the statutory provision of law for selling mortgaged property in auction.

9. The sales in favour of both Ragib Ali and Kutub Uddin were made violating the law. The High Court Division therefore erred in law in accepting the sale in favour of Ragib Ali while rejecting the other sale in favour of Kutub Uddin. The proper course would have been to sell the mortgaged property in accordance with section 33 of the Artha Rin Adalat Ain, 2003. Accordingly, we set-aside the impugned judgment and expunge the direction given by the High Court Division in Writ Petition No.6891 of 2002. The sale deeds executed in favour of Ragib Ali and Kutub Uddin Ahmed are hereby cancelled and the executing Court is directed to communicate a copy of the judgment to the concerned Sub-Register's office for taking necessary steps in the light of this judgment. The Artha Rin Adalat is further directed to sell the mortgaged property in accordance with section 33 of the Artha Rin Adalat Ain, 2003.

These appeals are disposed of with the above observations without any order as to costs.

Ed.

Appellate Division
(Civil)

ABM Khairul Haque CJ
Md Muzammel Hossain J
SK Sinha J

Judgment
February 14th, 2011.

Harun-or-Rashid .....Appellant

vs

Gulaynoor Bibi and others..... .....Respondents*

Code of Civil Procedure (V of 1908)
Section 151

The main scope for section 151 of the Code furnishes the legislative recognition of the well-established principle that every court has inherent power to act *ex debito justitiae* to do that real and substantial justice between the parties or to prevent abuse of the process of the court for which it exists. *Ex debito justitiae* according to equity, justice and good conscience is concerned with sound judicial principle and fundamental laws and judicial procedure. .....(16)

*Civil Appeal No. 94 of 2007

(From the judgment and order dated 11-4-2005 passed by the High Court Division in Civil Revision No.3951 of 2003)

Code of Civil Procedure (V of 1908)
Order VI, rule17 *read with*
Sections 115 and 151

When a court has passed an order under Order VI, rule 17 read with section 151 of the Code any person aggrieved by that order may prefer a revisional application under section 115 of the Code before the High Court Division. Section 151 contemplates the inherent power of the court, in addition and complementary to the powers expressly governed under the Code. .....(16)

Section 151

The inherent power is to be exercised in very exceptional circumstances. This power cannot be exercised disregarding the specific provision of law. .....(17)

Order VI, rule 17

Amendment of the plaint can be allowed when the proposed amendment will not change the nature, feature and character of the suit. If any party is aggrieved by the order passed by the trial Court, he may seek necessary relief invoking the specific provision of law before the competent Court. .....(19)

Section 151

When there is specific provision in the Code for a matter to be decided a Court should not exercise the inherent power to dispose of the matter. .....(18)

Raj Narain Saxena vs Bhim Sen, AIR 1966 All 84; Md Shahidur Rahman Majumder vs Sabirunnessa, 16 BLD (AD) (1996) 50 = 1 BLC (AD) 43; Reazul Hoque Molla vs Afizullah Mollah @ Shafiuddin Molla, 42 DLR (AD) 74 and Punjab Ali Pramanik vs Mohd. Mokarram Hossain, 29 DLR (SC) 185 ref.

Abul Quasem, Advocate-on-Record—For the Appellant.

Bivash Chandra Biswas, Advocate-on-Record—For the Respondent Nos.1-17.

Shaheed Alam, Advocate instructed by Syed Mahbubar Rahman, Advocate-on-Record—For the Respondent No.18.

None Represented—For the Respondent Nos.19-102.

Judgment

Md Muzammel Hossain J: This appeal by leave is directed against the judgment and order dated 11-4-2005 passed by a Single Bench of the High Court Division in Civil Revision No.3951 of 2003 discharging the Rule upon affirming the order No.386 dated 11-8-2003 passed by the learned Joint District Judge, 1st Court, Dhaka in Title Suit No.88 of 1994 allowing an application under section 151 of the Code of Civil Procedure,1908 reversing his earlier order dated 8-6-2003 rejecting the amendment applications dated 2-2-2003 and 6-5-2003 which were earlier allowed on 8-6-2003.

2. The facts for disposal of this appeal, in short, are that one Mirza Md Ashraf instituted Title Suit No.353 of 1974 in the Court of the learned Munsif, 1st Court, Dhaka for declaration of title in the suit property as described in the schedule to the plaint. The suit was subsequently transferred to the Court of learned Subordinate Judge, 1st Court, Dhaka, now the Joint District Judge, 1st Court, Dhaka and renumbered as Title Suit No.88 of 1994.

3. During pendency of the suit the plaintiff Nos.2-14, the purchasers in possession of the suit land from the original plaintiffs were added as plaintiff Nos.16-65 who are also the subsequent purchasers in possession of the suit land.

4. The original plaintiff, Mirza Md Ashraf died in 1981 leaving behind his legal heirs who were substituted on his behalf as plaintiff Nos.1(kha)-1(jha) in 1984. The suit property was recorded in the name of the added plaintiffs along with the original plaintiffs in RS record. The added plaintiff Nos.2-29 and 33-53 brought an application dated 2-2-2003 and another application dated 6-5-2003 under Order VI, rule 17 read with section 151 of the Code of Civil Procedure for amendment of the plaint and also for marking the deed dated 6-9-1971 as an exhibit in place of the earlier document.

5. The learned Joint District Judge by order dated 8-6-2003 allowed the amendment on contest for marking the document as Exhibit.7 in place of earlier document for consideration at the time of pre-emptory hearing of the suit. Thereafter the substituted plaintiffs brought an application under section 151 of the Code of Civil Procedure dated 5-7-2003 for reconsideration of its earlier order dated 8-6-2003 which was contested by the added plaintiff Nos.2-29 and 33-53. After hearing both the parties the learned Joint District Judge, 1st Court, Dhaka by the order No.386 dated 11-8-2003 reversed his earlier order dated 8-6-2003.

6. Being aggrieved by the aforesaid order passed by the learned Joint District Judge, present appellant as petitioner preferred revisional application being Civil Revision No.3951 of 2003 before the High Court Division. A Single Bench of the High Court Division by the impugned judgment and order dated 11-4-2005 discharged the Rule. The appellant being aggrieved by the impugned judgment and order passed by the High Court Division preferred the instant appeal with the leave of the Court.

7. Leave was granted to consider the submissions:

"i. That the impugned judgment and order dated 11-4-2005 passed by the High Court Division being erroneous, illegal and perverse cannot be sustained in law in the facts and circumstances of the case; that the learned Judge of the High Court Division on perusal of the applications for amendment under Order VI, rule17 of the Code of Civil Procedure Annexure-A and A(1) found that those applications have been brought by the added plaintiffs who are RS recorded tenants and in possession of the suit land as purchaser from the original owner and they were added long before the substitution of the heirs of the original plaintiff; that the defendant-petitioner have every right to make necessary amendment in the plaint if the same does not change the nature and feature of the suit land.'; that the learned Judge of the High Court Division committed error of law resulting in an error in the decision occasioning failure of justice by discharging the Rule against the order of cancellation of the order of amendment;

ii. that the order of amendment dated 8-6-2003 having been passed in contest under Order VI, rule17 of the Code of Civil Procedure against which Civil Revision having been provided by law, the Single Judge of the High Court Division has committed error of law by failing to hold and decide that the learned Joint District Judge of the trial Court had committed patent error of law by cancelling his earlier order of amendment by order dated 11.8-2003; that remedy against order of amendment having been available in law, the learned Judge of the High Court Division has committed error of law by failing to hold that relief under inherent power of the Court under section 151 of the Code of Civil Procedure had been

illegally resorted to by the Joint District Judge of the trial Court for cancelling the order of amendment and the same being erroneous and perverse cannot be sustained in law;

iii. that the High Court Division having found 'the same Court while allowing applications for amendment vide its earlier order dated 8-6-2003 found that the amendment will not affect the nature and feature of the suit,' has committed error of law by discharging the Rule by holding 'in such view of the matter I find no merit in the Rule which is liable to be discharged,' and this being self contradictory, the judgment and order of the High Court Division is liable to be set-aside; that the added plaintiffs having acquired title from the original owner plaintiff, Mirza Ashraf and they being in possession of the suit land have every right to make necessary amendment in the plaint without changing nature and feature of the plaint but the learned Joint District Judge has illegally cancelled his earlier order of amendment wrongly holding that the plaint can be amended only by the original plaintiff or his substituted plaintiffs and none else;

iv. that the original owner namely the plaintiff, Mirza Md Ashraf having sold his entire interest in the suit land before his death in 1981 his heirs, the substituted plaintiffs did not get any interest in the suit land and, as such, their names were not recorded in Mahanagar Settlement Operation; that the order of the High Court Division discharging the Rule in Civil Revision is erroneous and perverse in the facts and circumstances of the case and is liable to be set-aside for the ends of justice."

8. Mr Abul Quasem, the learned Advocate-on-Record appearing for the appellant submits that the High Court Division erred in law in passing the impugned judgment and order discharging the Rule and affirming those passed by the Trial Court because remedy against order passed by the Trial Court having been available before the High Court Division by preferring revisional application, the entertaining of an application under section 151 of the Code of Civil Procedure cancelling the earlier order of the Trial Court by the same Court is not tenable in law. In the other words, he submits that the High Court Division committed error of law in failing to hold that relief under section 151 of the Code of Civil Procedure should not be resorted to by the respondent before the Trial Court for cancelling the order of amendment dated 8-6-2003. He then submits that the High Court Division committed error of law by discharging the Rule issued at the instance of the added plaintiffs though observing to the effect that added plaintiffs have every right to make necessary amendment in the plaint if the same would not change the nature and feature of the suit. Inasmuch as the High Court Division also formed the opinion that- "in such view of the matter there is no merit in the Rule which is liable to be discharged" and thereby making self contradictory order and, as such, the impugned judgment and order passed by the High Court Division is liable to be set-aside and the appeal is liable to be allowed.

9. Mr Bivash Chandra Biswas, the learned Advocate-on-Record appearing on behalf of the respondent Nos.1-17 submits that there is no illegality in the impugned judgment and order passed by the High Court Division in discharging the Rule because the case of the co-plaintiffs cannot be amended by way of amendment, the original plaintiffs will be seriously prejudiced and as a result the trial Court vacated the earlier order of the amendment of plaint. He then submits that since the co-plaintiffs have

stepped into the shoes of the original plaintiffs and if the amendment is not made for the benefit of all the plaintiffs then that cannot be allowed and in that view of the matter the High Court Division rightly discharged the Rule and, as such, the appeal is liable to be dismissed.

10. We have heard the learned Advocates for both the parties and perused the impugned judgment and order of the High Court Division, leave granting order, concise statements and also other materials available on record.

11. It appears that the learned Joint District Judge, 1st Court, Dhaka by the order dated 8-6-2003 allowed the amendment of the plaint on contest as prayed for keeping the prayer for marking the document as Exhibit 7 in place of earlier document for consideration at the time of peremptory hearing of the suit.

12. The substituted plaintiff Nos.1(kha)-1(jha), heirs of the original plaintiffs brought an application under section 151 of the Code of Civil Procedure on 5-7-2003 for reconsideration of its earlier order dated 8-6-2003 which was contested by the added plaintiff Nos.2-29 and 33-53. The learned Joint District Judge, 1st Court, Dhaka by the order No.386 dated 11-8-2003 allowed the application under section 151 of the Code of Civil Procedure and thereby earlier order dated 8-6-2003 has been recalled.

13. Being aggrieved by the aforesaid order dated 11-8-2003 passed by the learned Joint District Judge, plaintiff-petitioner, Harunor Rashid preferred revisional application before the High Court Division and a Single Bench of the High Court Division by the impugned judgment and order dated 11-4-2005 discharged the Rule observing that adding of the plaintiffs who are the purchasers from the original plaintiffs remains unchallenged by the revisional petitioner. It appears that the High Court Division also observed that the same Court while allowing the application for amendment by order dated 8-6-2003 found that the amendment will not affect the nature and feature of the suit and accordingly High Court Division did not find any merit in the Rule and in the result the Rule was discharged.

14. The pertinent question in the instant case before us is whether the High Court Division is correct in passing the impugned judgment and order dated 11-4-2005 in discharging the Rule upon affirming the judgment and order dated 11-8-2003 passed by the learned Joint District Judge, 1st Court, Dhaka in Title Suit No.88 of 1994 allowing the application under section 151 of the Code of Civil Procedure and reversing the earlier order dated 8-6-2003 rejecting the application for amendment.

15. If any of the party is aggrieved by the order dated 11-8-2003 passed by the learned Joint District Judge allowing the prayer for amendment of the plaint, the aggrieved party can challenge the said order under section 151 of the Code of Civil Procedure for recalling the said order when there is no specific provisions of law to rectify the alleged mistake committed by the said Court. Section 151 of the Code of Civil Procedure provides as under:

> "151. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

16. The main scope for section 151 of the Code furnishes the legislative recognition of the well-established principle that every court has inherent power to act *ex debito justitiae* to do that real and substantial justice between the parties or to prevent abuse of the process of the court for which it exists. It has been well-established that *ex debito justitiae* according to equity, justice and good conscience is concerned with sound

judicial principle and fundamental laws and judicial procedure. When a court has passed an order under Order VI, rule17 read with section 151 of the Code any person aggrieved by that order may prefer a revisional application under section 115 of the Code of Civil Procedure before the High Court Division. Section 151 CPC contemplates the inherent power of the court, in addition and complementary to the powers expressly governed under the Code as held in *Raj Narain Saxena vs Bhim Sen, AIR 1966 All 84.*

17. The inherent power is to be exercised in very exceptional circumstances. This power cannot be exercised disregarding the specific provision of law. In the case of *Md Shahidur Rahman Majumder alias Md Shahidullah Majumder vs Sabirunnessa* reported in *16 BLD (AD) (1996) 50 = 1 BLC (AD) 43* this Division held that when a specific provision for appeal has been provided in the Code, the Court cannot exercise its inherent power under section 151 of the Code of Civil Procedure. In the case of *Reazul Hoque Molla vs Afizullah Mollah @ Shafiuddin Molla* reported in *42 DLR (AD) 74* this Division held that a Court of law cannot pass an order upon inherent power while acting under specific provision of law governing the disposal of the case. In the case of P*unjab Ali Pramanik vs Mohd Mokarram Hossain* reported in *29 DLR (SC) 185* where DC Bhattacharya, J observed as under:

> "81. It appears to us that the preponderant judicial view which emerges out of the authorities referred to above and with which we find ourselves in agreement, is that the Court should not presume the existence of inherent power to do that for which specific provision has been made by a statute and should not invest itself with such jurisdiction for the purpose of getting round the express provisions of the law. Unintentional or inadvertent mistake of a Court causing injustice to a party, however, stands on a different footing and in the case of such a mistake the exercise of inherent power of a Court is not subject to those limitations on its exercise which have been set down by the judicial authorities noticed above."

18. It has been established in a number of cases by the Apex Court of the sub-continent that when there is specific provision in the Code for a matter to be decided a Court should not exercise the inherent power to dispose of the matter. In view of the aforesaid discussion, we are of the view that the order dated 11-8-2003 passed by the learned Joint District Judge in recalling its earlier order dated 8-6-2003 on an application under section 151 of the Code is not tenable in law. The aggrieved party in all fairness should have invoked either review jurisdiction under section 114 or revisional jurisdiction under section 115 of the Code of Civil Procedure. Therefore, the High Court Division has erred in law in not holding that the order dated 11-8-2003 passed by the learned Joint District Judge is not tenable in law and, as such, by the impugned order dated 11-4-2005 passed by the High Court Division in Civil Revision No.3951 of 2003 Rule would have been made absolute. For the aforesaid reasons we find merit in the appeal.

19. However amendment of the plaint can be allowed when the proposed amendment will not change the nature, feature and character of the suit. In the instant suit if any party is aggrieved by the order passed by the trial Court, he may seek necessary relief invoking the specific provision of law before the competent Court.

With the above findings and observations, the appeal is allowed without any order as to cost and the impugned judgment and order is set-aside.

Ed.

General appearing for the opposite party opposing the Rule very strenuously submits that this proceeding under section 561A of the Code for quashing the proceeding as well as the conviction and sentence of the accused petitioner is not at all maintainable. He categorically submits that if any person is convicted on trial by a Sessions Judge or Additional Sessions Judge he may prefer appeal in the High Court Division invoking the provision of section 410 of the Code. But the convict petitioner under any circumstances cannot file a petition for quashing the proceeding and his conviction and sentence.

8. He also submits that though the accused was arrested after almost 10 years of the occurrence and the present proceeding was filed in 1999 but provision of section 5 of the Limitation Act for condonation of delay of any days in preferring a Criminal appeal against the conviction and sentence was also applicable. So, the convict petitioner cannot file a petition under section 561A of the Code for setting aside the conviction and sentence imposed upon him by a Sessions Judge. So, the Rule is liable to be discharged.

9. We have considered the above submissions of the learned Deputy Attorney-General appearing for the state with profound attention and have gone through the materials on record.

10. On going to the materials on record it appears that this convict petitioner was convicted under section 302/34 of the Penal Code by the Sessions Judge, Madaripur in Sessions Case No. 33 of 1987 by its judgment dated 11-5-1988. The conviction and sentence of this convict petitioner was appealable under section 410 of the Code of Criminal Procedure. Another convict Monjura Begum stands on the same footing with the petitioner has been acquitted in Criminal Appeal No. 242 of 1988 by this Court in its judgment dated 14-7-1993. The convict petitioner has taken some grounds that since co-accused has been acquitted by this Court in an appeal he should have given the same benefit from this Court and in fact the accused-petitioner in order to obtain such an order of acquittal from this Court preferred this petition under section 561A of the Code.

11. But in our opinion when there is a clear provision of appeal against the judgment of conviction and sentence of the Sessions Judge and the Additional Sessions Judge under section 410 of the Code and since the provision of section 5 of the Limitation Act is also applicable therein, as such, there was no any legal scope for the convict petitioner to prefer a petition for quashing the proceeding against his conviction and sentence. Since there is efficacious relief in preferring the appeal with a prayer for condonation of delays of any day under section 5 of the Limitation 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.

12. In our consideration the very filing of a petition under section 561A of the Code for quashing the conviction and sentence passed by a Sessions Judge where there is specific provision of application of section 5 of the Limitation Act the very continuation of such a proceeding is the abuse of the process of the Court. So, we find it difficult to discuss any more in this Rule since the Rule is not itself maintainable.

13. In the result, the Rule is discharged.

Let a copy of this judgment and order be sent to the Court concerned with the lower Courts record.

Ed.

High Court Division
(Special Original Jurisdiction)

M Moazzam Husain J
Md Badruzzaman J

Abdul Matin Sarker...
.....Petitioner

vs

Judgment
September 26th, 2013.

People's Republic of Bangladesh and others.....Respondents*

Constitution of Bangladesh, 1972
Article 102

Passport Order (PO 9 of 1973)
Articles 6 & 7

The power of the passport authority to renew the old handwritten passport or to issue new handwritten passport or MRP on surrender of the old handwritten passport is not fettered by or conditioned upon police report. Nor mere pendency of criminal cases or submission of charge-sheet against the applicant seeking renewal of his old handwritten passport by a new hand-written passport/MRP by surrender of his existing handwritten passport can be a valid ground for refusal or withholding the new handwritten passport or MRP. .....(11)

Sakib Rezwan Kabir, Advocate—For the Petitioner.

Mutahar Hossain, DAG with Samarendra Nath Biswas, AAG and Purabi Rani Sharma, AAG—For the respondents.

Judgment

M Moazzam Husain J: This Rule was issued calling upon the respondents to show cause as to why they shall not be directed to issue a Machine Readable Passport against the Delivery Slip No. 6801-0000-0079-336 replacing his handwritten passport earlier issued by the respondents.

*Writ Petition No. 7838 of 2013.

2. The facts relevant for disposal of this Rule, in brief, are that the section petitioner is a citizen of Bangladesh and he was holding a valid passport bearing No. W0488995 issued on 17-8-2004 valid till 16-8-2014. While the petitioner was so holding a valid passport a circular vide Memo No. স্বঃমঃপানীঃ (সাধারণ)-০২/১০(বহি-১)/৩৩৪ dated 27-3-2010 was issued by the Government launching machine Readable Passport (hereinafter referred to as "the MRP) offering to the citizen holding valid passport to replace their existing hand-written passport with the MRP. Thereafter, on 3-10-2010 another circular was issued by the Government saying, *inter alia*, that in case of replacement of hand written passport by the MRP no police report would be required. Thereafter by another circular dated 6-2-2011 the relaxation of police inquiry was further extended to cases of renewal saying that even in case of renewal of hand written passport and replacement of the same with MRP no police report shall be required.

3. With the above factual background the petitioner made an application on 10-2-2013 for replacement of his hand-written passport as mentioned above with an MRP having surrendered his original passport to the authority in accordance with law. Pursuant to the application made by the petitioner the passport authority issued a Delivery Slip (Annex-D) 10-2-2013 bearing No. 6801-0000-0079-336 wherein 17-3-2013 was fixed for delivery of the MRP. The petitioner having received the delivery slip was waiting for his MRP to be received on the date mentioned in the slip. In the delivery slip there was a mention that 'passport notification will be sent to the applicant's mobile phone/ email'. The date for delivery expired and thereafter quit some time elapsed but no notification of the kind was received by the petitioner. In the circumstances the petitioner sent his representative to the passport office to enquire about the matter. The person who was sent to the pass-

port office by the petitioner inquired about the development over the replacement case of the petitioner but the passport officials failed to give any satisfactory reply.

4. Meanwhile more man four months had elapsed without any positive result. Ultimately having had no other alternative the petitioner served upon the passport authority a demand of justice notice on 20-7-2013. Pursuant to the notice demanding justice respondent No.3 who happens to be one of the Deputy Director of the passport department made a reply to the legal notice on 25-7-2013 in which he stated, *inter alia*, that upon an inquiry made by special branch of police, Narshingdi it transpired that the petitioner is a charge-sheeted accused in a pending criminal case and in the circumstances the authority is unable issue any fresh passport or make replacement of the original passport with an MRP.

5. With the backdrop of facts the petitioner obtained the instant Rule seeking a direction in the form of *mandamus* upon the respondents to replace his hand written passport by an MRP.

6. Mr Sakib Rezwan Kabir, learned Advocate appearing for the petitioner submits that the issuance of the MRP to the petitioner is most illegally withheld by the authority on the ground of pendency of criminal case inasmuch as there is no bar in law on replacement of the original passport with MRP on account of mere pendency of the criminal case. He took us through a circular (Annexure-B) issued by the Ministry of Home on 3-10-2010 wherein it is clearly stated that in case of replacement of hand- written passport with an MRP no police report shall be required. He further submits that the verification requirement was further relaxed by another circular dated 6-2-2011 wherein it was stated that even in cases of renewal of hand- written passport police report shall not be required. Mr Sakib contended that the passport authority in withholding the MRP of the petitioner clearly acted in violation of law to the detriment of the petitioner's personal liberty guaranteed by the constitution itself. In the circumstances, the petitioner had no alternative other than seeking mandamus for an appropriate remedy.

7. Mr Mutahar Hossain learned Deputy Attorney-General found it difficult to defend the factum of withholding of MRP of a citizen on account of charge-sheet submitted against him in a pending criminal case.

8. We have heard the learned Advocates and perused the law and the records of the case. It appears that Articles 6 and 7 of Bangladesh Passport Order, 1973, provides certain conditions upon which the passport authority may refuse to issue passport or travel documents or vary, cancel the endorsements thereon or impound the passport already issued. Article 6 of the Order says, amongst others, that the passport authority may refuse to issue passport or travel documents if it is satisfied that the applicant is evading or likely to evade appearance in any pending proceedings against him in a criminal court or that an order prohibiting his departure from Bangladesh is made by the court. Article 7 says, *inter alia*, that the passport authority, in fit circumstances, may vary or cancel the endorsement/conditions on a passport or travel document and ask the holder of passport or travel document to deliver up such passport or travel document. Sub-Article (2) of Article 7 says, *inter alia*, that the passport authority may impound or revoke a passport or travel document if a) the passport/travel document is in wrongful possession of any person b) passport/travel document is obtained by suppression of facts and c) the passport/travel document is required to be impounded/revoked in the interest of sovereignty, integrity or security of Bangladesh or in the public interest. The passport or travel document may also be

revoked under the Order on conviction of the holder thereof for violation of any of the provisions of the Order or the Rules framed thereunder.

9. Seen in the light of the law the reply given by the passport authority in justification of their refusal to issue MRP to the petitioner as contained in Annexure-F seems to us to be grossly arbitrary and far beyond powers conferred by law. The Respondent No. 3 explained the reason for withholding of the MRP in his letter contained in Annexure-F. The primary reason for withholding/refusal as assigned by him is- পুলিশ তদন্ত প্রতিবেদনে তিনি নরসিংদী সদর থানার হত্যা মামলা নং ৬, তারিখ ৩-১১-২০১১ খ্রিঃ তারিখের ৬(১১)১১ চার্জসীটভুক্ত ৬নং আসামী উল্লেখ করে পাসপোর্ট না দেওয়ার জন্য সুপারিশ করা হয়। ১৯৭৩ সালের পাসপোর্ট আইনের আদেশ অনুসারে পাসপোর্ট আবেদনকারীর বিরুদ্ধে মামলা থাকাকালীন সময় পাসপোর্ট ইস্যু না করার জন্য উল্লেখ রয়েছে। The language of the Respondent clearly suggests that issuance of MRP was withheld on recommendation of a police officer made on the basis of pendency of a criminal case against the petitioner coupled with the satisfaction of the passport authority that the Passport Order of 1973 prohibits issuance of passport during pendency of criminal case against the applicant.

10. The Bangladesh Passport Order, 1973, including the barring clauses mentioned above nowhere mention that passport cannot be issued, renewed or handwritten passport cannot be replaced by MRP during pendency of criminal cases against an applicant or against the holder thereof. Nor is there any law empowering the passport authority to refuse replacement of handwritten passport by the MRP on mere recommendation of police. Furthermore, the circular bearing Memo No. PP (G-1) 01/10(immi.i) 1026 dated 3-10-2010 issued by the Ministry of Home clearly mentions that in cases of application for new handwritten passport or MRP by surrendering the old handwritten passport no police report shall be required. We are unable to follow from where the passport authority has found requirement of police report in cases of issuance of MRP on surrender of the handwritten passport or that the Passport Order of 1973 requires police report before replacing the handwritten passport by MRP. The factum of withholding of the MRP of the petitioner on the recommendation made by police by reference to a pending criminal case and finding legal bar on that count seem to us to be the result of total non-application of mind of the respondents to the true legal position and their cavalier attitude to the right of the citizens.

11. The power of the passport authority to renew the old handwritten passport or to issue new handwritten passport or MRP on surrender of the old handwritten passport is not fettered by or conditioned upon police report. Nor mere pendency of criminal cases or submission of charge-sheet against the applicant seeking renewal of his old handwritten passport by a new handwritten passport/MRP by surrender of his existing handwritten passport can be a valid ground for refusal or withholding the new handwritten passport or MRP.

12. The withholding the MRP of the petitioner sought on surrender of his handwritten passport on account of mere pendency of a criminal case or that a charge-sheet is submitted against him runs contrary to law and amounts to sheer dereliction of duty on the part of the respondents. A citizen's right to passport is directly linked with his/her fundamental right to 'freedom of movement' for that matter personal liberty guaranteed by the Constitution which cannot he denied, curtailed or infringed unless under strict requirement of law.

13. In view of what is stated above, we are in the view that this is eminently a fit case where interference by court is called for to protect liberty of citizens.

14. In the result, this Rule is made absolute. The Respondents are directed to issue a Machine Readable Passport (MRP) in favour of the petitioner against the Delivery Slip (Annex-D) standing in his name replacing his hand-written passport within 10(ten) working days from the date of receipt of this judgment.

There shall, however, be no order as to cost.

Ed.

High Court Division
(Criminal Revisional Jurisdiction)

M Enayetur Rahim J
Mohammad Ullah J

Abdul Mazed Vaaty (Md) @ Yusuf Vatt.....
...Accused-Petitioner
(In jail hajat)

vs

State...Opposite Party*

Judgment
January 26th, 2014.

Evidence Act (I of 1872)
Section 122

There is no presumption of law that the wife and husband constitute one person for the purpose of the criminal law. If the wife, removing the husband's property from his house does so with dishonest intention, she is guilty of theft. .....(24)

Evidence Act (I of 1872)
Section 122

The depositions/statements of PW-73, relating to the communication made to her by the accused-petitioner during subsisting their marriage, if any, will be inadmissible in evidence. .....(27)

*Criminal Revision No. 108 of 2014.

Ram Bharosey vs State of Uttar Pradesh, AIR 1954 (SC), 704; ML Varghese vs TJ Ponnan, AIR 1970 (SC), (1876); Abdul Khadar vs Taib Begum, AIR 1957 Mad 339; Quieen Empress vs Butchi, (1894) ILR 17 Mad 401 ref.

AJ Mohammad Ali, Advocate with Mohammad Ali, Advocate—For the Petitioner

Mahbuby Alam, Attorney-General with Murad Raza, Additional Attorney-General Md Momtazuddin Fakir, Additional Attorney-General MH Sarder, DAG Md Basir Ahmed, AAG Gazi Md Mamunur Rashid, AAG and Md Asaduzzaman, AAG—For the State.

Judgment

The accused-petitioner by filing an application under section 439 read with section 435 of the Code of Criminal Procedure has challenged the order dated 15-9-2013 passed by Druto Bichar Tribunal No.l, Dhaka in Druto Bichar Tribunal Case No.29 of 2011 and Druto Bichar Case No.30 of 2011 rejecting the application filed under section 122 of the Evidence Act, 1872 for expunging (সাক্ষ্য প্রত্যাখান) the evidence of PW 73 Mrs Nahid Laila Kakon, the divorced wife of the accused-petitioner.

2. The present accused-petitioner along with 16(sixteen) others have been facing trial before the Druto Bichar Tribunal No.l, Dhaka in Druto Bichar Tribunal Case No.29 of 2011 on the charges under sections 120B/324/326/307/302/201/118/119/212/217/218/330/109/34 of the Penal Code and Druto Bichar Case No.30 of 2011 on the charge under sections 3/4/6 of the Explosive Substances Act, 1908.

3. One Sharif Faruque Ahmed, Sub Inspector of Motijheel Police Station, Dhaka Metropolitan Police on 22-8-2004 lodged a First Information Report with Motijheel Police Station alleging *inter alia*, that on 21-8-2004 he

along with other police officers and forces were on duly at Banghabondhu Avenue, where a protest rally was holding as convened by Awami League. At about 17-40 hours Awami League President Sheikh Hasina concluding her speech while got down from a truck, which was used as stage, some miscreants had started blasting grenade/bombs around the said truck and as a result so many persons present in the rally received severe injuries. The injured persons were taken to different hospitals of the city. Awami League President Sheikh Hasina left the place of occurrence with the help of law enforcing agencies. Eventually, 17 (seventeen) persons succumbed to their injuries. On the basis of the said First Information Report Motijheel Police Station Case No. 97 dated 22-8-2004 under sections 326/324/307/302/34 of the Penal Code read with sections 3/4 of the Explosive Substances Act, 1908 was started.

4. The police after investigation into the case submitted 2(two) police reports (charge-sheets) on 9-6-2008. One under sections 324, 326, 120B, 109, 307, 302 and 34 of the Penal Code and the other one under sections 3, 4 and 6 of the Explosive Substance Act, 1908 against 22 accused persons including the petitioner.

5. On the basis of two charge-sheets two separate trial have been started, one under the Penal Code, number of which at present Druto Bichar. Tribunal Case No.29 of 2011 and the other one under the Explosive Substance Act 1908 number of which at present Druto Bicha Case No. 30 of 2011.

6. In the midst of trial police submitted supplementary charge-sheets on 2-7-2011 implicating new 30 accused persons in the charge-sheets in both the cases.

7. On 15-9-2013 date was fixed for examination of PW 73 Mrs Nahid Laila Kakon, the divorced wife of the present accused-petitioner.

8. On behalf of the accused-petitioner in both the cases separate applications were filed not to allow the said witness to depose and to reject/exclude/expunge the evidence of said witness on the ground that she shall not be compelled to depose against her husband during subsisting their marriage in view of the provision of section, 122 of the Evidence Act, 1872.

