Regd DA-1722

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

Vol. XIX May 2014

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*

Fifth Issue

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

Contents

Appellate Division 129-144 High Court Division 257-336

Appellate Division

1 BTRC vs KM Alam & Co. *(Civil)* 134
2 Mohsin Sarker (Md) vs Majeda Khatun *(Civil)* 139
3 Rawshan Jamil vs Md Adiluzzaman *(Civil)* 129
4 Shahjahan Siraj (Md) vs Md Rafique Quoraishi *(Civil)* 143

High Court Division

1 BPDB vs Summit Industrial and Mercantile Corporation (Pvt) *(Original Civil)* ... 284
2 Hamdu Miah (Md) vs Government of Bangladesh *(Spl. Original)*... ... 262
3 HKD International (CEPZ) Ltd vs BEPZA *(Spl. Original)* 298
4 Meghna Petroleum Ltd. vs Thakur Shipping Company Ltd *(Civil)*... ... 306
5 Nuran Nabi vs Government of Bangladesh *(Spl. Original)* 311
6 Nurul Imran Chisty vs State *(Spl. Original)* 320
7 Raihan Nazrul vs Abul Khair *(Civil)* 289
8 Rokeya Begum vs Advocate, Abdul Awal *(Civil)* 274
9 Shajeda Begum vs State and another *(Criminal)* 294
10 World Trade Shipping Corporation vs Sonat International Inc. *(Civil)* ... 302

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

Code of Civil Procedure (V of 1908)
Section 115
Order VII, rule 11(d)—Order VII, rule 11 Clause (d) is not available for rejection of a plaint under section 11 of the Code. The plea of *res judicata* as contained in section 11 of the Code can be resolved at the trial after framing an issue and cannot be decided from a reading of the plaint. *Rawshan Jamil vs Adiluzzaman (Civil)* 129

Code of Civil Procedure (V of 1908)
Section 11
Order VII, rule 11—The plea of res judicata is to be decided after framing an issue to that effect. There is no scope for application of section 11 of the Code for rejection of plaint. *Shahjahan Siraj (Md) vs Md Rafique Quoraishi (Civil)* 143

Public Procurement Ain, 2006
Clause 60(3)(CA)—The Review Panel constituted by the CPTU is part and parcel of the public Procure-ment Ain, 2006 and Public Procurement Bidhimala, 2008 and the decisions of review body cannot be ignored or avoided by BTRC. *BTRC vs KM Alam & Co. (Civil)* 134

Specific Relief Act (I of 1877)
Section 54—Suit for Permanent Injunction—Failure to prove title by the plaintiff in a suit for permanent injunction cannot disentitle him to a decree for permanent injunction if he can prove his possession. *Mohsin Sarker (Md) vs Majeda Khatun (Civil)* 139

High Court Division

Arbitration Act (I of 2001)
Sections 7A and 20—The scope for approaching the Court for determination of any issue including the jurisdiction of the arbitral tribunal has been expressly excluded by both the parties in writing. The incumbent, being a citizen of Bangladesh, appears, prima facie, to be disqualified to be appointed as arbitrator for settlement of any dispute between the parties, as per the provisions of clause 19.4 (c) of the RPF. *BPDB vs Summit Industrial and Mercantile Corp. (Pvt.) (Original Civil)* 284

Constitution of Bangladesh, 1972
Article 102(2)(a)(i) and (ii)—Promissory Estoppel—The principles of approbate and reprobate envisage that once a party takes a stand which ends in some kind of compromise and also acts on the compromise, such a party cannot be allowed to take a contrary stand unless the earlier stand is against all known principles of law. *HKD International (CEPZ) Ltd vs BEPZA (Spl. Original)* 298

Article 102(2) (a)(i)(ii)—The core demand of the petitioners is one of "restitutio in integrum", that is, one of placing the aggrieved petitioners in the situation as by law ought to have been allowed to operate and prevail to their benefit at the material time had no prejudice been sustained by them by the inability of the respondents to meet their own obligations mandated under the law. *Nuran Nabi vs Bangladesh (Spl. Original)*... 311

Article 112—Observation—The Court of Wards though legally bound to follow the decision according to Article 112 of the Constitution but time and again they are harassing the people claiming title over the "projabily property", either by issuing Memorandum or by other ways and means and thereby also wasting the courts valuable time. It is high time to caution the Court of Wards, Bhawal Raj Estate and also the Land Reform Board to abstain from creating such situation on frivolous issues and thereby pushing the public to the Court. *Hamdu Miah (Md) vs Government of Bangladesh, (Spl. Original)* 262

Appellate Division
(Civil)

Syed Mahmud Hossain J
Muhammad Imman Ali J
Mohammad Anwarul Haque J

Judgment
January 29th, 2014.

Rawshan Jamil.....Appellant

vs

Md Adiluzzaman and others.....Respondents*

Code of Civil Procedure (V of 1908)
Section 115
Order VII, rule 11(d)

Order VII, Rule 11 Clause (d) is not available for rejection of a plaint under section 11 of the Code. The plea of *res judicata* as contained in section 11 of the Code can be resolved at the trial after framing an issue and cannot be decided from a reading of the plaint. .....(23)

Burmah Eastern Ltd. vs Burmah Eastern Employees Union 18 DLR 709; Abdul Jalil vs Islami Bank Bangladesh Limited, 53 DLR (AD)12; Capital Tower Ltd. vs Mirpur Mazar Co-operative Market Society Ltd. 56 DLR (AD) 08 and Sreemati Pushpa Rani Das vs AKM Habibur Rahman (1993) 13 BLD (AD) 217 ref.

Khijir Ahmed, Advocate, instructed by Zainul Abedin, Advocate-on-Record—For the Appellant.

Abdul Wadud Bhuiyan, Senior Advocate, instructed by Nurul Islam, Bhuiyan, Advocate-on-Record.

Not represented—Respondent Nos.2-5.

Judgment

Syed Mahmud Hossain J: This appeal by leave by the appellant is directed against the judgment and order dated 29-10-1998 passed by the High Court Division in Civil Revision No.502 of 1995 discharging the Rule and affirming the judgment and decree dated 24-9-1994 passed by the learned Subordinate Judge (now Joint District Judge), Third Court, Dhaka dismissing Title Appeal No.291 of 1989 and affirming the judgment and decree dated 5-9-1989 passed by the learned Assistant Judge, First Court, Dhaka in Title Suit No.329 of 1988 rejecting the plaint under Order VII, rule 11 of the Code of Civil Procedure.

2. The facts, leading to this appeal, are précised below:

The suit property appertaining to Plot No. 4166 of SA Khatian No.1359 of Mouza-Wari, PS Sutrapur, Dhaka, measuring an area of 0.3080 acre with appurtenances originally belonged to Sreemoti Labanga Lata Chow-dhury, wife of late Ramdulal Ganguly. On 19-2-1984, the suit property was requisitioned by the Government in Requisition Case Nos.192/48 and 3/4 share of the suit property was allotted to the husband of plaintiff No.1, late Gowher Jamil and the remaining 1/4 share of the suit property to the father of plaintiff No.2, late Lokman Hakim, while they were in service under the Government. While residing over the suit property, Gowher Jamil, the husband of plaintiff No.1 erected a semi pucca corrugated iron shed and started an institution in the name and style, Jago Art Centre. Subsequently, the husband of plaintiff No.1 as a Director of Jago Art Center got allotment of 3/4 share of the suit property from defendant No.3 in the name of Jago Art Center. Gowher Jamil started the Jago Art Center to impart dancing lessons in dance and to promote the culture of music and dance in the country. On 22-9-1980, Gowher Jamil, the Director of the Jago Art Center, died in a road accident and after his death, plaintiff No.1 became the Director. On the death of Lokman Hakim, plaintiff No.2 got allotment of the suit

*Civil Appeal No. 223 of 2000.

(From the judgment and decree dated 29-10-1998 passed by the High Court Division in Civil Revision No.502 of 1995).

property who was also an employee of the Government. While in possession of the suit property, they got a notice from defendant No.2, Additional Deputy Commissioner (ADC) (LA), Dhaka on 30-7-1985 and came to know that the suit property had been de-requisitioned in favour of its owner Harlal Ganguly on 22-2-1948 and the plaintiffs were directed to hand over possession of the suit property. After getting this notice, they became astonished as to how the suit property was de-requisitioned in favour of Harlal Ganguly, who died long before. After that, defendant No.2, ADC (LA), Dhaka gave reminder to them to hand over possession of the suit property by 31-5-1986 failing which they would be evicted therefrom. But they did not hand over possession of the suit property in favour of defendant No.2, who again served a notice on 7-9-1986 to hand over possession of the suit property by 16-10-1986. Finding no other alternative, they filed Title Suit No.201 of 1986 in the Court of Assistant Judge, Dhaka on 28-6-1986 challenging the order of de-requisition dated 22-2-1986 and also the notice dated 7-9-1986. The suit was decreed ex parte on 18-4-1987 as the defendants did not file any written statement. Against the ex parte decree dated 18-4-1987, defendant Nos.2-4 preferred Title Appeal No.133 of 1987 before the learned District Judge, Dhaka. On transfer, the appeal was heard and disposed of by the learned Additional District Judge, Dhaka who allowed the appeal setting aside the ex parte decree passed by the trial Court and also dismissed the suit on the ground of maintainability under section 14A of the East Bengal (Emergency) Requisition of Property Act,1948. Harlal Ganguly during those long years did not come to the suit property and he also did not receive the rent of the suit property. Defendant No.1 has created a forged and collusive document in respect of the suit property on 1-6-1983 in the name of Harlal Ganguly and on the basis of this collusive document, he has been trying to mutate his name. Defendant No.1 in collusion with defendant No.2 managed to get the order of de-requisition of the suit property in favour of Harlal Ganguly on 22-2-1984. The order of de-requisition dated 22-2-1984 is collusive and illegal. Defendant Nos.2-4 in collusion with defendant No.1 have been trying to evict the plaintiffs from the suit property. The deed of sale dated 1-6-1983 in favour of defendant No.1 by Harlal Ganguly is collusive and forged and, as such, on the basis of this deed, he cannot get possession of the suit property. After that, defendant Nos.2-4 in collusion with defendant No.1 have been threatening the plaintiffs to dispossess them from the suit property on the basis of his forged and collusive deed dated 1-6-1983. Hence this suit has been filed.

3. Defendant Nos.1-4 contested the case by filing two separate applications under Order VII, Rule 11 of the Code of Civil Procedure for rejecting the plaint as being barred by law. After filing of these applications for rejection of the plaint, the learned Assistant Judge fixed the date of hearing and after hearing both sides passed a judgment on 5-9-1989 rejecting the plaint.

4. Against the judgment and decree dated 5-9-1989 passed by the learned Assistant Judge, the plaintiffs preferred Title Appeal No.291 of 1989 before the learned District Judge, Dhaka. On transfer, the appeal was heard by the then learned Subordinate Judge, Third Court, Dhaka, who by his judgment and order dated 24-9-1994 dismissed the appeal affirming the judgment and decree of the learned Assistant Judge.

5. Being aggrieved by and dissatisfied with the judgment and decree dated 24-9-1994, plaintiff No.1 filed a revisional application before the High Court Division and obtained Rule in Civil Revision No.502 of 1995. The High Court Division by the judgment and order

dated 29-10-1998 discharged the Rule on contest against respondent No.1 and ex parte against the rest without any order as to costs.

6. Feeling aggrieved by and dissatisfied with judgment and order passed by the High Court Division, plaintiff No.1 as the leave-petitioner moved this Division by filing Civil Petition for Leave to Appeal No.297 of 1999, in which, leave was granted on 24-10-2000 resulting in the initiation of Civil Appeal No.223 of 2000. During pendency of the appeal, the sole appellant died and she was substituted by her daughter.

7. Mr Khijir Ahmed, learned Advocate appearing on behalf of the appellant, submits that the High Court Division erroneously came to a finding that the case is barred under section 42 of the Specific Relief Act and that the plaint is liable to be rejected under Order VII Rule 11(d) of the Code of Civil Procedure and, as such, the impugned judgment should be set-aside. He further submits that the findings of the High Court Division that the suit is barred under section 14A of the (Emergency) Requisition of Property Act,1948 is erroneous and, as such, the impugned judgment is liable to be set-aside.

8. Mr Abdul Wadud Bhuiyan, learned Senior Advocate appearing on behalf of respondent No.1, on the other hand, submits that the plaintiffs did not have any legal character in respect of the suit property and, as such, the plaint can be rejected by resorting to the provision of section 151 of the Code of Civil Procedure. In support of his submissions, he relied upon two cases of this Division, which we shall discuss in the body of the judgment.

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

10. Before addressing the submissions made by the learned Advocate for the appellant, it is necessary to go through the submissions of the learned Advocate, on which, leave was granted as under:

> "While rejecting a plaint under Order VII, Rule 11 of the Code of Civil Procedure, the Court is only to look into the averment made in the plaint and nothing else. But here in the present case while passing the order of rejection of the plaint the trial Court, appellate Court as well as the High Court Division lost sight of the legal position and entered into the defence version of the case. The High Court Division also committed illegality in holding that the suit is barred by *res judicata* though as a matter of fact without taking the evidence this cannot be decided. The application under section 14A of the Acquisition and Requisition of Immoveable Property Ordinance,1948 is uncalled for and is illegal and while deciding the matter, the Courts below over looked the clear provision of section VII Rule 11 of the Code of Civil Procedure and its jurisdiction and the application."

11. Admittedly, the suit property was requisitioned by the Government on 19-2-1949 in Requisition Case No.148 of 1948. The suit property was allotted to Gowher Jamil and Lokman Hakim, father of respondent No.5, while they were in service of the Government. On their death, allotment was given to the appellant Mrs Rawshan Jamil (since deceased) and respondent No.5 who had been in possession of the suit property. Late Gowher Jamil, husband of Mrs Rawshan Jamil (since deceased) started an institution in the suit land under the name and style, Jago Art Centre, to impart lessons in dance and to promote the culture of music and dance in the country. The suit property, which was requisitioned by the Government from Harlal Ganguly was subsequently de-requisitioned on 22-2-1984. Soon after passing of the

order of de-requisition in favour of Harlal Ganguly, Mrs Rawshan Jamil, the appellant (since deceased) and respondent No.5 were asked to vacate the suit property. Mrs Rawshan Jamil and respondent No.5 as the plaintiffs instituted Title Suit No.201 of 1986 in the Sixth Court of the learned Assistant Judge for declaration of title that the order of de-requisition and the notice issued upon them for vacating the suit property were illegal, without jurisdiction and not binding upon them. That suit was decreed ex parte against respondent No.1 and others, who preferred Title Appeal No.133 of 1986. The appeal was allowed and the ex parte decree was set-aside and the suit was found to be barred by law. After that, Mrs Rawshan Jamil and respondent No.5 as the plaintiffs filed Title Suit No.329 of 1988 in the Court of Assistant Judge, First Court, Dhaka for declaration that the deed of sale dated 1-6-1983 alleged to have been executed by Harlal Ganguly in favour of respondent No.1 in respect of the suit property was forged, collusive and void.

12. The learned Assistant Judge rejected the plaint of Title Suit No.329 of 1988. Against the judgment and decree of the learned Assistant Judge, the plaintiffs filed Title Appeal No.294 of 1989 before the learned District Judge, Dhaka. The then learned Subordinate Judge, who heard the appeal affirmed the judgment and decree of the learned Assistant Judge by his judgment and decree dated 14-9-1994.

13. Against the judgment and decree passed by the appellate Court, Mrs Rawshan Jamil filed a revisional application before the High Court Division in which Rule was issued in Civil Revision No.502 of 1995. After hearing the parties, the High Court Division discharged the Rule by the impugned judgment dated 29-10-1998.