9. The contents of both the application runs as follows ;

বিষয়ঃ সাক্ষী নাহিদ কাকন এর সাক্ষ্য প্রত্যাখান করার আবেদন।

"দরখাস্তকারী/আসামী পক্ষ্যে বিনীত নিবেদন এই যে,

১। উপরোক্ত নং মোকদ্দমায় প্রসিকিউশন পক্ষ্যে উপস্থাপিত সাক্ষী নাহিদ লায়লা কাকন দরখাস্তকারী/আসামী আব্দুল মাজেদ ভাট এর বিবাহিতা স্ত্রী বটে।

২। যেহেতু সাক্ষ্য আইনের ১২২ ধারা মতে বিবাহ বিদ্যমান থাকাবস্থায় দাম্পত্য সময়ে স্বামী-স্ত্রীর মধ্যে যেকোন বিষয়ে একে অন্যের পক্ষে বিপক্ষে সাক্ষ্য প্রদানে আরোপিত নিষেধাজ্ঞার আওতায় উক্ত সাক্ষী প্রদান আইনের সম্পূর্ণ পরিপন্থি বিধায় উক্ত সাক্ষীর সাক্ষ্য প্রদান প্রত্যখ্যান হওয়া আবশ্যক।"

10. The learned Special Public Prosecutor for the State opposed the said prayer verbally submitting that divorce had been taken place between the accused-petitioner and the said witness (PW 73) and, as such, there is no bar to take her evidence.

11. The learned Judge of the Tribunal after hearing the respective parties by the impugned order dated 15-9-2013 rejected the said applications holding that before examining the said witness there is no scope to know about the present marital status between the accused and the said witness and thus, at this stage there is no scope to refuse to take her evidence or expunge the same.

12. Mr AJ Mohammad Ali, the learned Senior Advocate appearing with Mr Mohammad Ali, the learned Advocate for the accused-

petitioner placing the impugned order and the provision of section 122 of the Evidence Act submits that since the PW 73 is the wife of the accused-petitioner and, as such, she can not be compelled to depose against her husband, the accused-petitioner, even after the alleged divorce. He also submits that in view of Article 35 (4) of the Constitution of the People Republic of Bangladesh said witness is barred to depose against her husband because the husband and wife is to be constituted as one person.

13. Mr Mahbub Alam the learned Attorney-General appeared on behalf of the state to oppose the present application.

14. Mr Alam referring to section 122 of the Evidence Act submits that on a plain reading of the said section, it is clear that there is no scope to reject/expunge the evidence of PW 73 . The learned Attorney-General further submits that PW 73 is the former wife of the accused-petitioner as such at the present moment there is no bar to depose against her ex-husband because, the very purpose of section 122 of the Evidence act is to maintain the congenial and peaceful conjugal life in other words not to disturb the peace of families and to up hold the mutual confidence which is the most endearing solace of married life.

15. Mr Alam in support of his contention referred to the cases of *Ram Bharosey vs State of Uttar Pradesh* reported in *AIR 1954 (SC), page 704, and ML Varghese vs TJ Ponnan,* reported in *AIR 1970 (SC), page 1876.*

16. The learned Attorney-General also placed a copy of the deposition of PW 73, Nahid Laila Kakon before this court and read out the same which runs as follows:

"আমি নাহিদ লায়লা কাকন। আমি বেসরকারী স্কুলে শিক্ষকতা করি। আমার পূর্বের স্বামী আব্দুল মাজেদ ভাট ছিল। কিন্তু বর্তমানে আব্দুল মাজেদ ভাট আমার স্বামী নয়। আমার বর্তমান স্বামীর নাম মোহাম্মদ শহীদুল ইসলাম।

আমি আমার বাবা-মা এর একমাত্র সন্তান। আমার বাবা চাকুরীজীবি ছিলেন। আমার বাবা ২০০৫ ইং সনে মৃত্যু বরণ করেন। ১৯৯৭ সালে আমি সিরাজগঞ্জ সালদা ডিগ্রি কলেজ থেকে এইচ.এস.সি পাশ করি। ডিগ্রি পাশ করার পূর্বে আমার প্রেমিক নূর মোহাম্মদ ওরফে শাহনূরের সাথে পালিয়ে গিয়ে বিয়ে করেছিলাম। আমাদের দুই পরিবারের সদস্যরা বিয়ে মেনে না নেয়ায় আমাদের ডিভোর্স হয়ে যায়। ১৯৯৭ ইং সনে সিরাজগঞ্জ ডিগ্রি কলেজে কেমিস্ট্রিতে অনার্সে ভর্তি হই। আমার সহপাঠী ও আশেপাশের লোকদের কটুক্তির কারণে ঐ কলেজে যাওয়া বন্ধ করে ঢাকায় মোহাম্মদপুর কেন্দ্রীয় বিশ্ববিদ্যালয় কলেজে কেমিস্ট্রিতে অনার্সে ভর্তি হই। শিয়া মসজিদের পিছনে খালার বাসা থেকে আসা যাওয়া করি উক্ত কলেজে। খালার সাথে মনোমালিন্য হবার কারণে আমি খালার বাসা থেকে সিরাজগঞ্জে চলে আসি। পরবর্তীতে সিরাজগঞ্জ থেকে ঢাকার মোহাম্মদপুরের টাউন হলের পার্শ্বে ব্যতিক্রম মহিলা হোষ্টেলে এসে উঠি এবং ঐ হোষ্টেলে থেকে কেমিস্ট্রিতে অনার্স ফাইনাল পরীক্ষা দেই। আমার পরীক্ষার রেজাল্ট খারাপ হয়ে যায়। আমি আমার রুমমেটদের সাথে মাঝে মাঝে বিকালে বেড়াতে যেতাম। সংসদ ভবন এলাকায় একদিন আরিফ হাসান সুমন নামে এক ব্যক্তির সাথে পরিচয় হয়। সে আমার থেকে ৩/৪ বছরের ছোট হবে। কয়েক দিন দেখা হবার পর সুমনের সাথে ঘনিষ্টতা হয়, সে আমাকে বড় বোন বলে সম্বোধন করে। আমিও সুমনকে ছোট ভাই বলে মেনে নেই। একদিন সুমন আমাকে তার ভাইবোন-মা এর সাথে দেখা করার জন্য আমাকে তাদের বাসায় নিয়ে যায়। নিয়ে যাবার পর সুমনের বাবা-মা-কে বাবা-মা বলে ডাকি। সুমনের বাড়ীর ঠিকানা ৩/১১ আলী এন্ড নূর রিয়েল এষ্টেট, মোহাম্মদপুর, ঢাকা। সুমনদের পরিবারের সাথে সম্পর্ক বেড়ে যায়। সুমন ও সুমনের বোনেরা আমাদের সিরাজগঞ্জের বাড়ীতে গেছে। আমার বাবা-মা সুমনদের বাসায় বেড়াতে গিয়েছে। আমার আম্মা একদিন সুমনের আম্মাকে আমার জন্য পাত্র দেখতে বলেন। সুমনের আম্মা রাজী হন। পরবর্তীতে সুমন, সুমনের আম্মা, মাওলানা ইদ্রিস যিনি সুমনের দুলাভাই, সুমনের বাড়ীতে ভাড়াটিয়া মাওলানা তাজউদ্দিন এরা সবাই জনৈক মাজেদ ভাটের সাথে আমার বিয়ের প্রস্তাব দেন। তারা আমার বাবা মাকে বলেন মাজেদ ভাট পাকিস্তানী কিন্তু তিনি বাংলাদেশের নাগরিকত্ব প্রাপ্ত হয়েছেন। তারা সবাই আমার সাথে মাজেদ ভাটের পরিচয় করিয়ে দেয়। আমি ও আমার আম্মা সিরাজগঞ্জে চলে যাই। এর কয়েক দিন পর

সুমন, সুমনের আম্মা, সুমনের দুলাভাই, মাওলানা তাজউদ্দিন ও মাজেদ ভাট সবাই আমাদে সিরাজগঞ্জের বাসায় যায় এবং সেদিন সবার উপস্থিতিতে আমার বাবা মায়ের উপস্থিতিতে ২০০৩ইং সনের অক্টোবর মাসের ৩ তারিখে ধর্মীয় বিধানুসারে মাজেদ ভাটের সাথে আমার বিয়ে হয়। পরের দিন সুমন তার কয়েকজন বন্ধু বান্ধব নিয়ে সিরাজগঞ্জে আমাদের বাসায় যায়। খাওয়া দাওয়া শেষ করে তারা আমাকে সুমনদের ঢাকার বাসায় নিয়ে আসে। ঢাকায় নিয়ে আসার পর মাজেদ ভাট সুমনদের বাসার যে পাঁচ তলায় ভাড়া থাকতো সেই বাসায় আমাকে ও মাজেদ ভাটকে উঠিয়ে দেয়। উক্ত বাসায় মাজেদ ভাটের সাথে স্বামী স্ত্রী হিসাবে বসবাস করতে থাকি। বাসায় ৩টি বেড রুম ছিল। কিছুদিন পর লক্ষ্য করি বাসায় মাওলানা তাজউদ্দিন, সাতক্ষীরার গোলাম মোহাম্মদ ওরফে জি.এম. মুফতি হান্নান সুমনের দুলাভাই মাওলানা ইদ্রিস, মাওলানা মুনির আমাদের বাসায় আসা যাওয়া করছে। আমি আমার স্বামী মাজেদ ভাটকে জিজ্ঞেস করি তারা কেন আমাদের বাসায় আসে আর কিইবা আলাপ আলোচনা করে। মাজেদ ভাট আমায় বলে মূলতঃ আমি পাকিস্তানী লোক নই, আমাকে মিথ্যা বলা হয়েছিল, আমি মূলত ভারতের কাশ্মীরের লোক। (আপত্তি)। ভারতের কাশ্মীরে হিজবুল মুজাহিদী সংগঠনের নেতা সে বলে আমাকে জানায়। সে আরো বলে মুফতি হান্নান, মাওলানা ইদ্রিস, মাওলানা তাজউদ্দিন, মাওলানা মুনির উক্ত হিজবুল মুজাহিদী এর লোক। মাওলানা তাজউদ্দিন সহ সবাই সংগঠনের কাজে আমার স্বামী মাজেদ ভাটকে সহায়তা করে বলে মাজেদ ভাট আমাকে জানায়। আমি দেখেছি পাকিস্তান থেকে কিছু লোক এসে মাজেদ ভাটের সাথে দেখা সাক্ষাৎ করতো। এই ঘটনার কিছুদিন পর দেখি মাজেদ ভাট এবং মাওলানা তাজউদ্দিন এবং তাদের সাথে আরো দুইজন পাকিস্তানী ব্যক্তি দুইটি কার্টুনে কিছু ওজনদার বা ভারী জিনিষ আমার বাসায় নিয়ে এসে রাখে এবং তারা চলে যায়। মাজেদ ভাট থাকে। আমি মাজেদ ভাটকে জিজ্ঞেস করি কার্টুন গুলো কিসের। মাজেদ ভাট বলে কার্টুনের ভিতর গ্রেনেড ও গুলি রয়েছে। সে আরো বলে গ্রেনেড ও গুলি তাদের সংগঠনের কাজের জন্য আনা হয়েছে।

কয়েকদিন পর মাওলানা তাজউদ্দিন, মাওলানা ইদ্রিস, মুফতি হান্নান ও মাওলানা মুনির এরা আমার বাড়ীতে আসে এবং উল্লেখিত কার্টুন গুলো সাথে নিয়ে চলে যায়। এভাবে তারা বেশ কয়েকবার আমার বাসায় গ্রেনেড ও গুলি আনা নেয়া করে। তারা প্রায়ই আমাদের বাসায় এসে আলাপ আলোচনা করতো। কয়েকদিন পর তারা আমাদের বাসায় অনেকক্ষণ আলাপ আলোচনা করে ও টেলিফোনে বিভিন্ন জায়গায় কথাবার্তা বলে। তাদের আলাপ আলোচনায় এইটুকু বুঝতে পারি যে, তারা আওয়ামী লীগের উপর ভীষণ ক্ষুব্ধ। তারা যে কোন মূল্যে আওয়ামী লীগের অনেক বড় কোন ক্ষতি করতে চায়। তারা আমার বাসা থেকে চলে যাবার পর আমি মাজেদ ভাটকে বলি তোমরা আওয়ামী লীগের উপর এত ক্ষ্যাপা কেন। মাজেদ ভাট আমায় বলে এটি রাজনৈতিক বিষয় এগুলো নিয়ে তোমার চিন্তার কিছু নেই। আমাকে মাজেদ ভাট বলে এই বিষয় নিয়ে বাইরে আলোচনারও প্রয়োজন নেই।

আমি মাজেদ ভাটকে আরো বলি এদের সাথে থেকে আওয়ামী লীগের কিছু হলে তোমার কোন ক্ষতি হবে নাতো। মাজেদ ভাট আমায় বলে মাওলানা তাজউদ্দিনের ভাই সরকারের একজন মন্ত্রী আমাদের কিছু হবে না।

আমি মাজেদ ভাটকে জিজ্ঞেস করি উক্ত সংগঠন ছাড়া অন্য কিছু করো নাকি- করলে আমায় বলো। মাজেদ আমায় বলে এ্যালিফ্যান্ট রোডে মাওলানা ইদ্রিস, মাওলানা তাজউদ্দিনের 'আস্তিন' নামে পাঞ্জাবীর দোকান রয়েছে। সেখানে সে ব্যবসা করে। কিছু দিন পর আমি গর্ভবতী হই। আমি শারিরীক অসুস্থতার কারণে সিরাজগঞ্জে আমার বাবার বাড়ীতে চলে যাই। দেড় দুই মাস পর সুস্থতার পর মাজেদ ভাট আমায় ঢাকায় ৩/১১ আলী এন্ড নূর রিয়েল এষ্টেট, বাসায় নিয়ে আসে। আমি এসে দেখি আমার বাসায় একটি কালো ব্যাগে কিছু গ্রেনেড রয়েছে। আমি তখন মাজেদ ভাটকে বলি এই অবৈধ জিনিস আবার বাসায় রেখেছে।, আমার খুব ভয় হয়, তুমি তাড়াতাড়ি গ্রেনেডসহ ব্যগ সরিয়ে ফেলো অন্যত্র। আমাকে মাজেদ ভাট বলে ভয় নেই, মাওলানা তাজউদ্দিন এসে সেগুলো সরিয়ে নেবে। পরবর্তীতে মাজেদ ভাট মাওলানা তাজউদ্দিনকে খবর দিয়ে তাড়াতাড়ি সেগুলো সরিয়ে নেয়ার ব্যবস্থা নিতে বলেন। ২/৩ দিন পর মাওলানা তাজউদ্দিন এসে গ্রেনেড ভর্তি ব্যাগটি নিয়ে যায়।

২০০৪ ইং সালের জুলাই মাসে আমার শারিরীক অবস্থা আরো বেশী খারাপ হওয়াতে মাজেদ ভাট আমাকে সিরাজগঞ্জের বাসায় বাবা মায়ের কাছে রেখে আসে। ২০০৪ইং সালের আগষ্ট মাসের ২০ তারিখে সিরাজগঞ্জে ইবনে সিনা হাসপাতালে আমার একটি পুত্র সন্তান হয়। হাসপাতাল থেকে বাসায় আসার পর বিভিন্ন পত্র পত্রিকায় ও টেলিভিশনে দেখে ও মানুষের কাছে জানতে পারে যে, ঢাকাতে বঙ্গবন্ধু এ্যাভিনিউতে আওয়ামী লীগের

শেখ হাসিনার মিটিং এর উপর গ্রেনেড হামলা হয়েছে। আমি দেখেছি ও শুনেছি উক্ত হামলায় অনেক লোক নিহত ও অনেকে আহত হয়েছে। আমার সন্দেহ হয় ঐ কাজ মাজেদের লোকজনরাই করেছে। আমি মাজেদ ভাটকে জিজ্ঞেস করি এই ঘটনা কি তোমাদের কাজ? উত্তরে মাজেদ বলে উক্ত কাজ মাওলানা তাজউদ্দিন ও মুফতি হান্নানরা ঘঠিয়েছে। মাজেদ ভাট আমায় আরো বলে আমার ভয় পাবার কোন কারন নেই, মাওলানা তাজউদ্দিনের ভাই আব্দুস সালাম পিন্টু একজন মন্ত্রী, তাজউদ্দিনের সাথে তার ভাই ও সরকারের যোগাযোগ রয়েছে। তারা সব সমস্যার সমাধান করবে। আমাকে বলা হয় এই বিষয়ে কোন আলাপ আলোচনা না করার জন্য।

পরবর্তীতে দেড় দুই মাস পর মাজেদ ভাট আমায় ঢাকায় নিয়ে আসে। আমাকে ৩/১১ আলী এন্ড নূর রিয়েল এষ্টেট বাসায় না উঠিয়ে সাত মসজিদের একটি বাসায় উঠায় উক্ত বাসায় আমরা ৩/৪ মাস ছিলাম। উক্ত বাসায় মাওলানা তাজউদ্দিন ও মাওলানা ইদ্রিস এসে আমাদের খোঁজ খবর নিত। পরবর্তীতে ঐ বাসা পরিবর্তন করে আরেকটি বাসায় উঠি। সেটি ভাড়া করা হয় মোহাম্মদপুরের নূরজাহান রোডের পি ব্লকে। উক্ত বাসায় থাকা কালীন সময়ে আমার বাসায় আসা যাওয়া করে গোলাম মোহাম্মদ ওরফে জি এম, মাওলানা তাজউদ্দিন, মাওলানা মুনির, মুফতি হান্নান, মাওলানা ইদ্রিস, আবু তাহের ও আরিফ হাসান সুমন। আরো দুজন পাকিস্তানী উক্ত বাসায় আসা যাওয়া করে। উক্ত পাকিস্তানী দুইজন আমার বাসায় এক রাত ছিলো। যারা আসতো তারা আমার বাসায় গ্রেনেড ও গুলি নেয়া করতো। পাকিস্তান থেকে যে গ্রেনেড ও গুলির চালান আসতো সেগুলো মাওলানা তাজউদ্দিনের কাছে আসতো, তিনি সেগুলো রক্ষণাবেক্ষণ করতেন। সময় মতো সেগুলো সরিয়ে ফেলতো। পরবর্তীতে উক্ত বাসা থেকে আরেকটি বাসা পরিবর্তন করে মাজেদ ভাট। নূরজাহান রোডের পি ব্লকের বাসাটিতে এর পূর্বে ৫/৬ মাস ছিলাম। মসজিদের পার্শ্বের বাসাটিতে উঠার পর মাজেদ ভাট পাকিস্তানে যায় এবং পাকিস্তান থেকে প্রায় দেড় মাস পর বাংলাদেশে ফিরে আসে।

২০০৭ ইং সালে জুন মাসে একদিন দুপুরের পর বিকালের দিকে কিছু সাদা পোশাকধারী লোক আমার বাসায় এসে মাজেদ ভাটকে উঠিয়ে নিয়ে যায়। তারপর থেকে মাজেদের কোন খোঁজ আমি পাই নাই। কিছুদিন পর আমি আমার মায়ের সাথে ঢাকা থেকে সিরাজগঞ্জে বাসার চলে যাই।

২০০৯ ইং সালে জানুয়ারী মাসে ঢাকার উত্তরা থানা থেকে আমাকে জানানো হয় যে, মাজেদ ভাট অস্ত্র মামলায় গ্রেফতার হয়েছে। থানার মাধ্যমে জানানো হয় আমি যেন জেলখানায় গিয়ে মাজেদ ভাটের সাথে দেখা করি। মাজেদের কথামতো এক উকিল সাহেব আমার সাথে কথা বলে। কিন্তু পরবর্তীতে উক্ত উকিল সাহেবের সাথে আমি আর কোন যোগাযোগ করি নাই।

এর মধ্যে মাজেদ ভাটের বিশ্বস্ত গোলাম মোহাম্মদ ওরফে জি এম সিরাজগঞ্জে যেয়ে আমার সাথে যোগাযোগ করতো। জিএমের মাধ্যমে পাকিস্তানের শাহেদ নামে এক ব্যক্তি আমার বাংলালিংক মোবাইল ফোনে আমার সাথে প্রায়ই যোগাযোগ করতো। আমার মোবাইল নম্বর ছিল ০১৯-১৩৬৮-৮০১০। উক্ত শাহেদের মাধ্যমে জানতে পারি আমার, আমার বাচ্চার ও মাজেদ ভাটের জেলখানার খরচ বাবদ প্রচুর টাকা পাকিস্তান থেকে পাঠাতো উক্ত শাহেদ গোলাম মোহাম্মদ ওরফে জিএমের মাধ্যমে। কিন্তু দুঃখের বিষয় গোলাম মোহাম্মদ ওরফে জিএম উক্ত টাকা থেকে অল্প পরিমাণ টাকা আমায় দিত এবং বাকী টাকা গোলাম মোহাম্মদ জিএম, রেখে দিত। জি এমের কাছ থেকে প্রথমবার নেই ২৫,০০০, দ্বিতীয়বার নেই ২০,০০০, তৃতীয়বার নেই ২০,০০০, চতুর্থবার ৫৫,০০০ এবং শেষের বার ৪৫,০০০ টাকা। পরবর্তীতে জিএমের যোগাযোগ ও পাকিস্তানের শাহেদের নির্দেশে উক্ত সীম ও সেট পুড়িয়ে ফেলি।

আমি পরবর্তীতে বিজ্ঞ ম্যাজিস্ট্রেট বরাবর ১০-১০-২০১০ইং তারিখে জবানবন্দী প্রদান করি। এই সেই জবানবন্দীর মূল কপি। আমার ৮টি দস্তখত রয়েছে।"

17. Before proceeding to consider the rival submissions of the learned Advocate of the respect parties ii is pertinent to reproduce the Provision of section 122 of the Evidence Act, which runs as follows;

> "Communications During Marriage- No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married : nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consent, except in suits between married persons, or proceedings in which one

married person is prosecuted for any crime committed against the other."

18. On careful scrutiny of the above provision of law the salient fitures of the same appears to us that;

(i) a married person shall not be compelled to disclose any communication made to him/her during marriage by his or her spouse;

(ii) the married persons shall not except in two special classes of proceedings be permitted to disclose by giving evidence in Court the communication unless the person who made it, or his representative in interest, consents thereto except into Special Cases of proceeding be permitted to disclose by giving evidence in the Court;

(iii) the privilege, one established, continues even after the dissolution of marriage by death or divorce or even marriage is declared a nullify because the opening words of the section are no person who is or has been married;

(iv) the statements/depositions relating to the communications made between the spouses during subsisting their marriage is not admissible in evidence;

(v) the statements/deposition relating to other acts, conducts and incriminating materials relating to the offence is admissible in evidence.

In the case of *ML Verghese vs TJ Ponnan and others*, reported in *AIR 1970 (SC) page 1876* the Supreme Court of Indian held that;

"If the wife appears in the witness-box to give evidence about the communications made to her by husband, *prima-facie* the communications may not be permitted to be deposed to or disclosed unless the husband consents. That does not, however, mean that no other evidence which is not barred under section 122 of the Evidence Act or other provision of the Act can be given." *(under line is given by us)*

19. In the case of *Ram Bharosey vs State of Uttar Pradesh* reported in *AIR 1954 (SC), pages 704* it has been held that "the conduct and act of the accused, not to any communication, if not inadmissible under section 122 of the evidence Act."

20. Mr AJ Mohammad Ali relying on Article 35(4) of the Constitution has tried to impress us that since husband and wife are regarded as one person and, as such, PW 73 shall not be compelled to be a witness against herself.

21. In England the rule appears to be well settled that except in certain well defined matters, the husband and wife an regarded as one and in an action for libel disclosure by the husband of the libel to his wife is not, publication.

22. But in this sub-continent the above view has not beer adopted or approved.

23. Rather, in the case of *Abdul Khadar vs Taib Begum AIR 1957 Mad 339* the Madras High Court held that no there is AIR presumption of law in India that a wife and husband constitute one person for the purpose of criminal law, and therefore the English common law doctrine of absolute privilege can not prevail in India.

24. In *Quieen Empress vs Butchi, (1894) ILR 17 Mad 401* it was held that there is no presumption of law that the wife and husband constitute one person in India for the purpose of the criminal law. If the wife, removing the husband's property from his house does so with dishonest intention, she is guilty of theft.

25. In the Case of *ML Verghese vs TJ Ponnan* it is further held that;

"There is therefore authority for the

proposition that in determining the criminality of an act under the Indian Penal Code the Courts will not extend the scope of special exceptions by resorting to the rule peculiar to English Common Law that the husband and wife are regarded as one."

26. Thus, we are unable to accept the above submission of the learned Advocate for the Petitioner.

27. Having discussed and considered as above, we are not inclined to issue any Rule but to dispose of the application on the following observations:

(i) In view of section 122 of the Evidence Act, 1872 there is no scope to reject, exclude or expunge the evidence of PW 73, Nahid Laila Kakon, the divorced wife of accused-petitioner, Abdul Mazid Bhat, as sought by him.

(ii) The trial court has to be adjudged the admissibility of the evidence of PW 73 in the light of section 122 of the Evidence Act and the observations made by us in this judgment.

iii) The depositions/statements of PW 73, Nahid Laila Kakon relating to the communication made to her by the accused-petitioner during subsisting their marriage, if any, will be inadmissible in evidence.

vi) But, the depositions/statements relating to other acts and conducts of the accused-petitioner and other accused persons and any other incriminating materials relating to the offence, which are not the communications, will be admissible in evidence.

28. Accordingly, the application is disposed of.

The Tribunal is directed to conclude the trial without any further delay considering the public importance in the case. Communicate the order at once.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

SM Ziaul Karim J
Ashish Ranjan Das J

Judgment
April 21st, 2013.

Abul Kashem.....
.....Convict-Appellant

vs

State.....Respondent*

Evidence Act (I of 1872)
Sections 101 and 106

Legal evidence in a criminal trial is the evidence of the incriminating facts and circumstances of involvement of the accused in the commission of offence inevitable pointing to their guilty as the perpetrators incompatible with the plea of their innocence. In view of the proved facts and circumstances of the case which do not constitute any legal evidence moral conviction should not be substituted in place of the legal evidence. .....(37)

Penal Code (XLV of 1860)
Section 302

Suspicion or doubt however strong it might be cannot take place of evidence or there be slightest doubt as to the involvement of the accused in the crime., he cannot be convicted .....(38)

Kawsarun Nessa vs State, 48 DLR 196; Abdul Mannan alias Mona Miah vs State, 58 DLR 91; Md Mukter Hossain Khan vs State, 13 MLR 186; Abdul

*Criminal Appeal No. 3654 of 2003.

Huq vs State, 14 BLT 485; Fazu alias Fazlur Rahman vs State 1 BLC 558; Rekatfullah vs State, 13 DLR 750 and Safder Ali vs Crown, 5 DLR (FC) 107 ref.

Mujibur Rahman, Advocate—For the Convict-Appellant.

MA Mannan Mahon, DAG with Md Ensan Uddin Sheikh, AAG Md Osman Goni, AAG—For the State.

Judgment

Syed Md Ziaul Karim J: By this appeal, the convict-appellant has challenged the legality and propriety of the Judgment and order of conviction and sentence dated 16-9-2003 passed by learned Additional Sessions Judge, Seventh Court, Dhaka, in Session Case No. 95 of 1999 convicting the appellant under section 302 of the Penal Code and sentencing him to suffer imprisonment for life and also to pay a fine of Taka 3,000 in default to suffer rigorous imprisonment for two months more.

2. The prosecution case as projected in the first information report and unfurled at trial are that the deceased Safia Khatun aged about 30 years wife of Peer Box was staying at her conjugal home at village Dhanaid PS Saver, District-Dhaka with her other step sons. On 13-4-1995 at 3-00 PM accused Peer Box, along with her other step-sons namely Abdul Motaleb, Abul Hashem, Abul Kashem (appellant) being armed with lathi, dao, spade and axe assaulted the victim indiscriminately over some family conflicts. Accused Abdul Motaleb assaulted her by dao, accused Abul Hashem and accused Abul Kashem (appellant) assaulted her by spade and axe respectively upon her head causing profuse bleeding injuries. The victim died instantaneously at the spot. Having had heard the incident from the locals Md Ibrahim (PW 1) father of deceased rushed to the scene and found her dead-body at the court-yard. The body bore multiple injuries. Thereafter, the prosecution was launched by lodging the FIR by him as informant which was recorded as Savar PS Case No. 24 dated 13-4-1995 corresponding to GR No. 566 of 1995.

3. The Police after investigation submitted charge-sheet under section 302 of the Penal Code accusing only Abul Kashem herein appellant as accused, rest FIR named accused were let-off off from the Police report.

4. Eventually the accused was called upon to answer the charge under section 302 of the Penal Code to which he pleaded not guilty and claimed to be tried.

5. In course of trial the prosecution in all examined nine witnesses out of twelve charge sheeted witnesses.

6. After closure of the prosecution case the accused on dock was examined under section 342 of the Code, again he repeated his innocence and led no evidence in defence.

7. The defence case as it appears from the trend of cross-examination of the prosecution witnesses are that of innocence and false implication. It was divulged in defence, that the deceased Safia Khatun was murdered due to internal feud between them, and at the time of occurrence accused Abul Kashem was not present at the PO.

8. The learned Counsel appearing for the appellant seeks to impeach the impugned judgment and order of conviction and sentence on five fold arguments:

9. *Firstly:* It is a case of no legal evidence.

10. *Secondly:* The appellant had no special knowledge in respect of murder of the deceased although he along with other inmates were staying in the same homestead. In support of his contentions he refers the case of *Kawsarun Nessa vs State 48 DLR 196* held:

> "Since no special knowledge of the relevant fact as to committing of the crime

could be attributed to the accused the provisions of section 101 and 106 of the Evidence Act have no applicability in the case".

11. On the identical point he further refers the case of *Abdul Mannan alias Mona Miah vs State 58 DLR 91* held:

> "Alibi—Since the prosecution hopelessly failed to prove the minimum requirement of presence of the accused in his house at the time when his wife was killed there is no obligation on the part of the defence to prove the alibi"

12. Thirdly: The prosecution is to prove at least the presence of the appellant at the place of murdering at the relevant time failing which the convict is entitled to benefit of doubt

13. In support of his contentions he refers the case of *Md Mukter Hossain Khan vs The State 13 MLR 186* held:

> "Section 106-Liability of the husband of the murder of his wife when the husband was not in the house of occurrence at or about the time of occurrence
>
> Conviction in a murder case can be based on circumstantial evidence leading to the irresistible conclusion unerringly pointing at the guilt of the accused and not any other hypothesis other than his guilt. When the prosecution could not establish beyond all reasonable doubt that the condemned-prisoner was in the PO house with his family at or about that time of the occurrence, the apex court held that the condemned-prisoner cannot be taken to be liable for the murder of his wife and his three years old daughter and in that view of the matter allowed the appeal.

We find from the evidence and materials on record that the prosecution could not prove beyond reasonable doubt that the condemned petitioner was with his family in the occurrence house at or about the time of occurrence. In the absence of evidence as to the presence of the condemned-petitioner in the occurrence house with his family the condemned-petitioner cannot be taken to be liable to prove the fact as to how his wife and 3(three) year old daughter met their death by invoking section 106 of the Evidence Act. The onus of proof that it was the condemned- petitioner and none else who killed his wife and daughter was all along on the prosecution and it never shifted on the condemned-petitioner in the absence of any proof beyond reasonable doubt that he was present in the occurrence house when the occurrence took place. It is all the more difficult for the prosecution to press section 106 into service when the petitioner was also prosecuted for the murder of his baby daughter at the same house. We therefore find good deal of force in the points argued by the learned Advocate for the petitioner."

14. Fourthly: After closure of the prosecution case the appellant was not properly examined under section 342 of the Code inasmuch as the attention to the incriminating materials were not drawn to the appellant, which seriously prejudiced him.

15. Fifthly: The learned Counsel lastly submits that conviction and sentence is based on misreading and non-consideration of the materials on record which cannot be sustained in the eye of law.

16. The learned Deputy Attorney-General appearing for the State opposes the appeal and submits that there are consistent evidence against the appellant in respect of his complicity in the offence. He adds that at the time of commission of the offence the deceased Safia Khatun was staying at the appellant's house. So the appellant was responsible to explain the position in respect of murder of the deceased. He lastly submits that the impugned judgment and order of conviction and sentence based on evidence on record which calls for no interference by this Court.

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

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

19. Now the question calls for consideration is, whether the deceased died at her conjugal home and the accused was responsible for committing her murder.

20. It is indisputable that victim Safia Khatun died at the conjugal home when she was staying with her husband Peer Box along with others step-sons.

21. Let us now weigh and sift the evidence on record as adduced by the prosecution to prove the charge.

22. PW 1 Md Ibrahim Khan is the father of the deceased Safia Khatun and informant of this case. He is not the eye witness of the murder of her daughter. He deposed that his daughter Safia was married with the accused Peer Box. At the time of occurrence he was at his home. His daughter died at her conjugal home. On the same day at 4-00 PM he heard about the murder of her daughter. He rushed to the scene and heard that accused peer Box and his sons Hashem, Kashem murdered her. He lodged the FIR which he proved as Exhibit 1. Police rushed to the PO and sent the dead-body to the morgue for autopsy.

23. In cross-examination he stated that one S.I. had written the FIR, he put his LTI on it. He identified accused Abul Kashem on dock.

24. PW 2 Kadam Ali, PW 3 Giasuddin are the local witnesses. They disowned the prosecution case so they were declared hostile.

25. PW 4, Abdul Karim, is a local Union Parishad Chairman. He did not see the occurrence however heard it from the locals. He deposed that on the day of occurrence father of the deceased informed that his son-in-law and others murdered his daughter. He went with him to the Police Station and lodged the FIR. The Police held inquest in his presence. He stood as a witness of the inquest.

26. PW 5 Mujibur Rahman and PW 6 Ibrahim Kazi are the local witnesses they merely heard the occurrence and PW 7 Md Rowshan Ali and PW 8 Md Khalilur Rahman are the local witnesses they merely heard the occurrence and disowned the prosecution case. So they were declared hostile.

27. PW 9 SI Md Farid Ahmed was the investigating officer of this case. He deposed that on 13-4-1995 he was attached with the Savar Police Station. He was entrusted for investigation. He visited the place of occurrence, held inquest upon the cadaver and sent the dead-body to the morgue. He prepared sketch map and index and recorded the statements of the witnesses under section 161 of the Code. After investigation he submitted charge-sheet accusing only accused Abul Kashem.

28. In cross-examination he stated that in the FIR there were five accused. He denied the suggestion that he was deposing falsely.

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

30. In course of trial the prosecution in all examined nine witnesses, of them PW I is the informant and father of the deceased. He was not an eye witness of the occurrence. PWs 2, 3, 4, 5, 6, 7 and 8 were the local witnesses but they did not see the occurrence however PWs. 2 , 3, 4, 7 and 8 disowned the prosecution case and they were declared hostile. PW 9 is the investigating officer of this case.

31. We should bear in mind, credibility of testimony oral and circumstantial, depends considerably on a judicial evaluation of the

totality, not isolated scrutiny. When dealing with the serious question of guilt or innocence of persons charged with crime, the following principles should be taken into consideration:—

a) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.

b) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused.

c) In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person suffer.

d) There must be clear and unequivocal proof of the corpus delicit.

e) The hypothesis of delinquency should be consistent with all the facts proved.

32. In spite of the presumption of truth attached to oral evidence under oath if the Court is not satisfied, the evidence in spite of oath is of no avail.

33. On appraisal of the evidence on record it transpires that the instant case absolutely rest upon the evidence of PWs 1 and 9 PW 1 is the informant who did not see the occurrence. PW 9 investigated the case but he failed to collect any evidence that at the time of occurrence accused Kashem was present in the house of occurrence. PW 1 merely stated that having had heard the occurrence he rushed to the scene and found the dead-body of the deceased at the court-yard. He however narrated the occurrence to the effect that he heard the incident from the locals but he measurably failed to disclose any name of them. Later most of the witnesses disowned the prosecution case and they were declared hostile. So their evidence should be left out of consideration.

34. It is the definite case of the defence that at the time of occurrence, the accused was not present at the occurrence house. It is true that burden of proving a plea of alibi or any other plea specifically set up by an accused for absolving him of criminal liability lies on him. But this burden is some- what higher than that of the prosecution. The accused could be considered to have discharged his burden if he succeeds in creating a reasonable belief in the existence of circumstances that would absolve him of criminal liability, but the prosecution is to discharge its burden by establishing the guilt of the accused. An accused's burden is lighter, because the Court is to consider his plea only after and not before, the prosecution leads evidence for sustaining a conviction. When the prosecution failed to prove that the accused was in the murdering house he cannot be saddled with any onus to prove his innocence.

35. We find from the evidence and materials on record that the prosecution could not prove beyond reasonable doubt that the convict was in the place of murdering at or about the time of occurrence. In the absence of evidence as to the presence of the convict in the occurrence house with the deceased, the convict cannot be taken to be liable to prove the fact as to how the victim met her death by invoking section 106 of the Evidence Act. Therefore, we hold that the prosecution is to prove at least the presence of appellant at the place of murdering at the relevant time, failing which the convict is entitled o benefit of doubt. In the present case the prosecution measurably failed to prove such fact. So, accordingly he is entitled to benefit of doubt as a matter of right.

36. It is true that crime like murder is shocking in nature and also, revolting. The Crime is against society and humanity, but the prosecution convicted the above accused merely on suspicion. There cannot be conviction for murder on mere suspicion or presumption. The commission of murder must be proved. The

presumption cannot take the place of positive evidence, *(1970 PCrlLJ 166).*

37. It further appears to us that the instant case is absolutely a case of no evidence but the Court below without any legal evidence convicted him in moral view. Legal evidence in a criminal trial is the evidence of the incriminating facts and circumstances of involvement of the accused in the commission of offence inevitable pointing to their guilty as the perpetrators incompatible with the plea of their innocence. In view of the proved facts and circumstances of the present case which do not constitute any legal evidence moral conviction should not be substituted in place of the legal evidence.

38. We find that the accused was convicted merely on suspicion without any legal evidence. To that end in view, law is now well settled that suspicion or doubt however strong it might be cannot take place of evidence or there be slightest doubt as to the involvement of the accused in the crime., he cannot be convicted. With this regard reliance are being placed in the cases of *Abdul Huq vs State 14 BLT 485, Fazu alias Fazlur Rahman vs State 1 BLC 558, Rekatfullah vs State 13 DLR 750.* It is further held in the case reported in *AIR 1921 (PC) 69*, that the decision of the Court must rest upon legal ground established by legal testimony from the prosecution.

39. Moreso in all respect, the convict is also entitled to benefit of doubt. In the case of *Safder Ali vs Crown 5 DLR (FC) 107* held:

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

40. So, there is no cogent, convincing and unimpeachable evidence on record to prove the complicity of the accused with the crime of murder. Prosecution utterly failed to bring home guilt to the above accused beyond all reasonable doubt.

41. Moreover, the impugned judgment and order of conviction and sentence in its entirety is not well founded in the facts and circumstances of the case. So the submissions advanced by the learned Counsel for the defence prevails and appears to have a good deal of force. On the contrary the submissions advanced by the learned Deputy Attorney-General bear no substance.

42. In the light of discussions made above and preponderant judicial views emerging out of the authorities refers above we are of the view that the prosecution measurably failed to prove the charge against the convict-appellant beyond all reasonable doubt. Thus the appeal having merit succeeds.

In the result :—

(a) The appeal is allowed.

(b) The impugned Judgment and order of conviction and sentence dated 16-09-2003 passed by learned Additional Sessions Judge, Seventh Court, Dhaka, in Session Case No. 95 of 1999 is hereby set-aside.

(c) The convict-appellant is acquitted from the charge levelled against him;

(d) The appellant who is now on bail is discharged from the bail bond. The Office is directed to send down the records at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Farah Mahbub J
Abdur Rob J

Saidul Haque Shamim (Md).....Petitioner

vs

Judgment
January 10th, 2013.

Anti-Corruption Commission and others.....Respondents*

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

Penal Code (XLV of 1860)
Section 408

Since violation of rule 4 by not sending the FIR to the Commission for investigation has been mandated as directory by the Appellate Division and since alleged commission of offence under section 408 of the Code, being a schedule offence has to be investigated by the Commission in view of section 20 of the Act as such, issuance of the order by the Investigating Officer of the Commission to appear before it to assist the investigation, is mandated as lawful. .....(19)

ACC vs Dr Mohiuddin Khan Alamgir, 62 DLR (AD) 290 and Md Habib Abdur Rab vs State, in Criminal Miscellaneous Case No.4042 of 2009 ref.

Shamsuddin Babul with Golam Kibria. Advocates—For the Petitioner.

Fahima Nasrin, Advocate—For the Respondent No.4

Ahmed Sohel, Advocate—For the respondent Nos. 1 and 2.

Judgment

Farah Mahbub J : In this Rule, issued under Article 102 of the Constitution of the People's Republic of Bangladesh, the respondents have been called upon to show cause as to why the impugned Memo No.1606 dated 29-9-2009 issued by the respondent No.l under the signature of respondent No. 2 asking the petitioner to appear before him for recording statement in connection with Gulshan Police Station Case No.111 dated 30-5-2009 (Annexure-D) and also as to why entertainment/investigation of the said Police Station Case corresponding to GR No.618/2009 under section 408 of the Penal Code now, pending in the Court of respondent No.3 should not he declared to have been made without lawful authority and hence, of no legal effect

2. Facts, in brief, are that one Md Ali Asgar Quarishi being the Chairman of Multi Residential Systems Ltd incorporated under the Companies Act, 1994 as well as the Managing Director of Mukti Manoshik and Madakashakti Niamey Kendra Ltd. lodged an FIR (First Information Report) on 30-5-2009 with Gulshan Police Station bearing No.l11 (5)09 implicating the petitioner and another under section 408 of the Penal Code. It has been stated further that on receipt of the said FIR the duty officer of Gulshan Police Station, DMP Dhaka having registered the case forwarded the same to the Officer-in-Charge of the said police station for necessary steps regarding investigation. Accordingly, the Officer-in-Charge of the said police station had entrusted the case to one Sub-Inspector Abul Bashar, on the same date i.e., 30-5-2009 for investigation.

3. On receipt of summons of the aforesaid case, the petitioner voluntarily surrendered before the court concern and obtained bail from the concerned court below vide order dated 2-6-2009 (Annexure-B). The cause of action arose on 20-9-2009 when the respondent No.l under the signature of respondent No.2 being allegedly influenced by the informant of the case, most illegally and arbitrarily and with a view to harass the petitioner issued the impugned order dated 29-9-2009 directing him to appear before for recording his statements in connec-

*Writ Petition No.7309 of 2009.

tion with Gulshan Police Station Case No 111 dated 30-5-2009, as registered under section 408 of the Penal Code.

4. Being aggrieved the petitioner has preferred the instant application and obtained the present Rule Nisi.

5. Mr Shamsuddin Babul appearing with Mr Golam Kibria, the learned Advocates for the petitioner submits upon placing rule 4 of the Anti-Corruption Commission Rules, 2007 (in short, the Rules) that vide the said provision the Anti-Corruption Commission (in short, ACC) is empowered to take information into account which was sent to it by the respective police station within 2(two) days of receipt thereof. But in the instant case, as it is apparent from the order sheet that the FIR was not forwarded to the ACC in compliance of the said provision i.e., it has not been sent within 2 (two) days from the date of receipt thereof, for consideration and investigation; rather, it was registered as GR No. 618 of 2009 and had proceeded accordingly appointing one Sub-Inspector of the said police station for investigation of the allegation so made against the petitioner and another. Accordingly, he submits that issuance of the impugned notice by the respondent No.2 directing him to appear before the Commission with supporting documents to assist the investigation in connection with the said GR case, is without jurisdiction and hence, it is liable to be declared to have been passed without any lawful authority. He further goes to argue that as per section 19 of the Anti-Corruption Commission Ain, 2004 (in short, the Ain) the Commission is authorised to investigate any schedule offence and thereupon the investigating authority on conclusion of investigation shall submit report to the Commission under rule 10 of the Rules, 2007; whereupon sanction will be given by the Commission with a view to file the case under rule 30 of the said Rules. He also submits that there is no provision either in the Act of 2004 or Rules, 2007 to interfere or takeover or withdraw any case which was filed and registered as GR case and investigate the same within the periphery of the Act of 2004. In that view of the matter as well, he submits that issuance of the impugned notice by the respondent No.2 should be knocked down for violation of the provisions as incorporated in the Anti-Corruption Commission Ain, 2004 as well as the Rules, 2007.

6. Mr Ahmed Sohel, the learned Advocate appearing on behalf of Anti-Corruption Commission by producing the respective office file in connection with the instant case submits that it is apparent therefrom that though the FIR has been lodged with the respective Police Station but in compliance of rule 4 of the Rules of 2007 the same was not forwarded to the Commission within the prescribed period of 2(two) days. In this connection referring to the ratio as decided in *ACC vs Dr Mohiuddin Khan Alamgir* reported in *62 DLR (AD) 290* he submits that to that effect the Appellate Division has categorically observed particularly at para 31 that "Rules 3 and 4 of the Rules provides only for filing of the complaint involving the offences mentioned in the schedule to the Act. However, those provisions are merely directory and deviation from provisions in lodging an First Information Report instead of a complaint would not vitiate the proceedings." In other words, he submits that for not sending the First Information Report to the Commission for the purpose of investigation within the said prescribed period of time cannot go to vitiate the entire proceedings, for the same is merely directory. He also submits by referring to the rationale of *Md Habib Abdur Rab vs State, in Criminal Miscellaneous Case No.4042 of 2009* that vide the judgment and order dated 07-11-2012 one of the Benches of this Division has categorically found that offence under section 408 of the Penal Code being a schedule offence has to be investigated by the Commission in view of the provisions as enumerated in section 20 of the Anti-Corruption Commission Ain, 2004 as such, the investi-

gation so has been initiated by one Sub-Inspector of Gulshan Police Station has no mandate of law

7. In the present Rule Nisi the main contention of the petitioner is that in view of rule - 4 of the "দুর্নীতি দমন কমিশন বিধিমালা, ২০০৭" (in short, the Rules) the information so lodged with the concerned police station since has not been forwarded within the prescribed period of time i.e., within 2 days of receipt thereof, rather upon registering the case as GR No.618 of 2009 it proceeded under the Code of Criminal Procedure (in short, the Code) hence, issuance of the impugned order by the Investigating Officer of the Commission directing the petitioner to appear before the Commission with supporting documents to assist the investigation, is without jurisdiction.

8. The Commission, as defined in section 2 of the "দুর্নীতি দমন কমিশন আইন, ২০০৪" (in short, the Act) can inquire or investigate any offence as prescribed in the schedule (in view of section 17(ka)of the Act) as appended to the Act and that vide section 18(1) the Commission may delegate it's power to the Commissioner or any officer of the Commission as it may deem fit, but subject to the provisions of the Act, 2004. However, under section 19(1) the Commission is authorized to call any witness pursuant to inquiry or investigation.

9. Those provisions of law, as are relevant for disposal of the Rule are quoted below:

10. Rule 2(ka) of the Rules, 2007 provides as under:

"২(ক) "অনুসন্ধান" অর্থ আইনের তফসিলভুক্ত কোন অপরাধ সংক্রান্ত অভিযোগ প্রাপ্ত বা জ্ঞাত হইবার পর উহা কমিশন কর্তৃক তদন্ত অনুষ্ঠানের জন্য গৃহীত ও লিপিবদ্ধ হইবার পূর্বে উক্ত অভিযোগের প্রাথমিক সত্যতা উদ্‌ঘাটনের লক্ষ্যে কমিশন বা তৎকর্তৃক ক্ষমতাপ্রাপ্ত কোন ব্যক্তি কর্তৃক পরিচালিত কার্যক্রম।"

Section 17 of the Act, 2004 runs as follows:

"১৭। কমিশনের কার্যাবলি।-কমিশন নিম্নবর্ণিত সকল বা যে কোন কার্য সম্পাদন করিতে পারিবে, যথাঃ

(ক) তফসিলে উল্লিখিত অপরাধসমূহের অনুসন্ধান ও তদন্ত পরিচালনা।

....."

11. Section 18 of the Act, 2004 states thus:

১৮। কমিশনের ক্ষমতা প্রয়োগ।-(১) এই আইনের বিধানবলী সাপেক্ষে কমিশন, উহার দায়িত্ব পালনের ক্ষেত্রে কোন কমিশনার বা কমিশনের কোন কর্মকর্তাকে যেরূপ ক্ষমতা প্রদান করিবে, উক্ত কমিশনার বা কর্মকর্তা সেইরূপ ক্ষমতা প্রয়োগ করিতে পারিবেন।

(2)....."

Section 19 of the Act, 2004 provides as under:

"১৯। অনুসন্ধান বা তদন্তকার্যে কমিশনের বিশেষক্ষমতা। (১) দুর্নীতি সম্পর্কিত কোন অভিযোগের অনুসন্ধান বা তদন্তের ক্ষেত্রে, কমিশনের নিম্নরূপ ক্ষমতা থাকিবে, যথাঃ-

(ক) সাক্ষীর সমন জারি ও উপস্থিতি নিশ্চিতকরণ এবং শপথের মাধ্যমে সাক্ষীকে জিজ্ঞাসাবাদ করা।

(খ) কোন দলিল উদঘাটন এবং উপস্থাপন করা।

(গ) শপথের মাধ্যমে সাক্ষ্য গ্রহন।

(ঘ) কোন আদালত বা অফিস হইতে পাবলিক রেকর্ড বা উহার অনুলিপি তলব করা।

(ঙ) সাক্ষীর জিজ্ঞাসাবাদ এবং দলিল পরীক্ষা করার জন্য পরোয়ানা জারি করা এবং

(চ) এই আইনের উদ্দেশ্যে পূরণকল্পে, নির্ধারিত অন্য যে কোন বিষয়।

(১) ....."

(২) ....."

12. In the instant case, Gulshan Police Station Case No. 111(5) of 2009 corresponding to GR No.618 of 2009 has been lodged by the informant under section 408 of the Penal Code for the alleged misappropriation of money. As per clause (ga) of the schedule of the Act offence under section 408 of the Penal Code is a schedule offence. In this regard section 20 of the Act provides as under—

"তদন্তের ক্ষমতা।-(১) ফৌজদারী কার্যবিধিতে যাহা কিছুই থাকুক না কেন, এই আইনের অধীন ও উহার তফসিলে বর্ণিত অপরাধসমূহ কেবলমাত্র কমিশন কর্তৃক তদন্তযোগ্য হইবে।

(২) উপ-ধারা (১) এ উল্লিখিত অপরাধসমূহ তদন্তের জন্য কমিশন, সরকারী গেজেটে প্রজ্ঞাপন দ্বারা, উহার অধঃস্তন কোন কর্মকর্তাকে ক্ষমতা প্রদান করিতে হইবে।

(৩) উপ-ধারা (২) এর অধীন ক্ষমতাপ্রাপ্ত কর্মকর্তার অপরাধ তদন্তের বিষয়ে, থানার ভারপ্রাপ্ত একজন কর্মকর্তার ক্ষমতা থাকিবে।

(৪) উপ-ধারা (২) ও (৩) এর বিধান সত্ত্বেও, কমিশনারগনেরও এই আইনের অধীন অপরাধ তদন্তের ক্ষমতা থাকিবে।"

13. In view of the said provision it is only the Commission which shall investigate the schedule offence and submit report thereof; however, the case, shall be tried under section 28(2) of the Act, 2004; which is quoted below:

"২৮। অপরাধের বিচার, ইত্যাদি।-(১).....

(২) এই আইনের অধীন ও উহার তফসিলে বর্ণিত অপরাধসমূহের বিচার ও আপীল নিষ্পত্তির ক্ষেত্রে The Criminal Law Amendment Act, 1958 (XL of 1958) এর section 6 এর sub-section (5) এর sub-section (6) এর বিধান ব্যতীত অন্যান্য বিধানাবলী প্রযোজ্য হইবে।

(৩).....

14. In this regard, rule 4 of the Rules, 2007 further provides, *inter alia*—

"Lodging FIR in respect of corruption in police station—Notwithstanding anything contained in these rules, there shall be no bar to lodge FIR complaint in the police station in respect of offence mentioned in the schedule of the Act, provided that the police station concerned shall upon receipt of the complaint enter it in the Register and send within two working days, the same to the nearest District office in the case of officers and employees outside the Commission and to the Commission in the case of officers and employees of the Commission, for investigation."

15. In view of the said provisions, as to Commission of schedule offence a complaint may he made to the respective police station. On registering the same it needs to be sent to the Commission for investigation within 2(two) working days,

16. In the instant case, on receipt of the complaint on 30-5-2000 it had been registered as Gulshan Police Station Case No111(5)2009. On perusal of the record of the Anti-Corruption Commission (as placed before us for perusal) it appears that in compliance of rule 4 of the Rules, 2007 the FIR has not been sent to the Commission for investigation within the said prescribed period of time. However, vide Memo No. অপরাধ/৩৪৬০/ডিসি (গুলশান বিভাগ) dated 3-6-2009 the Deputy Police Commissioner (Gulshan Division), Gulshan had forwarded an office letter addressing the Police Commissioner, Dhaka Metropolitan Police, Dhaka with a prayer to send the case record to the Anti-Corruption Commission for investigation. Pursuant thereto the Joint Police Commissioner (Crime and Operation) on behalf of the Commissioner vide Memo No. ডিএমপি(সঃদঃ)/অপরাধ/দুদক/১২-২০০৯/গুলশান-১/৮০০২ dated 8-6-2009 had requested the Secretary, Anti-Corruption Commission to take necessary steps for investigation of the matter in question contending, *inter alia*, that the case had been lodged under section 408 of the Penal Code which was a schedule offence of the Act of 2004. Ultimately, vide Memo No. দুদক/স জে কা/ঢাকা-১/ ১৪৫৬/১(৩), dated 19-8-2009 one Md Akther Hossain, a Deputy Director of the Commission had been deputed as the Investigating Officer to conduct the investigation of the case in question.

17. Conversely, from the FIR (as contained in Annexure-A to the writ petition) it is apparent that with the lodging of the FIR one Abul Basher, a Sub-Inspector had been deputed to investigate the offence and at the same time vide the impugned order dated 29-9-2009 the petitioner, one of the co-accused had been directed by the Assistant Director (সমন্বিত জেলা কার্যালয়, ঢাকা-১) to appear before the Commission on 7-10-2009 with all relevant documents with a view to assist the investigation.

18. In this regard, the categorical assertion of the petitioner is that where parent law is silent about the procedure the interpretation of law should be that the procedural provision should be given mandatory effect, not directory. The said contention of the petitioner is negated in view of the observations so given by the Appellate Division in *ACC vs Dr Mohiuddin Khan Alamgir* reported in *62 DLR (AD) 290* at paragraph 31 observing, *inter alia*—

> "In the instant case, an officer of the Commission lodged a first Information report on 6-3-2007 with the Tejgaon Police Station and a case was started. This is not envisaged under rules 3 and 4 of the Rules. Those rules provided only for filing of the complaint involving the offences mentioned in the schedule to the Act. However, those provisions are merely directory and deviation from provisions in lodging an first information report instead of a complaint, would not vitiate the proceedings."

19. Since violation of rule 4 by not sending the FIR to the Commission for investigation has been mandated as directory by the Appellate Division and since alleged commission of offence under section 408 of the Penal Code, being a schedule offence has to be investigated by the Commission in view of section 20 of the Act as such, issuance of the impugned order dated 29-9-2009 directing the petition by the Investigating Officer of the Commission to appear before it to assist the investigation, is mandated as lawful.

20. However, it is pertinent to observe that investigation by the Sub- Inspector of Gulshan Police Station, if so has been proceeded, has no legal effect in the eye of law.

21. At this juncture, the categorical assertion of the petitioner is that allegation so has been brought in the FIR does not attract the ingredients of section 408 of the Penal Code since the petitioner is not an employee of Mukti Manoshik and Madakashakti Niramoy Kendro Ltd. Since this court is exercising power under Article 102 of the Constitution as such, is not in a position to decide said contentious issue which requires evidence and that the petitioner is at liberty to agitate his grievance, if any, before the proper forum in accordance with law.

With the above observations this Rule is accordingly discharged without any order as to costs.

Ed.

High Court Division
(Criminal Revisional Jurisdiction)

Sheikh Hassan Arif J
Mustafa Zaman Islam J

Judgment
September 26th, 2013.

Saiful Islam Firoz (Md) and others.....
.....Accused-petitioner

vs

State, represented by the Deputy Commissioner, Dhaka.....
.....Opposite Party*

Code of Criminal Procedure (V of 1898)
Section 439

Emergency Powers Rules, 2007
Rules 11 and 22

Appeal is a statutory right. It cannot be denied by assigning such flimsy reasons as has been done in the case. Even under Rule 11 of the EPR 2007, the Appeal by the convicts was guaranteed, and in such appeal the provisions of the Code were made applicable by virtue of Rule 12. Since we are exercising power under section 439 of the Code, we cannot but to hold that the impugned judgment is vitiated not only by non-application of mind,

*Criminal Revision No. 1742 of 2009.

but also for violation of several provisions of the Code of Criminal Procedure. It cannot sustain in the eye of law. .....(10)

Chand Shah vs Crown 8 DLR (FC) 24, Anti-Corruption Commission vs Mahmud Hossain, 61 DLR (AD) 72, Anti-Corruption Commission vs ATM Nazimullah Chowdhury 62 DLR (AD) 225, Anti-Corruption Commission vs Dr HBM Iqbal Alamgir 15 BLC (AD) 45 and Sarwar Kamal vs State; 64 DLR 329 ref.

Md Asaduzzaman, Advocate with Foyez Ahmed with Azmol Hossain with Tasnuva Shelly with Aslam Hossain with Anisul Hasan, Advocates—For the petitioners.

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

Judgment

Sheikh Hassan Arif J: On an application under section 439 of the Code Criminal Procedure by the petitioners (converted from an application under section 561A of the Code of Criminal Procedure), Rule was issued calling upon the opposite-party to show cause as to why the impugned judgment and order dated 18-3-2008 passed by the Metropolitan Sessions Judge, Dhaka in Criminal Appeal No. 155 of 2008 dismissing the appeal summarily and thereby affirming the judgment and order of conviction and sentence dated 21-1-2008 passed by the Metropolitan Magistrate, Druto Bichar Adalat No. 4, Dhaka in Druto Bichar Case No. 53 of 2007, arising out of Shahabagh Police Station Case No. 53 dated 21-8-2007 corresponding to GR No. 456 of 2007, convicting the petitioners under Rules 3(4) and 6(2) of the Emergency Powers Rules, 2007 and sentencing each of them to suffer rigorous imprisonment for 2 (two) years and to pay a fine of Taka 1,000, should not be set-aside.

2. Short back ground facts, relevant for the disposal of the Rule, are that one Rezaul Karim Khan, Assistant Sub-Inspector of Police of Shahbagh Police Station, Dhaka, as informant, lodged an FIR on 21-8-2007 under Rules 3(4) and 6(2) of the Emergency Powers Rules, 2007 ("EPR 2007") against the convict-petitioners along with 15 (fifteen) others alleging, *inter-alia*, that on 21-8-2007, in the morning, while he was on patrol duty along with other police personnel in Dhaka University area, some four to five thousands violent students assembled in front of the Arts Building and Modhur Canteen of the Dhaka University and held processions and demonstrations against the Emergency proclaimed by the then government; that as the informant and other police personnel tried to resist them, they started pelting bricks and went berserk with lathi etc.; that some teachers of the Dhaka University joined the said processions as well and they created obstructions against police in performing their official duties, damaged several vehicles and created a reign of terror in the Dhaka University area. Upon above FIR, Shahabagh Police Station Case No. 53 dated 21-8-2007 was registered, and police commenced investigation and submitted charge-sheet, being Charge-Sheet No. 298 dated 8-9-2007, under Rules 3(4) and 6(2) of EPR-2007 against the petitioners along with 15(fifteen) other accused. The case was then transferred to the Court of Druto Bichar Adalat No.4, Dhaka, presided over by a Metropolitan Magistrate, for trial, and the trial court, on 12-12-2007, framed charge against the petitioners and others under Rules 3(4) and 6(2) of EPR-2007, in absence of the petitioners. During trial, the prosecution examined sixteen witnesses, and the trial Court, by judgment and order dated 21-1-2008, acquitted all the accused except the petitioners, who were convicted in absentia and sentenced to suffer rigorous imprisonment for two years and to pay a fine of taka 1000, in default to suffer rigorous imprisonment for one month more. However, the sen-

tences against the petitioners having been remitted/pardoned by the Hon'ble President of Bangladesh on the very day of judgment in exercise of his power under Article 49 of the Constitution of Bangladesh, the petitioners preferred Appeal, being Criminal Appeal No. 155 of 2008, under Rule 11 of the EPR 2007 before the Court of Metropolitan Sessions Judge, Dhaka only against the impugned order of conviction, whereupon the learned Metropolitan Sessions Judge, Dhaka (the Appellate Court) dismissed the said appeal summarily by the impugned judgment and order dated 18-3-2008. The petitioners then moved this Court and obtained the aforesaid Rule through application under section 439 of the Code of Criminal Procedure.

3. The Rule is opposed by the State.

4. Mr Asaduzzaman, learned advocate appearing for the convict-petitioners, at the very out set, submits that the very basis of the impugned judgment and order of the Appellate Court below is misconceived inasmuch as that after the remission of the sentences against the petitioners by the Hon'ble President, they were no more fugitive on the day the appeal was presented and, as such, the Appellate Court below committed an error of law occasioning failure of justice in dismissing the said appeal summarily mainly on the ground that the petitioners were fugitive from law during trial and, as such, they were not entitled to any relief. Referring to the relevant orders passed by the Trial Court, in particular the orders dated 21-1-2008 and 22-1-2008, Mr Asad points out that since all the processes as issued by the Trial Court were recalled on 22-1-2008, the very next day the judgment of conviction and sentences was pronounced, the presence of the petitioners before the Court or any authority physically were not required anymore thereafter, and, as such, , the Appellate Court committed illegality in terming them fugitive from law. Mr Asad further submits that when the petitioners, upon obtaining certified copies, preferred appeal before the Appellate Court below in compliance with the relevant provisions of the EPR 2007 and Code of Criminal Procedure, the Appellate Court ought not to have rejected the said appeal summarily. Further, referring to various parts of the judgment as passed by the trial Court convicting the petitioners as well as the depositions of the witnesses, in particular the deposition PW 7, Mr Asad submits that the judgment of conviction as passed by the Trial Court cannot even sustain in the eye of law in-as-much-as that the conviction was solely based on the deposition one witness, namely PW-7, who was a chance witness and whose whereabouts were not known to the Trial Court or not even disclosed to the Court though he was a highly interested witness.

5. Mr KM Zahid Sarwar, learned DAG representing the State, on the other hand, submits that although the Hon'ble President remitted the sentences of the petitioners, they were still required to surrender before Court below, and by not doing so, they became fugitive in the eye of law and, as such, do not deserve any order in their favour from this Court of law in view of the long established principle of law as settled by this Court in various cases including *Chand Shah vs Crown 8 DLR (FC) 24, Anti-Corruption Commission vs Mahmud Hossain; 61 DLR (AD) 72, Anti-Corruption Commission vs ATM Nazimullah Chowdhury, 62 DLR (AD) 225, Anti-Corruption Commission vs Dr HBM Iqbal Alamgir 15 BLC (AD) 45.* Relying on a recently decided case of this Court in *Sarwar Kamal vs State; 64 DLR 329 ("Sarwar Kamal's case")*, Mr Sarwar submits that in a similar situation in that case the High Court Division refused any relief to the petitioner under section 561A of the Code of Criminal Procedure on the ground that he was a fugitive from law as he did not surrender before the Trial Court even though his sentence was remitted by the Hon'ble President. Further, drawing our attention to the deposition of PW

7 and the depositions of other witnesses, Mr Sarwar submits that though only one witness, namely PW 7, mentioned the names of the petitioners implicating them in the offences, the Courts below committed no illegality in relying on the said sole witness as it is lawful to convict on the basis of the deposition of one witness only, if found trustworthy. Therefore, he submits, this Court should not interfere into the impugned judgment of conviction.