14. In order to resolve the issues involved in this appeal, it is necessary to go through the prayer portion of the plaint of Title Suit No.329 of 1988, which is quoted below:

> "(ক) কিশোরগঞ্জ জিলাধীন কিশোরগঞ্জ সদর সুদাকিয়া নিবাসী মৃত রাম দুলাল গাংগুলির পুত্র কথিত বাবু হরলাল গাংগুলি কিশোরগঞ্জ সদর আখরা বাজার নিবাসী মৃত হাজী আখতার উদ্দিন আহম্মদের পুত্র মোঃ আদিলজ্জামান বরাবরে নালিশী সম্পত্তির বিগত ১-৮-১৯৮৩ইং তারিখে সম্পাদিত এবং উক্ত একই তারিখে ঢাকার তেজগাগাঁও সাব-রেজিষ্ট্রারীকৃত সাফ কাবালা দলিল যাহার বুক নং ১, ভলিউম নং ৪৯, পৃষ্ঠা নং ১১, ৭, ১১২, দলিল নং ৩০৪৩, বৎসর ১৯৮০, তাহা ভূয়া জাল, বানোয়াট, পন বিহীন, ভাক্ত, অবৈধ, যোগ সাজসী, শঠতা পূর্বক এবং অকার্য্যকরী এই মর্মে এক ঘোষণামূলক ডিক্রি দিতে আজ্ঞা হয়।
>
> (খ) মোকদ্দমার সমস্ত খরচের ডিক্রি দিতে আজ্ঞা হয়।
>
> (গ) অন্যান্য প্রতিকার যাহা বাদীগণ আইনতঃ এবং ন্যায়ত পাইতে হকদার তাহারও ডিক্রি দিতে আজ্ঞা হয়।"

15. The High Court Division came to a finding that the plaintiffs as allottees could not claim to have their legal right and character in bringing the suit over the requisitioned property in which they had no right and that in that consideration the learned Subordinate Judge held that the suit was barred under section 42 of the Specific Relief Act.

16. If the plaintiffs do not have any legal character/interest in the suit property, in such a situation, the plaint can be rejected by resorting to the provision of section 151 of the Code of Civil Procedure and in the instant case, the plaintiffs went into possession on the basis of allotment given by the Government, which requisitioned the disputed property. As soon as the Government de-requisitioned the suit property and issued notice upon the plaintiffs for vacating the suit property, they did not have any legal right to file the suit.

17. In this connection, reliance may be placed on the case of *Burmah Eastern Ltd. vs Burmah Eastern Employees Union (1966) 18 DLR (Dacca) 709*, which is as under:

"Turning, now, to the plaint in the present suit, it is obvious, from a mere perusal of the plaint itself, that it must be held that the suit is prohibited under, if not by law. This being the position, even if the case does not come, literally and strictly, within the letter of order VII, rule 11 of the Code of Civil procedure, there cannot be any manner of doubt that the suit is prohibited under the law in the sense that it is barred under legal provisions. The Court below should, therefore, have rejected the plaint in limine because the suit itself is barred under our legal system. If Order VII, rule 11 of the Code of Civil Procedure cannot be prayed in aid, the inherent power of the Court should be invoked.

18. The principle of law deduced in the above case is that if a perusal of the plaint reveals that the suit is not prohibited under any law then the provision of Order VII, Rule 11 of the Code of Civil Procedure cannot be invoked. But if the suit is prohibited under the law in the sense that it is barred under legal provisions, the plaint may be rejected by invoking section 151 of the Code of Civil Procedure. The plaint of the present suit cannot be rejected by resorting to Order VII, Rule 11 as the suit is not barred by any law. But the plaintiffs did not have any legal interest as required under section 42 of the Specific Relief Act and in such a situation, the plaint can be rejected under section 151 of the Code of Civil Procedure.

19. In the case of *Abdul Jalil vs Islami Bank Bangladesh Limited, (2011) 53 DLR (AD)12*, it has been held that it is well settled that where a plaint cannot be rejected under Order VII, Rule 11, the Court may invoke its inherent jurisdiction and reject the plaint taking recourse to section 151 of the Code of Civil Procedure.

20. In the case in hand, the plaintiffs do not have any legal interest in the suit property and the interest which they derived from the Government was extinguished as soon as the property was de-requisitioned by the Government, which issued notice upon the plaintiffs to vacate the said premises.

21. Reliance may be placed on the case of *Capital Tower Ltd. vs Mirpur Mazar Co-operative Market Society Ltd. 56 DLR (AD) 8*, in which, paragraph-17, it has been held as under:

"17. As to the maintainability of the suit in spite of not being one covered by the provision of section 42 of the Specific Relief Act the learned Counsel for respondent No.1 has referred to the decisions reported *ILR 22 Madras 270, AIR 1925 PC 36, AIR 1979 SC 114, (1911) 1 KB 410, (1953) 2 QB 18, AIR 1975 SC 1810, 9 PLR (Dhaka Series) 477 and 8 BLC (AD) 111.* The principle enunciated in the aforesaid cases that outside the scope of section 42 of the Specific Relief Act declaration can be sought for, in our opinion, can hardly be disputed, but the fact remains that the relief so sought for by the plaintiff not is at all available to him while he has no legal interest in the subject matter of the suit. *(emphasis supplied)*

21. Though the above case is not on rejection of plaint, the principle expounded in the above case is that the plaintiff cannot get any relief unless he has any legal interest in the subject matter of the suit. In the instant case, admittedly, the plaintiffs did not have any legal interest in the subject matter of the suit and, as such, the plaint is liable to be rejected under section 151 of the Code of Civil Prcedure.

22. The High Court Division wrongly concurred with the findings of the Courts below that the suit is barred by *Res Judicata* and, as such, the plaint is liable to be rejected under Order VII, Rule 11 of the Code Civil Procedure.

23. What is important to note here is that

Order VII, Rule 11 Clause (d) is not available for rejection of a plaint under section 11 of the Code of Civil Procedure. The plea of *res judicata* as contained in section 11 of the Code of Civil Procedure can be resolved at the trial after framing an issue and cannot be decided from a reading of the plaint. Similar opinions have been expressed in the case of *Sreemati Pushpa Rani Das vs AKM Habibur Rahman (1993) 13 BLD (AD) 217* and the case of *Abdul Jalil vs Islami Bank Bangladesh Ltd.* in Civil Appeal No.204 of 2003 in which judgment was delivered on 12-10-2011.

24. The High Court Division wrongly concurred with the finding of the Courts below that the suit is barred under section 14A of the (Emergency) Requisition and Acquisition of Property Act,1948. Having gone through the prayer portion of the plaint of Title Suit No.329 of 1988, it appears that the plaintiffs sought no relief against the order of derequisition and they even did not challenge the notices issued upon them to vacate the suit premises. Therefore, Title Suit No.329 of 1988 was not barred under section 14A of the (Emergency) Requisition and Acquisition of Property Act,1948.

25. All the Courts below erroneously came to a finding that the plaint was liable to be rejected under Clause-(d) of Order VII, rule 11 of the Code of Civil Procedure. But in the instant case, the plaint should have been rejected under section 151 of the Code of Civil Procedure in the light of the findings made before and, as such, the plaint shall be deemed to have been rejected under section 151 of the Code of Civil Procedure.

Therefore, we do not find any valid ground for interference with the impugned judgment. Accordingly, the appeal is dismissed.

Ed.

Appellate Division
(Civil)

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

Judgment
December 9th, 2013.

Bangladesh Telecommunication Regulatory Commission ("BTRC") and another.....Petitioner

vs

KM Alam & Co. and others.....Respondents*

Public Procurement Ain (XXIV of 2006)
Clause 60(3)(CA)

The Review Panel constituted by the CPTU is part and parcel of the public Procurement Ain, 2006 and Public Procurement Bidhimala, 2008 and the decisions of review body cannot be ignored or avoided by BTRC.

.....(12)

Mahbubey Alam, Senior Advocate with Murad Reza , Advocate , instructed by Sufia Khatun, Advocate-on-Record—For the Petitioners.

Sk Md. Morshed Advocate, instructor by Md Nawb Ali Advocate-on-Record—For Respondent Nos. 1

None represented—For Respondent Nos. 2-13.

Judgment

Md Imman Ali J: This civil petition for leave to appeal is directed against the judgment and order dated 18-8-2011 passed by a Division

*Civil Petition for Leave to Appeal No.1869 of 2011

(From the judgment and order dated 18th of August 2011 passed by the High Court Division in Writ Petition No. 5778 of 2011)

The case reported in 18 BLC 221 has been affirmed with observations.

Bench of the High Court Division in Writ Petition No. 5778 of 2011 making the Rule absolute.

2. The facts of the instant case, in brief are as follows:—

Bangladesh Telecommunication Regulatory Commission (BTRC) issued notices in different newspapers including the Daily Prothom Alo on 30-9-2010 inviting sealed technical proposals from the intending Chartered Accountant (CA) Firms for the purpose of appointing Auditors to conduct Inspection and Special Audit of Telecom Operators in Bangladesh. Accordingly the petitioner Nos. 1 and 10 (sixteen) other firms submitted their technical proposals, whereupon 6 (six) short listed firms, including the firms of the writ petitioner, were asked to submit their financial proposals, which they did. The short listed firms then made power point presentation before the BTRC and the Technical and Financial Evaluation Committee, ("Evaluation Committee") constituted by it. The Evaluation Committee submitted its report recommending three forms namely Ahmed Zaker & Co, Aziz Halim Khair Chowdhury and MA Fazal & Co,(respondent Nos. 10 to 12 respectively) as qualified auditors, pursuant to which BTRC appointed respondent Nos. 10 and 12 as auditors. Subsequently, since respondent No. 10 surrendered its appointment on account of its lack of technically expert personnel and logistics etc., BTRC appointed respondent No. 11 in its place. In the meantime, the writ petitioners on 28-3-2011 and 30-3-2011 filed objections before the Chairman, (Head of Procuring Entity), BTRC alleging irregularities/illegalities in the procuring process and requested not to take any decision regarding appointment of auditors. Paying no heed, BRTC proceeded with the procuring process and executed formal agreement with respondent No. 12 on 5-4-2011. Thereafter, the petitioners field representation/complaint before the Secretary, Ministry of Posts and Telecommunication followed by an Appeal before the Review Panel of the Central Procurement Technical Unit (CPTU) on 18-4-2011. Upon such Appeal, the CPTU issued Memo dated 24-4 - 2011 under Rule 59 of the Public procurement Rules, 2008 ("the Rules") requesting the Chairman of BTRC to follow the provisions of Rule 59 in view of the presentation of the said appeal. BRTC however continued with the procuring process and on 26-4-2011 executed another formal agreement with respondent No. 11 (in place of respondent No. 10) . The Review Panel, after hearing the parties including the BTRC, by its decision dated 8-5-2011 (Annexure-1) cancelled the review petition and further "cancelled" all the process adopted by the BTRC to select the CA firms and asked it to start fresh process forthwith by following the Rules. The petitioner then filed representation to the concerned authorities including the BTRC to implement the decision of the Review Panel, whereupon the concerned Ministry issued letter dated 24-5-2011 requesting BTRC to comply with the said decision of the Review Panel. BTRC then issued the impugned memo dated 26-5-2011 refusing implementation of the Review Panel's decision citing several reasons such as that the decision of the Review Panel is contradictory and that BTRC is not bound to implement the same in view of the combined reading of Rules 57, 59 and 60 of the Rules etc and accordingly continued the process.

3. Being aggrieved the respondent as petitioner filed Writ Petition No. 5778 of 2011 before the High Court Division and obtained Rule Nisi. At the time of issuance of the rule an *ad-interim* order was issued staying the operation of the appointment of respondent Nos. 10-12 as the Information System Auditors Chartered Accountant Firm for Inspection and special Audit/information system Audit of Telecom Operators and also the impugned order under

Memo No. ETRC/LL/Operators Audit (37/ 2011-330 dated 26 May, 2011 (Annexure-M) for a period of 4 (four) months.

4. Against that order of the High Court Division the writ-respondents filed Civil Petition for Leave to Appeal No. 1336 of 2011 before this Division. That civil Petition was disposed of by Order dated 14-7-2011 directing the parties to maintain *status quo* in respect of the appointment of respondent Nos. 10-12 as the Information System Auditors Chartered Accountant Firms for Inspection and special Audit/Information system Audit of Telecom operators till disposal of the writ petition.

5. By the impugned judgment and order, the High Court Division made the Rule absolute. Being aggrieved the writ respondent Nos. 2 & 3, Bangladesh Telecommunication Regulatory Commission (BTRC) and another have field the instant civil petition for Leave to Appeal.

6. Learned Senior Advocate Mr Mahbubey Alam with Mr Murad Reza, learned Advocate appearing on behalf of the petitioners submitted that the High Court Division by the impugned judgment erred in law in directing the writ respondent Nos. 2-4 to implement the decision/verdict of the Review Panel No.1 dated 8th May, 2011 by commencing fresh procurement process to appoint a Chartered Accountant Firm for Inspection and System Audit/Information System Audit of Telecom/ operators after cancelling the disputed procurement process. He submitted that the High Court Division failed to appreciate that the writ petitioners-respondents herein have no *locus standi* to file the writ petition in question, and their suppression of facts that they were directly involved with Grameen Phone Ltd. which disqualified them as bidders for the inspection and audit to be undertaken also should have led the High Court Division to dismiss the writ petition as not maintainable. He further submitted that the decision of the Review Panel-1 was self contradictory and of no legal effect and, therefore, the BTRC was not obliged to implement that decision and, as such, the High Court Division erred in directing the BTRC to implement the same. The learned Counsel pointed out that in the meantime writ respondent No. 12 has completed audit of Grameen Phone Limited and submitted final Audit Report on 26-9-2011 revealing huge amounts of discrepancies with regard to taxation amounting to a total of around Bangladesh Taka 2,800 crore and if the appointment of respondent No. 12, MA Fazal & Co. is cancelled then BTRC stands to loss a huge amount of revenue to which it is entitled.

7. Mr Sk Md Morshed, learned Advocate appearing on behalf of the respondent No. 1 made submission in support of the impugned judgment. The learned Advocate further pointed out that although he does not hold the brief for Grameen Phone Ltd., he felt obliged to bring to the notice of this Court the fact that the work done by MA Fazal & Co. in holding audit and submitting a report in respect of Grameen Phone Ltd. was in violation of the order of this Division dated 14th July, 2011 whereby the parties were directed to maintain *status quo* in respect of the appointment of respondent Nos. 10-12 for the purpose of Inspection and Special Audit/Information System Audit of Telecom Operators till disposal of the writ petition. He submitted that this Hon'ble Court may not take into consideration any facts revealed by preparing a report in violation of this court's order

8. We have considered the submissions of the learned Counsel for the respective parties and perused the impugned judgment of the High Court Division and other connected papers on record.

9. The High Court Division has dealt with

each and every one of the points raised by the learned Counsel for the petitioners. With regard to the maintainability of the writ petition, the High Court Division has observed that the writ petitioner firm admittedly participated in the tender and was short listed but not found responsive by the Evaluation Committee on the ground that it had conducted audit on a Telecom Operator in the last 3 years. But in fact the two writ respondents who had been selected by the BTRC had also audited other Telecom Operators in the past 3 years and, hence to exclude the writ petitioners would be discriminatory. The learned Counsel for the petitioners argued before us, as did Mr Murad Reza before the High Court Division as if the writ petition was filed as public interest litigation. However, the fact remains that the writ petitioners being themselves bidders in response to the tender and having been rejected are themselves aggrieved and, therefore, any question assessing their *locus standi* is a futile exercise. The High Court Division found that the writ petitioners had *locus standi* and we find no illegality in that.

10. With regard to the eligibility of respondent Nos.10 and 11 the High court Division found that those two firms had also conducted audit of one Telecom Operator in the past 3 years and, therefore, in choosing to accept their bids BTRC willfully waived the said disqualification in clear violation of the terms of the tender notice. The High Court Division further observed that just because the petitioner firm would not be able to participate in the fresh tender because of the said disqualification clause in the tender notice, it should not be disentitled to challenge the irregularity/illegality allegedly committed by the BTRC in the tender process in question. The High Court Division commented that the terms and conditions in any fresh tender notice to be published by BTRC might or might not keep the said disqualification clause and hence the writ petitioners should not be refused audience on mere hypothesis.

11. The High Court Division observed that the Evaluation Committee was not properly constituted in compliance with the provisions of Rule-8 of the Public Procurement Rules, 2008 inasmuch as there were no outsiders within the Evaluation Committee as required by schedule 2 to the Rules. Upon assessment of the evaluation report the High Court Division observed that the Evaluation Committee acted on the principle that "all are equal, but some are more equal-thus behaved unequally, discriminatorily and unreasonably which are not permitted in view of Article 27 and 31 of our constitution.