6. Considered the submissions of the learned advocates, perused the application as well as the materials on record, including the lower court records which are available before us. Let us first address whether the petitioners were fugitive from law and were entitled to relief from the Appellate Court below on the day when they preferred Criminal Appeal No. 155 of 2008. It is the admitted position that the trial of the case was held in absence of the petitioners. It is also on record that on the day the trial Court delivered the judgment, i.e., on 21-1-2008, the Gazette reemitting the entire sentences and penalties of the petitioners by the Hon'ble President was published. It further appears from the record of the trial Court that the fact of such remission of sentences and penalties was somehow communicated to the learned Judge of the Trial Court, who, accordingly, took note of the same in the order sheet on 22-1-2008 in the following terms:—

> "স্বরাষ্ট্র মন্ত্রনালয়ের স্মারক নং-স্বঃ মঃ (কারা-২) পি-২৮/২০০৭-৪৫ তাং ২১-১-২০০৯ ইং প্রাপ্ত হয়ে নথি উপস্থান করা হলো। উক্ত স্মারকে অত্র মামলয় গত ২১-১-২০০৮ ইং তারিখে দন্ডাদেশ প্রাপ্ত পলাতক আসামী
>
> ১. এইচ এম কামরুল হাসান কচি
>
> ২. আজিজ হাসান
>
> ৩. হাসান মামুন এবং
>
> ৪. সাইফুল ইসলাম ফিরোজদের
>
> সকল কারাদন্ড ও অর্থদন্ড গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের ৪৯ অনুচ্ছেদের ক্ষমতা বলে মহামান্য রাষ্ট্রপতি সদয় হয়ে মওকুফ করেছেন মর্মে উল্লেখ করা হয়েছে। দেখিলাম। তাহাদের বিরুদ্ধে প্রসেসসমূহ জারীর আদেশ স্থগিত করা হইল। তাহাদের বিরুদ্ধে ইতিপূর্বে ইস্যুকৃত W/A Re-Call করা হলো।" *(Underlines supplied)*

The above note of the trial judge in the order sheet reveals that although the trial Judge, on the previous day, issued Conviction Warrant and Warrant of Arrest against the petitioners pursuant to the order of conviction and sentence, the said Conviction Warrant and Warrant of Arrest were recalled on the very next day upon receiving information that the Hon'ble President had remitted the petitioners' entire sentences and penalties.

7. Since a similar issue was dealt with by this Court very recently in *Sarwar Kamal's* case as cited by the learned Deputy Attorney General, we have examined the said decision. In *Sarwar Kamal's case*, the convict Sarwar Kamal preferred appeal before the High Court Division against his conviction and sentence and he was on bail. After hearing, the High Court Division dismissed his appeal and accordingly directed him to surrender before the trial Court. Thereafter, as the Hon'ble President remitted his sentence on an application already filed by his wife, he refrained from surrendering as per the direction of the High Court Division. His learned Advocate rather drew the trial Court's attention to the fact of pardon by the President and prayed for recall of Warrant of Conviction and Arrest. However, the trail court rejected the said prayer holding that since Mr Sarwar Kamal did not surrender pursuant to the direction of the High Court Division after dismissal of his appeal, he became fugitive from law, and without such surrender, he was not entitled to get any relief from the Court. Being aggrieved, Mr Sarwar Kamal then filed an application before the High Court Division under section 561A of the Code of Criminal Procedure seeking a direction on the trial Court to implement the order of pardon/remission granted by the Hon'ble President. The High Court Division, rejecting

the said application, upheld the position taken by the trial court. Although in *Sarwar Kamal's case* the Rule was under section 561A of the Code of Criminal Procedure, the concerned Bench of this Court questioned the very propriety of pardon or remission itself as granted by the Hon'ble President and finally declared the same to be unlawful.

8 Since the facts of the case before us and the *Sarwar Kamal's case* are different, we are refraining from discussing that case in detail as that would be mere academic. What is relevant is that in *Sarwar Kamal's case*, the High Court Division specifically directed Mr Sarwar Kamal to surrender before the trial Court, which he did not comply, and on that ground the trial Court as well as the High Court Division termed him fugitive from law. However, in the case before us, there was no such direction from any Court of law except the processes issued by the trial Court itself, namely the process issued during trail and the Warrants of Conviction and Arrest issued on the very day when it pronounced the judgment of conviction and sentence. But on the following day, i.e. on 22-1-2008, all such processes were recalled. Therefore, we do not find any defiance of law or direction of the Court in this case on the part of the petitioners at list when the appeal preferred by them was presented before the Appellate Court. Since the trial court below recalled the Warrant of Arrest and Conviction on 22-1-2008 pursuant to the pardon/remission granted by the Hon'ble President on the previous day, under any stretch of imagination, the petitioners cannot be termed or called as 'fugitive from law' at list from 22-1-2008 on wards. However, it appears from impugned order of the appellate Court below that the appeal was summarily rejected mainly on the ground that the petitioners were fugitive from law during trial. Whatever may be their status during the trial, they were at least not fugitive from law on 22-1-2008 on wards as their entire sentences were remitted by the Hon'ble President in the meantime and the processes issued by the trial Court requiring the presence of their bodies were recalled by the trial Court itself. Therefore, physically they were not required to remain present or surrender before any Court of law and, as such, they cannot be termed fugitive and denied relief on the day their appeal was presented before the learned Sessions Judge for admission.

9. It further appears that the Appellate Court cited another reason for not entertaining the appeal, namely that the certified copies of the depositions of prosecution witnesses were not submitted by the petitioners along with the Petition of Appeal. We do not find any reason as to why such position was taken by the learned Sessions Judge in particular when section 419 of the Code of Criminal Procedure, which was made applicable by the "EPR 2007", requires only copy of judgment to be accompanied with the Petition of Appeal. Section 419 further provides that even the requirement of such submission of the copy of the judgment appealed against may be exempted by the Appellate Court. In any case, the learned Sessions Judge was supposed to send for the records of the case upon admission of appeal in view of the provisions under section 423 of the Code. Absurd as it is, the learned Sessions Judge even found fault in the petitioners as they had failed to submit the certified copies of the return of process issued by the trial court under sections 87 and 88 of the Code of Criminal Procedure, when those could have been made available upon admission of the appeal and calling for the records of the trial court.

10. Appeal is a statutory right. It cannot be denied by assigning such flimsy reasons as has been done in the present case. Even under Rule 11 of the EPR 2007, the Appeal by the convicts was guaranteed, and in such appeal the provisions of the Code of Criminal procedure were made applicable by virtue of Rule-12. However,

to our utter dismay, the learned Sessions Judge did not apply his judicial mind at all. Since we are exercising power under section 439 of the Code of Criminal Procedure, we cannot but to hold that the impugned judgment is vitiated not only by non-application of mind, but also for violation of several provisions of the Code of Criminal Procedure. Thus, it cannot sustain in the eye of law.

11. We have also considered the depositions of the witnesses as recorded by the trial Court below, in particular the deposition of PW 7, Md Ahsanullah, as well as relevant depositions of the prosecution witnesses. The deposition of PW 7 reveals that he was in fact a chance witness. He admitted that he had finished his study in Dhaka University in 2003, left the residential hall in 2006 and started residing at another address. He does not mention any reason as to why and how he was present at the place of occurrence on the very day of 28th August, 2007 and subsequently. He even does not explain as to how he knew the petitioners and how he collected their names as he was no more a student of Dhaka University at the relevant time and left the residential hall one year back. It was the onus of the prosecution as well as this witness to justify his presence at the place of occurrence at the relevant time and as to how he knew the identities of the petitioners, which they failed to discharge miserably. When he claimed to be present at the campus of Dhaka University on the 28th August, 2007, he failed to disclose anything as to how he remained present as such when the entire campus was burning due to the agitation of the students of the Dhaka University compelling the then government to clamp curfew. Therefore, we are of the considered view that any conviction solely relying on the disclosure of names by a chance witness like PW 7 will be highly unsafe and against the very tenor of rule of evidence making it not sustainable in law.

12. Though the appellate Court below questioned the absence of the petitioners during the entire trial, it has to be borne in mind that the trial was being conducted at a time when the country was under emergency. This Court can take those facts into consideration that no reasonable man would present himself happily before any Court or members of law enforcing agencies during that time fearing undue exercise of power. Therefore, even if they were absent during the entire trial, they ought not to have been convicted merely on the basis of such abscondance.

Since we are of the view that it was very much unsafe on the part of the trial Court to convict the petitioners solely on the basis of the deposition of a chance witness like PW 7 and that the petitioners were not fugitive from law at list on 22-1-2008 and thereafter, we do not find any legal reason to allow this conviction to sustain. Accordingly, this Rule, issued under section 439 of the Code of Criminal Procedure, should succeed.

13. In the result, the Rule is made absolute. The impugned judgment and order dated 18-3-2008 passed by the Metropolitan Sessions Judge, Dhaka in Criminal Appeal No. 155 of 2008 dismissing the appeal summarily and thereby affirming the judgment and order of conviction and sentence dated 21-1-2008 passed by the Metropolitan Magistrate, Druto Bichar Adalat No. 4, Dhaka in Druto Bichar Case No. 53 of 2007 (arising out of Shahbagh Police Station Case No. 53, dated 21-8-2007 corresponding to GR No. 456 of 2007) convicting the petitioners under Rules 3(4) and 6(2) of the Emergency Powers Rules, 2007 and sentencing each of them to suffer rigorous imprisonment for 2 (two) years and to pay a fine of Taka 1,000 is set-aside. The order of conviction is set-aside as well.

Send down the lower Court records at once.

Ed.

High Court Division
(Criminal Revisional Jurisdiction)

ANM Bashir Ullah J
Mustafa Zaman Islam J

Khandaker Nazrul Islam Khokan.....
.....Accused-Petitioner

vs

Mustaba Kuli Khan and another.....
.....Opposite Parties*

Judgment
June 23th, 2013.

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

Penal Code (XLV of 1860)
Section 415

In order to constitute an offence under section 415 of the Code the deception by the accused is must and such deception must be also from the initial stage of the transaction but in the instant case since the accused made a payment of Taka 38,820 to complainant in two installments, so, it is difficult for us to hold that the accused had an initial intention to deceive the complainant rather there appears part payment in the transaction. The allegations of the complainant are accepted in its entirety the same do not constitute any offence under sections 420 and 406 of the Code. .....(12)

Abdul Quader Chowdhury vs State, 28 DLR (AD) 38; Md Shafiuddin Khan vs State, 13 BLD 362 = 45 DLR 102 and Abdur Rouf alias Nayan vs State, 53 DLR 283 ref.

No one Appears—For the Petitioner.

ASM Nazmul Haque, DAG with Md Mamunor Rashid, AAG—For the State-Opposite Party.

*Criminal Revision No. 339 of 1997.

Judgment

ANM Bashir Ullah J: This Rule on an application under section 561A of the Code of Criminal Procedure (in short, the Code) filed by the accused-petitioner was issued calling upon the opposite party No. 1 to show cause as to why the criminal proceedings of CR Case No. 1994 of 1995 now pending in the Court of learned Metropolitan Magistrate, Dhaka should 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 Mr Mustaba Kuli Khan, the opposite party No. 1 as complainant filed a complaint case in the Court of learned Chief Metropolitan Magistrate, Dhaka under sections 406 and 420 of the Penal Code against the present petitioner as accused alleging *inter alia* that the accused-petitioner took a loan of Taka 10,88,820 from one Shah Mohammad Shafi Ahmed Khadmi, here in after referred as Khadmi, who happens to be the relation of the complainant. The accused paid Taka 38,820 in cash to said Khadmi. Thereafter Khadmi asked the accused to make the payment of the rest money to the complainant and in the mean time Khadmi died. Thereafter the accused in compliance of the request so made to him paid Taka 5,00,000 to the complainant through cheque and was taking time for the rest amount of Taka 5,50,000 on this or that plea. On 23-7-1993 the accused executed an angikernama on a stamp valued at Taka 50 that he would make the payment of the money within 20-8-1993 but ultimately he did not make payment of the money. Thus the complainant issued a legal notice on 8-8-1994 upon the accused requesting him for making the payment of the money but he did not pay heed to it and under this compelling circumstance he filed the petition of complaint under sections 406 and 420 of the Penal Code and accordingly the case was registered as CR case No. 1994 of 1995.

3. The learned Magistrate on receiving the petition of complaint examined the complainant and took cognizance against the accused under sections 406 and 420 of the Penal Code whereupon the accused appearing in the Court below enlarged on bail. The accused sought discharge from the case but the learned Magistrate by his order dated 11-12-1996 framed charge under sections 420 and 406 of the Penal Code to which the accused pleaded not guilty and claimed to be tried. Since the learned Metropolitan Magistrate did not discharge the accused from the case, the accused moved this Court filing an application under section 561A of the Code of Criminal Procedure for quashing the proceedings and obtained the present Rule.

4. None appears for the petitioner to support the Rule though the Rule is appearing in the daily cause list of this Court.

5. Mr ASM Nazmul Haque, the learned Deputy Attorney-General along with Mr Md Mamunur Rashid, the learned Assistant Attorney-General appearing for the State opposes the Rule. He submits that the accused made angikernama for making payment of Taka 5,50,000 in his own hand on 23-7-1993 but even then he did not make payment of the said amount within the stipulated time fixed by him and thereby he deceived the complainant, so, the accused committed an offence punishable under sections 406 and 420 of the Penal Code and the trial Court rightly framed charge under those sections of law against the accused, So the proceeding is not liable to be quashed.

6. We have considered the above submissions of the learned Deputy Attorney-General appearing for the state with profound attention and have gone through the materials on record.

7. On going to the materials on record it appears that the accused Khandaker Nazrul Islam Khokan took a loan of Taka 10,88,820 from one Shah Mohammad Shafi Ahmed Khadmi who before his death asked the accused to make the payment of the said money to the complainant and accordingly accused paid Taka 5,00,000 to the complainant through cheque and for the rest amount of Taka 5,50,000 he made an angikernama on 23-7-1993 with a stipulation that he would pay the rest amount on or before 20-8-1993 but thereafter he did not make any payment of the amount and this admitted facts brought the parties into the present litigation.

8. In the case of *Abdul Quader Chowdhury vs State, 28 DLR (AD) 38* it was held by our Apex Court that a criminal proceeding can be quashed under section 561A of the Code where the facts are so preposterous that even on the admitted facts no case can stand against the accused. Secondly, if the criminal proceedings in question manifestly appears that there is a legal bar against the institution or continuance of the proceedings. Thirdly, where the allegations in the First Information Report or the complaint are accepted in their entirety do not constitute the offence alleged, and fourthly, where there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge.

9. Now let us examine whether the facts of the instant case invoke any of the ingredients stated hereinbefore. It is almost admitted in the instant case that the accused admitting the transaction between him and Khadmi make a payment of Taka 5,38,820 in cash to Khadmi himself and after the death of Khadmi on the instruction of Khadmi he made a payment of Taka 5,oo,ooo to the complainant Mustafa Kali Khan though the accused ultimately failed to make any further payment of the rest amount of Taka 5,50,000 and though he executed an angikernama to that effect in his own hand on 23-7-1993 stipulating to make the payment within 28-8-1993 but ultimately he did not make any payment of the said amount.

10. In the case of *Md Shafiuddin Khan vs State, 13 BLD 362 = 45 DLR 102* it was held that loan on a representation to repay the same dishonestly inducing the person to lend the money, having no intention to repay the same, it will be an offence of cheating as defined under section 415 of the Penal Code. In this particular case we find that no such intention of the accused has been revealed as he made part payment at least in two occasions.

11. In the case of *Abdur Rouf alias Nayan vs State, 53 DLR 283* it was held by this Court that if part payment is made by the accused, it can not be said that there was any intention of initial deception, so offence under sections 406 and 420 of the Penal Code will not lie. As we have found that it is the admitted facts that the accused had already made a payment of Taka 5,00,000 to the complainant, so we find a part payment in the transaction between the parties.

12. In order to constitute an offence under section 415 of the Penal Code the deception by the accused is must and such deception must be also from the initial stage of the transaction but in the instant case since the accused made a payment of Taka 38,820 to complainant in two installments, so, it is difficult for us to hold that the accused had an initial intention to deceive the complainant rather there appears part payment in the transaction. So if the allegations of the complainant are accepted in its entirety the same do not constitute any offence under sections 420 and 406 of the Penal Code. Thus, we find it difficult to hold that the occurrence of this case can be covered under the provisions of sections 420 and 406 of the Penal Code.

13. Under the above facts and circumstances, the proceeding is liable to be quashed. Thus, we find merit in the Rule.

14. In the result, the Rule is made absolute. The CR case No. 1994 of 1995 now pending in the Court of Chief Metropolitan Magistrate, Dhaka under sections 420 and 406 of the Penal Code is hereby quashed.

Let a copy of the judgment be sent to the concerned Court along with the lower Courts record.

Ed.

High Court Division
(Special Original Jurisdiction)

Sheikh Hassan Arif J
Mustafa Zaman Islam J

Judgment
February 3rd, 2014.

Titas Gas Karmachari Union .....Petitioner

vs

Secretary, Ministry of Labour and Manpower and others.....
.....Respondents*

Bangladesh Labour Law Act (XLII of 2006)
Sections 178 & 179

Sections 178 and 179 of the Act, provides for the procedure of registration of a trade union in an establishment thereby requiring some information and/or papers that are to be furnished by a particular trade union to obtain registration. One of the vital requirements to obtain such registration is to have minimum 30% of total workers as its members while sub-section (5) of section 179 provides that no establishment can have more than three registered trade unions. Section 182, on the other hand, provides that once the Labour Director is satisfied about the compliance of the requirements of registration, he shall issue a registration certificate in favour of a particular trade union within 60(sixty) days from receipt of the application for registration. While sub-section (4) of section 182 provides that if, for any reason, such registration is not

*Writ Petition Nos. 6704 & 2218 of 2009.

granted or rejected, the applicant trade union may prefer appeal within 30 (thirty) days of such refusal/rejection before the Labour Court. Sub-section (6) of the same section gives the applicant-trade union a further right to prefer second appeal before the Labour Appellate Tribunal if it is aggrieved by the decision of the Labour Court upon its first appeal.

Both the processes, namely the process of holding CBA election and the process of cancellation of registration, should continue at the same time. When we hold that the respondent nos. 5-7 have equal right to participate in the CBA election unless their registration is cancelled through the process as provided by law, we also declare that the petitioner's right to be the only trade union and, for that matter to be the CBA without any election, should also not be ignored as the said right of the petitioner is also guaranteed by the law. Recognizing the above anxiety of the petitioner trade union, we are of the view that the Director of Labour (respondent No. 2) should be directed to go ahead with both the processes, namely the process of holding CBA election as well as the process of cancellation of registration of the trade unions. .....(7 & 12)

Abul Hossain vs Bangladesh, 2 BLC 632 ref.

Abdur Razaque Khan, Advocate with Md Nurul Huda, Advocate—For the Petitioner in both the Writ Petitions.

Mohammad Mehedi Hasan, Advocate with AKM Rabiul Hassan, Advocate—For the respondent No. 4 in both the Writ Petitions.

Md Zahidul Hoque, Advocate—For the respondent No. 5-7 in Writ Petition No.6704 of 2009 and respondent No. 5 in Writ petition No. 2218 of 2009.

Judgment

Sheikh Hassan Arif J: Since similar questions of law and facts are involved in the aforesaid two writ petitions, they have been taken up together for hearing, and are now being disposed of by this single judgment.

2. In Writ Petition No. 2218 of 2009, Rule Nisi was issued, at the instance of the petitioner-Trade Union, calling upon the respondents to show cause as to why respondent No. 2 (Director of Labour) should not be directed to initiate proceedings for cancellation of registration of respondent Nos. 5 to 7 (three trade unions) under section 190 of the Bangladesh Labour Act, 2006. In Writ Petition No. 6704 of 2009, at the instance of the same petitioner-Trade Union, Rule Nisi was issued calling upon the respondents to show cause as to why the impugned office memo No. RTU/CBA (415)/2009/612(2)/1(3) dated 4-10-2009 (Annexure-C) issued by the Director of Labour (respondent No. 2) for taking steps to hold election to determine Collective Bargaining Agent (CBA) in the respondent No. 4 establishment, without holding an enquiry about eligibility and fulfillment of legal requirements and preconditions on the part of respondent Nos. 5, 6 and 7-Trade Unions to participate in the said CBA election, should not be declared to be without lawful authority and of no legal effect.

3. Short back-ground facts, relevant for the disposal of the aforesaid Rules, are that the petitioner, Titas Gas Karmachari Union (Registration No. B-1193), has been performing its functions as trade union in the Titas Gas Transmission and Distribution Co. Ltd. (respondent No. 4) since its registration on 15-9-1969 under the provisions of the then Industrial Relations Ordinance, 1969. The petitioner claims to have had 1050 workers of the respondent No. 4- establishment as its members out of total 1398 workers. This being so, according to it, no other trade union could have had mini-

mum 30% of the total workers as its members in order to perform as validly registered trade union. The petitioner, being the only trade union, became Collective Bargaining Agent (CBA) in view of the relevant provisions of law applicable at the relevant time and, accordingly, signed several memorandum of settlements with the management of the respondent No. 4, e.g., the settlements dated 19-2-1987 and 3-4-1990. The petitioner also worked as interim trade union when the question of determination of CBA arose in 1991, which is evident from the letter dated 20-5-1991 issued by respondent No. 2 recognizing the petitioner as the interim CBA. However, since respondent No. 4 establishment suddenly stopped collection of petitioner's membership subscriptions through check-off system in 2004, the petitioner moved Writ Petition No. 1852 of 2005, wherein this Court, by order dated 2-4-2005, issued Rule upon the respondents to show cause as to why they should not be directed to continue collection of monthly subscription from the wages of the members of the petitioner trade union through check-off system (though the Rule issued in the said writ petition has been discharged recently for non-prosecution vide order dated 30-1-2014). Further case of the petitions is that three other trade unions, namely respondent Nos. 5, 6 and 7, have somehow got registrations from the Registrar of Trade Unions on 18-10-1989, 29-7-1991 and 31-7-1991 respectively and have been functioning illegally; that when the respondent No. 2 took initiative once to inquire into the matter and asked all the trade unions and respondent No. 4-establishment to furnish relevant papers and information in respect of the strength of membership, the petitioner complied therewith, but the respondent No. 5-7 failed to furnish those required information showing their minimum 30% membership strength. It is contended that since the respondent No. 5-7 did never have minimum 30% membership strength, they could not have validly registered and, as such, cannot function legally, and that it is the responsibility of respondent No. 2 to take necessary steps for cancellation of their registrations, which it was not doing, in spite of repeated requests by the petitioner vide letter dated 3-3-09 and notice demanding justice dated 19-3-2009, prompting the petitioner to move this Court and obtain the aforesaid Rule issued in Writ Petition No. 2218 of 2009. In addition, since the respondent No. 2 has taken initiative to hold CBA elections by issuing the impugned letter dated 4-10-2009 (Annexure-C) without resolving those issues, the petitioner again moved this Court and obtained the other Rule issued in Writ petition No. 6704 of 2009. By furnishing a supplementary affidavit, the petitioner now claims that it has 701 workers as its members out of total 1167 eligible voter employees of the respondent No. 4-establishment.

4. Rules are opposed by respondent No. 6,-Titas Gas Employees Union (Registration No. B-1936), claiming that they have requisite number of members to continue as validly registered trade union and, as such, they are entitled to participate in the CBA election, and that the petitioner has been filing writ petitions before this Court just to delay the holding of CBA elections. It is further stated by respondent No. 6 that even the persons holding the posts of president and secretary of the petitioner trade union are not validly elected office bearers and, as such, the Rules should be discharged.

5. Mr Abdur Razaque Khan, learned senior counsel appearing for the petitioner-trade union in both the writ petitions, submits that as per the applicable law, an establishment cannot have, at a particular relevant time, more than three registered trade unions. However, admittedly, the respondent No.4-establishment now has four registered trade unions including the petitioner and respondent No. 6, and, as such,, it is the responsibility of the Director of Labour to immediately hold enquiry and take steps for

cancellation of registrations of the trade unions which do not have minimum 30% membership strength. Learned advocate further submits that since at present the petitioner has about 70% of total employees and workers as its members, it is incumbent upon the respondent No. 2 to take immediate steps for cancellation of registrations of at least two trade unions because under no circumstances there can be more than two trade unions under the law given the fact that the petitioner's membership strength is 70% of the total workers. Mr Khan further argues that without resolving these issues as to the existence of lawfully registered trade unions, the Director of Labour cannot take initiative to hold CBA election among four trade unions and, accordingly, a direction should be issued from this Court to resolve those disputes first and to hold CBA election thereafter, if necessary. Mr Khan points out that this petitioner has been the only validly registered trade union since its inception and, accordingly, functioning as CBA and, as such, should still now be allowed to function as the interim CBA until and unless the new CBA is elected through CBA election among the validly registered trade unions.

6. Mr Md Zahidul Hoque, learned advocate appearing for the respondent No. 6, on the other hand, submits that since respondent No. 6 obtained registration validly and still functioning as such, it has every right to participate in the CBA election until its registration is cancelled in accordance with law. Learned advocate further submits that the petitioner- trade union is even not properly represented by it's validly elected President and Secretary and, as such, the Rule issued in the aforesaid writ petitions should be discharged with a direction to hold CBA election immediately.

7. Considered the submissions of the learned advocates, perused the writ petitions, affidavits in opposition and materials on record. Sections 178 and 179 of the Bangladesh Labour Act, 2006 (hereinafter called "the said Act") provides for the procedure of registration of a trade union in an establishment thereby requiring some information and/or papers that are to be furnished by a particular trade union to obtain registration. One of the vital requirements to obtain such registration is to have minimum 30% of total workers as its members [see 179(2)], while sub-section (5) of section 179 provides that no establishment can have more than three registered trade unions. Section 182, on the other hand, provides that once the Labour Director is satisfied about the compliance of the requirements of registration, he shall issue a registration certificate in favour of a particular trade union within 60(sixty) days from receipt of the application for registration. Again, while sub-section (4) of Section 182 provides that if, for any reason, such registration is not granted or rejected, the applicant trade union may prefer appeal within 30 (thirty) days of such refusal/rejection before the Labour Court. Sub-section (6) of the same section gives the applicant-trade union a further right to prefer second appeal before the Labour Appellate Tribunal if it is aggrieved by the decision of the Labour Court upon its first appeal.

8. Thus, it appears from the relevant provisions of the said Act that it is the trade union, which applies for registration, can only challenge the order of refusal or rejection of registration. This follows that the law has not given any specific right to the existing trade unions to prefer any appeal or objection before the Labour Court against granting of registration to a particular trade union. The only avenue open to the existing trade unions is to file complaint before the Labour Director against a particular trade union on allegations that it has lost its required qualifications to exist as a validly registered trade union, and upon such complaint, the Labour Director is required to hold inquiry and seek 'permission' from the Labour Court only if, upon inquiry, he is satisfied that the registration of that particular trade union should

be cancelled. Once such 'permission' is given by the Labour Court, the said trade union may even prefer appeal against such 'permission' before the Labour Appellate Tribunal within 30(thirty) days in view of sub-section (1) of Section 191, which further provides that the decision of Labour Appellate Tribunal on that appeal shall be final. Sub-Section (2) of Section 191, however, provides that until such appeal is disposed of by the Labour Appellate Tribunal, the said trade union shall be permitted to continue its functions as a trade union.

9. Now, the main allegation of the petitioner trade union is that since it has 70% membership strength of total workers of the respondent No. 4-establishment and at a certain point of time it even had 80% strength, it should be allowed to function as the only trade union in the said establishment unless and until any other trade union fulfills the minimum requirements to function as a validly registered trade union, namely that they have minimum 30% membership strength.

10. It is admitted position that during the existence of the petitioner trade union, three other trade unions got registration. Therefore, once they got registration, they acquired the right to function as trade unions in the concerned establishment. Now the question is how those trade unions got registration when the petitioner is showing evidence that it had more than 80% membership strength at that relevant time. There may be various reasons for granting registrations to a particular trade union, though, in reality, it does not have 30% membership strength. Even sometimes a particular establishment may have more than three registered trade unions when some existing members of a particular trade union hold dual or triple membership at the same time, which is prohibited by law and, once detected, punishable in view of Section 193 of the said Act. Thus, it may be said that while granting registration the Labour Director did not enquire into the matter of holding double or triple membership by a particular member, otherwise it would not have been possible to have more than three registered trade unions in a particular establishment. Thus, Mr Khan has correctly pointed out that the Registrar of Trade Union (now Labour Direction) must be very careful when it is granting registration to the 3rd or 4th trade union in a particular establishment because on such occasions there is every possibility that some members are holding double or triple membership. Therefore, it may also be said that while granting registration to the 3rd and 4th trade union or even to the 2nd trade union in respondent No. 4, the Register of Trade Unions acted negligently. This kind of negligence on the part of the Registrar Trade Union should not be taken lightly because of the fact that one illegal registration may cause huge problem to other legally registered trade unions in respect of their fundamental rights to form association and to perform as, such as, guaranteed under Article 38 of the Constitution.

11. Be that as it may, it is now admitted that at present there are four registered trade unions performing or existing in the respondent No. 4-establishment. However, the proper stage has not yet come to hold that this or that particular trade union is performing illegally unless an inquiry to that effect is held by the Director of Labour. Once the Labour Director is satisfied upon such inquiry that a particular registered trade union has become disqualified because of the fact that it has lost its minimum 30% strength of membership or for any other reason, he will seek permission from the Labour Court to cancel its registration, and only after obtaining such permission, he can cancel the registration of a particular trade union. Not only that, the said particular trade union will still have the right to prefer two consecutive appeals against such permission granted by the Labour Court, and sub-section (2) of Section 191 has given the said trade union a right to be allowed

to function as trade union until its 2nd appeal is disposed of finally against it by the Labour Appellate Tribunal. This being the legal dilema, the delinquent trade union or unions will always have the right to function as registered trade union until and unless the permission to cancel their registration is approved finally by the Labour Appellate Tribunal. In other words, until such appeal is disposed of against them, they will still be allowed to function as trade unions, which includes their right to participate in the election for determination of the Collective Bargaining Agent. This position of law has already been settled by this Court in the case of *Abul Hossain vs Bangladesh [2BLC 632]*, wherein the concerned establishment had five registered trade unions and his Lordship Justice Mainur Reza Chowdhury (as he then was), delivering the judgment of the Court, held that unless the registration of other trade unions are cancelled, they remain to be registered trade unions of the said establishment and, as such, they are entitled to receive notice to participate in the election for determination of the Collective Bargaining Agent. This Court also took the same view in a recently unreported case in Writ Petition No. 2080 of 2012.

12. As we acknowledge the grievances of the petitioner trade-union and hold that the said grievances are genuine, at the same time we cannot go beyond the scope of the provisions of law. It is very much understandable that some sort of gross illegality is going on in the respondent No. 4-establishment as regards the existence of more than three registered trade unions and holding of dual or triple membership by several workers of the said establishment. In addition, the negligence on the part of the Labour Director or Registrar of Trade Union in granting registration without proper scrutiny cannot be ignored. Therefore, this Court is of the view that both the processes, namely the process of holding CBA election and the process of cancellation of registration, should continue at the same time. When we hold that the respondent nos. 5-7 have equal right to participate in the CBA election unless their registration is cancelled through the process as provided by law, we also declare that the petitioner's right to be the only trade union and, for that matter to be the CBA without any election, should also not be ignored as the said right of the petitioner is also guaranteed by the law. Recognizing the above anxiety of the petitioner trade union, we are of the view that the Director of Labour (respondent No. 2) should be directed to go ahead with both the processes, namely the process of holding CBA election as well as the process of cancellation of registration of the trade unions.

13. Accordingly, the Labour Director (respondent No. 2) is directed to immediately initiate enquiry as to the strength of membership of every trade union in the respondent No. 4-establishment and to reach a decision as to the identification of validly registered trade unions and as to the cancellation of registration of trade union or unions if any of them has become disqualified in the meantime and to take actions against the members of the trade unions who are holding double or triple membership at the same time. Initiation of this process of cancellation of registration must start immediately upon receipt of the copy of this judgment and that process must be finished within 60 (sixty) days thereafter. At the same time, since no CBA election has ever been held in the respondent No. 4-establishemnt, respondent No. 2 must also take immediate initiative to hold CBA election among the registered trade unions and that process should start within 30 (thirty) days from receipt of the copy of the judgment. If the CBA election precedes the determination of validly registered trade unions by the Labour Director, and it transpires, after enquiry, that the elected trade union itself does not have minimum strength of membership as required by law or it has any other disqualification, the Labour Director must take immediate steps for seeking permis-

sion from the Labour Court for cancellation of the registration of that trade union, though elected in the meantime as CBA, and after cancellation of such registration, will again take initiative for holding CBA election immediately

14. With the above observations and directions, the Rules issued in the above two writ petitions are disposed of.

Communicate this order at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Md Rezaul Hasan J

HRBC-Intraco(BD) Joint Venture .....Petitioner

vs

Judgment July 31st, 2013.

Government of the Peoples Republic of Bangladesh and others..... ..... Respondents*

Arbitration Act (I of 2001)
Sections 42(2) and 43

Applications, filed in this court, do not fall within the ambit of "international commercial arbitration" hence none of these applications is maintainable. .....(14)

Rupali Bank Limited vs Tafazal Hossain, 44 DLR (AD) 260 ref.

Rokanuddin Mahmud, Senior Advocate for Mustafizur Rahman, Advocate—For the Petitioner.

Murad Reza, Additional Attorney-General with AKM Zahirul Huq, DAG and Md Motiur Rahman, AAG—For the Government.

*Arbitration application Nos. 9 and 10 of 2013.

Judgment

These two applications have been filed under section 42(2) read with section 43 of the Arbitration Act, 2001 (herein after referred to as the Act). In both these applications, the claimant and the opposite parties are same and both these applications have arisen out of and are filed to set-aside two awards, both dated 31-12-2012 (delivered to and received by the parties on 5-12-2013) passed in two arbitration case, respectively numbered as Arbitration case No. 1 of 2011 (from which arose the Arbitration Application No. 10 of 2013) and Arbitration Case No. 2 of 2011 (from which arose the Arbitration application No. 9 of 2013). The impugned awards have been made, in both cases, by a panel of 3 arbitrators consisting of same persons and regarding dispute that has arose in connection with a project known as 'Joydebpur-Mymensingh Road Improvement Project', divided into two packages, namely package No.WI-1 and WI-2. Similar facts and circumstances as well as similar questions of law and facts are involved in both the matters. Hence both the matters have been taken for disposal simultaneously by a common judgment. It is relevant to mention here that the Arbitration Application No.9 of 2013 relates to package No.WI-1 and Arbitration Application No.10 of 2013 relates to package No.WI-1, of the same project.

2. In both these application's, containing allegations almost in verbatim, the applicant (claimant) prays for setting-aside both the awards dated 31-12-2012 (both received by the parties on 5-1-2013), passed by majority in the Arbitration Tribunal comprising (1) Mr Justice Md Awlad Ali, Chairman, (2) Mr Md Idris Miah, Retd. Additional Chief Engineer, Arbitrator and (3) Mr Md Mostofa, Retd. Additional Chief Engineer, Arbitrator to the extent it relates to the terms (i) and (ii) as contained in the majority award signed by Mr Justice Awlad Ali

and Mr Md Mostofa. The arbitral awards, as received from the arbitrators, have been annexed to the arbitration applications as Annexure-A to both applications.

3. The petitioner, as claimant, submitted a statement of claim dated 20-11-2011 praying for the following reliefs:

(i) A declaration that the Memo No. JMRIP-42-43/11-1114 dated 14-7-2011 terminating the Contract is void and illegal,

(ii) A direction for the opposite party No. 1 to rescind, revoke and cancel Memo No. JMRIP-42-43/11-1114 dated 14-7-2011,

(iii) A declaration that the claimant joint venture, through Intraco (BD) Associates Ltd., is entitled to carry on and complete the works under Contract No. WI-2 for the Construction of Construction of Rajendrapur to Maona section (Chainage Km 12 + 650 to Km 30 + 250) of the Joydebpur-Mymensingh Road Improvement Project;

(iv) A declaration that the opposite parties are not entitled to encash and seek payment under Bank Guarantee Nos. MBL /Moti/BG-25/2011 dated 21-3-2011 for Taka 22,38,21,023 (Taka twenty two crore thirty eight lakh twenty one thousand twenty three only) and MBL Moti/BG-35/2011 dated 27-4-2011 for Taka 20,34,73,660 (Taka twenty crore thirty four lakh seventy three thousand six hundred sixty only); and

(v) Grant such other or further reliefs to which the claimant is entitled under the law and equity, The case of the claimant as contained in the Statement of Claim contending as follows:

(a) The claimant is and was at all material times a Joint Venture between Hebei Road and Bridge Group Co. Ltd. of the People's Republic of China ("HRBC") and Intraco (BD) Associates Ltd. of Bangladesh ("Intraco"). The claimant is represented by its authorised signatory Mr Sk Babar Ali, 78 Motijheel C/A (5th Floor), Dhaka-1000, who is the Managing Director of Intraco (BD) Associates Ltd. and the attorney of Hebei Road and Bridge Group Co. Ltd. of the People's Republic of China.

(b) Opposite party No. 1 is the Government of Bangladesh represented by the Chief Engineer, Roads and Highways Department; opposite party No. 2 is the Project Director (ACE), Roads and High-ways Department, Joydebpur-Mymensingh Road Improvement Project.

(c) By a memo dated 29-7-2010, being Invitation to Tender No. JMRIP-02, respondent No. 2 invited a tender, being Invitation for Tender for Package Nos. WI-1 and WI-2 of Joydepur-Mymensingh Road Improvement Project.

(d) HRBC and Intraco became interested to participate in the said tender by forming a joint venture. While the joint venture was being finalised, Intraco purchased the tender documents in the name of the proposed joint venture for, amongst others, Package No. WI-1, on 12-8-2010 comprising, amongst others, the Instructions to Tenderers (ITT) and Tender Data Sheet (TDS).

(e) HRBC and Intraco formed the claimant joint venture by entering into a Joint Venture Agreement

dated 25-8-2010 ("JVA") for participating in the tenders for the Joydevpur-Mymensingh Road Improvement Project: Package No. WI-1 and Package No. WI-2 floated by the opposite party No. 2.

(f) On 26-9-2010, Mr Sk Babar Ali was granted a Power of Attorney by HRBC to represent it in all matters connected with the said tenders.

(g) The claimant submitted tender dated 30-9-2010 for execution of the works under the package for Package No. WI-2 at a contract price of BDT 203,47,36,577.47 (Taka two hundred and three crore forty seven lakh thirty six thousand five hundred and seventy seven and paisa forty seven) for as corrected and modified in accordance with the ITT.

(h) The tender submitted by the claimant, along with all other tenders, was evaluated by Technical Evaluation Committee (TEC) of the Joydevpur-Mymensingh Road Improvement Project, Tender Package Nos. WI-1 & WI-2. It is important to note that the Convenor of the TEC was Mr Md Aminur Rahman Lasker, Project Director (ACE), RHD, RNIMP-II (i.e. another Project).

(i) In the course of evaluation, Mr Md Aminur Rahman Lasker as Convenor of the TEC sent an e-mail dated 1-11-2010 from the e-mail address pdrnimp2@rhd.gov.bd to the e-mail address of HRBC, hrbc@hebrb.com.cn, with copy to e-mail address pdjmrip@rhd.gov.bd, seeking confirmation as to whether the joint venture agreement of claimant was genuine and authentic. It should be noted that the e-mail account hrbc@hebrb.com.cn of HRBC is posted in the said company's website. It should be further noted that at that point no copy of this e-mail was made available to Intraco; a copy of the said e-mail has been subsequently procured by Intraco from the Roads and Highways Department in the wake of subsequent allegations.

(j) In reply to the said e-mail dated 1-11-2010, HRBC sent by fax to the Roads and Highways Department a certificate dated 5-11-2010 signed by Mr Yang Jingyan confirming and approving that the joint venture agreement of the claimant was genuine and authentic The said fax was sent from a fax number of HRBC posted in the said company's website. It should be noted that no copy of this fax was sent to or made available to Intraco (BD) Associates Ltd; a copy of the said fax has been subsequently procured by Intraco from the Roads and Highways Department in the wake of subsequent allegations.

(k) Thus, the TEC convened by Mr Md Aminur Rahman Lasker as Convenor inquired about and was fully satisfied with the authenticity and genuineness of the joint venture agreement of the claimant joint venture.

(l) Finding the bid of the of the claimant to be the lowest, the Roads and Highways Department, by memo No. 42/10-234 dated 28-2-2011 sent under the signature of the opposite party No. 2, Mr M Feroz Iqbal, the Project Director (ACE), RHD, Joydebpur-Mymensingh

Road Improvement Project, issued notification of award in favour of the claimant subject to furnishing of Performance Security and Advance Payment Guarantee in the specified form for the specified amounts. The claimant submitted the Performance Security and Advance Payment Guarantee in the form of bank guarantees, being Bank Guarantee Nos. MBL/Moti/BG-25/2011 dated 21-3-2011 for Taka 22,38,21,023 (Taka twenty two crore thirty lakh twenty one thousand twenty three only) and MBL Moti/BG-35/2011 dated 27-4-2011 for Taka 20,34,73,660 (Taka twenty crore thirty four lakh seventy three thousand six hundred sixty only) issued by Mercantile Bank Ltd., Motijheel Branch, Dhaka for the required amount.

(m) Following submission of the Performance Security, a written Contract dated 23-3-2011 ("Contract") was entered into between the opposite party No. 1 as the Employer and the claimant as the Contractor, being Contract No. WI-2 for the Construction of Construction of Rajendrapur to Maona section (Chainage Km 12+650 to Km 30+250) of the Joydebpur-Mymensingh Road Improvement Project. The said Contract included, amongst others, the Notification of Award, General Conditions of Contract (GCC) and the Particular Conditions of Contract (PCC).

(n) Following execution of the Contract, the mobilization money was received by the claimant, and in accordance with the Contract, the claimant had already commenced works.

(o) It appears that on 25-5-2011, the opposite party No. 2, Mr M Feroz Iqbal, the Project Director, wrote a letter, being Memo No. JMRIP/42/11-763 dated 25-5-2011, addressed to Mr Yang Jingyan, Managing Director of HRBC alleging that the activities at the project sites were insignificant and requesting HRBC to mobilize its teams at the project sites.

(p) It appears that, in reply to the letter of 25-5-2011 above, by a fax message dated 31-5-2011 signed by Mr Yang Jingyan, he alleged that the JVA of the claimant was fake, and that HRBC never entered into any JVA with Intraco as alleged. It is interesting to note that though the letter dated 25-5-2011 was written by Mr M Feroz Iqbal as Project Director, the reply dated 31-5-2011 was addressed to Mr Md Aminur Rahman Lasker, Convenor of the TEC. These communications mentioned above have been subsequently provided to the claimant by the Roads and Highways Department.

(q) The claimant and Intraco maintain that the JVA is genuine and authentic. It was executed by HRBC and Intraco. It would be noted that even though the letter dated 25-5-2011 was written by opposite party No. 2, Mr M Feroz Iqbal as Project Director, the reply dated 31-5-2011 issued by Hebei Road & Bridge Group Co. Ltd. was addressed to Mr Md Aminur Rahman Lasker, Convenor of the TEC. If it is indeed the case that the JVA is fake, and that HRBC was unaware of the Project or the Contract until the letter dated 25-5-2011, then the question naturally arises as to how does HRBC know

that Mr. Md Aminur Rahman Lasker is the Convenor of the TEC, and why should the reply to Mr M Feroz Iqbal's query be addressed to Mr Md Aminur Rahman Lasker.

(r) The bid submission was accompanied by authenticated documents provided by HRBC. After the opening of the financial bids of the tenderers and the Claimant having been identified as the lowest bidder, as many as three representatives of HRBC from China and one from Philippines travelled to Dhaka to inquire about the project upon obtaining visa from Bangladesh Foreign Missions.

(s) In the circumstances, when the opposite party No. 2 by letter dated 16-6-2011 wrote to the claimant seeking clarification on the matter, the claimant replied by letters dated 21-6-2011, 3-7-2011 and 4-7-2011 explaining the above facts and circumstances and explaining that the Joint Venture Agreement was genuine.

(t) Notwithstanding the said explanations, the opposite party No. 2 by letter dated 5-7-2011 asked the claimant to show cause as to why the Contract should not be terminated; notwithstanding the Claimant's reply dated 12-7-2011, by the decision communicated under Memo No. JMRIP-42-43/11-1114 dated 14-7-2011 issued by the Project Director, he purported to terminate the Contract by reference to GCC Clause 89.1(a) effective after expiry of 28 days.

4. The opposite party No. 2 has filed affidavit-in-oppositions in both the Arbitration Application No.9 of 2013 as well as in Arbitration Application No.10 of 2013 denying all material allegations and further stating that the Opposite Parties in their letters dated 18-5-2011, 24-5-2011, 25-5-2011 and 7-6-2011 also informed the Claimant about the absence of their lead partner HRBC, which is contrary to the terms and conditions of the said contract and thus requested the Claimant to immediately arrange meeting with them. True copies of the said letters 18-5-2011, 24-5-2011, 25-5-2011, 7-6-2011 and 17-6-2011 have been annexed as Annexure- 16 series. They have also filed a supplementary counter-affidavit; that the Opposite Parties, following the said termination of contract of the package 1 and 2, finally in the interest of public at large and also for the sake of development of Joidevpur - Mymensingh Road on 23-12-2012, have entrusted the said package 1 and 2 to Bangladesh Army for the development and construction of the said Road; that the Special Works Organisation (West) of Bangladesh Army, on 23-12-2012 took over the said project, being Package No. WI-1 and WI-2 from the opposite parties. The opposite parties accordingly, vide a memo dated 7-4-2013 paid Taka 20,00,00,000 (Twenty Crore) to Bangladesh Army to carry out the said packages. True copies of the said letters dated 23-12-2012 and 7-4-2013 respectively have been annexed as Annexure- 17 series; that the Claimant, following the receipt of the said awards, failed/refused to refund back the amount of Advance made to them within 4 month, as directed in the awards. The opposite parties had no other option but to invoke the Advance Payment Guarantees from the bank, vide their notice of demand dated 4-6-2013 and 18-6-2013 as directed in the said Award (Annexure 11 and 13 to the Counter Affidavit). The said bank, nevertheless has so far failed/refused to encash the Advance Payment Guarantees (bank's letter dated 23-6-2013 Annexure 12 to the Counter Affidavit) contrary to the establish principle of law; that on the other hand, the Claimant taking full advan-

tage of the said awards, vide its notice of demand dated 9-6-2013 and 4-7-2013, demanded release of the performance guarantees as per the Term No. (iii) of the said awards. In that view of the matter, it has become very much apparent from the conduct of the Claimant that they are purporting to take full advantage of the said awards by approbating and reprobating under the same breath. True Copies of the said letters of demand dated 9-6-2013 and 4-7-2013 have been annexed as Annexure-18.

5. It further appears from the materials on record that, by notice dated 15-9-2011 the claimant has appointed one Mr Md Idris Miah as their arbitrator whereas the opposite parties have appointed one Md Mostafa as Arbitrator, vide letter dated 30-1-2012. Both Arbitrators has appointed Mr Justice Md Awlad Ali (since retired) as the Chairman of the Arbitration Tribunals. The said Arbitration Tribunals, having considered the statement of claim, the rejoinder as well as other documentary and oral evidence, have passed the awards in both the arbitration cases on 31-12-2012, respectively, being Arbitration Case No.1 of 2011 and Arbitration Case No.2 of 2011 between the parties.

6. Being aggrieved by the said awards the claimant has filed two applications, both under section 42 sub-section (2) read with section 43 of the Act, for setting-aside the award on the grounds stated in the applications, registered as Arbitration Application No. 9 of 2013 and 10 of 2013.

7. The learned Advocate Mr Rokanuddin Mahmud, appearing alongwith the learned Advocate Mr Mustafizur Rahman, having placed the application alongwith the annexures, firstly submits that the arbitrators have framed as many as 3 issues as will be evident from the award and has recorded their findings to the effect that there was no fraudulent practice on the part of the claimant. Therefore, the termination of contracts under clause 89(1)(a) of the GCC is not valid. He next submits that the notice of the termination dated 14-7-2011 has been issued on the ground of resorting to fraudulent practices in obtaining this works, but the learned Arbitrators having recorded that there was no fraudulent practice, therefore, passing of the impugned awards holding termination as otherwise valid is beyond the scope of their authority and, as such, the award is liable to be set-aside under section 43(1)(a), sub-clause (iv). He therefore prays for setting-aside the award on the ground that the award has been passed by the learned Arbitrators for dealing with a dispute not contemplated by, nor falling within, the terms of the reference. Hence the same is liable to be set-aside under section 43(1)(a), sub-clause (IV).

8. On a query made from the Bench, the learned Advocate submits that the award had been challenged within 60 days time limit as prescribed under section 42 of the Act. On further query from the Bench, the learned advocate has candidly admitted that the claimant has left the site upon termination of the agreement, as per GCC Clause No. 90.1 and that the job has been awarded to another contractor, namely Bangladesh Army.

9. The learned Additional Attorney-General Mr Murad Reza, appearing alongwith the learned Deputy Attorney-General Mr AKM Zahirul Huq and Assistant Attorney-General Mr Md Motiur Rahman, on the other hand, having drawn my attention to the applications as well as to the documents annexed to the applications, firstly submits that it has been recorded by the CW-1 (claimants witness No.1) that the joint venture partner HRBC (a company registered at Chaina) has withdrawn from the joint venture. As such, as on the date of filing the applications HRBC is not a claimant and the joint venture agreement (JVA) has ceased to exist and, in consequence, the so called attorney has also ceased to be attorney of the joint ven-

ture partners for all practical purposes. Accordingly, the learned Additional Attorney-General empliatically submits that when one of the principles i.e. the foreign component (HRBC) is no longer a party to the applications, the applications filed before this court is not al all maintainable inasmuch as these does not refer to any dispute coming within the scope 'international commercial arbitration' as defined under section 2 the Act. He next submits that clause 89.1 (b) of the GCC defines 'fundamental breach' in following terms namely 'fundamental breaches of contract shall include, but shall not be limited to, the following, i.e. to the circumstances and events described in clauses J to VIII. Moreover, out of these eight clauses, learned additional Attorney-General submits, only clause (VII) refers to corrupt or fraudulent practices, but this clause No. (VIII) does not exclude any other circumstances or events that will constitute 'fundamental breach of the contract' and thereby would render the contract liable to be terminated. In otherwords, he argues that clause 89.1 (a) or (b) only give inclusive definition of "fundamental breach" of contract, not exclusive definition. Next, referring to the letter of termination dated 14-7-2011, the learned Additional Attorney-General submits that the letter, Memo No. JMRIP-42-43/11-1114 dated 14-7-2011, refers to as many as 8 reasons for termination of the agreement and one of the 8 reasons is fraudulent practices, whereas other grounds clearly refers to fundamental breach of contract on other grounds as defined in GCC clause No. 89.1 (b). He then submits that the notice dated 14-7-2011 should be read as a whole in order to understand the circumstances that has constituted fundamental breach of agreement committed by the claimant. The narrowest meaning attributed to this notice by the claimant is an absurd interpretation and is not sustainable in law. The learned Additional Attorney-General, next referring to the awards, submits that in the awards 3 issues have been framed and the learned arbitrators, although have decided Issue No.1 to the effect that there was no fraudulent practice on the part of the claimant, but they have held the termination valid for committing fundamental breach. He also submits that even in the notice dated 15-9-2011, whereby the dispute was referred to the arbitrators, the claimant themselves have admitted at paragraph No.17 of the said notice that their foreign counter part HRBC was trying to illegally back out of the JVA. However, the arbitrators have passed the award based on issue Nos. 2 and 3. As such, he submits that, the contention that the learned arbitrators, in passing the award, have dealt with matters not contemplated by disputants or that the award was not falling within the terms of submission is totally misconceived and misleading. Inasmuch as the definition of 'fundamental breach' clearly covers the situation referred to in the termination letter dated 14-7-2011. He further submits that the contract was finally terminated on 18-10-2011 due to 'fundamental breach' committed by the claimant, as specifically referred to therein, and the award was passed on 31-12-2012 with a direction to refund the public money (which is indeed ADB loan) detained by the claimant. But disregarding the said direction, the claimant has refused to refund the advance payment received and thereby causing serious loss to the national economy and acting contrary to the public interest.

10. Heard the learned Advocates, perused the applications, counter affidavits and the supplementary affidavits as well as the documents annexed therewith.

11. In the background of these case the court has to decide (1) whether this application is maintainable, in other words whether this court has jurisdiction to entertain this application. (2) whether the award is liable to be set-aside on the grounds and submissions recorded herein before and (3) what relief or what direction, if any, should be passed in these two cases.

12. Having considered both the awards, I find that CW1 has unequivocally admitted that joint venture partner has withdrawn from the JVA for the reason best known to them. Besides, this position has been admitted in the notice dated 15-7-2011 of the claimant (at paragraph No.17), whereby they have appointed their arbitrator. This application under section 42(2) read with section 43 has been filed on 22-7-2013, although affidavit was sworn on 5-3-2013. As such at the time of filing of this application evidently HRBC was not a claimant when the applications were filed before this court.

13. Having examined the record, I have found no materials that meets the requirements of sub clause-(i) to (iii) of clause-(C) of section 2 of the Act.

14. In the light of the facts and law consulted above, I am of the considered view that these two application, filed in this court, do not fall within the ambit of "international commercial arbitration" hence none of these applications is maintainable. In this connection it is pertinent to cite here the decision referred to in *44 DLR (AD) 260, Rupali Bank Limited vs Tafazal Hossain.* In that case it has been held that, "Jurisdiction of a Court goes to the very root of a matter brought before it, and if the Court got no jurisdiction everything shall fall through. The Court which got no jurisdiction over a matter shall not go into the merit of the matter."

15. Besides, having considered the provisions sub-section (2) of section-42, I find that these Arbitration Applications were admitted after expiry of 60 (sixty) days period. Hence, these are barred by limitation, though the affidavits to the application were sworn within 60 (sixty) days. But the time limit of 60 days shall be counted from the date the applications have been posted in the daily cause list for admission hearing, not from the date of swearing affidavit. So, the petitions are time barred as well.

16. I therefore dismiss both these applications as not maintainable and beyond the jurisdiction of this court.

17. Besides in view of the above quoted decision, this court need not enter into the merit of the matter, so far as other points are concerned.

Parties will bear their respective cost.

The order of stay granted earlier by this court shall stand vacated.

Ed.

High Court Division
(Criminal Revisional Jurisdiction)

ANM Bashir Ullah J
Mustafa Zaman Islam J

Judgment
June 26th, 2013.

Mirza Mohammad Mohiuddin.....
..Accused-Petitioner
vs
State.....
.....Opposite-Party*

Code of Criminal Procedure (V of 1898)
Section 188

Under section 188 of the Code the Court can take cognizance of an offence without the sanction, but it cannot try the case except the sanction of the Government. No sanction was obtained before inquiry. But the case is still pending and awaiting for trial. The prosecution at this stage of the proceeding can obtain sanction from the Government to address the demand of section 188 of the Code.

There should be a time limit upon the prosecution for obtaining the sanction of the Government under section 188 of the Code and with this view we impose a time limit of 6(six) calendar months from

*Criminal Revision No. 1258 of 2000.

the date of receipt of this judgment and order by the trial Court for securing the Government's sanction to address the demand of section 188 of the Code failing which the trial of the proceeding will be stopped.

.....(14 & 15)

Dr. Taslima Nasrin vs Md Nurul Alam, 48 DLR 280 and Ranjit vs SM Parul Hore 1980 CrLJ Noc 57 (Cal); (1979) 1 Cal. HN 414 ref.

Mainul Hosein with Bipul Bagmar, Advocate—For the Accused-Petitioner.

Md Mamunur Rashid, AAG—For the Opposite-Party.

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 opposite party to show cause as to why the judgment and order dated 5-10-2000 passed by the learned Metropolitan Additional Sessions Judge, 5th Court, Dhaka in Criminal Revision No. 52 of 2000 arising out of the judgment and order dated 30-12-1999 passed in GR No. 3736 of 1995 should 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 Mr Israt Hossain, Controller and Finance Manager and Company Secretary of Singer Bangladesh Limited lodged First Information Report (in short, the FIR) with Motijheel Police Station, Dhaka against the accused-petitioner Mirza Mohammad Mohiuddin alleging *inter alia* that the accused had served in the Singer Bangladesh Company Limited in the position of Factory Manager, Audio and Video since 1-2-1993 to 1-10-1995 and later on Plant Manager in the company. M/s Tysonic Enterprises, a business firm at Singapore with whom the accused-petitioner had made correspondence for purchasing some parts for the Television. The accused-petitioner asked the said company at Singapore to file quotation showing higher price than that of the actual price of the goods with a further request to deposit the said higher price in his personal account at Singapore. The company at Singapore was also requested to give the excess money in cash in his hands. The company at Singapore being convinced with the said proposal and request of the accused-petitioner deposited such excess money, a total Singapore dollars 44,477 equivalent to Taka 12,94,894.93 to his account at Singapore.

3. On the basis of the said FIR Motijheel Police Station Case No. 59 dated 14-11-1995 corresponding to GR No. 3736 of 1995 was started under sections 408 and 420 of the Penal Code. Thereafter, the accused-petitioner was arrested and was produced before the learned Chief Metropolitan Magistrate, Dhaka on 15-11-1995 and subsequently he was enlarged on bail. Police on completion of the investigation submitted charge-sheet against the accused on 18-2-1996 recommending his trial under sections 408 and 420 of the Penal Code.

4. The petitioner preferred an application under section 561A of the Code in this Court for quashing the proceeding and the said quashment proceeding was registered as Criminal Revision No. 318 of 1996 and this Court by its judgment dated 27-11-1997 discharged the Rule in the said quashment proceeding.

5. However, the petitioner filed another petition in the trial Court under section 177 of the Code challenging the jurisdiction of the trial Court as the alleged offence has been committed at Singapore, outside of Bangladesh. But the learned Magistrate rejected the said petition by his order dated 30-12-1999. Against the said

order of rejection, the petitioner preferred Criminal Revision being No. 52 of 2000 in the Court of Metropolitan Sessions Judge, Dhaka which has been ultimately heard by the Metropolitan Additional Sessions Judge, 5th Court, Dhaka who by his impugned judgment and order dated 5-10-2000 rejected the revisional application also. The accused-petitioner being aggrieved by and dissatisfied with the said judgment and order passed by the revisional Court below moved this Court and obtained the present Rule.

6. 'Mr Mainul Hossain along with Mr Bipul Bagmar, the learned Advocate appearing for the petitioner supports the Rule. He submits that both the trial Court and the revisional Court below erred in law holding that the trial of the GR No. 3736 of 1995 is maintainable in the Court of Metropolitan Magistrate, Dhaka. They failed to consider that the alleged occurrence of misappropriation, though the accused-petitioner do not admit the same had taken place at Singapore, outside of Bangladesh, so, the inquiry and trial of the case without the prior sanction of the Government is highly illegal in view of section 188 of the Code. But both the Courts below without appreciating the provision of section 188 of the Code and its application came to a wrong conclusion that there is no legal bar in continuation of the proceeding in the trial Court.

7. He further submits that the very initiation of the proceeding under sections 408 or 420 of the Penal Code was although unjustified as there was no case of the prosecution that the petitioner was entrusted with any property of the Singer Bangladesh Limited which he had misappropriated. So, the very initiation, continuation and framing of charge under sections 408 and 420 of the Penal Code is highly illegal and at the same time the continuation of the proceeding against the accused will be a simple feudal exercise of law. He lastly concludes that if the question of jurisdiction along with the merit of the case are considered altogether it will be a revealed that the continuation of the proceeding is nothing but the abuse of the process of the Court, so, the proceeding should be quashed as a whole.

8. On the other hand, Mr Md Mamunur Rashid, the learned Assistant Attorney-General appearing on behalf of the opposite party opposes the Rule. He submits that there is a little scope to challenge the initiation and continuation of the proceeding against the petitioner Mirza Mohammad Mohiuddin as the same was agitated in the former quashment proceeding in Criminal Revision No. 318 of 1996 and that proceeding was preferred after framing of charge by the Court below and in that proceeding it was agitated seriously that the original case as a whole and the framing of charge under sections 408 and 420 of the Penal Code there to are not maintainable against the accused. But this Court by its judgment dated 27-11-1997 held that without trial there is no scope to hold that the allegations brought against the accused under sections 408 and 420 of the Penal Code is vague and false. So, the accused-petitioner had no any legal scope to agitate the same fact in the present proceeding again.

9. He also submits that since the occurrence of this case took place outside of Bangladesh, the provision of section 188 is to be followed in the trial of the case and since the trial had not yet been commenced and not concluded there is ample opportunity to accord sanction from the Government and this type of lacuna can be addressed at any time of the proceeding before pronouncing the judgment.

10. He lastly submits that since no sanction was obtained from the Government, the same can be taken by the prosecution at any point of time during pendency of the case and the pros-

ecution may be asked to obtain sanction and to proceed in the case for a trial.

11. We have considered the above submissions of the learned Advocate of both the parties with profound attention and have gone through the materials on record particularly the certified copies of the FIR, impugned orders and the judgment of the previous quashment proceeding passed in Criminal Revision No. 318 of 1996.

12. It is admitted that the alleged offence of transaction was taken place at Singapore which is the outside of the territory of Bangladesh. Section 188 of the Code clearly provides that when an offence is committed by a person outside of Bangladesh he may be dealt with in respect of such offence as it had been committed at any place within Bangladesh. So, from this clear provision of law, the question raised before us as to the jurisdiction of the Court of Bangladesh safely be answered that any offence committed outside of Bangladesh at the instance of any Bangladeshi citizen, his such offence may be tried in the Court of Bangladesh.

13. But at the same time we find some condition in section 188 of the Code and in the proviso of the said section it has been also laid down that no charge as to any such offence shall be inquired into in Bangladesh except with the sanction of the Government. Thus we find that whenever any offence is committed outside of Bangladesh by a citizen of Bangladesh the same may be tried into Bangladesh subject to sanction of the Government before inquiry. But in the case of *Dr Taslima Nasrin vs Md Nurul Alam* reported in *48 DLR 280* the same question was raised whether an offence committed outside of Bangladesh by a citizen of Bangladesh can be inquired and tried into Bangladesh without the sanction of the government of Bangladesh. In the said reported case it was held in the following ways:

> "But the Court, in view of the proviso to section 188 of the Code of Criminal Procedure, in spite of due cognizance of the case, is unable to try the case without sanction from the Government. This sanction however can be accorded by the Government even after cognizance has been taken of the case if it is found desirable."

14. From the above decision of this Court we find that in a case like this the sanction of the Government can even be taken before trial and this Court in taking such decision also relied on the case of *Ranjit vs SM Parul Hore and another, 1980 CrLJ Noc 57 (Cal); (1979) 1 Cal. HN 414* wherein it was held that under section 188 of the Code the Court can take cognizance of an offence without the sanction, but it cannot try the case except the sanction of the Government.

15. In the instant case no sanction was obtained before inquiry. But the case is still pending and awaiting for trial. So, we are of the view that having regards to the above citation, the prosecution at this stage of the proceeding can obtain sanction from the Government to address the demand of section 188 of the Code of Criminal Procedure.

16. At the time of hearing the learned Advocate for the petitioner also submits that the very initiation of the proceeding under sections 408 and 420 of the Penal Code did not justify at all as there was no entrustment of any property in the custody of the accused which he had allegedly misappropriated. As we have noticed it earlier that in a previous proceeding filed by this petitioner to quash the proceeding as a whole this question was agitated before this Court in Criminal Revision No. 318 of 1996 and this Court by its judgment dated 27-11-1997 came to a conclusion that it is the matter of trial

whether the allegation against the accused is vague, false or indefinite. Since there appears a verdict in respect of the maintainability of the case or in respect of the merit of the case we cannot sit over the judgment of our own Court. So, we find it difficult to consider the merit of the case as to whether the initiation of the case under sections 408 and 420 of the Penal Code was justified or not.

17. Having regards to the discussions made above, we are of the view that since this case was started in 1995 and now we are running 2013, that is, the case is pending for the last 18 years. But it is also fact that the trial and the other normal activities of the proceeding was stayed for most of the time at the instance of this petitioner. However for the long pendency of the case we are of the view that there should be a time limit upon the prosecution for obtaining the sanction of the Government under section 188 of the Code and with this view we impose a time limit of 6(six) calendar months from the date of receipt of this judgment and order by the trial Court for securing the Government's sanction to address the demand of section 188 of the Code failing which the trial of the proceeding will be stopped.

18. In the result, the Rule is discharged. The order of stay granted earlier by this Court on 14-12-2000 is hereby vacated. The prosecution will secure sanction from the Government to address the demand of section 188 of the Code for the trial of the proceeding within 6 (six) calendar months from the date of receipt of this judgment by the trial Court failing which the trial of the proceeding will be stopped.

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

Ed.

High Court Division
(Special Original Jurisdiction)

Hasan Foez Siddique J
Zafar Ahmed J

Judgment
November 7th, 2012.