12. The High Court Division further observed that, admittedly, the petitioner firm filed its first objection before the head of the procuring entity on 28-3-2010 but the BTRC published notification of awarding contract in favour of respondent Nos. 10 and 12 in the Daily Star on 30-3-2011 in view of Rule-37, which is a clear violation of Rule 59 (2) which provides that once an objection is filed before the procuring entity, the notification of awarding contract shall not be published until the said objection is finally disposed of. The High Court Division went on to observe that "not only the notification of awarding contract has been published pending such objection, the BTRC even executed formal agreement with respondent No. 12 on 5-4-2011 and continued such violation thereafter. Again, when an interim request/order was sent by the CPTU to the BTRC on 24-4-2011 in view of Rule 59(1), the BTRC defied the same and continued to execute another formal agreement with respondent No. 11 on 26-4-2011." It was further observed that the procuring entity has the power to continue with the publication of notice of awarding contract once a certificate is issued by the head of the entity with prior approval of the Secretary or Minister of the concerned Ministry to the

effect that the said continuation is required in consideration of public. interest, but the circular dated 2-5-2011 issued by the Chairman of BTRC docs not show any such prior approval from the concerned Minister or Secretary, who expressed contrary view in their letter dated 24-5-2011. Taking all these matters into consideration the High Court Division came to the conclusion that the decision of the Review Panel constituted by CPTU is final and binding on all concerned parties including BTRC, which attended the hearing before the Review Panel. In this regard we are of the view that the Review Panel constituted by the CPTU is part and parcel of the public Procurement Ain, 2006 and Public Procurement Bidhimala, 2008 and the decisions of such review body cannot be ignored or avoided by BTRC. We do not find any impropriety in the assessment made and decision reached by the High Court Division in this regard.

13. It appears that the Review panel has recommended the cancellation of the procurement process under clause 60 (3) (Gha) which is perfectly within its domain to do. We do not find any illegality in the decision arrived at by the Review Panel and hence the judgment and order of the High Court Division also does not suffer from any illegality.

14. with regard to the submission of the learned counsel for the petitioners that cancelling the appointment of respondent No. 12 would have far reaching effects, we note that the High Court Division has commented on the audit report on Grameen Phone Ltd . submitted by respondent No. 12 in this way "We cannot allow a statutory body like BTRC to some how defy the law first, then give largess benefit through such defiance and subsequently justify the same by saying that the State has, also made some profit; from such illegality. This sort of practice should be discouraged by strong words of this Court and must be nipped in the bud. In this regard we are also constrained to note that by order dated 14th July, 2011 this Division directed the parties to maintain status quo in respect of the appointment of respondent No. 10-12 as the Information System Auditors Chartered Accountant Firm for Inspection and Special Audit Information System Audit of Telecom operators ti11 disposa1 of the writ Petition". We note that Mr Mahbubey Alam, learned senior Advocate appeared for the petitioner at that hearing. we feel constrained to say that *status quo* in respect of appointment" signifies that "no further action to be taken" in respect of the appointment and further process. In such a situation how the petitioners continued to conduct their inspection/audit in under defiance of the order of this Bench, is beyond our comprehension. Whatever the report reveals against Grameen phone Ltd. the same is not legality before us and we shall not take it into consideration. Grameen phone Ltd. is not party before us and we make no comment with regard to the content of the report. No doubt, if what the 1earned Counsel for the petitioners submitted is correct, the report exposes areas where the Exchequer has lost revenue. If the report has opened the eyes of the authorities concerned, that is well and good. Perhaps that will help the authorities in their choice of auditors. Nevertheless, the authorities must appoint Firms of Chartered Accountants/Information system Auditors for Inspection and Special Audit in accordance with the relevant law and Rules.

15. We conclude that the High Court Division having properly assessed the circumstances facts evidence and materials on record has came to a correct decision which does not require any interference by this Division.

With the above observation the Civil peti tion for Leave to Appeal is dismissed.

Ed

Appellate Division
(Civil)

ABM Khairul Haque CJ
Md Muzammel Hossain J
SK Sinha J

Mohsin Sarker (Md).....Petitioner

vs

Majeda Khatun and others.....
.....Respondents*

Judgment
January 17th, 2011.

Specific Relief Act (I of 1877)
Section 54

Suit for Permanent Injunction—Failure to prove title by the plaintiff in a suit for permanent injunction cannot disentitle him to a decree for permanent injunction if he can prove his possession. .....(8)

Manindra Nath Sen Sarma vs Bangladesh, 4 BLD (AD) 285 ref.

Mahbubey Alam, Senior Advocate, instructed by Md Aftab Hossain, Advocate-on -Record—For the Petitioners.

None Represented—For the Respondents.

Judgment

Md Muzammel Hossain J: This petition for leave to appeal under Article 103 of the Constitution of People's Republic of Bangladesh is directed against the judgment and order dated 9-8-2009 passed by a Single Bench of the High Court Division in Civil Revision No.2278 of 2001 discharging the Rule and affirming the judgment and decree dated 31-1-2001 passed by the learned Additional District Judge, 3rd Court, Dhaka in Title Appeal No.214 of 1996 dismissing the appeal and affirming the judgment and decree dated 31-7-1996 passed by the learned Senior Assistant Judge, 6th Court, Dhaka in Title Suit No.137 of 1996 decreeing the suit for permanent injunction.

2. The present respondent Nos.1-6 as plaintiffs instituted the Title Suit No.132 of 1990 before the Court of Assistant Judge, 2nd Court, Dhaka for permanent injunction in respect of $0.17^{3}/_{4}$ acres of land appertaining to CS and SA Plot No.367 under CS Khatian No.136 corresponding to SA Khatian No.211 and Mutation Khatian No.211/4 of Mouja Barua. The suit on transfer to the Court of Additional Assistant Judge, 4th Court, Dhaka was renumbered as Title Suit No.98 of 1992 which was again transferred to the Court of Assistant Judge, 6th Court, Dhaka and renumbered as Title Suit No.137 of 1996.

3. The respondent Nos.1-6 as plaintiffs filed the aforesaid suit stating, *inter alia*, that Omar Ali Sarker was the original owner of the suit land and out of the suit land Abbas Ali Sarker, the son of said Omar Ali Sarker, was the owner and possessor of 7 annas share and Sadar Bewa, wife of Omar Ali, was owner to the extent of 2 annas share and their names were correctly recorded in the CS Khatian; that Sadar Bewa died leaving one son named Abbas Ali and he became owner of 2 annas share of his mother and in this way, the said Abbas Ali became the owner of 9 annas share in the suit plots and since then he has been possessing the same for more than 12 years; that the said Abbas Ali died leaving behind 2 sons, namely, Asar Ali and Ayub Ali and one wife, Asia Khatun and subsequently said Asia died leaving behind aforesaid 2 sons and they got the land on the basis of amicable partition between the 2 brothers; that when Asgar Ali was in possession and enjoyment of his share in the suit land by cultivating the same and on payment of rent thereof, he transferred 0.16 acres of land out of the land described in schedule of the plaint to Abdus Sattar, predecessor of the plain-

*Civil Petition for Leave to Appeal No. 2216 of 2009

(From the judgment and order dated 9-8-2009 passed by the High Court Division in Civil Revision No.2278 of 2001)

tiff by a registered deed of sale dated 21-1-1948 and handed over possession to him and thereafter the plaintiff Nos.1 and 6 purchased $0.01^{3}/_{4}$ acres of land from Ayub Ali by a registered deed dated 30-1-1985 and got possession therein; that while father of the plaintiff was in possession and enjoyment of 0.06 acres of land by cultivating various crops thereon, SA and DP Khatians were prepared in his name and thereafter he died leaving behind 2 sons (plaintiff Nos.2 and 30) and 3 daughters (plaintiff Nos.1, 4 and 5) and they are in possession and enjoyment of the said land on payment of rent, taxes and mutating their names; that though the defendants have got no right, title, interest and possession in the suit land but on 27-5-1989 the defendants came to take away the crops forcibly but due to intervention they could not succeed in doing the same and in pursuance to that activities of the defendants, the plaintiff No.1 made GD entry No.1410 dated 27-5-1989 with the local police station and on investigation the local police found the plaintiff in possession of the suit land; that recently the defendants at the strength of an ineffective deed tried to dispossess the plaintiff forcibly from the suit land but due to timely intervention of the plaintiff and their relatives they could not succeed in doing so but threatened to dispossess them, so the suit.

4. The present petitioner as defendant No.2 contested the suit by filing the joint written statement denying all the material allegations made in the plaint stating, *inter alia*, that Omar Ali was the original owner and possessor of the suit land and before CS operation said Omar Ali died leaving behind one wife, Sadar Bewa, 2 sons, named Abbas Ali and Meher Ali and 3 daughters, named Arjan, Samiron and Kadbanu and they inherited the said land according to their shares; that Meher Ali died before CS operation leaving behind only one son Dukkhu Miah; that since the aforesaid 3 daughters were living in the home of their respective husbands CS Khatian has been prepared in the name of Abbas Ali, Dukhu Mia, son of Meher Ali and Sadar Bewa and since then said Dukhu has been enjoying and possessing 0.16 acre of land to the North Eastern side of the suit plot and 0.23 acre to the Southern side and Abbas was in possession and enjoyment of 0.23 of land in the middle of the suit plot on amicable partition and thereafter said Sadar Bewa died leaving Abbas Ali and 3 daughters; that while said Abbas Ali was in possession and enjoyment of the said land, he died leaving one wife, Asia Khatun and 2 sons named Ayub Ali and Asgar Ali and 3 daughters named, Rosia, Monowara and Mukta and on amicable partition Asgar Ali got half from the Western side and half from the Western side and Ayub Ali got half from the Eastern side; that after the death of Abbas Ali his two sons namely, Asgar Ali and Ayub Ali inherited their share from the land left by his father and thereafter Asgar Ali transferred 0.16 acre of land out of said 0.23 acre of land to Abdus Sattar (predecessor of the plaintiff Nos.1-5) by a registered deed of sale dated 21-1-1948 on condition to recovery the same and accordingly on the same date i.e. on 21-1-1948 said Asgar Ali executed and registered a sale deed in favour of Abdus Sattar Raj but Asgar Ali did not handover the said land to Abdus Sattar Raj who had never enjoyed the said land; that 3 months after on 21-1-1948 Asgar Ali returned the said consideration money to Abdus Sattar in presence of Kelajuddin, Belal Uddin, Shahaj Uddin and others and told him to execute and register a deed in favour of him but he did not do so; that subsequently said Asgar Ali transferred the said land to defendant No.1 by registered deed of sale dated 2-10-1948 and handed over possession to him and since then he has been possessing his own purchased land; that while he was in possession and enjoyment of the said land he transferred 0.0165 acres of land to the plaintiff Nos.1 and 6 by a

registered deed of sale dated 30-1-1985 and handed over possession to them; that the plaintiff Nos.1 and 5 had never enjoyed and possessed the suit land rather since 2-10-1948 the defendant No.1 has been possessing the suit land by cultivating various crops; that in the year 1988 the plaintiffs forcibly destroyed the crops cultivated by the defendant in their land and after the said occurrence the defendants filed a petition of complaint being No.289A 1 of 1988 before the Court of Chief Metropolitan Magistrate and in the said case the learned Magistrate by his judgment and order dated 25-5-1989 convicted the plaintiffs and the learned Magistrate also found the defendants are in exclusive possession in the suit land and on the other hand, the plaintiffs have got no right and possession in the suit land and, as such, the suit of the plaintiffs is not maintainable in its present form, therefore, the same is liable to be dismissed with cost.

5. The learned Senior Assistant Judge, 6th Court, Dhaka by the judgment and decree dated 31-7-1996 decreed the suit. Being aggrieved by the aforesaid judgment and decree the defendant-petitioner preferred Title Appeal No.214 of 1996 in the Court of District Judge and the learned Additional District Judge, 3rd Court, Dhaka by the judgment and decree dated 31-1-2001 dismissed the appeal. Being aggrieved by the aforesaid judgment and decree dated 31-1-2001 the defendant-petitioner moved the High Court Division in Civil Revision No.2278 of 2001 and a Single Bench of the High Court Division by the impugned judgment and order dated 9-8-2009 discharged the Rule affirming those passed by the court of appeal below.

6. The defendant-petitioner being aggrieved by the impugned judgment and order passed by the High Court Division preferred the instant Civil Petition for Leave to Appeal before this Court.

7. Mr Mahbubey Alam, the learned Advocate for the petitioner submits that since the area of the suit land measuring $17^3/_4$ decimals out of total land of 62 decimals as described in the schedule of the plaint is not sufficiently identifiable and does not conform to the provision of Order VII Rule 3 of the Code of Civil Procedure, the courts below erred in law in decreeing the suit for permanent injunction and the learned Single Judge of the High Court Division also erred in law in not interfering with the judgment and decree passed by the courts below and, as such, the impugned judgment and order passed by the High Court Division is liable to be set-aside. Mr Alam then submits that the deposition of PWs contradicted each other but the High Court Division committed error of law in affirming the judgment and decree passed by the Court of Appeal below and, as such, the judgment and degree passed by the High Court Division merits interference by this Court. He then submits that though DWs 2 and 3 in their evidence stated that Majida Begum and others or their predecessor Abdus Sattar were never in possession of the suit land the learned Single Judge of the High Court Division without considering the material evidence on record wrongly found that the plaintiffs were in exclusive possession of the suit land and thereby arrived at an erroneous decision calling interference by this Court. He finally submits that since the first deed dated 21-1-1948 followed by the subsequent agreement marked as Exhibit-Ka was not acted upon and was not followed by delivery of possession of 16 decimals of land of the deed and by the second deed dated 30-1-1985 containing $1^3/_4$ decimals of land the plaintiff Nos.1 and 6 made a clever manoeuvre to make out a case of exclusive continuous possession of $17^3/_4$ decimals of land which evidently proved that the plaintiff did not come in the Court with clean hands but the Courts below without considering the points of law decreed the suit and

the High Court Division also failed to apply judicial mind in passing the impugned judgment and order which requires interference by this Court.

8. We have heard the learned Advocate appearing for the petitioner, perused the leave petition, impugned judgment and order passed by the High Court Division and all other connected papers on record. It appears that the plaintiff examined 4 witnesses namely, PW I-Most. Mozida Khatun, PW 2 Yousuf Mollah, PW 3-Surjat Ali and PW 4 Mozuruddin Mollah who adduced evidence in support of the plaintiffs' case. They proved plaintiffs exclusive possession in the suit land and they also corroborated each other in support of the plaintiffs' case. The defendants by examining the plaintiffs' witnesses could not find out any discrepancy as to the possession of the plaintiffs in the suit land. It also appears that there was a criminal case in between the plaintiffs and the defendants and the trial court rightly found that on the basis of judgment passed in criminal case it cannot be said that the defendants are in possession of the suit land. DW 2 Mohsin Sarker in cross-examination stated that the land was not returned by registered deed and there was no written document for payment of Taka 100 in respect of Ekramnama deed. DW 2 Asgar Ali Raj in cross-examination admitted that the land was not returned by registered deed and these witnesses could not say when Sattar Raj was given Taka 100. The High Court Division noticed that both the courts below held that the plaintiffs having deed of 30 years old in respect of suit property cannot be denied their title over the suit land. It also appears that the trial court in cross-examination of DW 2 found that the plaintiffs planted "puishak" (পুইশাক) in the suit land. DW 3 Abdul Awal in cross-examination by the plaintiffs stated there was a suit because the plaintiffs planted "puishak" (পুইশাক) in the suit land. DWA Rahmat Ali Mollah in cross-examination stated that he did not know the exact share of Asgar Ali as he had not seen Asgar Ali. On the other hand, Asgar Ali in cross-examination stated that he left the village 20/25 years ago to East Kamsair. Both the courts below made concurrent findings of facts as to the possession of the plaintiffs in the suit land and that the record of the suit land stands in the name of the plaintiffs and they also got their name mutated and accordingly the suit was decreed by the trial court in favour of the plaintiffs. The court of appeal below also found that the plaintiffs proved their title in the suit land by its registered deed dated 21-1-1948 marked as Exhibit-2. It is well established that in a case for permanent injunction question of title is not material but the possession of parties is material. In the case of *Manindra Nath Sen Sarma vs Bangladesh* reported in *4 BLD (AD) 285* this Division held that failure to prove title by the plaintiff in a suit for permanent injunction cannot disentitle him to a decree for permanent injunction if he can prove his possession.

9. It appears that the trial court and the court of appeal below made concurrent finding of facts as to the possession of the plaintiffs in the suit land. Both the courts below on consideration of the material evidence on record found that the plaintiffs were able to prove their exclusive possession in the suit land. The High Court Division having considered the evidence of the witnesses rightly found that the Courts below made concurrent findings of fact and there is no misreading or non-consideration of any material evidence on record and the High Court Division rightly discharged the Rule. In view of the above findings and observations we do not find any merit in the leave petition.

Accordingly, the leave petition is dismissed.

Ed.

Appellate Division
(Civil)

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

Judgment
February 25th, 2013.