Afzal Hossain (Md) .....Petitioner
vs
Government of Bangladesh and others.....Respondents*

Local Government (Municipality) Election Rules, 2010
Rule 39(2)

The allegations of irregularity or improper counting of ballots have not been pleaded adequately and specifically and the evidence adduced by the election petitioner regarding improper counting of ballots of each of the Polling Centres are insufficient and the allegations are not at all proved. Both the Tribunals acted unlawfully in passing the order of inspection and recounting the ballot papers inasmuch as the respondent No.7 failed to establish the factual foundation of it by adducing sufficient evidence bringing specific allegation of improper counting of each of the polling centres. .....(41)

Muzaffar Hossain vs Md Humayun Kabir, 15 BLD (AD) 245 = 48 DLR (AD) 59; Motaleb vs Md Mostaque Ali, 19 BLD (AD) 156 = 51 DLR (AD) 228; VS Achuthand vs PJ Francis, AIR 2001 SC 837; Abdul Latif Bepari vs Md Nurul Islam Howlader, 20 BLD (AD) 264 = 51 BLC (AD) 152; Ansaruddin Ahmed vs Senior Assistant Judge and Election Tribunal 14 BLD (AD) 77 = 46 DLR (AD) 181; Ram Sewak Yadav vs Hussain Kamal Kedwai, AIR 1964 SC 239; Rajnarayon vs Indira Nehru Gandhi, AIR 1972 SC 1302; Suresh Prasad Yadav vs Jai Prakash Mishra, AIR 1975 SC 376 and Dr Mohiuddin Khan Alamgir vs Government of Bangladesh, 62 DLR (AD) 425 ref.

*Writ Petition No. 149 of 2012.

Yousuf Hossain Humayun with Manzill Murshid and Abdul Awal, Advocates—For the Petitioner.

Jamiruddin Sircar, Md Aminul Hoque, Senior Advocates, with Mvi. Mohammad Wahidullah, Advocates—For the Respondents.

Judgment

Hasan Foez Siddique J : This Rule Nisi was issued calling upon the respondents to show cause as to why the order dated 29-11-2011 passed by the Election Appellate Tribunal, Jhalukathi in Election Appeal No. 6 of 2011 affirming the order dated 1-11-2011 passed by the Election Tribunal, Jhalukathi in Election Petition No. 5 of 201 1 should not be declared to have been made without lawful authority and is of no legal effect.

2. The relevant facts for the disposal of the Rule, in short, are that the petitioner, respondent No. 7 and some others contested in election for the post of Mayor of Jhalukathi Municipality held on 24-3-2011. The petitioner was declared elected defeating his nearest rival candidate, the respondent No. 7. The respondent No.7 filed election petition before the Election Tribunal, Jhalukathi making following prayers:

> "(ক) ঝালকাঠী পৌরসভায় ইং ২৪-৩-২০১১ তারিখের পৌর নির্বাচনের ১নং বিবাদী প্রতিপক্ষ নামিক নির্বাচনী ফলাফল বাতিল পূর্বক তদস্থলে অত্র বাদী দরখাস্তকারীকে মেয়র পদে নির্বাচিত মর্মে ঘোষনার আদেশ দিবার। (খ) মোকদ্দমার সম্যক খরচ বিবাদীগন প্রতি আদেশ দিবার (গ) আইন ও ইক্যুইটির বিধান মতে বাদী দরখাস্তকারী আর যে, প্রতিকার পাইতে পারে তাহার ও আদেশ দিবার।"

3. The symbols of petitioner and respondent No.7 were "Pine Apple" and "Ship" respectively. The names of Polling Centres are: 1) Jhalukathi Government College, West Chand-kathi, 2) Bekona Government Primary School, Bekona, 3) Jhalukathi Government Women College, 4) Jhalukathi Government Boys High School, 5) Kutubnagar Government Primary School, 6) Zilla Parishad Bhaban, Krishna-kathi, Jhalukathi, 7) Upazilla Parishad Milonay-aton (UTDC Hall), 8) Upazilla Parishad Officers Club and Library, 9) Municipal Ideal Government Primary School, 10) Shahi Model Government Primary School, 11) JBI Union High School, Ishanil, 12) Basanda Government Primary School, 13) Kefayet Nagar Government Primary School (New building), 14) Kefayet Nagar Government Primary School (Old building), 1 5) Udbodhon Secondary School, 16) Syedunnessa Government Primary School, 17) Halima Moazzam Reg. Primary School and 18) City Kinder Garden Vote Centre.

4. In the election petition, the respondent No.7 brought allegation in the following manner:

> "স্থানীয় কতিপয় নেতৃবৃন্দ ১নং বিবাদী প্রতিপক্ষকে নিয়া কোন ভাবেই আগানো সম্ভব নহে উহা নিশ্চিত বুঝিতে পারিয়া তাহারা নির্বাচনী কাজে কর্তৃপক্ষ কর্তৃক নিয়োজিত কর্মকর্তা কর্মচারীদের সহিত বে-আইনী যোগসাজসে থাকিয়া ঝালকাঠী পৌরসভার ইং ২৪-৩-২০১১ তারিখের নির্বাচন বে-আইনী ও অবৈধ প্রভাব বিস্তার করিয়া বিভিন্ন রকম কারসাজি করিয়া সকল ভোট কেন্দ্রে বিশেষভাবে সন্ত্রাসী তৎপরতা এবং অত্র পক্ষের এজেন্ট বা সমর্থক ভোটারদেরকে নানাভাবে ভয়ভীতি প্রদর্শন করিয়া অত্র পক্ষের সমর্থনীয় ভোটারদেরকে ভোট কেন্দ্রে যাওয়ার ব্যাপারে বিলম্ব ঘটাইয়া এদের নামাকরনে জাল ভোট প্রদান করে। বিশেষ করিয়া নিম্নলিখিত ভোট কেন্দ্রে তাহাদের দখলীয় প্রভাব খাটাইয়া ১নং বিবাদী প্রতিপক্ষের আনারস মার্কায় জাল ভোট প্রদান করিতে সক্ষম হয়। বিশেষভাবে উল্লেখ্য যে, স্বাক্ষর জ্ঞানহীন ভোটারদের ব্যালট পেপারের মুড়িতে টিপ দেওয়ার বিধান থাকা স্বত্বেও স্ব স্ব প্রিজাইডিং অফিসার সহ কেন্দ্রের অন্যান্য সরকারী কর্মকর্তা কর্মচারীদের বে-আইনী ভাবে বাধ্য করিয়া স্বাক্ষরজ্ঞান সম্পন্ন ভোটারদের টিপ নেওয়া হইয়াছে। স্বাক্ষরজ্ঞান সম্পন্ন ভোটারদের টিপ নেওয়া উদ্দেশ্যেমূলক এবং ১নং বিবাদী প্রতিপক্ষের মার্কা আনারসে ভোট সংখ্যা অন্যায়ভাবে বৃদ্ধি করায় কার্যাদি হয়। এইরুপ বে-আইনী কার্যাদি করিয়া সকল কেন্দ্রেই

হইয়া থাকিলেও নিম্নলিখিত ভোট কেন্দ্রগুলোতে বিশেষভাবে উক্তরুপ অন্যায় ও বে-আইনী কার্যাদি হইয়াছে। কেন্দ্রগুলো হলো- ১) উপজেলা পরিষদ (ইউ টিডিসি হল), ২) উপজেলা পরিষদ অফিসার্স ক্লাব ও লাইব্রেরী, উপজেলা পরিষদ চত্বর, ৩) শাহী মডেল সরকারী প্রাথমিক বিদ্যালয়, ঝালকাঠী, ৪) জে,বি,আই, ইউনিয়ন হাইস্কুল, ইছানীল, ঝালকাঠী, ৫) বাসন্ডা সরকারী প্রাথমিক বিদ্যালয়, ৬) কিফাইতনগর সরকারী প্রাথমিক বিদ্যালয় (নতুন ভবন), ৭) কিফাইতনগর সরকারী প্রাথমিক বিদ্যালয় (পুরাতন দ্বিতল ভবন), ৮) হালিমা মোয়াজ্জেম রেজিঃ প্রাথমিক বিদ্যালয়, ৯) উদ্বোধন মাধ্যমিক বিদ্যালয়, ১০) সিটি কিন্ডার গার্ডেন, ১১) সরকারী মহিলা কলেজ।---উপরোক্ত ভোট কেন্দ্র গুলোতে ইস্যুকৃত ব্যালট পেপারের চেয়ে ভোট গণনাকালীন সময় ব্যালট পেপারের সংখ্যা অধিক হইয়াছে। তদুপরি প্রায় ভোট কেন্দ্রই অত্র পক্ষের নিয়োগকৃত এজেন্টগনকে ভোট গ্রহন ও গণনার সময় নানা ধরনের হুমকির মাধ্যমে ভয়ভীতি দেখাইয়া তাহাদেরকে সার্বক্ষনিকভাবে নির্বাচনী বুথে সহ গণনাকালীন সময় উপস্থিত থাকিতে দেওয়া হয় নাই। ভোট গণনার সময় অত্র বাদী দরখাস্তকারীর জাহাজ মার্কায় ব্যালট ১নং বিবাদী প্রতিপক্ষের আনারস মার্কায় ব্যালট বা ভোট দিবার দেখাইয়া ১নং বিবাদী প্রতিপক্ষের সঠিক প্রাপ্ত ভোটের চেয়ে বেশী ভোট দেখানো হইয়াছে ১নং বিবাদী প্রতিপক্ষের চেয়ে বাদীর "জাহাজ মার্কা" প্রতীকে ৮,৭৯৭টি ভোট বেশী প্রাপ্ত হইয়াছেন। যাহা পূণঃ গণনা করিলেই প্রমানিত হইবে এবং বাদী ঝালকাঠী পৌরসভার মেয়র হিসাবে বিজয়ী ঘোষিত হইবে।"

5. The election petition was resisted by the present petitioner, the returned candidate.

6. On 26-10-2011 that is, after 7 months of holding election, the respondent No.7 fileds an application before the Election Tribunalfor recounting votes. The contents of that application run as follows:

"উক্ত নং মোকদ্দমাটি উভয় পক্ষের সাক্ষ্য জেরা সমাপ্ত হইয়া আগামী ৩০-১০-২০১১ তারিখ ধার্য আছে। তাহাতে ঝালকাঠি পৌরসভার গত ইং ২৪-৩-২০১১ তারিখের নির্বাচনী ১৮টি ভোট কেন্দ্রেই মেয়র পদে ভোট গণনার কারচুপি হইয়াছে। যাহাতে নির্বাচনী ফলাফল সঠিকভাবে প্রস্তুত হয়নি। অত্র বাদী মেয়রপদে ১১,৮৬৪টি ভোট এবং ১নং বিবাদী ৩,০৬৭টি ভোট প্রাপ্ত হইয়াছেন মর্মে অত্র পক্ষ দাবী করিয়াছেন। ভোট গণনার কারচুপি হওয়ায় বিষয় অত্র পক্ষ সাক্ষী জেরার মাধ্যমে প্রমান করতে সক্ষম হইয়াছেন। অত্র পক্ষের আবেদনে বিজ্ঞ আদালতে ১৮টি ভোট কেন্দ্রের গৃহীত ভোটের ব্যালট তলব করিয়া আনিয়াছেন। বিজ্ঞ আদালতের মাধ্যমে ভোট গণনায় আপত্তি নাই মর্মে ১নং বিবাদী বাদীর জেরায় প্রকাশ করিয়াছেন। মেয়র পদের ভোট গণনায় কারচুপি করিয়া বাদীর জাহাজ প্রতীকে মাত্র ৬,৩৩৭টি ভোট প্রাপ্ত দেখিয়াছেন। অত্র বাদী বর্তমান মোকদ্দমায় ১নং বিবাদীর নির্বাচনী ফলাফল বাতিল পূর্বক তাহাকে বিজয়ী মর্মে ঘোষনার প্রতিকারে বর্তমান মোকদ্দমা দায়ের করিয়াছেন। পৌরসভা নির্বাচন বিধি ২০১০ এর ৬২ বিধি মোতাবেক বিজ্ঞ আদালত কর্তৃক ভোট গণনা করিলেই বাদীর দাবীর সত্যতা প্রমানিত হইবে। ১নং বিবাদী ইং ২৪-১০-২০১১ তারিখে দরখাস্ত দায়ের করিয়া বর্তমান মোকদ্দমাটি যুক্তিতর্ক শুনানীর জন্য তারিখ নির্ধারনের প্রার্থনা করিয়াছেন। এমতাবস্থায় বর্তমান মোকদ্দমাটি সুষ্ঠ, নিস্পত্তি ও ন্যায় বিচারের স্বার্থে যুক্ততর্ক শুনানী পূর্বে বিজ্ঞ আদালতে সংরক্ষিত ইং ২৪-৩-২০১১ তারিখে অনুষ্ঠিত পৌর নির্বাচনের ১৮টি ভোট কেন্দ্রের মেয়র পদে ভোট গণনা করার আদেশ দেওয়া আবশ্যক। তদঅন্যথায় অত্র পক্ষের ক্ষতির করাণ হইবে।

সেমতে প্রার্থনা বিজ্ঞ আদালত দয়া প্রকাশে প্রোক্ত কারণ সদয় বিবেচনা করতঃ ন্যায় বিচারের স্বার্থে বর্তমান মোকদ্দমার যুক্তিতর্ক শুনানীর পূর্বে বিগত ইং ২৪-৩-২০১১ তারিখের পৌর নির্বাচনে ১৮টি ভোট কেন্দ্রের মেয়র পদে ভোট গণনার আদেশ দানে সুবিচার করার মর্জি হন।"

7. The Tribunal by his order dated 1-11-2011 allowed the said prayer and decided to recount the votes of all the polling centres.

8. Against which the present petitioner preferred appeal before the Election Appellate Tribunal, who by his order dated 29-11-2011, dismissed the appeal and upheld the order of the Election Tribunal. Then this petitioner moved the application in this Court and obtained the present Rule.

9. Mr Manzill Murshed, the learned advocate appearing on behalf of the petitioner, submits that the respondent No.7 in his evidence hopelessly failed to establish the foundation to reopen the ballot papers. He submits that sub-

sequently after counting the votes the respondent No. 7 did not take any steps to recount the ballots by filing any application before the Presiding Officer or Returning Officer. Mr Abdul Awal, another learned Advocate for the petitioner, submits that the allegations brought by the respondent No.7 are quasi criminal in character so the allegations must be sufficiently clear and precise to bring home the charges to the candidates which are absolutely absent in this case. He submits that the respondent No.7 failed to produce trustworthy materials in support of the allegations made for a recount enabling the Tribunal to record a satisfaction of a *prima facie* case for re-opening the ballot bags. He submits that the ballot is sacrosanct and the same cannot be violated merely for asking on vague and indefinite allegations.

10. Mr Jamiruddin Sircar, the learned Senior Counsel along with Mr Md Aminul Houqe, the learned Senior Counsel, and Mr Moulovi Wahidullah, the learned Advocate, appearing on behalf of the respondent No. 7 submits that in his evidence the writ petitioner admitted that he has no objection to recount the votes. He submits that the writ petition is not maintainable in view of the fact that the orders of the Tribunals are not *coram non-judice* or malice in law. He further submits that both the Tribunals below concurrently held that the respondent No.7 has been able to establish the factual foundations to reopen the ballot papers and there are adequate materials before the Tribunal to be satisfied that counting was not made properly. There is no error of law in the orders of the Tribunals which calls for any interference by this Writ Court.

11. We have heard the learned Advocates for both the parties, perused the writ petition, affidavit-in-opposition filed on behalf of the respondent No.7, annexures and other materials on record.

12. Election for the post of Mayor of Jhalukati Municipality was held on 24-3-2011.The present petitioner, the respondent No.7 and others contested the said election. After counting the votes, the Returning Officer declared the result of the election. The petitioner obtained 8,096 votes and the respondent No.7 got 6,337 votes. The petitioner was declared elected as Mayor of Jhalukhati Municipality which was published in the official gazette. The respondent No.7 filed election petition for declaration that he is the elected Mayor of Jhalukathi Municipality and result declaring the petitioner as Mayor is void.

13. The respondent No.7 adduced 10 witnesses in support of his case. On the other hand , the petitioner adduced 9 witnesses. At that stage, the respondent No.7 filed application for recounting the votes of all centres. The Election Tribunal allowed that application. Election Appellate Tribunal affirmed that order.

14. An election enquiry is in nature of a quasi criminal trial. The standard required is rigorous.The election petitioner is virtually in the position of a prosecutor. It is an elementary rule of law that the prosecution should make out its case by positive proof and not by mere conjecture. The election petition must contain a concise statement of material facts and must set forth full particulars of the corrupt practice. Since onus to prove corrupt practices lies entirely on the petitioner the material facts in regard to corrupt practices should be pleaded with exactitude and precision and likewise should be pleaded on basic facts contributing the ingredients of that particular corrupt practice. Here election was held on 24-3-2011, Election Petition was filed on 18-4-2011. The respondent No.7 filed application for recounting of votes on 26-10-2011, that is , after 07 months of counting votes. There is specific provision in the law itself to recount the ballot papers. Rule 39(2) of the Local Government (Municipality) Election Rules, 2010 provided the provisions of recounting of votes which run as follows:

"৩৯(২) প্রিজাইডিং অফিসার নিম্নলিখিত ক্ষেত্রে পুণরায় ভোট গণনা করিতে পারিবেন–

(ক) প্রয়োজনে, স্বীয় উদ্দোগে; বা

(খ) কোন প্রতিদ্বন্দ্বী প্রার্থীর বা নির্বাচনী এজেন্টের বা পোলিং এজেন্টের সুনির্দিষ্ট লিখিত আবেদনের প্রেক্ষিতে, যদি তাহার নিকট আবেদনটি যুক্তিযুক্ত বলিয়া বিবেচিত হয়।"

15. We do not find anything in the election petition or in the evidence or in the application for recounting the votes filed before the Election Tribunal that either the respondent No.7 or his Election agent or his polling agents made any prayer to the Presiding Officer for recounting votes. That provision has been enacted as statutory checks and effective safeguards against trickery, mistakes and fraud in counting. The election petitioner cannot be permitted to make out a case for re-counting ballot papers on a ground for which there is no foundation laid by him.

16. The power vesting in the court seized of an election dispute to order for inspection and recount of the ballot papers has been the subject matter of several decisions of our Apex Court which have by authorities exposition settled the law thereon.

17. In the case of *Muzaffar Hossain vs Md Humayun Kabir and other* reported in *15 BLD (AD) 245 = 48 DLR (AD) 59* their Lordships of the Appellate Division have observed :

> "When no written prayer is made before the Presiding Officer for recounting of the ballot papers on the ground of any malpractice and when no objection is raised before the Returning Officer alleging election malpractices, it is to be held that no valid ground for recounting of votes has been made out at the trial."

18. In the case of Abdul *Motaleb vs Md Mostaque Ali and others* reported in *19 BLD (AD) page 156 = 51 DLR (AD) 228* their Lordships have further observed:

> "Election Tribunal in the interest of justice may recount ballot papers for proper resolution of an election dispute. But in order to make out a case for recounting the person who challenges the counting has to prove that at the time of counting of votes by the presiding officer a contesting candidate or his election agent upon raising specific objection specifically requested the Presiding officer to recount the ballot papers and the same was improperly refused or was not done in accordance with law.
>
> Before opening the election materials for recounting of ballot papers the Election Tribunal is to satisfy itself positively that those materials have been preserved by the proper authority in accordance with law and the same has also been found intact under proper seal and cover so that no reasonable suspicion can be raised by the interested candidate of any post election tampering with ballot papers or other relevant election materials."

19. The secrecy of the ballot is sacrosanct and shall not be permitted to be violated lightly and merely for asking for vague and indefinite allegations or averments of general nature. At the same time purity of election process has to be preserved and therefore inspection and recount shall be permitted but only a case being properly made out in that regard. A particular person seeking inspection and recount of ballot papers must contain averments which are adequate, clear and specific making a case of improper acceptance or rejection of votes or non-compliance with statutory provision in counting, vague and general allegation that valid votes were improperly rejected or invalid votes were improperly accepted would not serve the purpose. The election petitioner must produce trustworthy material in support of the allegations made for a re-count enabling the Court to record a satisfaction of a *prima-facie*

case having been made out for grant of the prayer. The court must come to the conclusion that it was necessary and imperative to grant the prayer for inspection to do full justice between the parties so as to completely and effectually adjudicate upon the dispute. The power to direct inspection and re-count shall not be exercised by the court to show indulgence to a petitioner who was indulging in a roving enquiry with a view to fish out materials in the hope that the recount if allowed may probably twist the balance of votes in his favour. Aforesaid views have been expressed by the Supreme Court of India in the case of *VS Achuthanda vs PJ Francis and another* reported in *AIR 2001 SC page 837*. The object of giving particulars of corrupt practices is that the election petitioner should not be allowed to fish out some possible material at a subsequent stage and the other side should be aware of the case which he has to meet.

20. We have found that there were total 18 polling stations to cast votes in the election. In election petition the respondent No. 7, *inter alia*, stated: "এইরুপ বে-আইনী কার্য্যাদি করিয়া সকল কেন্দ্রেই হইয়া থাকিলে ও নিম্নলিখিত ভোট কেন্দ্রে গুলোতে বিশেষ ভাবে উক্তরুপ অন্যায় ও বে-আইনী কার্যাদি হইয়াছে।" Accordingly he mentioned the names of 11 Polling Stations, that is, the respondent No. 7 himself left his allegations against counting of votes in 7 Polling Stations. Those are 1) Jhalukathi Government College, West Chandkathi, 2) Bekona Government Primary School, Bekona, 3) Jhalukathi Government Boys High School, 4) Kutubnagar Government Primary School, 5) Zilla Parishad Bhaban, Krishna-kathi, 6) Poura Adorshya Government Primary School and 7) Syadunnessa Government Primary School Polling Centres. Leaving the allegation of improper counting in respect of those 7 Polling Centres, the respondent No.7 cannot demand recounting of votes of those Centres.

21. In the case of *Abdul Latif Bepari vs Md Nurul Islam Howlader* reported in *20 BLD (AD) page 264 = 51 BLC (AD) 152* their Lordships of the Appellate Division have observed that recounting is not to be granted as a matter of course. It is only to be allowed when the tribunal is satisfied on the basis of evidence before it that recounting is indispensably necessary for complete and effectual justice. Similar views have been expressed by their Lordships in the case *Ansaruddin Ahmed vs Senior Assistant Judge and Election Tribunal reported in 14 BLD (AD) 77 = 46 DLR (AD) 181* observing that the Election Tribunal has power to order for recounting of the ballots when it finds that there exists factual foundations for the same and it is necessary for a proper decision in the case. In the case in hand, the Election Tribunal has, *inter alia*, observed:

> "উক্ত মামলার রায় অনুধাবন করতঃ অত্র ট্রাইব্যুনাল মনে করেন যে, অত্র নির্বাচনী দরখাস্তে প্রার্থী পক্ষ সুনির্দিষ্টভাবে ঝালকাঠি পৌরসভা নির্বাচনে ২০১১ এর ১৮টি ভোট কেন্দ্রে মেয়র পদে ভোট গণনায় কারচুপি করা হইয়াছে, প্রার্থীর "জাহাজ মার্কা" প্রতীকে প্রাপ্ত ভোট বাতিল ভোটের সাথে এবং ১নং প্রতিপক্ষের "আনারস" প্রতীকের সহিত মিলাইয়া গণনা করা হইয়াছে, নির্বাচনী কার্যে জড়িত সরকারী কর্মকর্তা-কর্মচারীর মাধ্যমে ভোট জালিয়াতি করা হইয়াছে, ইস্যুকৃত ব্যালট পেপারে চাইতে ভোট গণনা কালে ব্যালট পেপারের সংখ্যা অধিক হইয়াছে, ১নং প্রতিপক্ষের প্রাপ্ত ভোটের চাইতে বেশী ভোট দেখানো হইয়াছে মর্মে অভিযোগ আনয়ন করিয়া এবং তৎমর্মে সাক্ষ্য প্রদান করিয়া নালিশী পৌর নির্বাচনে ব্যালট পেপার, মুড়িপত্র পরিদর্শন এবং মেয়র পদে প্রদত্ত ভোট পূনঃ গণনার বিষয়ে অত্র ট্রাইব্যুনাল কর্তৃক আদেশ প্রচারের যথাযথ ভিত্তি সৃষ্টি করিয়াছেন।"

Now, let us see whether the finding of the Tribunal to the effect: "ভোট পূণঃ গণনার বিষয়ে অত্র ট্রাইব্যুনাল কর্তৃক আদেশ প্রচারের যথাযথ ভিত্তি সৃষ্টি করিয়াছেন।" is based on evidence and other materials on record or not. Earlier we have quoted the relevant portion of the election petition and the application for recounting of ballot papers. Where the election petitioners seek to prove charge purely on partisan evidence consisting of his workers, agents, supporters and friends,

the court would have to approach the evidence with great care and cautious scrutiny and circumspection. Now let us see the evidence of the respondent No. 7, the election petitioner.

22. In support of his case the election petitioner examined 10 witnesses out of them witness No. 1 is the election petitioner himself. In his evidence- he, inter alia, said: "নির্বাচনে সঠিকভাবে ভোট গণনা করা হয় নাই।.....নির্বাচনে ব্যবহৃত ব্যালট পূণঃ গণনা করা হইলে আমার দাবী প্রমানিত হবে।"

23. Petitioner witness 2 Md Monirul Islam son of the election petitioner Liakat Ali who was the chief election agent. He brought allegation in respect of JBI Ishanil Polling Centre. He, inter alia, said,:

> "ভোট গণনা সঠিক হয় নাই এবং ভোটারদের প্রদত্ত ভোট মোতাবেক ফলাফল প্রস্তুত হয় নাই।" In cross examination he said,
>
> "নির্বাচনের সময় এসপি ও র‍্যাব ছিল। নির্বাচনে উপযুক্ত সংখ্যক পুলিশ সদস্য ছিল। কোন কোন এজেন্টকে কেন্দ্র হতে বের করে দেওয়া হয়েছে তা জানি না।"

24. Petitioner witness 3 Kochi Begum was a polling agent of the election petitioner at Syed Halima Moazzem Mir School Polling Centre. In her cross examination she said "গণনাকালে জাহাজ মার্কার ব্যালট বেশী ছিল। কিন্তু জাহাজ মার্কার ব্যালট অন্য ব্যালটের সাথে মিশানো হলে আমি বাধা দেই। তখন আমাকে বের করে দেয়।"

25. In cross examination she has said, "আমি শেষ পর্যন্ত ছিলাম না।".....আমি ৮-৩০ টায় ভোট কেন্দ্রে ঢুকেছি। অনুমান ৩-৩০ টায় বের হয়েছি।" That is, before concluding the votes she left the polling centre.

26. Petitioner witness 4 Morsheda Akter Ripa was polling agent of the election petitioner at City Kinder Garten Polling Centre. In her evidence she said, "উক্ত কেন্দ্রে সঠিকভাবে ভোট গণনা হয় নাই। জাহাজ মার্কায় সবচেয়ে বেশী ভোট পায়।" In cross examination she said- "আমাকে ৩-০০/৩-৩০ টায় ভোট কেন্দ্র থেকে বের করে দিয়েছে।.... লিয়াকত আলী তালুকদার আমাকে সাক্ষ্য দিতে বলেছে।"

27. Petitioner witness 5 Md Jamal Hossain Howlader, in his cross examination, has said,"আমি ভোট গণনার সময় ছিলাম না।"

28. Petitioner witness 6 Al-Masum was a polling agent of the election petitioner at Kutubnagar Primary School Polling Centre. In his evidence he has said "প্রথম গণনা সঠিক চলছিল পরে ঠিক হয় নাই XXX সত্য যে, কুতুব নগর কেন্দ্রে লিয়াকত তালুকদার সর্ব্বোচ্চ ভোট পেয়েছে।" It is to be mentioned here that the petitioner did not bring any specific allegation of improper counting of ballots of Kutubnagar primary School Polling Centre.

29. Petitioner witness 7 Enayet Hossain was agent of the election petitioner at Ishanil Polling Centre. In his evidence he has said; "আমি ভয় পেয়ে দুইটার সময় কেন্দ্র থেকে চলে যাই।" In his cross examination he said that :

> "....কখন ভোট গ্রহন শুরু ও শেষ হয়েছে তা জানি না।"

30. Petitioner witness 8 Md Jamal Hossain was a polling agent of the election petitioner at Bikana Polling Centre. In his cross examination he said: "কয়টায় গণনা শুরু ও শেষ হয়েছে তা বলতে পারবো না। ভোট গণনার শেষ পর্যন্ত ছিলাম না।" In election petition the respondent No. 7 did not bring any specific allegation in respect of improper counting of ballots of Bikana Primary School Centre.

31. Petitioner witness 9 Md Alamgir Hossain Khan was a polling agent of Abu Zahid at Kutubpur Primary School Polling Centre. In his evidence he has said, "আমি ভোট গণনা কালে কেন্দ্রে থাকতে পারি নাই।" There is no specific allegation in the petition in respect of improper counting of votes at Kutubnagar School Centre in election petition.

32. Petitioner witness10 Md Sohag Howlader supporter of the election petitioner and voter of Ward No. 3 of the Zilla Parishad Polling centre. In his cross examination he has said, "আমি ভোট গণনার সময় ছিলাম না।" He has said about Zilla Parishad Polling Centre but in election petition the respondent No.7 left the allegation of improper counting of said centre.

33. None of the witnesses deposed a single

word regarding improper counting of votes in respect of rest 12 polling Centres. In absence of any evidence regarding improper counting of votes it is difficult to accept the finding of the tribunal that the factual foundation for inspection and recounting has been established satisfactory. The evidence should be realistically and pragmatically viewed avoiding mere doctrinaire approach.

34. It has been consistent practice of this court not to interfere with the findings on question of facts unless there is some grave or palpable error in the application of evidence on the basis of which the findings were arrived.

35. In the instant case the allegation in the election petition and application for recounting are vague and those do not contain adequate statements of the material facts. In the case of *Ram Sewak Yadav vs Hussain Kamal Kedwai and others (AIR 1964 SC 239)* Supreme Court of India held that an order for inspection would not be granted as a matter of course. That having regard to the insistence upon the secrecy of the ballot papers, the court would not be justified in granting an order for inspection only where the petition for setting-aside an election contains an adequate statement of facts on which the petitioner relies in support of his case and it is necessary to decide the dispute and to do complete justice between the parties. An order for inspection of ballot papers would not be granted to support vague pleas made in the petition not reported by material facts or to fish out evidence to support such pleas. Mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection. In the case of *Rajnarayon vs Indira Nehru Gandhi* reported in *AIR 1972 SC 1302* it has been observed that an election petition shall set fourth full particulars of any corrupt practice that the petitioner alleges, including as full or statements as possible of the names of that parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice.

36. In the case of *Suresh Prasad Yadav vs Jai Prakash Mishra,* reported in *AIR 1975 SC 376* Indian Supreme Court further held: "The Court would be justified in ordering a recount of the ballot papers only where:

(i) The election petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(ii) On the basis of evidence adduced such allegation are *prima-facie* established, affording a good ground for believing that there has been a mistake in counting; and

(iii) That Court trying the petition is *prima-facie* satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.

37. In absence of any specification with regard to the ground on which the election of the respondent is being questioned together with summary of the circumstances alleged to justify the election being questioned on such ground. Court can safely ignore to take notice of allegation which is couched in vague and nebulous manner.

38. Mr Aminul Hoque, the learned Counsel for the respondent No. 7 relied on the case of *Dr Mohiuddin Khan Alamgir vs Government of Bangladesh* reported in *62 DLR (AD) 425.* In the cited case their Lordships have observed:

"In the case of *AFM Shah Alam vs Mujibul Huq* reported in *41 DLR (AD) 68* it was held that in election matters the jurisdiction of the High Court Division cannot be invoked under Article 102 of the Constitution except on a very limited

ground of total absence of jurisdiction *(coram non-judice)* or malice in law for the purpose of interfering with any step in the election process, like, in that case, acceptance of nomination paper. In the present case it is against rejection of nomination paper. No case of coram non-judice or malice in law has been made out so as to attract the jurisdiction of the High Court Division under Article 102 of the Constitution.

Whether the writ petition is maintainable against any step in the election process stands well settled in view of the decision reported in the case of *AFM Shah Alam vs Mujibul Huq* reported in *41 DLR (AD) 68*, in the case of *Mahmudul Hoque vs Md Hedayetullah* reported in *48 DLR (AD) 128* and in the case of *AKM Moyeedul Islam vs Bangladesh Election Commission* reported in *48 DLR (AD) 208*. It is well settled that writ petition under Article 102 is not maintainable against any step in the process of election like acceptance or rejection of nomination paper of a candidate."

39. We have no disagreement with the observation of their Lordships of the Appellate Division. In all those cases the dispute arose regarding acceptance or rejection of nomination paper. But in the instant case the allegation has been brought against the decision of the tribunal regarding recounting of the ballot papers. The issues decided by their Lordships in the cited cases and in the present case is distinguishable. The *ratio decidendi* of the cited cases has got no manner of application in the present case.

40. Prayer for recount in term of Rule 39 (2) of the Local Government (Municipality) Election Rules, 2010 was not made by or on behalf of any of the contesting candidates including the respondent No.7 before the Presiding Officer of any of the Polling Station which they would ordinarily have made if there was any truth in the pleas canvassed by the respondent No.7 in his election petition and application for recounting.