Shahjahan Siraj (Md).....
.....Petitioner

vs

Md Rafique Quoraishi and others.....
....Respondents*

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

The plea of *res judicata* is to be decided after framing an issue to that effect. There is no scope for application of section 11 of the Code for rejection of plaint. .....(18)

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

Farooque Ahmed, Senior Advocate, instructed by Md Abu Siddique, Advocate-on-Record—For the Respondents.

Judgment

Syed Mahmud Hossain J: This civil petition for leave to appeal is directed against the judgment and order dated 1-3-2009 passed by a Single Bench of the High Court Division in Civil Revision No.2809 of 2006 discharging the Rule.

2. The facts, leading to the filing of this petition, in brief, are that the plaintiff instituted Title Suit No.33 of 2000 in the Court of Joint District Judge, First Court, Comilla, for declaration that the judgment and decree obtained by respondent No.1 in Title Suit No.215 of 1987 is collusive, ineffective and without jurisdiction.

*Civil Petition for Leave to Appeal Nos. 969 of 2009.

(From the judgment and order dated 1-3-2009 passed by the High Court Division in Civil Revision No. 2809 of 2006.)

3. The plaintiffs case, in-short, is that the suit land originally belonged to Labonaya Prova Lodh, who left for India back in 1957. The Government acquired $0.34^{1}/_{2}$ acre of land for the plaintiff from Comilla Zilla Samabaya Union in LA Case No.2/88-89 and handed over the possession thereof to him on 30-8-1968. Meanwhile, the plaintiff constructed a two storied building as per the approved plan of Comilla Pourashava in one part of the suit land and established a printing press in the other part. His further case is that the suit land was enlisted as enemy property in EPL Case No.8 of 73-74. Defendant No.1 filed Title Suit No.211 of 1980 in the Court of the then Munsif, Second Court, Comilla, which was transferred to the Court of Assistant Judge, Additional Court, Sadar, Comilla and renumbered as Title Suit No.215 of 1987 against the admitted owner Labonaya Prova Lodh for specific performance of contract and the present plaintiff was impleaded as defendant No.9. The plaintiff and the Government contested the suit by filing separate written statements. The suit was dismissed on contest by the judgment and order dated 30-11-1988.

4. Against the judgment and decree passed by the trial Court, defendant No.1 preferred Title Appeal No.51 of 1989 before the learned District Judge, Comilla. On transfer, the appeal was heard by the learned Subordinate Judge (now Joint District Judge), Second Court, Comilla, who by his judgment and order dated 30-11-1991 allowed the appeal reversing the judgment and decree passed by the trial Court.

5. Against which, the plaintiff and the Additional Deputy Commissioner filed two revisional applications before the High Court Division and obtained Rules in Civil Revision Nos.874 and 1594 of 1992 respectively. The High Court Division by the judgment and order dated 26-11-1996 discharged both the Rules.

6. Being aggrieved by and dissatisfied

with judgment and order of the High Court Division, the plaintiff filed Civil Petition for Leave to Appeal No.4 of 1999 and the Additional Deputy Commissioner, Comilla filed Civil Petition for Leave to Appeal No.5 of 1999 before this Division. This Division upon hearing dismissed both the civil petitions. Against which, the plaintiff and the Government filed Civil Review Petition Nos.31 and 32 of 1999 which were also rejected on 2-3-2000.

7. The plaintiff earlier filed Title Suit No.213 of 1999 in the Court of Assistant Judge, Sadar, Comilla, plaint of which was also rejected allowing the application filed by defendant No.l under Order VII, rule 11 of the Code of Civil Procedure. Subsequently, the plaintiff filed Title Suit No.33 of 2000 in the Court of the learned Subordinate Judge, First Court, Comilla, for declaration that the suit property is abandoned property and the judgment and decree obtained in Title Suit No.215 of 1987 is void, illegal and not binding upon the plaintiff. Simultaneously, the Additional Deputy Commissioner, Comilla also filed Title Suit No.32 of 2000 on the self-same prayer.

8. Plaintiff No. 1 appeared in the suit and filed an application under Order VII, rule 11 of the Code of Civil Procedure for rejection of the plaint. The plaintiff contested the application filed under Order VII, rule 11 of the Code of Civil Procedure by filing written objection.

9. The learned Subordinate Judge (now Joint District Judge), First Court, Comilla, by his order dated 5-6-2004 rejected both the applications.

10. Against the order passed by the learned Joint District Juge, defendant No.l filed Civil Revision Nos.58 and 59 of 2004 before the learned District Judge, Comilla. On transfer, both the civil revisions were heard analogously by the learned Additional District Judge, First Court, Comilla, who allowed both the revisions on 7-5-2006.

11. Being aggrieved by and dissatisfied with judgment and order dated 7-5-2006 passed in Civil Revision No.59 of 2004, the plaintiff filed a revisional application before the High Court Division in which Rule was issued in Civil Revision No.2809 of 2006. The learned Single Judge of the High Court Division by his judgment and order dated 1-3-2009 discharged the Rule.

12. Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the plaintiff-leave petitioner has filed this civil petition for leave to appeal before this Division.

13. Mr Nurul Islam Bhuiyan, learned Advocate-on-Record, appearing on behalf of the leave-petitioner, submits that the learned Additional District Judge rejected the plaint of both the suits as those suits were barred under section 11 of the Code of Civil Procedure although there is no scope for rejection of the plaint under section 11 of the Code of Civil Procedure and that the High Court Division also affirmed that judgment as such, the impugned judgment should be set-aside.

14. Mr Faruque Ahmed, learned Senior Advocate appearing on behalf of the defendant-respondents, on the other hand, supports the impugned judgment.

15. We have considered the submissions of the learned Advocate-on-Record and learned Senior Advocate, perused the impugned judgment and the materials on record.

16. The High Court Division came to a finding that the trial Court failed to appreciate the law and facts involved in the suit and wrongly rejected the applications filed under Order VII, rule 11 of the Code of Civil Procedure on the ground that the nature and character of earlier Title Suit No.215 of 1987 and those of subsequently filed Title Suit Nos.32-33 of 2000 were not same and that the learned

of the powers vested in it under section 151. At any rate, no authority could be cited before me laying down categorically that in such cases the court has no inherent jurisdiction to interfere."

34. Unreported decision of the Appellate Division passed in Civil Petition for Special Leave to Appeal No.324 of 1982 on the question of fraud practice upon the court. The case of *Babor Ali Prodhan vs Kinu Mia, 31 DLR (AD) 323* this decision relied by the learned Assistant Attorney-General.

35. Lastly the case of *Md Refaat Ali vs Government of Bangladesh, 21 BLD 133* on inherent powers of the court under section 151 of the Code of Civil Procedure, wherein it is held that:

"9. It is true, ordinarily the court does not exercise its inherent power under section 151 of the Code of Civil Procedure whenever a remedy is available to the aggrieved party under any provision of the Code of Civil Procedure. But it is also well-settled that if the disputed order or decree is obtained by a party by practicing fraud upon the court or it is has been occasioned due to the fault of the Court or court officials, the court has not only the competence in exercise of its inherent power under section 151 of the code to undo the wrong done to the aggrieved party but also it is imperative in the interest of justice to do so. Fraud always vitiated all solemn transactions and a fraudulent act by its own nature is a nullity in the eye of law and it is never protected by law. In such cases, it will be highly inequitable and in just to ask the wronged party to seek his relief under other arduous and time consuming provisions of law instead of giving him a relief under section 151 of the Code as the special preserve of the court for doing justice. It deserves to be noted in this connection that procedures are just means towards advancement of the cause of justice and not certainly for obstructing it in the name of technical fall-outs. The filing of an application under Order IX, rule 13 of the Code of Civil Procedure cannot be allowed to stand in the way of the relief the defrauded defendant is entitled to under the law. We are satisfied in the facts of the case, that the learned Subordinate Judge rightly exercised his power under section 151 of the Code in giving the appropriate relief to the wronged. We find no merit in the case which fails accordingly."

36. Mr AJ Mohammad Ali, learned advocate submits that there are time of limitation, one is prescribed, written, that cannot be condoned but other, which on proper application for condoning the delay, can be condoned.

37. We have heard the learned Advocates and perused the materials filed before us and voluminous counter-affidavit of defendant No.3 and also government.

38. Let us proceed one by one. Article 152 of the Limitation Act prescribed period of limitation for filing the appeal to the District Judge.

Description of Suit	Period of Limitation	Time from which period begins to run.
152. Under the Code of Civil Procedure, 1908, (V of 1908) to the court of a District Judge.	Thirty days.	The date of the decree or order appealed from.

39. Section 12 of the Limitation Act gives indulgence to the litigant if the litigant did not come within the prescribed period for an appeal, exclusion of time can be allowed by applying subsections 1, 2, 3 and 4. It has been held by judicial authorities that under sub-sections 2 and 3 of section 12 of the Limitation Act an appellant is entitled to get a deduction of time requisites for obtaining a copy of the decree as well as copy of the judgment if applied for copies of the decree and judgment

at different times, both these periods should be excluded in computing the period of limitation provided the applications were made when his right to appeal subsist. It may be otherwise said that litigant would get the benefit of the time on which litigant has no control. A litigant shall get the period from the date the decree is signed until it was made ready for delivery. It is being now well settled that application for copy must be made before the period of appeal expired. Therefore, 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. Time requisites, as mentioned in sub-section(2) as per judicial decisions, means that in computing the period of limitation prescribed for an appeal, the day on which the judgment or order complained of was pronounced and the time taken by the court to make available the copy applied for, have to be excluded.

40. Now the question of condonation of delay i.e. after obtaining the judgment and decree and after exclusion of time as provided under section 12 if the litigant do not come within the prescribed period, then also the litigant can come before the appellate/revisional forum if the litigant could satisfy the court as to his conduct for not moving the court within prescribed period. Section 5 of the Limitation Act gives remedy which runs as :—

> "Section 5. Extension of period in certain cases.—Any appeal or application for a revision or a review of judgment or for leave to appeal or any other application to which this may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed thereof, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal of, making the application within such period."

41. This section would not automatically apply. It requires two ingredients for its application, one is satisfy the court and next is sufficient cause. Satisfy the court means that after due diligence, after obtaining the certified copy if the litigant do not come in court in time, and the explanation covering the entire period which inspire the court to condone the 'Unusual' delay, sufficient cause include Lawyer's wrong advice, mistake or oversight of the todbirkar, moving on wrong forum, disturbance in the country etc. It is to be borne in mind that sufficient cause is liberally construed to be applied by the court judiciously, not arbitrarily or capriciously that applicant act bonafide, negligent, nor inaction nor want of bonafide.

42. This law has been applied in different ways on the facts of each case some time we find six days delay has not been condoned *(Bangladesh vs Abdul Wahab, 45 DLR 30)* some time we find 4,000 days delay has been condoned, the condonation of delay is exclusively within the discretion of the court and this discretion is to be applied on the conduct of the litigant.

43. It is admitted position that appeal when tendered was out of time by 1230 days. Let us go through the applications, one for condonation of delay, next, 'Shampurak abedanpatra' whether this type of application is allowable in court we do not understand and third, on the same date an application under section 151 of the Code of Civil Procedure by the Government. In front of shampurak abedanpatra' there is no reason for filing of the application under section 151 of the Code of Civil Procedure on the same date, if it is on different dates then the case may be otherwise. Whatever the case may be, let us read the application for delay i.e. first application filed on 17-9-1998 wherein it is stated that 'decree was passed on 30-4-1995 and decree was drawn up on 7-5-1995. That's all. No other narration excepting

the period of delay. The person who sworned affidavit has not mentioned the post he hold in the office of the Deputy Commissioner, Chittagong. In what authority he act on behalf of the government has not been disclosed. We do not understand Jela Proshashok' office can be used as residence of the person. In the affidavit it has been written as:

হলফনামা

আমি, বাদশা মিয়া, পিতা মৃত আবুল কাশেম মোহাম্মদ জামাল, সাকিন-পাথর ঘাটা, থানা-কোতোয়ালী, জিলা- চট্টগ্রাম, বর্তমানে জেলা প্রশাসকের কায্যালয়, চট্টগ্রাম..... ।

44. From the affidavit we do not find in what capacity this gentleman sworned the affidavit.

45. Identity of this man is very difficult and doubtful. A supplementary-affidavit in the nature of 'Shampurak Abedan Patra' was filed on 25-11-2010 i.e. long after 12 years of the first -original application for condonation of delay. In this 'Shampurak Abedin Patra' for condonation of delay, paragraphs Nos. 3, 4, 5 and 6 relates to the merits of the government case. Paragraphs Nos. 6 and 7 relates to explanation as regard condonation of delay. We may quote paragraphs 6 and 7:

৬। উপরে বর্নিত বিবরণ থেকে দেখা যায় যে, অত্র আপীল দপ্তরের কোন গাফিলতি ছিল না। মাননীয় উচ্চ আদালতে একাধিক নজির আছে যে আইনজীবি বা আইনজীবি ক্লার্কের কারণে মামলায় কোন ক্ষতি হইলে তৎজন্য মামলার পক্ষগন দায়ী হইতে পারে না।

৭। আলোচ্য ক্ষেত্রে আপীলকারীপক্ষের আপীল দায়েরের ক্ষেত্রে অনিচ্ছাকৃত ভাবে ১,২৩০ দিন বিলম্ব ঘটিয়াছে। অপরদিকে নালিশী মূল মোকদ্দমা ও রায় ডিক্রী non-entertainable suit ও এখতিয়ার বহির্ভূত রায় ডিক্রী হওয়ায় বিজ্ঞ আপীল আদালতের অন্তর্নিহিত ক্ষমতা প্রয়োগপূর্বক ন্যায় স্বার্থে বিলম্ব মওকুফ করে আপীলটি গ্রহন করা আবশ্যক। এই বিষয়ে মহামান্য সুপ্রীম কোর্টের আপীলাত বিভাগের 9 BLC (AD) 51 এ প্রকাশিতHousing and Settlement vs Abdul Majid Howlader মামলার রায় প্রতিষ্ঠার যোগ্য। উক্ত রায়ের প্রকাশিত কপি পৃথক ফিরিস্তি সহ বিজ্ঞ আদালতে দাখিল করা হইল।

46. Paragraphs Nos. 8, 9, 10, 11, 12, 13, 14 described *locus standi* of the plaintiff. On a reading of the explanation we do not find the requisites as regard obtaining certified -copy, as there is no mention as to on which date certified copy of the impugned judge was applied, how the delay accrued in the original application. We find entire application directed toward conduct of the government pleader. We do not find what action has been taken by the government against its pleader. This affidavit was sworn by Abu Monsur Hossain Chowdhury as:

শপথনাম

আমি আবু মনসুর হোসেন চৌধুরী, বয়স-৫২ বৎসর, পিতা হাজী আহাম্মদ হোসেন চৌধুরী, সাকিন আর, এস, শাখা জেলা প্রশাসক অফিস, ঢাকঘর-কোতোয়ালী, থানা কোতোয়ালী, জিলা-চট্টগ্রাম, বর্তমানে--জেলা প্রশাসকের কার্য্যালয়, চট্টগ্রাম..... ।

47. Without disclosing what nature of work he did.

48. On the same date, application under section 151 of the Code of Civil Procedure was filed. In the cause title it has been described as "the application under section 151 of the Code of Civil Procedure to set-aside the decree being barred by law". We do not under stand how this application can be said to be treated to be an application for condonation of delay. This is for separate reason. The appeal has not yet been admitted but government pleader filed this application for setting aside the decree and that too, on the same date of filing of Shampurak Abedanpatra. In this application all through it has been stated from first to last page about the conduct of the plaintiff as plaintiff played 'gigantic fraud' and she has no *locus standi* to file the suit as the schedule attracts abandoned property. This application also filed by the same person, Abu Monsur Hossain Chowdhury with the same status i.e. resides in the office of the 'Zilla Proshashok'. From all these application it is clearly shown that the plaintiff played fraud upon the court in obtaining decree and govern-

ment pleader practiced gigantic fraud upon the court but there is no explanation for condoning the delay. Moreso the person who made affidavit his status has not been disclosed. This is one side of the appellant.

49. Let us now go to the other part. It has been held by different decisions that long delay can be condoned on the conduct of the litigant. Now we see the conduct of the litigant i.e. government. From the order sheets of the appeal it appears that this appeal was tendered on 17-9-1998 and at that time District Judge was Mr Md Jahirul Islam and from Order No.l dated 19-10-1999 it appears that application was filed along with memorandum of appeal. Thereafter, we find that his lordship Mr Justice Siddiqur Rahman Miah was District Judge, who is now going to be retired but government and its machineries keep the matter hanging. Application for condonation of delay is hanging for long 13 years of filing of the application. Suddenly this matter was taken up by the learned judge who condoned the delay of 1230 days in a sentence. It is settled principle of law that if the delay be condoned on the date of filing of application or at an early date then the applicant need no explaination of the delay from the date of filing and its disposal but when the application was not disposed of at an early date and the condonation matter kept in hanging for unlimited period then the applicant/ government is to explain why the matter of condnation of delay was not disposed earlier. It appears long 13 years after filing of the appeal and application for condonation of delay, the application has been disposed of shows the character of the government lawyer. It appears that earlier on two occasions plaintiff came before this court, in Civil Revision No. 701 of 2005 and CO No. 86 of 2011 for disposal of the application for condonation of delay expeditiously but government, when a decree has been passed legally or illegally, keep mum and suddenly rise from slumber in 2011 and was successful in obtaining one sentence favourable order from appellate court and delay was condoned.

50. Now the other point. We find defendant No. 3 as well as government made submissions on merit of the case but this rule relates only for condonation of the delay, Government as well as defendant No. 3 argued that certain portion of the case property is abandoned property as such as per Article 14 of PO No. 16 of 1972 no one can take this property. Yes if the entire property be abandoned then one cannot take the abandoned property. Article 14 of PO 16 of 1972 runs 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 force.

Government lawyer as well as Assistant Attorney-General as well as defendant No. 3 lawyers referred to the decision passed by this court while dispose of First Appeal No. 131 of 1998, let us quote the certain portion of the judgment:

> "Furthermore some portion of the suit property was declared abandoned property and accordingly the plaintiffs prayed for declaration that the suit property is not an abandoned property. In such a position the trial court ought to have separated the abandoned property from the schedule of the plaint. It is settled principle that no suit can be heard by the civil court when the same is admittedly declared as abandoned property."

51. It is the stand of the government that the entire land was purchased by government in 1943. If the entire land was purchased by the government, then how did this property become abandoned property. Government lastly took the stand that a portion of the land is abandoned property. Government cannot have two stands in respect of a property. It is either purchased or abandoned but not two at a time, it is settled that if it is the stand of the government that a position of land is abandoned property then before declaring the property as abandoned property, Government must go for partition of the property, separate the portion then declare it as abandoned. Reference may be made to the case of *Rahima Akther vs Asim Kumar Bose, 40 DLR (AD) 23* where it is held In the case of *Zillul Huq vs Maloti Bala Dey, 50 DLR 367* it is held

> "Now the question that calls for our immediate consideration is whether the co-owner of an undivided property can maintain possession in the entire disputed property to the exclusion of other co-owners and whether the Government stepping into the shoes of the absentee co-owners can oust the co-owner in possession of the entire ejmali property by exercising executive power. The answer to this question is an emphatic no. The settled law is that a co-owner's right in undivided joint property extends over every inch of the joint property and his/her possession over the entire property can not be termed as unlawful by any means. In such a case, the co-owner in possession of the entire ejmali property and their only remedy lies in a suit for partition for carving out their shares in the property in question by way of partition metes and bounds. In the instant case, the Government, stepping into the shoes of Birendra and Bimala Kanta, who became enemy aliens in due course of law, cannot have a better right than Birendra and Bimala and, as such, possession of disputed property without bringing a suit for partition to separate the enemy partition of the property in dispute."

52. Now other question. On a reading of the judgment it appears that learned judge was busy in finding *locus standi* and gigantic fraud by the plaintiff. That can be done after delay has been condoned not before that. Not a single word was 'expend' as to the explanation as been given, is satisfactory or it can he accepted. Just in one sentence 'for the reasons stated above delay has been condoned' without discussing the merit of the application. This type of judgment cannot be kept on record. This Judgment shows that the learned Judge lacking total legal knowledge to deal with this type of matter.

53. Lastly, most vital aspect which totally oust the Government out of court. Government against the self same judgment, filed Other Appeal No.255 of 1999 before the District Judge with prayer for condonation of delay for 1596 days. We do not understand against the self same judgment government filed two appeals, one is out of time by 1230 days other is out of time by 1596 days. Appellate Court condone the delay but in Civil Revision No.701 of 2005 (judgment dated 15-4-2009) this court set-aside the judgment of the appellate court and dismissed the appeal. Government did not proceed further. Since one appeal is dismissed from the self same judgment at the instance of the self same party other appeal by the self same party cannot proceed. This also shows conduct of the government lawyer which is very unfortunate.

54. We are not oblivious of the fact that Appellate Division condoned the delay of more than 4000 days but this decision is not applicable on the facts of the given case as, we may summaries, as:—

i) Appeal with application for condonation of delay was tendered and filed on

17-9-1998.

(ii) *Shampurak Abedan* and application under section 151 of the Code were filed on 12-11-2010.

(iii) Matter was disposed on 15-3-2010.

iv) Other appeal No. 255 of 1999 was filed against the selfsame judgment for condoning delay of 1596 days (whereas in this appeal 1230 days delay has occurred); appeal was allowed.

(v) Civil Revision No. 701 of 2005 was taken and Rule was made absolute dismissing the appeal preferred by the government.

(vi) Government did not proceed further stamping the fate of this appeal.

55. Court is not protecting the property of government and if Government lawyer failed to protect the property court has no duty to come in aid of Government. Let us take in this way. Every lawyer has a chamber and can take pace of the proceedings of his case. Criminal/Civil/Writ and other through a clerk. 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 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. With these observations we find substance in this Rule.

56. In the result, this Rule is made absolute. No costs.

57. The impugned judgment and order dated 15-3-2011 passed by the learned District Judge, Chittagong in Other Appeal No.248 of 1998 is set-aside.

Send down the lower courts at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Mirza Hussain Haider J
Md Khurshid Alam Sarkar J

Judgment
April 15th, 2013.

Hamdu Miah (Md) and .....anothers
vs
Government of Bangladesh, represented by the Secretary, Ministry of Land and others.....
.....Respondents*

State Acquisition & Tenancy Act (28 of 1951)
Section 144

After final publication of the records under the Revisional Survey and the Dhaka City Survey in the names of the predecessors in interest of the petitioners and the respondents having not taken any step against the same till date by producing any evidence to prove that the entries in those records are incorrect, the law clearly provides that the names of the predecessors in interests of the petitioners recorded in those surveys are presumed to be correct. .....(18)

Transfer of Property Act (IV of 1882)
Section 10

Even the owner of the property cannot impose any condition upon the transferee, in his transfer deed prohibiting its transfer and enjoyment by the transferee, as it violates the principle of 'rule against perpetuity'. .....(20)

Registration Act (XVI of 1908)
Section 53(A)

The Registrar/Sub-Registrar has been given a guideline as to which property can be registered and which property cannot be registered. If the Registrar/Sub-Registrars are

*Writ Petition Nos. 17056 and 17216 of 2012.

restrained by the two impugned Memos at the instance of the Manager, Court of Wards, even if the criteria of section 53A is fulfilled, it would be an unwarranted interference by an unauthorized person in the lawful function of the Registrar/sub-Registrar which is not permitted under the law. Nor the respondents have any right to issue such direction upon respondents and the Registrar, under the law, is not obligated to abide by such illegal directions issued by unauthorized persons. .....(21)

Constitution of Bangladesh, 1972
Article 112

Observation—The Court of Wards though legally bound to follow the decision according to Article 112 of the Constitution but time and again they are harassing the people claiming title over the "projabily property", either by issuing Memorandum or by other ways and means and thereby also wasting the courts valuable time. It is high time to caution the Court of Wards, Bhawal Raj Estate and also the Land Reform Board to abstain from creating such situation on frivolous issues and thereby pushing the public to the Court. .....(25)

Projabily Property

Property enlisted/shown in the "projabily property" Gazette are the properties of "projas" who have been accepted as "owners" and the "rent receiving" interest whatsoever it had therein, of the Zamindars all vested to the Government by operation of SAT Act, 1950. .....(16)

People's Republic of Bangladesh vs Sri Sri Madan Gopal Jew Bigraha, 33 DLR (AD) 13; Promode Ranjan Saha vs Government of Bangladesh, 33 DLR (AD) 53; Anwara Begum Chowdhurani vs Nur Jahan Begum, 27 DLR (SC) 109 and Bhawal Raj Court of Wards Estate vs Rasheda Begum, 14 MLR (AD) 401 ref.

Md Khalilur Rahman with Md Khalilur Rahman (Helal) and Dr Md Abdul Malek Howlader, Advocates—For the Petitioners is both the Writ Petitions.

Ms. Aysha Flora with Md Faizul Kabir, Advocates —For the Respondents Nos. 3 and 4.

Judgment

Mirza Hussain Haider J : These two Rules Nisi, obtained by two different parties, involves similar facts and concerning common question of law, as such both are taken up together for hearing and accordingly disposed of by this single judgment.

2. In Writ Petition No.17056 of 2012, Rule Nisi has been issued calling upon the respondents to show cause as to why the impugned Memos, bearing No. BR Dhaka No. 98/98/792 dated 1-10-2012 and No. BR Dhaka 98/98/799 dated 2-10-2012, Annexures-1 and 1(1) respectively, both issued under the signature of Respondent No. 4 requesting Respondents No. 5 to 7 not to register any type of transfer/sale deed covering the properties in CS Plot No. 2497 and 2582 of CS Khatian No. 118 Mouza Baunia, JL No. 211 as found at page 510 of the "projabily property" Gazette (Annexure-C) which corresponds to SA Khatian Nos. 118/41, 118/76, 183, 184, 188, 198, 212, 220, 174, 179, 118/2 and 234 and also corresponds to RS Plot Nos. 6108, 6109, 6110, 6112 and 6116 of RS Khatian Nos. 63, 116, 117, 181, 240, 811, 818, 819, 862, 1083, 1371, 1490 and 1589, should not be declared to have been issued without lawful authority and of no legal effect, and/or pass such other or further order or, orders to this Court may seem fit and proper.

3. Similarly, in Writ Petition No.17216 of 2012, Rule Nisi has been issued calling upon the respondents to show cause as to why the impugned Memos, bearing No. BR Dhaka No. 98/98/792 dated 1-10-2012 and No. BR-Dhaka/98/98/799 dated 2-10-2012, Annexures J and J(1) respectively, both issued under the signature of Respondent No. 4 requesting Respondent Nos. 5 to 7 not to register any type of transfer/sale-deed covering the properties in CS Plot Nos. 2035, 2106, 2137, 2142, 2151, 2176, 2972, 2976, 2977, 2987, 3280, 3290 and2977/3459 recorded in Khatian No, 556, along with Plots of two other CS Khatians being CS Khatian Nos. 554 and 555 belonging to other private persons' "projabily property" and CS Plots No. 2748 and 2970 of CS Khatian No. 118 CS Plot No. 3280/3438 of CS Khatian No, 646 and CS Plot No. 3279 of CS Khatian No. 12 of Mouza Baunia of JL No.211 corresponding to RS Plot Nos. 9175, 9176, 9177, 6928, 7113, 688], 6862, 6869, 6911, 6609, 6743, 6735, 6735/6993, 6996, 6735/6994, 6868, 6868/6995, 6868/6996, 6911, 6709, 6711, 6853, 6841, 10054, 10055, 10056, 11400, 10050, 10057, 10058, 10066, 10059, 10060, 10064, 10063, 10061, 10062, 10040, 10043, 10045, 10046, 10044, 10047, 10048, 10084, 10081, 10082, 10083, 10017, 10018, 10116, 11387, 10113, 10112, 11386, 10111, l0108, 10110, 10109, 10115, 10114, 10121, 10122, 10120, 3857 and 10135, of RS Khatian Nos. 139, 1194, 695, 1447, 1644, 855, 515, 1447, 264, 515, 743, 265, 1050, 1051, 1464, 210,910, 1538,1490, 706, 707, 1087, 1327, 694, 968, 94, 648, 720, 1539, 661, 68, 1326, 216, 126, 1051, 379, 384, 968, 1577, 699, 714, 148, 216, 571, 1538, 1650, 631, 714, 1577, 741,700, 1390, 1243, 281, 366, 1601, 430, 998, 632, 769, 743, 1568, 626, 276, 382, 876, 486, 678, 1190,106, 301, 456, 924, 1197, 129, 687, 694, 1645, 877, 1082, 367, 978, 632, 628, 337, 726, 278, 303, 382, 209, 1406, 89 and 208, should not be declared to have been issued without lawful authority and of no legal effect, and/or pass such other or further order or orders as to this Court may seem fit and proper'.

4. Facts necessary for the disposal of Rule in Writ Petition No. 17056 of 2012, in short, are that the writ petitioners being involved in purchase and selling lands upon developing the same, intended to purchase 5.16 acre land of CS plot No. 2497 and 9.72 acre land of CS plot No. 2582, both of CS khatian No.l18 of Mouza Baunia, under Police Station Pallabi, District-Dhaka, and accordingly contacted Md Ahsanullah and others, the SA, RS and Dhaka City Survey recorded owners, who are owning and possessing the same upon paying the land Development Taxes, in their names, to the government regularly. The said Writ petitioners, after being satisfied with the right, title and possession of the said owners in the aforesaid government records, took 9 registered powers of Attorney in their favour from the aforesaid owners in possession. But when the writ petitioners went to the respondent No. 6, the concerned sub-Registrar of Mirpur, for execution and registration of the deeds of sale by using those powers the said respondent refused to register the same on the plea that by the aforesaid two impugned Memoranda, being No. BR Dhaka-98/98/792, dated 1-10-212 and BR Dhaka-98/98/799 dated 2-10-2012 issued under the signature of respondent No.4, the present Manager, Court of Wards, Bhawal Raj Estate, under the management of the land Reform Board (Respondent No.3), he has been directed not to register any deed of transfer in respect of the said plots mentioned in the said two impugned memoranda.

5. On the other hand, the facts of the writ petition No. 17216 of 2012, in short, are that the writ petitioners, being a developer Company and its Managing Director, respectively, earlier purchased the properties contained in 17 CS Plots of Baunia Mouza, under Police Station Pallabi, from its lawful owners in possession, whose names have been duly successively recorded in the SA, RS and Dhaka City Survey khatians. Out of the aforesaid 17 CS plot 12 CS

(plots being No. 2035, 2106, 2137, 2142, 2151, 2176, 2972, 2976, 2977, 2987, 3280, 3290 and 2977/3459, were commonly recorded under three CS Khatians being No. 554, 555 and 556 amongst which, two CS khatians, namely, 554 and 555 comprising of plot numbers 13, 285, 212, 3280, 2035, 2I06, 3290, 2116, 3295, 2137, 2142, 2150, 2151, 2176, 2972, 2976, 2977, 2987, 3001, 3030, and 2977/3457 are recorded in the name of two private persons in the cadastral survey (CS) Khatian, who have had no connection, whatsoever, with the Court of Wards, Annexures B and B(l), respectively. The other CS khatian, being No. 556, was recorded in the name of the original owner, the then Zamindar, represented by the Court of Wards(Annexure-B-2). The remaining four CS plots, being No. 2748 and 2970 under CS khatian No. 118 and CS plot No. 3279 and No. 3280/3438 under CS khatian No. 12 and 646 respectively, were also recorded in the name of the original owner, the then Zamindar, represented by the Court of Wards in the CS record Annexure-C, C(l) and C(2) respectively, which were settled with the "projas" and, as such, the said lands covering the aforesaid four khatians being "Projabily properties" the rent receiving interests thereof were acquired by the then government under the then government under the State Acquisition and Tenancy Act, 1950, by way of publishing "projabily property" gazette (Annexure-D) for which the rent received i.e. the Zamindar received compensations, as evident from Annexure-D(l). Pursuant to Annexure D and D (l) the Zamindars, as well as the Court of Wards, lost all right, title, interest and possession in those properties/plots by operation of section 3 of the State Acquisition and Tenancy Act, 1950. Consequently, all the subsequent record of rights, namely, the SA, RS and Dhaka City Survey were duly prepared and finally published in the names of the previous projas upgrading them as owners and their subsequent successors and transferees as "owners' in possession whose title and possession are protected against all, under the State Acquisition and Tenancy Act, 1950 as well as by the subsequent enactment of President's Order (PO) 90 of 1972. Under such circumstances, the writ petitioners, having purchased the said properties from the SA, RS and Dhaka City Survey recorded owners, went to respondent No. 6 for registration of the deeds of transfer of their purchased properties from those khatians to the subsequent transferees as well as also for registration of the deeds of purchase of other properties from the said plots but the said respondent, pursuant to the aforesaid two impugned Memoranda No. BR Dhaka-98/98/ 792, dated l-l0-2012 and BR Dhaka-98/98/799 dated 2-10-2012, Annexure-J and J(l), respectively, declined to register any transfer deed on the plea that respondent No. 4, Manager, Court of Wards, prohibited him from registering any deed connecting the aforesaid CS plots.