41. On consideration of the pleading application for recounting the ballot papers and evidence adduced by the respondent No.7 it appears to us that allegation of improper counting of ballot papers and charges of corrupt practice which are quasi criminal in nature have not been established in the instant case. The allegations brought by the respondent No.7 are not specific and clear rather those are indefinite and vague. The evidence adduced by the respondent No.7 are unreliable. No definite particulars have been given in the application for inspection as to the illegalities, irregularities or improper counting of votes. A recount will not be granted as a matter of right but only on the basis of evidence of good grounds for believing that there has been a mistake in counting. The reasons are that such an order affects the secrecy of ballots which is under the law not to be lightly disturbed. The secrecy of ballot is sacrosanct and shall not be permitted to be violated and merely for asking or on vague and indefinite allegations or averments of general nature. Our view is that the averments made in the petition and the material brought on record by the respondent No.7 did not make out a case of recount. The allegations of irregularity or improper counting of ballots have not been pleaded adequately and specifically and the evidence adduced by the election petitioner regarding improper counting of ballots in each of the Polling Centres are insufficient and the allegations are not at all proved. Both the Tribunals acted unlawfully in the passing order of inspection and recounting the ballot papers inasmuch as the respondent No.7 failed to establish the factual foundation of it by adducing sufficient evidence bringing specific allegation of improper counting of each of the Polling Centres.

42. In view of the facts and circumstances of the case we find substance in the Rule.

In the result, the Rule is made absolute. The judgment and order dated 29-11-2011 passed by the Appellate Tribunal, Jhalukathi in Election Appeal No. 6 of 2011 affirming the order dated 1-11-2011 passed by the Electron Tribunal. Jhalukathi in Election Case No. 5 of 2011 are hereby declared to have been made without lawful authority and are of no legal effect and both the orders are set-aside.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Sharif Uddin Chaklader J
AKM Shahidul Huq J
Judgment January 24th, 2013.

Tahamina Amin Chowdhury.....Petitioner

vs

Deputy Commissioner, Chittagong and another .....Opposite-Parties*

Limitation Act (IX of 1908)
Section 12

A litigant shall get the period from the date the decree is signed until it was made ready for delivery. Application for copy must be made before the period of appeal expired. If the application for copy of the decree is made when the period of limitation for appeal had already run out, the appellant is not entitled to exclude time under section 12 of the Act in obtaining copy of the decree. .....(39)

Sections 5 and 12

Government is the biggest/largest litigant who has GP, PP lot of AGPS and APPS with a handful of hands to look after the proceeding. Delay may be for one two months or 3 months for different official performances but when it goes a long way that it itself speak negligence and lack of bona fide which can not be condoned. .....(55)

Province of East Pakistan vs Meajan Ali Ahmed, 18 DLR (SC) 343; ADC (Revenue) and Assistant Custodian, Vested property, Sirajganj vs Md. Abdul Majid, 2 BLC (AD) 11; The Principal Secretary, President's Secretariat, and others vs Mohammad Abdul Batten, 1994 BLT (AD) 90; ADC (Revenue) and Assistant Custodian, Vested property, Sirajganj vs Md Abdul Majid, 2 BLC (AD) 11; Deputy Commissioner vs Kobad Ali, 39 DLR (AD) 205; East Pakistan vs Meajan Ali Ahmed and 15 others, 18 DLR (SC) 343; Director of Housing and Settlement vs Abdul Majid Howlader 9 BLC (AD) 51; Abul Khair Mia vs Abdul Latif Sarder, 32 DLR (AD) 167; Rabeya Khatoon vs Bangladesh represented by the Deputy Commissioner, 60 DLR (AD) 9; M/s. Haji Md Ali and Sons vs Burma Eastern Ltd., 38 DLR (AD) 41; Master Abdul Aziz vs Abani Mohan Mukherjee, 30 DLR (SC) 221; Babor Ali Prodhan vs Kinu Mia, 31 DLR (AD) 323; M/s. Gannysons Ltd. vs Sonali Bank, 36 DLR (AD)146; Secretary, Ministry' of Public Works and Urban Development vs Md Suruzzamal, 48 DLR (AD) 1; Rangpur vs Hasrat Mohani 3 ADC 23; Secretary Ministry of Works vs Chairman, 53 DLR (AD) 26; Khair Ullah (Md) vs ADC Revenue, 54 DLR (AD) 13; M/s. Concord Engineers and Construction Ltd. vs The Chief Engineer Roads and Highways Department, Government of Bangladesh. Sarak Bhaban, PS Ramna, Dhaka, 3 ADC (AD) 23; Director of Housing and Settlement vs Abdul Majid Howlader, 9 BLC (AD) 51; National Bank of Pakistan vs Farid sons Limited, 20 DLR (SC) 248; Khairullah (Md) vs ADC Revenue, 54 DLR (AD) 13; SP Chengal

*Civil Revision No.1722 of 2011.

Varaya Naidu (dead) by LRS. vs Jagannath (dead) by LRS, 1994 Supreme Court Cases 1 SCC; Shahr Banoo Mohsin Asgar vs Lailun Nahar Ershad, 44 DLR 552; Abdus Sattar Khondker vs Premlata, 16 BLD 596 = 49 DLR 583; Babor Ali Prodhan vs Kinu Mia, 31 DLR (AD) 323; Refaat Ali vs Government of Bangladesh, 21 BLD 133; Bangladesh vs Abdul Wahab, 45 DLR 30; Rahima Akhter vs Asim Kumar Bose, 40 DLR (AD) 23 and Zillul Huq vs Maloti Bala Dey, 50 DLR 367, ref.

Sirajul Haque, Advocate with Md Bashiruddin Zindigir, Advocate—For the Petitioner.

Md. Jaber Assistant Attorney-General—For the Defendant No.1 Opposite Party.

AJ Mohammad Ali, Advocate with Fida M Kamal, Advocate with Ahsanul Karim, Advocate—For Defendant No. 3 Opposite Party.

Judgment

Sharif Uddin Chaklader J : By this rule plaintiff calls in question the judgment and order dated 15-3-2011 passed by the learned District Judge, Chittagong condoning the delay of 1230 days in filing Other Appeal No. 248 of 1998.

2. Plaintiff-petitioner instituted Other Suit No. 55 of 1987 with the following amongst other prayers:

"অতএব বাদী নিম্নমতে প্রার্থনা করেনঃ–

ক) ১-৬নং বিবাদী যাহাতে জোর পূর্বক তপশীলোক্ত জমিতে প্রবেশ করিতে না পারে বা তথা হইতে বাদীনিদের জোর পূর্বক বেদখল করিতে না পারে বা তথায় স্থিত বাদীনিদের গৃহাদী বিনষ্ট করিতে না পারে তৎজন্য ১-৬ নং বিবাদীর বিরুদ্ধে চিরস্থায়ী নিষেধাজ্ঞার ডিক্রী হয়।"

3. Plaintiff prayed for injunction on the schedule land as:

তপশীল

মৌজা-পূর্ব নাসিরাবাদ, থানা-পাঁচলাইশ, চট্টগ্রাম। আর এস খতিয়ান নং ৮৩৪/১, আর, এস দাগ নং-৪০৩৭/৪০৪২/৪০৩৯/৪০৯৬/৪০৮২/৪০৪১/৪০২৫/৪০২৬৪০২৭/৪০২৮ তৎ ক্রসপাউন্ডিং পি,এস, খতিয়ান নং-৭৪ এবং পি, এস দাগ নং ৬২৫/৬২৭/৬২৮/৭০১/৭০২/৭০৩/৭০৫/৭০৭/৭০৯/৭১০/৭৩৪/৬৩৩ এবং আর, এস দাগ নং-৪০২২/৪০২৫/৪০২৬ তৎ ক্রসপন্ডিং পি,এস, খতিয়ান নং- ৭৩,৭৩/১, পি, এস দাগ নং ৪০৯/৪১৬/৪১০/৪২৪/৭১৫/৭১৬/৪২০/৪২১/৪২২/৪১৭ এবং আর, এস, দাগ নং ৪০২১/৪০২৭/৪০২৮/৪০২৯ তৎ ক্রসপন্ডিং সি, এস খতিয়ান নং ৯২ পি, এস, দাগ নং ৬২২/৬২৬/৭০৬/৭০২ এবং পি, এস, খতিয়ান নং ৯৪/৭, পি, এস দাগ নং ৭১১/৭১২/৭১৪/৭৩৩ মোট পরিমাণ ৫৪ একর নাল, ঠিলা, খিলা, জংগল ও পাহাড় ভূমি.....

চৌহদ্দীঃ–

উত্তরে আবুল বশর চৌধুরী ও বাচন বিবি খিলা, ঠিলা ও পাহাড়, দক্ষিনে-নাদের খান নাল ও ঠিলা, পূর্বে-আবুল কাসেম চৌধুরীর ঠিলা জমি এবং পশ্চিমে-পূর্ব পাহাড়তলী মৌজার জমি।

পি,এস, দাগ নং	বাদী	অংশ
৬৩০	২১১৯৩	আংশিক
৬৩১	৭৪২৩	আংশিক
৬৩২	৩৩৩০	আংশিক
৬৩৩	১.১৭৫৮	আংশিক
৬৩৪	৩৩৩০	আংশিক
৬৩৫	২.০৫২৬	আংশিক
৬৩৭	৩৪৩৮	সম্পুর্ণ

মোট: ৭.০৯৯৮

অদ্য ১১-২-৯০ইং তারিখের ৬৯ নং আদেশ মোতাবেক সংশোধিত।

4. It is the case of the plaintiff that suit land which originally belonged to Ananda Charan Datta and Ghana Charan Datta, was put into auction for arrear rents in Rent Case No. 154 of 1946 and pursuant to the decree one, Abdul Latif Chowdhury, son of Haji Mobarak Ali of village Saga char under Patia Upazilla purchased the suit land in Rent Execution Case No.131 of 1947 on 8-4-1948 and sale was confirmed on 11-5-1948 and possessing the suit

land until he executed power-of-attorney on 18-4-1968 in favour of his son, Abdul Basher Chowdhury and close well-wisher, Abdul Jalil and power-of-attorney holders mutated their names and also paid rents regularly. In PS survey the suit land although recorded wrongly in the name, of Nasiruddin, Hosne Ara Begum, Khadija Begum and Captain Bakhtiar but recorded persons never possessed the suit land in BS Survey, to the knowledge of the aforesaid persons and also of the Government. Defendant Nos.5 and 6. recorded the suit land in the name of Abdul Latif. The aforesaid power-of-attorney holders by registered deed dated 6-1-1985 and 21-1-1986 transferred the suit land in favour of plaintiff No.3. which was registered in the Sub Registry office, Pahartalli; by these two deeds 20 acres of land was gifted in favour of plaintiff Nos.l and 2 who got possession. After getting the, suit land as aforesaid, plaintiffs demarcated the suit land having title and possession and paid rents regularly. Plaintiffs also cut earth from the suit land, filled the lower portion and developed the suit land and constructed homestead. Plaintiffs possessed the null land through borgaders, wherein defendants or any body else had no possession or title and they could not demand the suit land and by this possession, plaintiffs acquired title by adverse possession. Plaintiff possessed the suit land peacefully but at present, defendant Nos.l-4 in different ways disturbed the peaceful possession of the plaintiffs and they want to include the shares in their proposed housing society and the said persons with the government employees continuously giving threat. Plaintiffs turned down the proposal of the aforesaid persons whereupon interested persons became furious and on 14-6-1987 with some gunda elements tried to get into possession by force and thereby tried to dispossess the plaintiffs from the suit land. Plaintiff's husband and plaintiff's tenants and local people intervened and the gunda elements leave the suit land giving open threat that they will get the suit land from government, defendant Nos. 5 and 6, through Magistrate and Police they will come back and dispossess the plaintiff. Plaintiff with her husband went to defendant No.7, Tahsildar for inquiry but did not get any information. But the plaintiff could see some employees of defendant No.5 conspiring with the gunda elements for satisfying their lust. Defendant Nos.5 and 6 only can realize tax from the plaintiff, hence the suit.

5. Defendant No.l and defendant Nos.5 and 6 contested the suit. It appears that defendant No.l later on did not contest the suit as such we left aside the case made out by defendant No.l in the written statement.

6. Defendant Nos.5 and 6 in the written statement after taking preliminary objections as to maintainability of the suit, denied the plaint case line by line. It is their specific case that suit land originally belonged to Ananda Charan Datta and Gyananda Charan Datta and Nilmani Datta. 45.96 acres of land was recorded as projabili in the RS khatian. The entire land of jote for arrear of rent was put into auction and government purchased the suit land on 18-3-1934 and for managing the auction purchased land for which defendants' instituted further suit. The said lands purchased after auction still remain in previous Jote No.140. After 14 jote created by resettlement of the suit land in Miscellaneous Case No.651 of 1945-46 the suit land was resettled. After resettlement, Brojalal Ghose, Sumon Lal Ghose got 15.48 acres of land from several R.S. dag numbers involved in the suit and Jote No.180 was created which was recorded in R.S. No. 836/16. Brojalal Ghose sold his land of Jote Nos.180. 181. 182 to Nasir Uddin, Khadija Begum and Harun Matin and also to other persons and thereby became title less. The aforesaid purchasers in Mutation Case No.47/52-53 and JM Case No.l 14/54-55 recorded their names in Jote khatian No.835/16 and according to their possession, the suit land has been recorded in SA khatian Nos.74 and 94. The

aforesaid purchasers, Nasiruddin, Khadija Begum and Harun Matin were non-Bengali and left the country for Pakistan during war of liberation and never came back and Government as per PO No. 16 of 1972 declared the property as enemy property. The said property during BS survey was recorded in the name of Government of Bangladesh. To protect the said property from illegal trespassers or illegal strangers in 1975 Government appointed Md Nurul Huda (defendant No.3) as care taker. Government through Miscellaneous Cases Nos.6 of 1980-81, 7 of 1980-81, 8 of 1980-81, 9 of 1980-81, 2 of 1981 -82 leased out the property in favour of Md Solaiman, Faruq Ahmed and others. Brojalal Ghosh was never tenant either under Ananda Charan or Gyananda Charan and was never resettlement holder of Government. Brojalal Ghose, Benulal Ghose and their heirs, who were owners of jote No. 180, 181, 182 through Resettlement Case No. 651/45-46, sold the suit land to Nasir Uddin, Khodeja Begum, Harun Matin and others by several kabalas. The case of the plaintiffs of mutation of their names in Mutation Case No. 384/78-79, 480/78-79 is totally false and no such khatian was opened in the office of Assistant Commissioner, Land and Mutation Case No.401/78-79 was not related to the suit property; that mutation case was related to Nurul Alam, son of Ashraf Ali, of village: Bakalia, Chittagong in respect of 0.28 decimals of land and Mutation Case No.430/78-79 was in respect of Pear Mohammad of Sakir-51, Keranigonj, Police Station Kotwali, Chittagong for 0.57 decimals of land. The aforesaid mutation case and khatian of the plaintiffs are false and prepared for ulterior motive. Plaintiffs and husband of plaintiff, Abul Bashar are members of gang of forged deed and they created several forged deeds and after creating different forged deeds they wanted to grab the property illegally. Criminal cases have been instituted against Abul Bashar, husband of plaintiff and also against Md Abdul Jalil and others. Double Mouring Police Station Case No.32(1)87 under section 467/468/109 of the Penal Code was initiated on 30-1-1987. Charge-sheet was submitted and charge was framed and the case is pending in Criminal Motion No.381 of 1989 which is pending before the Additional District Judge, lst court, Chittagong. On these grounds defendants prayed for dismissal of the suit.

7. In the suit, plaintiff examined one witness and he was particularly cross examined by the Government. Government did not adduce any witness nor exhibited any documents.

8. Learned Subordinate Judge, 3rd Court, Chittagong by judgment and decree dated 30-4-1995 decreed the suit on the finding that "defendant government did not take any step to prove the case by adducing any witness or exhibiting any documents'. Learned Judge thereafter took into consideration as regard possession of the plaintiff which is the crux for deciding case of permanent injunction. On consideration of exhibits 3 series, exhibits 2 series, exhibits 4 series, exhibits 7 series, exhibits 5 series and exhibits 6 series held by the aforesaid exhibits, plaintiff has been able to prove their possession of the suit property and decreed the suit.

9. Against this decision defendant-Government preferred Other Appeal No.248 of 1998 out of time by 1230 days. The application for condonation of delay was filed. After contesting hearing the delay was condoned.

10. Having aggrieved against the said decision, present rule was obtained.

11. Mr Serajul Haque with Mr Md Basiruddin Zindigir, learned advocates appearing for the petitioner. For the non contesting defendant No.3 of the suit, Mr Fida M Kamal, Mr AJ Mohammad Ali and Mr Ahsanul Karim, learned Advocates along with bunch of lawyers appeared. Mr Md Jaber, learned Assistant Attorney-General with some government pleaders appeared for defendant No. 1, appellant, opposite party No. 1. All the lawyers appeared in this rule which is for condonation

of delay, not a rule on decree but made argument one after another tirelessly which cover all categories of cases on this rule.

12. Mr. Serajul Haque, learned Advocate, appearing for the petitioner, submits that, delay was 1230 days but in the application for condonation of delay no explanation was given nor the learned Judge ever considered whether the applicant gave any reason far less sufficient or satisfactory for condonation of delay and in one sentence, only in one sentence this long delay has been condoned on taking into consideration of the findings of other suit filed by the plaintiffs affirmed up to the Appellate Division and submits that, since delay has not been properly explained the judgment and order passed by the learned District Judge being devoid of any substance is liable to be set-aside. Learned Advocate in the course of argument referred to Civil Revision No.701 of 2005 arisen from the self same order of the learned District Judge passed in Other Appeal No.255 of 1999 arisen from the selfsame suit against the self same judgment of the trial court wherein learned District Judge on condoning the delay of 1569 days, admitted the appeal for hearing and this judgment was challenged in Civil Revision No.701 of 2005; the High Court Division made the rule absolute and dismissed Other Appeal No.255 of 1999. Against which, defendant government did not proceed further, Learned Advocate further submits that against the self same judgment two appeals cannot be filed by same defendant and since Judgment passed by the High Court Division dismissing Other Appeal No.255 of 1999 against which government did not proceed further. the decision operates as resjudicata on the facts of the given case. Learned Advocate for the petitioner referred to the decisions of *Province of East Pakistan vs Meajan Ali Ahmed and 15 others, 18 DLR (SC) 343*, the case of *Additional Deputy Commissioner (Revenue) and Assistant Custodian, Vested property, Sirajganj vs Md Abdul Majid, 2 BLC (AD) 11* and the case of *The Principal Secretary, President's Secretariat, vs Mohammad Abdul Batten, 1994 BLT (AD) 90.* In the decision of *1994 BLT (AD) 90* Appellate Division of the Hon'ble Supreme Court did not condone the delay of 195 days and observed that:

> "(2) This petition is barred by limitation of 195 days. There is an application for condonation of the delay. Grounds taken for condonation are that the relevant Ministry asked for legal opinion on 9-9-93 for filing a Leave petition and also to get a certified copy of the High Court Division's order, that the File was sent to the Attorney-General and then to the Additional Attorney-General for opinion, that, thereafter, it was sent to the Solicitor "who was pleased to appoint an Advocate-on-Record", that the Solicitor's Office asked the Ministry of Home Affairs for supplying necessary documents and papers, that thereafter, necessary fund was ought for etc. These are not at all good grounds for condonation of the delay; rather these show utter negligence, carelessness, inefficiency or, may be, connivance of persons/officials of the petitioner-government who handled this matter. When an Assistant Attorney-General (Mr. Mashuque Hossain Ahmed) had appeared before the High Court Division and argued on behalf of the Government he certainly knew of the result of the writ petition. As such certified copy of the impugned order could have been easily obtained in time, the writ petition was filed four years after the impugned order of dismissal of the respondent under MLR 9. No Affidavit was filed raising questions as to its maintainability and inordinate delay. As to the delay in filing this Leave petition, whether it was either deliberate or due to utter negligence on the part of the petitioner's officers, there is no good ground for its condonation."

13. In the decision of *Additional Deputy Commissioner (Revenue) and Assistant Custodian, Vested property, Sirajganj vs Md Abdul Majid 2*

BLC (AD) 11, 83 days delay was not condoned observing.

14. The question raised by Mr Chowdhury has already been answered by this Division in the case of *Deputy Commissioner vs Kobad Ali, 39 DLR (AD) 205* in the following terms:

"6.There is a long practice being followed since the days of Dhaka High Court that a revisional application is to be filed within the period of ninety days, prescribed by law for an appeal, and that discretion entertain an application beyond that period in a suitable case where there is no negligence or laches on the part of the petitioner. This is a long standing practice otherwise sound and reasonable, and it does not call for any departure

7. So far as the instant case is concerned the learned Judge of the High Court Division upon assigning cogent reasons has passed the impugned order in exercise of his discretion holding that the petitioner could not give satisfactory explanation for the inordinate delay of 83 days in moving the application in question."

15. In the decision of Province of *East Pakistan vs Meajan Ali Ahmed and 15 others, 18 DLR (SC) 343*, 115 days delay was not condoned observing.

"4. Mr. Hamidul Huq Chowdhury has had no difficulty in showing that on these facts, there had been delay which it is entirely impossible to excuse. The government were aware from the outset that on account of the floods in Bogra they were already out of time on the day when the Deputy commissioner made his reference, i.e. the 22nd October, 1962. The case arising as it did out of the acquisition of rent receiving interests, a subject which has given rise to intensive litigation, of which in the main the Board of Revenue was presumably in charge, it is not easy to see why in this particular case, affecting, as is said one of the biggest Hats in the Province and a major source of revenue for the district of Bogra, it should have been necessary to relegate the papers after the decision of the High Court to the district authorities for their opinion, which in the circumstances could hardly have possessed any value. The Government's case rested on statutes, and not on considerations of balance or of justice in regard to local conditions. Before the High Court, the Province was represented by a Government Pleader. This was a case which should certainly have been dealt with in Dacca without need of reference to Bogra at all, but even allowing for the unnecessary reference to the district authorities, and the pre-occupation of those authorities with the flood, there are delays following after the 22nd October, 1962. which cannot be explained on any ground that can be acceptable in a Court to avoid the effect of limitation in respect of right that have become vested through lapse of time. There was no need for the Board of Revenue to have taken 16 'days' before referring the matter to the Legal Remembrancer, or for the Legal Remem-brancer to take another 5 days before referring the matter to the Government Pleader. Worst of all is the delay of some 45 days between obtaining copies of the judgment and decree and the filing of the petition for special leave. There is no excuse for that particular period, when the file was not passing between offices, but was conceivably in the possession of the Government Pleader, who had already given an opinion in favour of filing an appeal. Once time limited by law has expired, the party which is out of time must, particularly in a case where vested rights have been assured through lapse of time, that here it is difficult to find an explanation for any period of the delay which has been allowed to occur,

totaling 113 days in all, that is, nearly twice the prescribed period of limitation.

5. We are satisfied that this is a case in which the prayer for condonation cannot be entertained. The order of condonation made at the time when leave was granted was passed *ex parte* and is rested moreover, on an application which gave the impression that the entire period of delay was due to the floods in Bogra. Now that the true facts are known it is clear that there is no ground for allowing condonation. There is reason to think that there are other modes in which uniformity in the application of the Ordinance of 1960 can be restored qua this particular Hat."

16. Mr Md Jaber, learned Assistant Attorney-General, appearing for the opposite party, on the other hand submits that, judgment passed by the learned District Judge being well reasonable is maintainable. Learned Assistant Attorney General further submits that in the application for condonation of delay, 1230 days was not properly explained but government filed supplementary-affidavit and also application under section 151 of the Code of Civil Procedure explaining the delay and reasons stated therein being satisfactory, learned District Judge acted within his jurisdiction in applying his discretion by condoning the delay. Learned Assistant Attorney-General further submits that in Title Suit No.97 of 1994 decree was passed for the plaintiff in respect of the self-same land but in Appeal from Original Decree No.131 of 1998 High Court Division found that plaintiff by applying gigantic fraud tried to grab the suit property by showing a dead man alive in auction proceeding of 1948 and set-aside the decree and sent the suit back on remand. Against this decision, Civil Petition for Leave to Appeal was taken properly to the Appellate Division and Civil Petition for Leave to Appeal No.1476 of 2008 and Civil Petition for Leave to Appeal No.1477 of 2008, both these civil petitions for leave to appeal were dismissed as not being pressed showing that plaintiffs of that suit and also of this suit played fraud upon the court and fraud having been detected vitiated everything. Learned Assistant Attorney-General on reference to a voluminous counter-affidavit, submits that this property cannot be a secular property as Government of Bangladesh purchased the suit property on 18-3-1943 in execution of a decree in respect of the suit land, as such, whatever title plaintiff has, extinguished after the sale has been confirmed. Learned Advocate further submits that plaintiff has no *locus standi* to file any suit on the subject matter. Learned Assistant Attorney-General further submits, that, in condoning the delay fate of appeal has not reached its finality and it is only admission by which parties now can contest the suit over the dispute as such plaintiff should not be prejudiced in admission of appeal. Learned Assistant Attorney-General on reference to voluminous counter-affidavit with some papers and "Shampurak Abedan" and also application under section 151 of the Code of Civil Procedure, submits that, if the application for condonation of delay be considered along with 'Shampurak Abedan Patra" and the application under section 151 of the Code of Civil Procedure, then sufficient reason can be found for condoning the delay. Learned Assistant Attorney-General further submits that from Title Suit No.79 of 1994 it appears that suit was filed for declaration of title, confirmation of possession with some other reliefs and from that suit, present plaintiff herself strike out her name and filed the instant suit for permanent injunction. Since plaintiff strike out her name from Title Suit No.97 of 1994, she has no *locus standi* to file the instant suit as relief sought for in the earlier suit have total impact on the instant suit. Learned Assistant Attorney-General further submits that it is admitted position that certain portion of the schedule property is abandoned property, as such as per provision of Article 14 of PO 16 of 1972 this suit can-

not proceed. Learned Assistant Attorney-General further submits that unless delay be condoned, the questions relating to the maintainability of the suit shall remain unanswered. Learned Assistant Attorney-General on submission of condonation of delay relied on the decisions of *Director of Housing and Settlement vs Abdul Majid Howlader, 9 BLC (AD) 51* wherein it is held:—

> "16. There has been delay of 542 days in filing the revisional application by the appellant. The High Court Division refused to condone the delay on the ground that the petitioner before the High Court Division was negligent in taking step in filing the revisional application against the decree passed in Title Appeal No. 118 of 1997 affirming the decree passed in Title Suit No. 191 of 1996. In the background of the provision of law the suit filed by the respondents and decreed by the courts below was being totally non-entertainable by the civil Court the High Court Division was required to exercise its discretionary jurisdiction to correct the gross error of law committed by the courts below. In that view of the matter we are of the view that the High Court Division was not correct in refusing to condone the delay and consequent thereupon in not entertaining the revisional application. The High Court Division was quite unmindful of the fact that the reliefs granted in the suit were not legally available to the respondents and consequently allowing the gross error of law to remain in effect that would amount to allow the respondents to enjoy the fruit of the decree although under the law they are not entitled to the same and thus if the decree so passed in favour of the respondents remains winterfeed the appellant and respondent No. 20 would be deprived of their legal claim in the property in suit. Since the respondents obtained a decree from a Court which was not competent to pass the same being barred by the law to entertain the suit of the kind filed by the respondents or, in other words, in view of the provision of law barring the civil Court from entertaining the kind of the suit filed by the plaintiffs and decreeing the same, the High court Division was required to exercise its discretionary jurisdiction to correct the gross error of law committed by the courts below. The High Court Division in spite of filing of revisional application beyond the period prescribed by a long standing practice is quite competent in its revisional jurisdiction to exercise its discretionary jurisdiction to correct gross error of law committed by the courts below or, in other words, to put law straight in a case like the present one and in that view of the matter we are of the view High Court Division was not correct in not entertaining the revisional application upon condonation of the delay for which explanation was offered, though not accepted by the said Division on the view that the petitioner was guilty of serious negligence and laches. Such explanation for condonation of inordinate delay of 542 days, cannot be accepted as satisfactory ". But the fact remains that the decree that was passed by the courts below and as against which revisional application was filed was a nullity because the civil court entertained the suit in spite of the provision of law barring the same from entertaining the suit either questioning the order passed or action taken in a proceeding initiated under the Act for acquisition of a property, as in the case of the property in suit, and that because of the fact that upon acquisition the property in suit vested in the Government and for that the respondents were not entitled to have a decree from a civil Court to have the acquired property released in their favour. Since the suit of the respondents itself was not entertainable by the civil Court, as such,

the decree so passed in the suit being a nullity, in our view, no useful purpose would be served in sending the revisional application upon allowing the appeal, to the High Court Division to entertain the same for disposal finally and thereby prolonging the litigation. In that view of the matter we are inclined to dispose of the matter once and for all."

17. Learned Assistant Attorney-General next relied on the case of *Abul Khair Mia vs Abdul Latif Sarder, 32 DLR (AD) 167* wherein crux of the decision was ex-parte decree was obtained on suppression of summons fraudulently is a nullity it is held as:

"4, This fact as disclosed by the evidence is that the decree-holder by suppressing summons obtained the *ex parte* decree fraudulently and this finding of fact has been arrived at both by the appellate court below and the High Court Division. Such decree obtained fraudulently is a nullity in the eye of law. It is by practicing deceit and fraud that the decree was obtained and when such fraud and deceit is established, a decree has no existence in the eye of law and it must be set-aside. Such enquiry is permissible within the scope of Order IX, rule 13 of the Code of Civil Procedure because the term of the rule itself provides for setting aside the ex-parte decree if it is obtained, inter alia, by suppressing the summons. It is not the question of re-assessment of the evidence in revisional jurisdiction. The finding of fact arrived at by the last Court of fact, namely, the appellate court below, is that summons were fraudulently suppressed and once the fraud is established, limitation will run only from the date when the fraud was detected. It is contrary to the essence of justice to saddle a person with knowledge of an ex-parte decree which apparently was built up on the theory that the process server resisted in the execution of the decree. In this context the High Court Division considered the evidence and found that the finding was perverse, namely, that the judgment-debtor has resisted the process server on 21-3-66 and, therefore, the period of limitation will run from that date. If fraud is proved then there is no question of limitation. Reliance may be placed in the cases of *Abdul Rauf vs Abdul Hamid Khan, (1965) 17 DLR (SC) 515; PLD 1965 (SC) 671* and *Saifur Rahman vs Haider Shah, 19 DLR (SC) 433.*"

18. Learned Assistant Attorney-General next relied on the case of *Rabeya Khatoon vs Bangladesh represented by the Deputy Commissioner, 60 DLR (AD) 9* wherein it is held that:

"5. As it appears, the High Court Division made the Rule absolute holding that admittedly the suit land was acquired by the government for rehabilitation of the refugees who migrated to then East Pakistan from India. The suit land was allotted to Rustom Ali. Admittedly Rustom Ali, after getting allotment of the suit land, did not construct any homestead on the same and allowed defendant No. 4 to possess the suit land on the strength of an agreement, Exhibit-2, in contravention of terms and conditions of the allotment, inasmuch as clause 5 of the letter of allotment, which has been marked as Exhibit-A3, provides that the allottees must maintain the houses at their own expenses whenever necessary and they may construct additional sheds according to their requirement within their compound at their own cost with previous permission of the collector but the refugees will have no right to sell or otherwise dispose of the land and buildings; however, if any refugee migrated at any time he will have to take over the land and buildings to the Collector who will dispose those on the advice of the government; thus Exhibit A3 shows that Rustom Ali had no right to make any transfer or sell the suit land in

favour of Abdul Jabbar as admittedly, Rustom Ali did not execute any sale deed in favour of Abdul Jabbar and the very claim of the plaintiff is that Abdul Jabbar, on the strength of a contract, entered into possession of the suit land and sold the suit land in favour of the plaintiff by kabala deed dated 11-12-1983 though admittedly Abdul Jabbar did not acquire any title in the suit land on the basis of the agreement dated 25-12-1987 and so by kabala deed dated 11-12-1983, plaintiff did not acquire any title in the suit land; further, admittedly the government did not enter into any contract with the plaintiff and did not hand over possession of the suit land in favour of the plaintiff and accordingly the plaintiff is nothing but a trespasser upon the suit land on the strength of Exhibits 1 and 2; further in terms of section 5 of East Pakistan Ordinance No. XXIV of 1970 the Deputy Commissioner, Jessore, with a view to get recovery of possession of the suit land from the plaintiff and other unauthorized occupants, duly issued a notice which has been marked as Exhibit A5 and the plaintiff, although gave an undertaking by writing to hand over possession of the suit land in favour of the defendant, filed the suit and got a temporary injunction restraining the government from taking over possession of the suit land; further the plaintiff, being an unauthorized occupant in the suit land, had also no *locus standi* to maintain a suit for permanent injunction against the defendants who in exercise of the power under section 5 of the Ordinance XXIV of 1970 duly issued notice and neither the learned Assistant Judge nor the learned Additional District Judge considered this aspect of the matter; it is the settled principle of law that a trespasser cannot maintain a suit for permanent injunction against a rightful owner; both the Courts below misread the provisions of Article 42 of the Constitution of the People's Republic of Bangladesh, inasmuch as the plaintiff, being a trespasser, cannot get protection of law to retain her illegal possession in the suit land; the notice of eviction was served upon the plaintiff on 19-1-1986 whereupon plaintiff undertook to hand over the possession of the suit land on 1-2-1986 but instead, filed the instant suit on 4-2-1986 and after filing of the suit that she on 28-1-1987, got Exhibit 3 which is hit by the principle of *lis pendens* as provided in section 52 of the Transfer of Property Act; moreover, defendant No. 1, after taking preliminary steps for eviction of the plaintiff, issued notice vide Exhibit -A5. for eviction, of an unauthorized occupant from government land and the right of the Government to evict the defendant cannot be defeated by creating a subsequent kabala from Rustom Ali whose allotment deed had already been cancelled by order dated 7-12-1986 and after the above cancellation, Rustom Ali had no right to execute and register any kabala in favour of the plaintiff."