6. Further case of the writ petitioners of both the writ petitions are that the aforesaid two impugned memos are illegal and are of no legal effect as Respondent No. 3, the Manager Court of Wards, has no right, title, possession or authority to issue such, impugned Memos after publication of the "projabily property" Gazette (Annexure-C and D in the aforesaid two writ petitions respectively) after the State Acquisition and Tenancy Act, 1950 came into operation and also that the Respondent No. 3 and 4 are neither the controlling authority of the respondent Nos. 5 to 7 nor those-respondents are answerable to respondent Nos.3 and 4. Moreover, President's Order No. 90 of 1972 has imposed a complete bar in claiming ownership over the "projabily properties" by the previous Zamindars or any one claiming through the said Zamindars. Hence these two Rules.

7. The Respondents Nos. 3 and 4 namely, the Land Reforms Board and the Court of Wards, entered appearance in both the Rules and filed affidavits in opposition contending *inter alia* that on the basis of recent decision and

the directive of the Ministry of Land and also the Parliamentary Standing Committee for Ministry of Land, registration of any deed of transfer of any property belonging to the then Bhawal Raj Estate which are managed by the Court of Wards, has been stopped for the purpose of preserving the historic and heritage properties of the Bhawal Raj as such the said respondents have issued the impugned memos being duty bound to protect the interest of the Bhawal Raj. The said respondents in their affidavits did not deny the facts of acquisition of the rent receiving interest by the government. Rather in para 3 they also admitted the facts stated in the writ petitions stating to be matters of record. However, in para 10 they stated that the last record of right i.e. "Dhaka City Survey;" was erroneously prepared and published in the name of illegal occupiers, which they did not establish by any paper. Having gone through the said affidavit-in-opposition, we could not understand the head and tail of the same. The affidavits in opposition filed in Writ Petition No.17056 of 2012 is not only chaotic but also Confusing. The respondents did not state as to how the property belongs to the court of wards or how the same are not "Projabily Properties" or how Annexure C and D to the aforesaid two writ petitions respectively, do not focus on the correct picture nor they could show that the court of wards took appropriate steps in last 60 years to protect the properties of the Bhawal Raj. Similar is the position in respect of the affidavit-in-opposition filed in Writ Petition No. 17216 of 2012.

8. Mr M Khalilur Rahman, the learned advocate appearing on behalf of the petitioners in both the Rules, submits that when by operation of law the rent receiving interests of all the properties possessed by "projas", of all the seminaries vested with the government pursuant to sections 3 of the East Bengal State Acquisition and Tenancy Act, 1950 and thereby raising the status of "projas" to those of "owners" of such lands and also declaring them to be the owners of the said land which they were settled with by the then Zamindars and accordingly, gazette notifications (Annexure C in Writ Petition. No. 17056 of 2012 and Annexure D in Writ-petition No. 17216 of 2012) have been published incorporating the CS khatian numbers with mouzas, JL Numbers, thanas and districts throughout the then East Pakistan, which were thereafter, by operation of law recorded in the names of the said "projas" transformed as "owners", the predecessors in interest of the petitioners, in the subsequent SA and RS records, giving them the title and accordingly, in the last Dhaka City Survey, the successors of such owners' name being recorded, the respondents have no right under any law to direct the registering authority not to register any document and as such, the embargo, as imposed by the impugned memos are not only illegal but also examples of high handedness.

9. He next submits that as it is known to everybody that in one khatian there may be several plot numbers and similar plot numbers may be available in different khatians citing ratio of shares of the owners, and in the impugned two memoranda no khatian number having been mentioned, the same are vague, indefinite and rather incomplete which cannot be applied on any land. In the absence of stating any khatian number in the impugned orders, rather simply upon incorporating only the CS plot numbers no specific right over any property can be construed, rather than to create confusion in the mind of the respondents No. 5 to 7, i.e. the registering authority as such the impugned orders are not sustainable under any law as the same are vague and indefinite.

10. He further submits that section 53A of the Registration Act gives the authority to the Registrar to register any deed of transfer, instrument, subject to compliance of some conditions as required under the said law. As such the Registrar, under any circumstances, cannot

be bound by any other authority or by directives to do or not to do anything relating to registration of any deed. Referring to section 43 of the Transfer of Property Act, 1882 he, lastly, submits that the property intended to be transferred or purchased by the petitioners with notice that the same are owned and possessed by the appropriate person, upon examining the records of the government imposition of embargo on the registering authority not to register any Document in respect of the said property is not sustainable in law. Hence the Rules should be made absolute.

11. On the other hand, Mr Faizul Kabir, along with Ms. Aysha Flora, the learned advocates appearing on behalf of Respondents No. 3 and 4, on the face of the submissions made by the learned advocates for the petitioners, in both the writ petitions, as to acquisition of the rent receiving interests of the Zamindars under the State Acquisition and Tenancy Act, could not make out any case in favour of the respondents. Mr Kabir did not put forward any argument on the publication of the "projabily property" gazette notification (Annexure-C in Writ Petition No. 17056 of 2012 and Annexure-D in Writ Petition No. 17216 of 2012) and also on finally published Dhaka City Survey in the names of the predecessor in interest of the petitioners. The learned advocate did not make any statement or submission on the presumptive value of the latest survey i.e. Dhaka City survey nor as to why no step has been taken for correcting the Dhaka City Survey, if any. Rather he simply confined himself within the submission that the property being historic and heritage property of Bhawal Raj, the respondents have taken appropriate steps to stop transferring such properties by the present petitioners, who are, according to him, mere "illegal occupants" and, as such, the impugned memos have been properly issued. Thus the writ petitions are not maintainable and both the Rules are liable to be discharged.

12. Heard the learned Advocates of both the parties, perused the two writ petitions, the affidavits in opposition and the Annexures appended to the two writ petitions. It appears that the properties of writ petition No. 17056 of 2012 bearing CS plot No. 2497 and 2582 have been recorded in CS Khatian No. 118 along with other CS plots. The said CS khatian No.118 appears at page 510 of the "projabily property" Gazette dated 24-3-1952 (Annexure-C) by which the rent receiving interest of the then Zamindars have been acquired by the government under section 3 of the State Acquisition and Tenancy Act, 1950. It also appears that the previous Zamindar Kumar Rabindra Narayan Roy Chowdhury has been paid up compensation for that purpose, as evident from compensation payment Gazette Notification No. 3126 dated 27-2-1956 published on 29-2-1956 in the then Dhaka Gazette, Annexure-C(l), by the then Government. Similarly, the properties of the writ petition No. 17216 of 2012, as it appears from Annexure B, B(l), B(2) and Annexures C, C (l) and C(2), that 43 CS plots in 6 Khatians out of which plots No. 2035, 2106, 2137, 2142, 2977, 2151, 2176, 2972, 2976, 2977, 2987, 3280, 3290 and 2977/3459 of CS Khatian 554 as well as those total khatian No. 555, total 26 plots, have been recorded in the names of private individuals, not the Zamindar or the court of wards. As such the court of wards has no connection, whatsoever, with the same. On the other hand 13 plots bearing same numbers namely, 2035, 2106, 2137, 2142, 2151, 2176, 2972, 2976, 2977, 2987, 3280, 3290 and 2977/3459 of CS Khatian No. 556 along with CS plots No.2748 and 2970 of CS khatian No.118 CS plot No.3280/3438 of CS Khatian No. 646 and CS plot No. 3279 of CS khatian No. 12 (total 17 plots) all were originally recorded in the name of the then Zamindar, Kumar Rabindra Narayan Ray Chowdhury, represented by the Court of Wards, the respondent No. 4, in the CS Survey, as appears from Annexure B, B(l), B(2), C,C(1) and C(2) respec-

tively, which were settled with the "projas" as under-raiyts. Thereafter, with the enactment of the Statement Acquisition and Tenancy Act, 1950 the rent receiving interest the raiyots i.e. the then Zamindars vested with the government and the "projas" were upgraded and recognized by the government as owners of their settled land they had been possessing under the Zamindar. Under such circumstances in all subsequent surveys the previous "projas" and their successors names have been recorded as owners, duly recognized by the government. But it reveals that all the plots mentioned above in six khatians which have been recorded in the names of the then projas or their successors have been claimed as the properties of the Court of Wards without providing any khatian number by the impugned memos. On Examination of the "projabily property" Gazette it appears that the plots of CS khatian No. 556, 118, 646 and khatian No. 12 have been duly recorded as "projabily properties" whose "rent receiving" interests of the then Zamindars have been acquired by the government under the State Acquisition and Tenancy Act 1950. As such whatever rights, title and interest, the Court of Wards, if any, had, in all these plots, have been ceased by the Government. In Annexure C to writ petition No. 17056 of 2012, the "Projabily Property" Gazette, at page 510 plots of CS khatian No. 118 have been enlisted as projabili properties. Similarly in Annexure-D to the writ petition No. 17216 of 2012 all the plots of CS khatians No.12, 118, 556 and 646 have been shown at pages 503, 510 and at page 516 respectively in the "projabily property" Gazette.

13. It further appears that following the "projabily property" Gazette the SA khatians were published recording the names of the then "projas" upon upgrading their status as the "owners" in different SA khatians by the Survey and Settlement Department of the Government. Similarly, the next RS khatians were also prepared and published recording the names of the said "projas"/"owners" and their subsequent legal heirs and assignees as "owners". The Land Reform Board and the Court of wards as respondent No. 3 and 4, in both the writ petitions, respectively, did not deny the statements in respect of publishing the "projabily property" Gazette and the compensation payment Gazette and preparation and final publication of the SA and RS record of rights in the names of the previous "projas" and their successors in interests as "owners". Even in respect of preparation and publication of the recent Dhaka City Survey record the respondents frankly admitted, in paragraph-10 of their affidavit that those were recorded in the name of the previous "projas" as "owners" but claimed that those recordings as wrong although no step has yet been taken by the respondents to correct the said final recording, of course time allowed for correction of such wrong recording, as alleged, has expired long before. The learned Advocate for the petitioners referring to the "projabily property" Gazette (Annexure-C and D in the aforesaid two writ petitions, respectively) and also to the PO 90 of 1972 (Annexure-D and E in the aforesaid two writ petitions, respectively) and also to the decision of the Appellate Division in the case reported in *33 DLR (AD) 13* and *53, 27 DLR (SC) 109*, and*14 MLR (AD) 401* submitted that the Appellate Division in those cases has, already settled that the property mentioned in the "projabily property" Gazette are the' properties of the projas and their successors in interests, as the rent receiving interest, therein, of the previous Zamindars have been acquired by the Government. As such when the petitioners went for registering the transfer deeds of the land purchased from the successor in interest of the then "projas", whose names 'have been correctly recorded and finally published in the aforesaid Khatians, the respondents No. 5 to 7 have no authority to refuse registration on the direction of respondents No. 3 and 4. Thus hav-

ing not done what they are suppose to do under the law they have committed illegality in not registering the deeds.

14. Under such circumstances, when the said plots are published, in the gazette notification as "Projabily Properties" and the rent receiving interests of the then Zamindars are acquired under section 3 of the State Acquisition and Tenancy Act 1950 (hereafter referred to as the SAT Act) the same no longer belongs to the then Zamindars or the Court of Wards rather to the "projas" as per SAT Act 1950 who have been upgraded and declared to be the "owners", the respondents have no authority to issue the impugned notices. Moreover when no khatian number has been mentioned, in the impugned memos simply mentioning the CS plot, numbers does not specify the land as such, the impugned notices are vague and indefinite by which no legal force can be ascertained. Section 3 of the State Acquisition and Tenancy Act, 1950, reads as follows:

"3. Acquisition of the interest of certain rent-receivers and consequences thereof—(1) At any time after the Commencement of this Act, it shall be lawful for the (Government) to acquire by notification in the official Gazette, with effect from such date as may be specified in the Notification(hereinafter referred to as the notified date),—

(i) all interests of such of the rent-receivers as may be specified in the notification, in their respective estates (taluks, tenures, holdings or tenancies), as the case may be, in any district', part of a district or local area, and

(ii) All interests of all rent-receivers whose properties are, the court of Wards Act, 1879, in their respective estates, (taluks, tenures, holdings ortenancies), as the case may be including all their interests in all sub-soil and rights to minerals in such estates, (taluks, tenures, holdings or tenancies)

(2) Subject to the provisions of sub-sections [(4), (5) and (6)] of section 20, the Government may also, simultaneously with or at any time after the publication of a notification under sub-section (1) in respect of the interests of any rent -receiver in any estate (taluks, tenure, holding or tenancy) acquire, by notification in the official Gazette, with effect from such date as may be specified in the notification (hereinafter referred to as the notified date), [all or any of the lands in his khas possession of which he shall not be entitled to retain possession under the said section and so much of the lands in his khas possession as has been acquired under this sub- section and has not vested in the [Government] under clause (a) of sub-section (4), shall vest absolutely in the [Government] free from all encumbrances.

[(2a) In a notification issued under this section, rent-receivers may be specified or described by name, or by reference to are as wherein they have interests or in such other manner as the [Government] may determine].

(3) The notification referred to in sub-section (1) or sub-section (2) shall be in such form and shall contain such particulars as may be prescribed.

(4) On and from the date specified in a notification under sub-section (1)—

(a) all interests of the rent -receivers in the estates, [taluks, tenures, holding, or tenancies] specified in the notification, including their interests in all lands in their khas possession, and interests in all subsoil and rights to minerals, in such estates, [taluks, tenures, (holding or tenancies] and also including the interests of any such rent-receiver in any building or part of a building

standing on any such land and used primarily as office or kutchery for the collection) of rent of any estate [taluk, tenure, holding or tenancy] shall vest absolutely in the [Government] free from all encumbrances; 4****

Provided that nothing in this clause shall apply to any building within the homestead of the rent-receiver concerned ;

(b) all arrears of revenue or rent and all cesses, together with interest, if any, payable thereon, remaining lawfully due to the Collector on the notified date in respect of any "interest acquired under sub-section (l) shall after the said date; continue to be recoverable from the person by whom they were payable and shall, without prejudice to any other mode of recovery, be recoverable by the deduction of the amount of such arrears, cesses and interest from the compensation money payable to such person under this section 58, when so ordered by the collector,

(c).....

(d).....

(dd).....

(e).....

(f).....

(g).....

((h).....

(5) The outgoing rent-receivers, whose interests have been acquired under this section, shall be entitled to compensation as provided in this Act."

15. On the other hand, Presidents order (PO) 90 of 1972 has given the protection to such projas. Article 2 of PO 90 reads as follows:

"2. Notwithstanding anything contained in any other law for the time being in force, on the commencement of this order, all suits, appeals, application and other legal proceedings pending or, continuing or deemed to be pending or continuing in any court against the Government of the People's Republic of Bangladesh in which the legality or validity of the State and Tenancy Act, 1950 (EB Act No. XXVIII of 1950), or of the East Bengal State Acquisition and Tenancy (Amendment) Ordinance, 1956 (EB Ordinance No III of 1956), or of any other law making any amendment in the said Act, or of the acquisition of any property made under any provision thereof is challenged or called in question shall abate, and all orders, including orders of injunction and other interlocutory orders, passed in such suits, appeals, applications and other legal proceedings shall cease to have any effect; and no court shall entertain, and no person shall bring, any fresh suit, appeal, application or other legal proceedings in which the legality or validity of any such law or acquisition is challenged or called in question ."

16. The Appellate Division in the case of *People's Republic of Bangladesh vs Sri Sri Madan Gopal Jew Bigraha* , reported in *33 DLR (AD) 13* after considering and discussing the legal effect of the aforesaid laws, held that 'with the publication of notifications under section 3 all rent-receiving interests including wakf and debuttor property stood acquired by and vested in the Government'. Again in the ease of *Promode Ranjan Saha and others vs Government of Bangladesh and another,* reported in *33 DLR (AD) 53* it has been observed that 'after the promulgation of PO 90 of 72 all orders including orders of injunction, etc. passed in appeals, application, etc. shall cease to have any effect and no court shall entertain any fresh suit, appeal, application, etc. in which the legality of any such law of acquisition is challenged or called in question'. In the case of *Anwara Begum Chowdhurani vs Nur Jahan Begum* reported in *27 DLR (AD) 109* it has been held that 'after the notification issued under section 3 of the Act

the status of the under-raiyat became upgraded to that of raiyat. The rent receiving interests can be acquired even before the preparation of record of rights and publication of compensation assessment rolls'. It has further been held therein that 'with the acquisition of the rent-receiving interests by the government all intermediary interests disappeared and a person holding the land under the government becomes a "tenant", becomes a "raiyat" or a "Malik" of the land recognized by the government. Consequently, the under-raiyat who actually holds the land becomes a tenant under the government. Superior land lord (i.e. the raiyat) of an under-raiyat by virtue of elimination of his rent-receiving interests disappears and the under-raiyat is upgraded to the status of a "raiyat". Lastly, in the case of *Bhawal Raj Court of Wards Estate vs Rasheda Begum and others* reported in *14 MLR (AD) 401* the Appellate Division has held " record of rights prepared and finally published under section 144 cannot be varied by any authority and remedy of wrong entry if any lies with the appropriate court'. It has further been held in that judgment by the Appellate Division that "Manager, Bhawal Raj estate, Court of Wards can manage only the retainable land." The Appellate Division in the aforesaid cases has already settled that the property enlisted/ shown in the "projabily property" Gazette are the properties of "projas" who have been accepted as "owners" and the "rent receiving" interest whatsoever it had therein, of the Zamindars all vested to the Government by operation of SAT Act, 1950. The relevant portion of the finding of the Appellate Division in the case reported in *14 MLR (AD) 401* are as follows:

> "The learned advocate appearing for the leave petitioner, when confronted with the aforesaid gazette notifications dated 24-3-1952 and 29-2-956, as to acquisition of rent receiving interest and the vesting of lands of the leave petitioners, including the case lands, found it difficult to substantiate the *locus-standi* of the leave petitioner in challenging the draft records of right prepared in the names of the respective writ petitioners in respect of their respective case lands prepared during the Mohanagar Survey. Further with the publication of the gazette notifications dated 24-3-1952 and 29-2-1956 the leave petitioner ceased to have any right, title and interest and possession in the case lands, because of acquisition, and vesting of said lands in the Government. "Thereafter, the full bench of the Hon'ble Appellate Division, on an application corrected the said judgment stating that the rent receiving interest of Projabily Property had vested to the Government and land has been vested to the projas as owners. In that case the Court of Wards, Bhawal Raj Estate and the Land Reform Board the present contesting respondents were parties and had challenged the Dhaka City Survey khatian prepared and published in the names of the successors in interests of the projas". The Apex Court in that case further held:
>
> "Thus we are of the view that the leave petitioner had no *locus-standi* to challenge the draft Mohanagar Survey khatian as prepared in the names of the respective writ petitioners, at-least after publication of the gazette notifications dated 24-3-1952 and 29-2-I956."

17. In the aforesaid judgment the Appellate Division lastly held that the Court of Wards can only keep in his custody, the retainable khas land of the previous Zamindars (which was 375 bighas at the time of SAT Act, 1950) and not the "projabily property". It may be mentioned, in this connection, that the land holding limitation (hereafter has been reduced to 100 bighas and lastly to 60 bighas). On the face of the aforesaid decision of the Appellate Division the Court of Wards and Land Reform Board, cannot, under any circumstances, claim ownership over the

Projabily Property of the previous Zamindar, Kumar Rabindra Narayan Ray Chowdhury and, as such, cannot issue the impugned two Memoranda, specifically when they were parties in the aforesaid case before the Appellate Division. Such interference by the respondents are nothing but harassment to the previous "projas" who has become owners of their respective properties by operation of law.

18. On the other hand, section 144A of the State Acquisition and Tenancy Act, 1950 provides "Every entry in the record of rights prepared or revised under section 144 shall be evidence of the matter referred to in such entry, and shall he presumed to be correct until it is proved by evidence to be incorrect". Thus after final publication of the records under the Revisional survey and the Dhaka City Survey in the names of the predecessors in interest of the petitioners and the respondents having not taken any step against the same till date by producing any evidence to prove that the entries in those records are incorrect, the law clearly provides that the names of the predecessors in interests of the petitioners recorded in those surveys are presumed to be correct. On this score also the respondents case are not sustainable in law.

19. Considering the provisions of law mentioned above and the findings of the Appellate Division in the aforesaid cited cases we are of the view that the property in question in both the Rules being "Projabily properties", as evident from Annexures C and D to Writ Petition No. 17056 of 2012 and Writ Petition No. 17216 of 2012, respectively, and the same being finally published in SA, RS and Dhaka Mohanagar City Survey khatians in the name of the predecessors in interest of the petitioners and the then Zamindars having not taken any step in respect of wrong entry, as claimed by the respondents, the court of wards, the said respondents cannot, under any circumstance, claim that the property belongs to the court of wards. As such when the property does not belong to the court of wards the court of wards has no legal authority to direct the registering authority not to register any deed of transfer in respect of the said properties.

20. The right to transfer the property being a part of enjoyment of property, is a fundamental right of the citizen under article 42 of the constitution, it cannot be curtailed by issuing Memoranda by the third party who does not have any right, title, interest or possession in the property. Moreover, section-10 of the Transfer of Property Act provides that even the owner of the property cannot impose any condition upon the transferee, in his transfer deed prohibiting its transfer and enjoyment by the transferee, as it violates the principle of 'rule against perpetuity'. So, on that score also the impugned orders, prohibiting the transfer of other persons' property is illegal and of no legal effect.

21. Moreover, under the Registration Act and the Registration Manual the Registrar derives its powers and authorities of registering any deed as well as the same is under the control of the Ministry of Law. Whereas, the Court of Wards being under the control of the Land Reform Board is not a superior authority of the Registrars and Sub-Registrars to impose any prohibitory order in respect of registering any deed. According to section 53(A) of the Registration Act, the concerned Registrar/Sub-Registrar has been given a guideline as to which property can be registered and which property cannot be registered. So, if the Registrar/Sub-Registrars are restrained by the two impugned Memos at the instance of the Manager, Court of Wards, even if the criteria of section 53A is fulfilled, it would be an unwarranted interference by an unauthorized person in the lawful function of the registrar/sub-Registrar which is not permitted under the law. Nor the respondents have any right to issue such direction upon respondents No. 5 to 7 and the Registrar, under

the law, is not obligated to abide by such illegal directions issued by unauthorized persons like respondents No. 3 and 4.

22. Apart from the above, we want to focus about the role of the learned advocate for the respondents as well as the respondents No. 3 and 4. We find it very difficult to understand from the affidavit-in-opposition filed by the Respondents No. 3 and 4 that what is the gist of the case of the respondents and the respondents without stating the fact that the respondents are the owners of the land and, as such, have issued such directions upon the registering authority rather stated that the impugned memos have been issued for protecting the historic and heritage properties of Bhawal Raj. Nor the respondents could show that the registering authority has responsibility to abide by such directions and thereby refusal to registration has been done in accordance with law. On the other hand, respondents No. 3 and 4 could not come forward with any piece of document to show that they have right, title or possession in the land in question, specifically, when the property has been published in the gazette notification under section 3 of the State Acquisition and Tenancy Act, 1950 and the said publication being finalized and protected by PO 90 of 1972, the respondents No. 3 and 4 did not come forward to assist the court by showing a piece of paper for the said plots, which have already been recorded in the name of the projas fall within the "retainable khas land" of the Zamindars being up to 375 bighas with the commencement of the SAT Act, 1950 which has subsequently been reduced to 100 Bigas and lastly to 60 bighas. The respondents No. 3 and 4 did not even come forward with any piece of paper to show that the limit of retainable khas land has been raised to more than 60 bighas for which the court of wards can act as the custodian.

23. For the reasons and discussions made hereinabove we find merit in both the Rules. Accordingly both the Rules in Writ Petitions No. 17056 of 2012 and 17216 of 2012 are made absolute.

24. The two impugned Memos bearing No. BR-Dhaka No. 98/98/792 dated 1-10-2012 and No. BR- Dhaka 98/98/799 dated 2-10-2012 Annexures-1 and 1(1) in Writ Petition No. 17056 2012 and Annexure J and J-(l) in Writ Petition No. 17216 of 2012 are declared to have been issued without lawful authority and of no legal effect.

25. Before withdrawing our pen, we would like to note that, now a days time and again we are confronted with unnecessary and uncalled for litigations like the present one inspite of settling the self same issue connecting with "projabily property" by the Apex court in its different decisions reported in, *33 DLR (AD) 13* and *53, 27 DLR (SC) 109* and lastly in the case reported in 14 MLR (AD) 401. In these two writ petitions the question over the title of "projabily property" of the previous Zamindar, Kumar Rabindra Narayan Roy Chowdhury, represented by the Court of Wards, Bhawal Raj Estate, again came up for our consideration as the court of Wards claimed the "projabily property" as its own property and accordingly issued the two "impugned Memoranda, though it has already been settled earlier in the aforesaid cases holding that the "projabily properly" can never be claimed by the previous Zamindars represented by the court of Wards. The Court of Wards though legally bound to follow the said decision according to Article 112 of the constitution but time and again they are harassing the people claiming title over the "projabily property", either by issuing Memorandum or by other ways and means and thereby also wasting the courts valuable time. So it is high time to caution the Court of Wards, Bhawal Raj Estate and also the Land Reform Board to abstain from creating such situation on frivolous issues and thereby pushing the public to the Court. Thus they are cautioned not to

harass anybody specifically the previous "projas" or their successors-in-interests any more, claiming title over the "projabily property" as cited in the "projabily property" gazette published on 24-3-1952. If in future, any such illegal and uncalled for claim is sought for by the court of wards or if any litigation is continuing or started afresh because of court of wards action by claiming title over the said "projabily property" by the Court of Wards and the Land Reform Board, then they would be liable to be dealt with for contempt of Court, apart from such litigations been abated under PO 90 of 1972.

26. Under such circumstances we think it would be proper to call the manager, court of wards and the Land Administrator to explain their position in this respect because the government officials under no circumstances can play with the property of the general people. This court thus thought that exercising the power conferred under the law we should call the said officials to explain their conduct as to these two cases in particular. But considering that it will be nothing but a futile exercise of this Court on the matter, because when the respondents could not come forward with a proper affidavit giving proper explanations supported by the papers, we simply can express our anxiety and great concern that the government officials are doing this only to harass the general people of the country and thereby they are trying to have some personal gain over it . As such the respondents No. 3 and 4 are cautioned not to deal with such property of the general people in such manner which can be subject matter of harassment of the general people.

27. Let a copy of the judgment and order be communicated to the Hon'ble Minister, Ministry of Land, Hon'ble Minister, Ministry of Law for issuing guidelines to the concerned officers for the purpose of dealing with such property of the public in accordance with law so that the government officials do not create any impediment in general peoples' enjoyment of property right freely or harass the people upon taking undue advantage of being a government official.

However, there will be no order as to cost.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Sharif Uddin Chaklader J
AKM Shahidul Huq J

Judgment
May 27th, 2013.

Rokeya Begum.....
.....Petitioner
vs
Advocate Abdul Awal and ors.....
..Opposite-Parties*

Non Agricultural Tenancy Act (XXIII of 1949)
Section 24(10)
State Acquisition & Tenancy Act (28 of 1951)
Section 96(17)

Plaintiff did make the immediate demand, that is, he did perform the ceremony of talabe mowasibat immediately on coming to know of the sale and also talab-i-ishad in presence of witnesses, which the PWs univocally proved. Moreover, section 24(10) of Non Agricultural Tenancy Act and section 96(17) of the State Acquisition and Tenancy Act speak that right of pre-emption under Muhammadan Law shall prevail which cannot be defeated by these statutory laws. .....(39)

Hazi Waziullah alias Waziullah Miah vs The Additional Deputy Commissioner, Revenue, Noakhali and Assistant Custodian of Vested and Non-Resident Property, 41 DLR (AD) 97; Attar Mia vs Mahmuda Khatun Chowdhury, 1 MLR (AD) 59 = 48

*Civil Revision No.1769 of 2012 *with* Civil Revision No.1772 of 2012.

DLR (AD) 16; Mohammad Siddiq vs Ghasi Ram, AIR 1946 (Lahore) 322; Abdul Haque Miah vs Abdur Rashid, 1983 BLD (AD) 103 = 35 DLR (AD) 54; Mst Fatema Bibi vs Sree Manik Lal Samaddar, 1996 BLD (AD) 129 = 50 DLR (AD) 97; Male Mohammad vs Hafez Abul Kalam, 6 BLC (AD) 83; Abdul Momin alias Tara Mian vs Mahfizur Rahman, 1 ADC 515; Nuri Miah vs Ambica Singh, 34 Indian Cases 869; Ram Gopal vs Piari Lal 21 A. 441: AWN (1899) 63; Tafazul Hussain vs Than Singh 6 Indian Case426 : 32 A. 567 : 7 ALJ 715; San-Wai Das vs Our Parshad 4 Indian Case 179 : 147 PLR 1909 : 90 PR 1909 : 159 PWR 1909; Mohammad Lokman Mondal vs Amir Ali Mondal 19 DLR 759; Monajal Huq vs Shafiullah and AIR 1936 Cal. 398 and Rai Nalinaksha Dutta Bahadur vs Kazi Abdul Jalil AIR 1936 Cal. 398 ref.

Md Ziaul Haque, Advocate with Rafiqul Islam Sohel, Advocate—For the Petitioners.

Khair Ezaz Maswood, Advocate with AQM Shafiullah, Advocate with Ruhul Ameen, Advocate and Rokeya Akhter, Advocate—For the Opposite-Parties.

Judgment

Sharif Uddin Chaklader J : Rokeya Begum as petitioner moved this Court under section 115(1) of the Code of Civil Procedure against the judgment and decree dated 30-11-2011 passed by the learned Joint District Judge, 2nd Court, Feni dismissing Title Appeal No.87 of 2009 affirming those dated 18-11-2009 passed by the learned Senior Assistant Judge, Feni Sadar, decreeing Title Suit No.49 of 2002.

2. Plaintiff Abdul Awal on the following averments filed the suit for pre-emption under Mohammadan Law. It is his case that Bashirullah was the owner of the suit land of CS khatian No. 19 and SA khatian No.17, died leaving 3 sons, Siddique Ahmed, Sultan Ahmed and Khaiz Ahmed and 3 daughters, Firoza Khatun, Mamuna Khatun, Maksuda Khatun by his first wife and 2 daughters, Golnahar and Fatema Khatun by his 2nd wife and 2nd wife Amena Khatun. Out of the heirs, Siddique Ahmed died leaving plaintiff, defendant Nos.5 and 6 as three sons, one daughter, defendant No.7 and wife, defendant No-8. Other heirs of Bashirullah also died leaving heirs as well. Plaintiff is a co-sharer by inheritance in the suit land. Plaintiff used to live in Dhaka. Plaintiff came to the village on 15-3-2002 and learned to know that the suit land has been transferred. Immediately plaintiff has performed the formalities of Talab-i-Ishad and Talab-i-Mowasibat in presence of witnesses and tendered price money to defendant No.l. But defendant No.l did not pay any heed to this issue as such, plaintiff after obtaining certified copy on 17-4-2002 definitely came to know about the sale that defendant Nos.2-4 sold the suit land to defendant No.l by Ewaz deed No.517 dated 28-1-1999. Plaintiff case is that exchange deed was made to over come the right of pre-emption, filed the suit.

3. Petitioner as defendant No.l contested the suit by filing written statement denying all the material allegations made in the plaint and after taking all the preliminary objections as to maintainability of the suit, it is her case that Basirullah sold 44 decimals of land by deed No.4330 dated 23-9-1946 to the predecessor of defendant No.l. Rustam Mia, Sultan Ahmed, son of Basirullah, sold to Rustam Mian 33 decimals of land by deed No.6227 dated 1-12-1957. SA khatian No. 17 rightly recorded his name along with others, as such, he was a co-sharer in the suit land. Rustom Mian died leaving Makbul Ahmed and 8 sons, one daughter, Hajera Begum. Makbul Ahmed died leaving 4 sons including defendant Nos.l and 4. The heirs of Basirullah were also co-sharer in the suit jote. Khaiz Ahmed, son of Basirullah died leaving wife, Halima Begum and Rokeya Begum and others as 3 daughters, Jamaluddin and others as 3 sons. In this way defendant Nos.2-4 became

owners in the suit jote and they have transferred the suit plot to defendant No.l by ewaj deed No.517 dated 28-1-1999. Defendant No.l become the owner in that land and possessing the land to the knowledge of the plaintiff since transfer. Plaintiff is not entitled to claim pre-emption as he is no way co-sharer in the suit jote. Moreover, defendant No. 17 added after he has filed Miscellaneous Case No.62 of 2007. She has obtained a compromise decree in terms of solenama against the ewaj deed in question hence the suit is liable to be dismissed.