19. Learned Assistant Attorney-General, next, relied on the case of *M/s. Haji Mohammad Ali and Sons vs Burma Eastern Ltd., 38 DLR (AD) 41* wherein it is held fraud when proved, question of limitation does not arise. It is held as:

"32. In the latter case this Court while considering whether an Exparte decree obtained fraudulently by suppressing summons is a nullity observed that if fraud is proved then there is no question of limitation and it will run from the date when fraud was detected. Obviously, in the present case before us appellant firm has succeeded in establishing that there has been suppression of truth, absence of prior notice before cancellation, non-compliance with the terms of agreement and malafide on the part of respondent No. 1 which have entitled the appellant to the decree, sought for by it."

20. Learned Assistant Attorney-General also relied on the case of *Master Abdul Aziz vs Abani Mohan Mukherjee, 30 DLR (SC) 221* wherein Court's inherent power under section 151 of the Code of Civil Procedure was propounded as:

> "7. Now, the question posed by Mr Ali is whether the High Court which recorded the impugned order was competent to alter the said order in exercise of its inherent power under section 151 of the Code of Civil Procedure, 1908. He argued that even if it be assumed that the order dated 31-4-70 amounted to an order of abatement as contended by Mr Moinul Huq, there is no escape from the finding that the said order was passed on the basis of a false affidavit and a false certificate of death. In view of the facts and circumstances of the case, even if there were an alternative remedy, it would not bar the exercise of power under section 151 of the Code by the Court. Section 151 preserves the inherent power of the court to make such order as may be necessary for the ends of justice. It may be noted that the provisions of the Code are generally meant to serve the ends of justice but in their very nature they cannot read all possible circumstances. Consequently every court has an inherent power to make any order it considers necessary for the ends of justice. Reference on this point may be made to the following cases, namely: 19 CWN 419 *(Peary Choudhury vs Sence Dass) 45. 151 (Debi Baksh Singh vs Habib Shah) 45, CWN 392 (Akina Bibi vs Mohammad Ali) AIR 1934 Allahabad 287 (Lachhman Rai vs Jang Bahadur Rai), AIR 1937 Sind 101 (Mohanlal vs Khushalibai) (1958) 10 DLR 79 PLD 1958 Dae. 295 (Ganesh Chandra Basu vs Bashu Laskar).* What has been held in the above cases is that the court has an inherent power under section 151 of the Code to set-aside its order passed under a misapprehension of facts when true facts are brought to light and that the Court has also power under the aforesaid section 151 of the Code to vacate an order obtained by misleading the Court and practicing fraud upon it. In the present case the High Court recorded an order that the appeal had been abated in view of an affidavit and a deal certificate which were latter found to be false. The court was evidently misled in recording the order as regards abatement though there was no basis for the same. The said order had, therefore, no legal effect. This will appear from the observation of the High Court. It is as follows:
>
> "All that we dealt on that day was to notice the fact that the respondent No.1 was shown by the petitioner to have died on 6-7-64 and as a result of that the appeal abated. From the discovery of more reliable materials it now appears abundantly clear that noting was not correct and this court was quite competent to disregard or set-aside that order of abatement either by substituting the heirs or by noticing that its very basis has no existence.

21. Learned Assistant Attorney-General next relied on the case of *Babor Ali Prodhan vs Kinu Mia 31 DLR (AD) 323* wherein on the question of possession of the tenant after acquisition of the rent-receivers interest, Appellate Division held as:

> "4. Details of the history as the right to the rent of the ex-rent receiver on the acquisition the rent receiving interest need not be set out in detail, excepting that when the rent suit was filed in 1960 the law as to right of ex-rent receiver recover arrear rent is to be found in section 63C of the State Acquisition and Tenancy Act which, inter alia, provides that all arrears of rent and cess together with interest thereon which remained due to any rent receiver in respect of an interest on the date of acquisi-

tion, and which have not become barred limitation shall continue to be recoverable by such rent receiver amicably through Civil Court, from the persons liable to pay them. We have referred only to the relevent part bereft of irrelevant parts. This provision of law has no doubt preserved the right of ex-rent receiver to realize his dues as rent from his tenants and this right is therefore to be construed in the light of the provisions of the State Acquisition and Tenancy Act. Under section 3 of the with the notification made in the Official Gazette all rent receiving interests of the rent receiver shall vest in the Government absolutely free from all encumbrances. It is not disputed that on and from 14th April, 1956 rent receiving interest of all rent receivers in Bangladesh were acquired under this section, and so the relationship of "landlord and tenant so far as the previous rent receivers have ceased to exists. The suit could be filed as money suit and the decree holder in any suit whether described as money suit or rent suit has ceased to have his right treat it as rent suit under the Bengal Tenancy Act."

22. Learned Assistant Attorney-General further relied on the case of *M/s. Gannysons Ltd. vs Sonali Bank, 36 DLR (AD) 146* wherein Article 14 of PO No.16 of 1972 was considered it is held that:

"7. Mr TH Khan , counsel for the appellant, contended that since the properties in question, though mortgaged with the appellants being abandoned property, the decree obtained by the respondent Bank is incapable of execution in view of the fact that the decretal abandoned properties have vested in the Government. There is also the express bar in the provisions of Article 14 of the Bangladesh Abandoned Property (Management, control and Disposal) Order, 1972, PO No. 16 of 1972. The trial court as well as the High Court Division ought to have taken judicial notice of such provisions in spite of the government's failure to invoke them , Article 14 provides as follows;

"14. (1) Any property vested in the government under this Order shall be exempt from all legal process, including seizure, distress, ejectment, attachment or sale by any officer of a Court or any other authority, and no injunction or other order of whatever kind in respect of such property shall be granted or made by any Court or any other authority, and the Government shall not be divested or dispossessed of such property by operation of any law for the time being in force.

(2) Any such legal process as aforesaid subsisting immediately before the commencement of this Order shall cease to have effect on such commencement and all abandoned properties in custody of any Court, receiver, guardian or other person or persons appointed by it, shall upon delivery of the same being called for by the government, be delivered to the Government."

From these provisions it appears that once any property is declared or treated as abandoned property under the aforesaid Act it cannot be subjected to any legal process such as seizure, distress, attachment or sale by any officer of a Court or any other authority and further, that the government cannot be divested or dispossessed of such properties.

12. As against these circumstances which prevented the appellants from taking any steps earlier, the respondent Bank has not been able to prove that the appellants were aware of the institution of Title Suit No. 249 of 1976 or the Exparte decree passed by the Court or even the proceeding in execution in title Execution No. 46 of 1980 until the advertisement appeared in the newspaper already referred to above. The respondent Bank has equally failed to

show how the decree obtained in the aforesaid suit can be executed in respect of properties which had vested in the Government under the provisions of PO No. 16 of 1972. Further, though M/s. Gannysons Ltd. was made defendant No. 1 in the aforesaid title suit it was shown as having been in control and management of the government of the People's Republic of Bangladesh and no relief was sought for against the company managed by the original directors. Only three Directors, namely, Dada Abdul Gani, Mad. Yunus Abdus Sattar and Abdur Rahman Abdul Majid were made proforma-defendants in the suit showing them as Directors of M/s. Gannysons Ltd. of 35-36, Bangabandhu Avenue, Dhaka. As a matter of fact, Dada Abdul Gani and Mr Yunus Abdus Sattar ceased to be directors shareholders prior to 1969. It is however, not understood why in the decree itself the proforma-defendants have been shown as "defendants".

13. It is also difficult to understand why, if the loan was obtained by M/s. Gannysons Ltd. before it was treated as abandoned properties, the Bank, instead of proceeding against the directors of the company who continued till it was declared as abandoned, it proceeded against it when it came to be treated as abandoned property by the Government. The Bank wanted to proceed against the properties which were offered as security against the loan obtained by the appellants before it was treated as abandoned property, but in all fairness the Bank should have made them parties as well as the Government and should have sought relief against them, particularly when the previous directors were persistently pursuing their remedies, for the release of the properties in question."

23. Learned Assistant Attorney also, relied on the case of Bangladesh represented by the *Secretary, Ministry of Public Works and Urban Development vs Md Suruzzamal, 48 DLR (AD) 1* wherein, Article 2(1) PO 16 of 1972 was considered and Appellate Division held as:

> "16. Having given our most anxious consideration to the submissions of both sides we cannot but hold that the two Courts below have sorely missed the yardstick with which to determine whether a property is an abandoned property or not. A property is an Abandoned Property if it falls within the definition of Article 2 of President's Order No. 16 of 1972. In this particular case the owner himself is not coming forward to assert that he was present in Bangladesh all along. In the case relief upon by the High Court Division namely, *M/s Khan Brothers Ltd. vs Government of Bangladesh 27 DLR 423*, an artificial person namely a private limited company itself challenged a Gazette Notification taking over the management of its properties and assets under Articles 4 and 5 of President's Order No. 16 of 1972. In the other case relied upon by the High Court Division, Government of the *People's Republic of Bangladesh vs M/s Speedbier Navigation Co. 30 DLR (SC) 101*, five Bangladeshi partners of the firm representing 75% interest of the firm challenged the Notifications taking over their properties for management. In the last case filed upon by the High Court Division, *Bangladesh vs Messrs ATJ Industries Ltd. 28 DLR (AD) 120*, it is the share-holders who challenged the taking over of the management of the properties of a private limited company. In the present case the real owner being totally absent from the legal proceedings instituted against him since 1972 and having not made any representation to the Government for restoration of his property the onus on the Government to prove that the owner was not present in Bangladesh or his whereabouts were not known or he has

ceased to occupy, supervise or manage in person his property, is a negative one, meaning thereby that the government do not have to adduce positive evidence of those facts. A mere assertion will do in the facts and circumstances of the case which the appellant through PW 1 Md Syed Kamal Ali has done. The auction-purchasers witnesses, on the other hand, have only orally asserted that Dr Shamim was a Bangali, that he was present in Bangladesh throughout and that he was present in Bangladesh even in 1988. No certificate has been produced to show that he was a Bangladeshi National. No evidence has been given that Dr Shamim was in possession of the suit property on or before 28-2-72. No address of Dr Shamim has been given to prove that his whereabouts were known. There is no assertion by any of these witnesses that Dr Shamim occupied, supervised or managed in person his property. On the contrary, it is these witnesses themselves who admitted that Radio Bangladesh was in possession of the suit property since the liberation of Bangladesh. The High court Division unnecessarily shifted the onus on the appellant to prove that it required about the whereabouts of Dr. Shamim which was not at all the business of the appellant. If Dr Shamim was a Bangali and was present in Bangladesh, he may not have occupied, managed or supervised the suit property in person for many reasons, but there is no earthly reason why he did not contest the money suit filed by Rupali Bank, why he did not resist the auction sale of his valuable suit property and why, finding Radio Bangladesh to be in possession of his property, he did not make any effort to release his property from the possession of the government. Man may lie, but circumstances do not and in the circumstances of the case it appears to us that both the courts below turned a blind eye to the admitted circumstances of the case and were swayed by the verbal assertions of the auction-purchaser's witnesses without weighing them with the attendant circumstance of the case and without probing the evidentiary value of their statements when the circumstances themselves speak volume against their assertions."

19. This Division has held in the case of *Gannyson vs Sonali Bank, 36 DLR (AD) 146,* that once property vests in the Government under proceedings can be taken against such property. The money decree obtained by Rupali Bank against Dr Shamim, the execution thereof and the auction sale of the suit property are all void and will not divest the Government of its title to the suit property and the auction-purchaser has acquired no title to the same by his auction purchase."

24. Learned Assistant Attorney-General also relied on the case *Government of Bangladesh represented by the Deputy Commissioner, Rangpur vs Hasrat Mohani 3 ADC 23,* a case on section 5 of the Limitation Act, whereon it is held as:

"11. appears that the Lower Appellate Court after hearing the parties observed; "The learned Government pleader has argued that to obtain opinion of various authorities concerned before filing an appeal sometimes may reasonably be expected to elapse. Specifically the learned GP has mentioned that the Ministry of Land wanted the file for taking decision to prefer appeal, which remained in the Ministry for long time and was also misplaced. So the Government has sufficient explanation of delay. On the other hand, the learned advocate for the plaintiff respondents argued that no such letter from the Ministry of land is shown by the defendant-respondents. So there is no reason to be believe that the case file was sent to the Ministry of Land, but the file was in custody of Deputy Commissioner, Rangpur.

But the submissions of the learned Advocate from the plaintiff-respondents seems to be based on surmises. There is no proof of the contention that the file remained in the custody of Deputy Commissioner, Rangpur. On the other hand it appeared that the submission of the learned GP has some substance, because the government machinery is inter dependant, so it takes sometimes in normal course. In an unusual incidence it takes more time to arrive in a decision."

The learned GP has submitted a case law of *1 BLC 105* in which it has been held;

"As the file of the government moved from one officer to the other officer within usual normal gap of time it can not be said that there had been gross negligence on the part of the government in filing the appeal for which the delay of 547 days in preferring the appeal was condoned."

25. Learned Assistant Attorney-General further relied on the case of Government of Bangladesh, represented by the *Secretary Ministry of Works vs Chairman, Court of Settlement, 53 DLR (AD) 26*, wherein it is held as;

"6.It appears that on government's own admission the property in question was not an abandoned property and was wrongly included in the 'Ka' list of abandoned buildings. In that view of the matter question of limitation does not arise. By the impugned judgment justice having been done we are not inclined to interfere with the same on technical ground of limitation.

26. Learned Assistant Attorney-General further relied on the case of *Khair Ullah vs ADC Revenue, 54 DLR (AD) 13* wherein it is held as:

"6. We have gone through the judgment of the High Court Division and it appears that the High Court Division condoned the delay holding that there was no negligence on the part of the Government-respondent but it was due to the negligent act of the then Assistant Attorney-General. The High court Division after considering several decisions of the higher courts of the country as well as of the Indian jurisdiction found that the delay was unintentional and for no fault of the respondent-petitioner. Mr Zahedul Bari led us through the judgment of the High Court Division and tried to impress that there was an intentional delay and the Government-respondent should not be treated separately as they have no special status, but from the judgment of the High court Division it appears that this aspect of the matter has been fully considered and it is well settled that the condonation of delay under section 5 of the Limitation Act is a highly discretionary matter and considering the facts and circumstances the High Court Division exercised the discretion in favour of the Government-respondent. In view of the aforesaid we hold that no illegality and wrong has been committed by the High Court Division in exercising the discretion.

There is therefore no merit in this petition and the same is accordingly dismissed."

27. On behalf of non contesting defendant No.3 and non filing of appeal by defendant No.3; we allowed Mr AJ Mohammad Ali, with Mr Fida M. Kamal and Mr Ahsanul Karim, learned Advocates to appear and to argue the case only to enlighten us on the question of delay and in what manner the delay can be condoned. On behalf of defendant No.3 a voluminous counter affidavit has been filed annexing 100s of documents. It is their common submission that since fraud has been detected it vitiated everything and next, common submission is that, by condoning the delay fate of the appeal has not been decided it give only a chance to the parties to settle the dispute in a proper forum.

28. Mr AJ Mohammad Ali, learned Advocate, submits that, this suit cannot be proceeded as per provision of Article 14 of PO 16 of 1972 as earlier suit in Appeal from Original Decree No.131 of 1998 it has been decided certain portion of the suit land being abandoned property, as such this suit cannot proceed. Learned Advocate further submits that a gigantic fraud has been practiced in getting the decree in trial court that have been detected. Learned Judge of the appellate court committed no illegality in condoning the delay. Learned Advocate on reference to the schedule of Other Suit No.97 of 1994, submits that over the selfsame matter no suit can proceed simultaneously by the same plaintiff and after judgment of Other Suit No. 47 of 1994 is set-aside by this court in Appeal From Original Decree No.131 of 1994, this suit can not proceed. Learned Advocate further submits that government case has not been properly defended as government lawyer himself purchased some portion of the suit land which shows fraud practiced upon the court.

29. Mr Fida M. Kamal, learned Advocate, also appeared for same defendant No.3, on reference to the schedule of both the suits submits that, in the earlier suit injunction was sought for and confirmation of possession was prayed for but in the instant suit it has been filed for permanent injunction, the prayer of both the suit being similar and in earlier suit decree was passed for confirmation of possession, this suit on the similar facts having been clearly seen learned District Judge on taking into consideration of fraud practice by the plaintiff, condoned the delay holding that when fraud has been detected it vitiated everything, this Rule has no leg to stand.

30. Mr Ahsanul Karim, learned Advocate, submits that although there being no reason given by the learned judge in condoning the delay but this court can maintain the judgment on the reason that "so, after consideration of the matter, the delay of 1230 days in preferring the appeal is condoned." Learned Advocate submits that this suit on the facts of the given case involved government property and that cannot be a subject matter of the suit filed by a private individual as the suit is not maintainable and decree so passed cannot stand as such delay as condoned ought not to be disturbed as on the side of defendant No.3 voluminous counter affidavit has been submitted, if considered then it appears that plaintiffs, suit can not be maintainable. Learned Advocates for the defendant No.3 relied on the case of *Concord Engineers and Construction Ltd. vs The Chief Engineer Roads and Highways Department, 3 ADC (AD) 23*. This decision has already been relied by the learned Assistant Attorney-General. Another decision i.e. the case of *Director of Housing and Settlement vs Abdul Majid Howlader, 9 BLC (AD) 51*, it is also relied by the learned Assistant Attorney-General. Next the case of *M/s. National Bank of Pakistan vs Farid sons Limited, 20 DLR (SC) 248* was relied wherein it is held that:

> "2. Mr Asrarul Hossain, the learned Counsel for the appellants, was apparently under the impression that unless the impugned order was challenged by a separate appeal, his clients would be barred from assailing it later on, even on appeal from the final order of the High Court. This impression is erroneous in the face of the clear language of section 105 of the Code of Civil Procedure. If the appeal is declared on the merits in favour of the respondents by the High Court, and the Bank wishes to appeal from that order, it would be open to the Bank to agitate the question of the condonation of the delay in presenting the appeal to the High Court also, as a ground of appeal. In view of this legal position we do not think it is necessary to consider the present appeal on the merits. It may be that if the appellants succeed in the High Court, the question raised on the present appeal would not call for any consideration at all.

We therefore, formally dismiss the appeal but leave the parties to bear their own costs in this court."

31. Another decision i.e. the case of *Khairullah (Md) vs ADC Revenue, 54 DLR (AD) 13.* This decision was also relied by the learned Assistant Attorney-General. Another decision, the case of *SP Chengal Varaya Naidu (dead) by LRS. vs Jagannath (dead) by LRS, 1994 Supreme Court Cases 1 SCC* on the question of judgment obtained by fraud. The case of *Shahr Banoo Mohsin Asgar vs Lailun Nahar Ershad, 44 DLR 552* on the question of inherent power of the court under section 151 of the Code of Civil Procedure was relied wherein it is held that:

"9. Mr Md Nurul Huq, the learned Advocate who appears for the plaintiffs and opposite parties, on the other hand, argues that as there are alternative remedies available to the defendants for setting aside the *ex parte* decree, it was not open to the learned Assistant Judge to entertain the application in exercise of his inherent powers. He cites several decisions in support. None of these decisions lays down categorically that inherent power of the court can never be exercised for setting aside an *ex parte* decree or order obtained by fraud practiced upon the court. Strong reliance is placed by the petitioners in *Abdul Aziz vs Abani Mohan 30 DLR (SC) 221.* In that case an order of abatement of an appeal was obtained on production of a false certificate of death. An application under section 151 of the Code of Civil Procedure was subsequently made for setting aside the order on the ground of fraud practiced upon the court. A question arose whether section 151 can be restored to for setting aside the order when there were other remedies open to the applicant. The High Court Division answered it in the affirmative and set-aside the order. On appeal the decision was affirmed. In course of the judgment Ahsanuddin Chowdhury, .J. who delivered the judgment for the Appellate Division stated the legal position in the following terms.

"Section 151 preserves the inherent power of the court to make such order as may be necessary for the ends of justice. It may be noted that the provisions of the Code are generally meant to serve the ends of justice but in their very nature they cannot read all possible circumstances. Consequently every court has an inherent power to make any order it considers necessary for the ends of justice. Reference on this point may be made to the following cases, namely, *19 CWN 419 (Peary Chou-dhury vs Sonoory Dass) 45 CWN 392 (Akina Bibi vs Mohammad Ali) AIR 1934 Allahabad 287 (Lachhman Rai vs Jang Bahadur RAi). AIR 1937 Sind 101 (Mohamlal vs Khushallbai) (1958) 10 DLR 79, PLD 1958 Dac. 295 (Ganesh Chandra Basu vs Bashu Laskar).* What has been held in the above cases is that the court had an inherent power under section 151 of the Code to set-aside its order passed under a brought to light and that the court also ahs power under the aforesaid section 151 of the Code to vacate an order obtained by misleading the court and practicing fraud upon it.

10. In some of the case referred to in the judgment fraudulent decrees were set-aside in exercise of inherent powers of the under section 151 of the Code of Civil Procedure. To the same effect are the decisions in *Mofazzel Molla vs Parul Bala Debi, 24 DLR 117. Md Amir Hossain Sarder vs Sarat Chandra, 31 DLR 109, Mozaffar Ahmed vs Moulvi Saleh Ahmed 40 DLR 239.*

11. Similar view was also expressed in the case of *Baidyanath Dubey vs Deonandan Singh, 1968 SC 275* where the Supreme Court of India held that a court has inherent powers to recall orders obtained by practicing fraud on it, at the instance of a

party to the proceedings and there is no question of the court being functus officio.

12. It is thus fairly established that in cases of fraud upon the court, the court may exercise its inherent powers to set things right even though there are alternative remedies open. In some of the cases it has been observed that not only the Court has such powers, but it is its duty to set-aside the decree or order obtained by fraud practiced upon the court itself when apprised of it."

32. The case of *Abdus Sattar Khondker vs Premlata, 16 BLD 596 = 49 DLR 583* was relied wherein inherent powers of the court under section 151 of the Code of Civil Procedure was propounded and it is held that:

"9. It, thus, clearly appears from *10 DLR case* that when there is an allegations of fraud practiced on the court, an application under section 151 of the Code lies but when the allegation of fraud is that fraud was practiced on a party an application under section 151 would not lie and in that case the proper course would be to institute a regular suit. I, therefore, find that the case relied on by Mr Quayum do not help him in the facts and circumstances of the present case rather they support the case of the opposite party inasmuch as in the instant case it is the definite case of the opposite party that the decree dated 29-9-1975 was obtained by the plaintiff petitioner by practicing fraud upon the court.

10. In this connection we may also take note of the case of *Peary Chowdhury vs Sanoo DAs* reported in *19 CWN 419,* where in their Lordships observed. "We are of the opinion, how-ever, that under the circumstances found by the learned District Judge the court had an inherent jurisdiction to set-aside the decree. Not only has the court power, but it is its duty, to set-aside a decree obtained by fraud practiced upon the court, when apprised of it. We agree with the following observations made in a case in the Bombay High Court in which a decree by consent was set-aside in a summary manner upon an application by the defendant. What the defendant says is that there was a suit against him, and that the suit was declared to have ended by reason of a decree passed with his consent. He never consented, and the result has been that there has been fraud committed upon the court. The court was persuaded to sign a decree to which the defendant had never consented and that upon the representation that he had consented to it. Therefore once the court is asked to go back upon its own procedure, it is not a question whether there is any section in the Civil Procedure code; to warrant the action of the court amending its proceedings. It is an inherent power of every court to correct its own proceedings where it has been misled."

33. Similarly in the case reported in *24 DLR 116,* it has been held that as to case where fraud is committed upon the court as well as the parties, a court has inherent jurisdiction to interfere in exercise of its power vested in section 151 of the Code of Civil Procedure and in a case of fraud upon a party the only remedy is in a suit. Here we may also quote from an unreported decision of single Bench of this court passed in Civil Revision No. 86 of 1962 decided by Ali J, on 30-4-65 on a consideration of a number of decisions his Lordship Ali, J, arrived at the following conclusion:

"On a careful perusal of these decisions as well as a number of the other authorities referred to therein I feel that it is firmly well settled that in case of fraud on a party the only remedy is in a suit. As to the cases where fraud is committed upon the court as well as the parties, the consensus of judicial opinion appears to be that the court has inherent jurisdiction to interfere in exercise

Anti-Corruption Commission Act (V of 2004)

Section 20—Since violation of rule 4 by not sending the FIR to the Commission for investigation has been mandated as directory by the Appellate Division and since alleged commission of offence under section 408 of the Code, being a schedule offence has to be investigated by the Commission in view of section 20 of the Act as such, issuance of the order by the Investigating Officer of the Commission to appear before it to assist the investigation, is mandated as lawful. *Saidul Haque Shamim (Md) vs Anti-Corruption Com-mission (Spl. Orig)*201

Bangladesh Labour Law Act (XLII of 2006)

Sections 178 & 179—Sections 178 and 179 of the Act, provides for the procedure of registration of a trade union in an establishment thereby requiring some information and/or papers that are to be furnished by a particular trade union to obtain registration. One of the vital requirements to obtain such registration is to have minimum 30% of total workers as its members while sub-section (5) of section 179 provides that no establishment can have more than three registered trade unions. Section 182, on the other hand, provides that once the Labour Director is satisfied about the compliance of the requirements of registration, he shall issue a registration certificate in favour of a particular trade union within 60(sixty) days from receipt of the application for registration. While sub-section (4) of section 182 provides that if, for any reason, such registration is not granted or rejected, the applicant trade union may prefer appeal within 30 (thirty) days of such refusal/rejection before the Labour Court. Sub-section (6) of the same section gives the applicant-trade union a further right to prefer second appeal before the Labour Appellate Tribunal if it is aggrieved by the decision of the Labour Court upon its first appeal. *Titas Gas Karmachari Union vs Secretary, Ministry of Labour and Manpower (Spl. Original)* 213

Code of Criminal Procedure (V of 1898)

Section 188—Under section 188 of the Code the Court can take cognizance of an offence without the sanction, but it cannot try the case except the sanction of the Government. No sanction was obtained before inquiry. But the case is still pending and awaiting for trial. The prosecution at this stage of the proceeding can obtain sanction from the Government to address the demand of section 188 of the Code. *Mirza Mohammad Mohiuddin vs State (Criminal)* 226

Section 439—Since we are exercising power under section 439 of the Code, we cannot but to hold that the judgment is vitiated not only by non-application of mind, but also for violation of several provisions of the Code. It cannot sustain in the eye of law. *Saiful Islam vs State (Criminal)* 205

Section 561A—In order to constitute an offence under section 415 of the Code the deception by the accused is must and such deception must be also from the initial stage of the transaction The allegations of the complainant are accepted in its entirety the same do not constitute any offence under sections 420 and 406 of the Code. *Khandaker Nazrul Islam Khokan vs Mustaba Kuli Khan (Criminal)* 211

Emergency Powers Rules, 2007

Rules 11 and 22—Since we are exercising power under section 439 of the Code, we cannot but to hold that the judgment is vitiated not only by non-application of mind, but also for violation of several provisions of the Code. It cannot sustain in the eye of law. *Saiful Islam vs State (Criminal)* 205

Evidence Act (I of 1872)

Sections 101 and 106—Legal evidence in a criminal trial is the evidence of the incriminating facts and circumstances of involvement of the accused in the commission of offence inevitable pointing to their guilty as the perpetrators incompatible with the plea of their innocence. *Abul Kashem vs State (Criminal)* ...195

Section 122—The depositions/statements of PW-73, relating to the communication made to her by the accused-petitioner during subsisting their marriage, if any, will be inadmissible in evidence. *Abdul Mazed Vaaty (Md) @ Yusuf Vatt vs State (Criminal)* 189

Section 122—There is no presumption of law that the wife and husband constitute one person for the purpose of the criminal law. If the wife, removing the husband's property from his house does so with dishonest intention, she is guilty of theft. *Abdul Mazed Vaaty (Md) @ Yusuf Vatt vs State (Criminal)* ... 189

Limitation Act (IX of 1908)

Sections 5 and 12— Delay may be for one two months or 3 months for different official performances but when it goes a long way that it itself speak negligence and lack of bona fide which can not be condoned. *Tahamina Amin Chowdhury vs Deputy Commissioner, Chittagong (Civil)* 239

Local Government (Municipality) Election Rules, 2010

Rule 39(2)—The allegations of irregularity or improper counting of ballots have not been pleaded adequately and specifically and the evidence adduced by the election petitioner regarding improper counting of ballots of each of the Polling Centres are insufficient and the allegations are not at all proved. Both the Tribunals acted unlawfully in passing the order of inspection and recounting the ballot papers inasmuch as the respondent No.7 failed to establish the factual foundation of it by adducing sufficient evidence bringing specific allegation of improper counting of each of the polling centres. *Afzal Hossain (Md) vs Government of Bangladesh (Spl Original)* 230

Passport Order (PO 9 of 1973)

Articles 6 & 7—The power of the passport authority to renew the old handwritten passport or to issue new handwritten passport or MRP on surrender of the old handwritten passport is not fettered by or conditioned upon police report. Nor mere pendency of criminal cases or submission of charge-sheet against the applicant seeking renewal of his old handwritten passport by a new hand-written passport/MRP by surrender of his existing handwritten passport can be a valid ground for refusal or withholding the new handwritten passport or MRP. *Abdul Matin Sarker vs People's Republic of Bangladesh (Spl. Original)* ... 186

Penal Code (XLV of 1860)

Section 302—Suspicion or doubt however strong it might be cannot take place of evidence or there be slightest doubt as to the involvement of the accused in the crime., he cannot be convicted *Abul Kashem vs State (Crimi)* 195

Section 408—Since violation of rule 4 by not sending the FIR to the Commission for investigation has been mandated as directory by the Appellate Division and since alleged commission of offence under section 408 of the Code, being a schedule offence has to be investigated by the Commission in view of section 20 of the Act as such, issuance of the order by the Investigating Officer of the Commission to appear before it to assist the investigation, is mandated as lawful. *Saidul Haque Shamim (Md) vs Anti-Corruption Commission (Spl. Original)*

Section 415—In order to constitute an offence under section 415 of the Code the deception by the accused is must and such deception must be also from the initial stage of the transaction The allegations of the complainant are accepted in its entirety the same do not constitute any offence under sections 420 and 406 of the Code. *Khandaker Nazrul Islam Khokan vs Mustaba Kuli Khan (Criminal)* 211

Order should accompany 75 percent of the total price in advance

(Postage & Package extra)

Price of each issue of the current year only Taka 40 (postage & registration charge extra). Issues are sent under registered cover. Issues of back volumes are subject to availability. Single loose Issue if available, price Taka 70. Owned by Esrarul Huq Chowdhury. Printed and published by Esrarul Huq Chowdhury at Silver Lining Press. Correspondence Address : Manager, The Bangladesh Law Chronicles, 264/1 Maibagh, Dhaka-1217, Bangladesh. Tel : 935-3649; 832-2271 Mobile : 017-1168-8860 [Apr-4.0 k Paper Tech 65 gsm, Toka HG-81 , AYP]