4. Six issues were framed i.e. whether the suit is maintainable in its present form, whether the suit is bad for defect of parties, whether the suit is time barred, whether other formalities for pre-emption observed under Mohammadan law, whether the plaintiff is 1st Class co-sharer by inheritance in the suit jote, whether the plaintiff entitled to get a decree of pre-emption as prayed for?

5. In the suit plaintiff examined 4 witnesses and defendant No.l examined including herself, Tofail Ahmed as DW 2, Hosen Ahmed as DW 3, Md Shahidullha as DW 4 and Haji Mozzamel Haq has deposed on behalf of defendant No. 17 as attorney. Plaintiff adduced exhibit-1 to exhibit-3 series and defendant Nos.l and 17 exhibit-ka to exhibit-ga and exhibit-ka (l) to exhibit-ga (1).

6. Both the courts below decreed the suit concurrently. Mr Ziaul Haque, with Mr Rafiqul Islam Sohel, learned advocates appearing for the petitioner, submits that, both the Courts below committed gross illegality in not considering the suit land having been acquired by defendant No.l by previous Miscellaneous Case No.62 of 2007 in pre-emption, this suit is not maintainable. Learned Advocate further submits that plaintiff had come to his village home before 15-3-2000 and he was also seen the shop made by the defendant No.l in the suit land but no discussion has been made to the said fact. Learned Advocate further submits that plaintiff did not perform all the formalities under Mohammadan Law, even there is no mention of tendering Taka 15,000 as suit value to the defendant No.l in the plaint as such the suit is not maintainable. Learned Advocate further submits that since the petitioner acquired the suit property in previously instituted Miscellaneous Case No.62 of 2007 by solenama in the aforesaid pre-emption case, the instant suit under Mohammadan Law is not maintainable.

7. On the question of maintainability of the suit, learned Advocate relied on the case of Nuri Miah vs Ambica Singh and another, 34 Indian Cases-869 and also the case of Md Arshad Hussain vs The State of Bihar and others, judgment dated 22-4-2011 passed in Letters Patent Appeal No.313 of 2010.

8. Learned Advocate also on admissibility of the earlier decision, relied on section 41 of the Evidence Act as well as on the case of *Hazi Waziullah alias Waziullah Miah vs The Additional Deputy Commissioner, Revenue, Noakhali and Assistant Custodian of Vested and Non-Resident Property, 41 DLR (AD) 97.* Learned Advocate also relied on the case of *Attar Mia vs Mahmuda Khatun Chowdhury, 1 MLR (AD) 59 = 48 DLR (AD) 16.* This judgment is on the question of partial pre-emption.

9. Mr Khair Ezaz Maswood along with Mr AQM Shafiullah, learned Advocates, appearing for the opposite parties, submits that concurring findings of fact if not perverse, under section 151(1) of the Code of Civil Procedure this Court has no jurisdiction to interfere with those findings. Learned Advocate on the question of two judgments on same subject matter submits that judgment passed under section 96 of the Sate Acquisition and Tenancy Act is not decree, it is order, other judgment passed on the instant suit, which being decree prevail over the judgment passed under State Acquisition and Tenancy Act and relied on

the case of *Mohammad Siddiq vs Ghasi Ram, AIR 1946 (Lahore) 322.*

10. Rule of Civil Revision No. 1772 of 2012 was obtained by Abdul Malek alias Manu against judgment and decree dated 30-11-2011 passed by the learned Joint District Judge, 2nd court, Feni in Title Appeal No.90 of 2009 affirming those dated 18-11-2009 passed by the learned Senior Assistant Judge, Feni Sadar, Feni decreeing Title Suit No.49 of 2002. In that suit plaintiff is same but defendant No.l, who is petitioner, is different. The facts disclosed by defendant No.l of this suit is verbatim same as of defendant No.l of the instant suit; as such, we do not proposed to write the similar fact once again. Issues were similar and witnesses examined are same.

11. Mr Rafiqul Islam Sohel, learned Advocate, appearing for the defendant-petitioner, submits that, Courts below concurrently failed to consider that defendant No.l is a co-sharer by inheritance as such if any transfer made in favour of defendant No.l then it is hit by provision of law. Learned Advocate referred to the case of *Abdul Haque Miah vs Abdur Rashid, 1983 BLD (AD) 103 = 35 DLR (AD) 54.* Learned Advocate next submits that transfer was made on 28-1-1999, suit has been filed on 9-6-2002, the suit having been filed long after period of limitation, is barred by limitation under Mohammadan Law, Mohammadan Law prescribed filing of suit within one year from the date of transfer. Learned Advocate further submits that pre-emptor-plaintiff having not been co-sharer, he has no *locus standi* to file the suit. Learned Advocate further submits that after purchase, khatian has been split up and jama has been separated, as such, suit for pre-emption ought not to be decreed.

12. Learned Advocate on determination of co-tenancy relied on the case of *Fatema Bibi vs Sree Manik Lal Samaddar, 1996 BLD (AD) 129 = 50 DLR (AD) 97.* Learned Advocate on separation of jama relied on the case of *Male Mohammad vs Hafez Abul Kalam, 6 BLC (AD) 83* and the case of *Abdul Momin alias Tara Mian vs Mahfizur Rahman, 1 ADC 515.*

13. Let us proceed with our judgment.

14. On the question of defect of parties, Courts below concurrently found that plaintiff took all the step in getting the suit ready for hearing and defendant did not raise any objection specifically against defect of parties and did not supply any particulars of co-sharers, who are left out, found that the suit is not bad for defect of parties. On the question of limitation it appears that apparently the suit is barred by limitation as transfer was made on 28-1-1999 but the suit was filed on 9-6-2002. Section 245 of the Mohammadan Law prescribed period for filing suit is one year. It appears from the plaint that plaintiff went to village home, as for his profession he resides at Dhaka, on 15-3-2002. PWs. in chief as well as in their cross-examination stated that on 15-3-2002 there was admission of the plaintiff to pre-empt the case land. Courts below considered that it is on evidence that delivery of possession is made in 2002. As per section 245 of the Mohammadan Law the case is not barred by limitation as such it has been within the period of limitation i.e. within one year from the date of knowledge. On the vital question i.e. whether formalities of filing of the suit has been performed or not, Courts below found that plaintiff as per section 236 of Mullas Principles of Mohammadan Law performed both Talab-i-Mowasibat and Talab-i-Ishad. PWs. in their examination-in-chief and in their cross-examination fully corroborate that plaintiff performed all the formalities as per section 236 of the Mohammadan Law. The depositions of DWs. on this score are totally contradictory and not satisfactory. On the question whether plaintiff is co-sharer or not, both the Courts below found from the history sheet and admitted by defendant that plaintiff is a co-sharer and entitled to pre-empt the case land.

On the question of maintainability of the suit it appears that D.W.I in cross-examination admitted that plaintiff having performed all the formalities of Mohammadan Law, suit is maintainable.

15. On the question of which judgment will prevail., the Judgment under section 96 of the State Acquisition and Tenancy Act or the instant judgment under the Mohammadan Law as pre-emption under section 96 State Acquisition and Tenancy Act is totally different for pre-emption under Mohammadan Law. This is the prime question to be answered.

16. On the question of which judgment got preference, Mr Ziaul Haque, learned Advocate relied on the case of *Nuri Miah vs Ambica Singh, 34 Indian Cases 869,* judgment was delivered by Mr Justice Ashutosh Mookerjee on 11th May, 1916. We tempted to reproduce certain portion of the judgment i.e. paragraph 11. "The true foundation of the right of pre-emption is explained in two passages in Book XXXVIII of the Hedaya. The first of these passages is in these terms: " 'Shaffa', in the language of the law, signifies the becoming proprietor of land sold for the price at which the purchaser has bought them, although he is not consenting thereunto. This is termed shaffa', because the root from which shaffa is derived signifies conjunction, and the land sold are here conjoined to the land of the shaft or person claiming the right of pre-emption." This indicates that the right of pre-emption is a right of substitution. The plaintiff complains that his co-sharer has transferred his share in the joint property to a stranger, and claims to be substituted in the place of the purchaser of the share of the joint property. If, before this can be affected, the property ceased to be joint property, it is obvious that the foundation of the right of pre-emption disappears. This view is, fortified by the second passage which is in these terms: "It is an express condition of shaffa that a man be firmly possessed of the property from which he derives his right of shaffa, all the time when the subject of it is sold, a condition which does not hold on the part of his heirs." (The author here deals with a case where the person claiming the right of pre-emption has died before a decree is made in his favour by the Qazi.) "It is moreover a condition that the property of the shafi remains firm until the decree of the Qazi be passed; and, as this does not hold on the part of the deceased shafi, the shaffa is, therefore, not established with respect to any one of his descendants, because of the failure of its conditions." It has not been seriously disputed by the plaintiff that the right of pre-emption, in order that it may be enforced by a Court, must not only arise on the sale, but be also existent at the date of the institution of the suit, for it is unquestionable upon the authorities that if a person who claims a right of pre-emption, ceases to interested in the joint property before the institution of the suit, he cannot obtain assistance from the Court. Consequently, the view cannot be maintained that the right of pre-emption which arises from the moment the sale is affected by the co-sharer is enforceable as it stands at the time of its origin; it is liable to be extinguished by events subsequent. The only point of difference between the plaintiff and the defendants is, whether the point of time with reference to which the existence of the right is to be determined is the date of the institution of the suit or the date of the decree by the Trial Court. In my opinion, for the reasons already assigned, it is plain that the right must exist and retain its enforceable character when the decree is made by the primary Court. This view was adopted in *Ram Gopal vs Piari Lal 21 A. 441: AWN (1899) 63* and *Tafazul Hussain vs Than Singh 6 Indian Case426 : 32 A. 567 : 7 ALJ 715;* these decisions are mentioned without dissent by well-known text writers such as Ameer Ali Tyabji and Wilson. It is also worthy of note that the Chief Court of the Punjab has accepted the same view in *San-Wal Das vs Our Parshad 4 Indian Case 179 : 147 PLR 1909 : 90 PR 1909 : 159*

PWR 1909, though a contrary view had been adopted in an earlier case, Faiz Baksh vs Ramjidas 34 PR 1875. In the case just mentioned, which was decided by a Full Bench of eight judges, the nature of the right of pre-emption was fully analysed by Chief Justice Clark and Mr Justice Chatterjee. Mr Justice Chatterjee observes as follows: "A pre-emptor is bound to show that he was clothed with the right at the date of sale and also at the date of suit land up to the time of the final decree or should have this claim dismissed. If the pre-emptor loses his right within the period mentioned above, whether by his own act or from causes beyond his control his suit fails. The pre-emptor cannot get a decree unless he maintains the right on which he sues to the end." Chief Justice Clark added that conceding that the plaintiff pre-emptor must retain the prior right up to the time of institution of suit and even up to decree, a plaintiff must have subsisting cause of action up to the time of decree. The possession of the property in which the right of pre-emption inheres is a part of his cause of action and if he loses that property either voluntarily or involuntarily before decree his suit must fail." This is obviously consistent with sound sense; for if the contrary opinion were accepted, the result would follow that relief by way of pre-emption may be awarded to a person who, according to the altered circumstances as they exist at the date of the decree, can show no reason whatever why he should be placed in that position of advantage."

17. We are of the view that this judgment is not exactly on the question which we proposed to settle.

18. Now let us proceed with our own decision.

19. Section 2 of the Code of Civil Procedure relates to definitions and sub-section 2 speaks 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. In AIR 1974 (SC) 1901, it is held that formal expression of an adjudication which the court conclusively and finally determines the rights of the parties with regard to all or any of the matter's in controversy in the suit. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

(a) any adjudication form which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

20. Order has been defined in sub-section 14 of section 2 means the formal expression of any decision of a Civil Court which is not a decree.

(ii) Suit.—The expression 'suit' is not defined in the Code. "The word 'suit' ordinarily means and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint.

21. Thus every suit is instituted by the presentation of a plaint. It means that when there is no civil suit, there is no decree. Thus, rejection of an application for leave to sue in forma paupeis is not a decree, as there is no plaint till the application is granted. It may, however, be noted that under certain enactment specific provisions have been made to treat the applications as suits; e.g. proceedings under the succession Act, the Arbitration Act, etc. They are statutory suits and the decisions given thereunder are, therefore, decrees. Therefore, a proceeding which does not commence with a plaint and which is not treated as a suit under any other Act, cannot be said to be a 'suit' under the Code and the decision given therein cannot be said to be a 'decree' under section 2(2) of the Code. A decision of a tribunal, even though described as 'decree' under the Act, it is a

decree passed by a tribunal and not by a court covered by section 2(2) of the code.

22. A proceeding under section 96 of the State Acquisition and Tenancy Act which though makes a formal expression of an adjudication conclusively determining the rights of the parties with regard to any matter in controversy, being not a suit as referred to in the definition of a decree in the Code of Civil Procedure, cannot be said to be a decree within the meaning of the definition of a decree given in the code as aforesaid.

23. From the settled decision essence of distinction between a decree and order seems to be in the nature of decision, rather than in the manner of expression. Thus the adjudication of a court which is not a decree is an order. Distinction between decree and order are as follows:

(i) similarities:

(a) both relate to matter's in controversy;

(b) both are decisions given by a Court;

(c) both are adjudications of a Court of law;

(d) both are formal expression of a decision given by a Court.

Dissimilarities:

In spite of above common elements, there is a fundamental distinction between the two expressions:

(a) A decree can only be passed in a suit, but an order could be given either in a suit presentation of a plaint or from by a petition or an application.

(b) A decree may be preliminary or final or partly both on the other hand there could be no preliminary order.

(c) In a suit there would be only one final decree, not more, but in a case of suit or proceeding, a number of orders may be passed.

(d) Every decree is appealable, unless otherwise expressly, provided, but every order is not appealable,only those orders are appealable as specified in the Code.

(e) A decree is an adjudication conclusively determining the rights of the parties with regard to all or any of the matters in controversy; an order on the other hand,may or may not finally determine such rights.

Elements of decree:

In order that a decision of a court may be a decree the following elements must be present:

(i) There must be adjudication, (ii) Such adjudication must have been given in a suit, (iii) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit.

(iv) Such determination must be of a conclusive nature;

(v) There must be a formal expression of such adjudication.

24 It is further to be noted that decree of suit is on plaint but order can given either on petition, application, not on plaint.

25. As per decision of *28 DLR (SC) 91*, order defined in section 2(14) of the Civil Procedure Code is analogous to a decree and generally has the essential attributes of a decree but as it arises out of a proceeding not being a suit, it does not amount to a decree. It is further held that an order allowing pre-emption under section 96(7) of East Bengal Act XXVIII of 1951 is an order within the meaning of section 2(14) Code of Civil Procedure and, as such, provision of section 36 of the Code will apply in the matter of execution of such an order "Proceeding" is a prescribed mode of action for carrying into effect a legal right. It means and includes all the steps and measures for prosecution and

defence on an action.

26. Rule-14 of order 20 CPC relates to Decree in pre-emption suit i.e. Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

(a) specify a day on or before which the purchase-money shallbe so paid, and

(b) direct that on payment into court of such purchase-money;together with the costs (if any) decreed against the plaintiff,on or before the day referred to in clause (a), the defendantshall deliver possession of the property to the plaintiff,whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct.

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule(l) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect;

and

(b) if and in so far as the claims decreed are different in degree,that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

27. Theme of this rule is to provide the procedures of decree in pre-emption suits. Rights of pre-emption is the right to be substituted in place of original vendee. Right of pre-emption can be exercised only in respect of immovable property.

28. Law on the controversy mentioned herein above but it required to be applied. It is settled three classes of persons and no other entitled to claim pre-emption under Mohammadan Law, namely—

i) a co-sharer in the property i.e. shafi-i-sharik;

ii) a participation in immunities and appendages, such as right of or right to discharge water;

iii) Owner of adjoining immovable property i.e. shafi-i-jar but not their tenants in possession of such property without any lawful title.

29 Like section 96 of the State Acquisition and Tenancy Act, first class excludes second class and second excludes third class. In the case of two or more pre-emptors of the same class, they are entitled to equal shares of property in respect of pre-empted property.

30. As per section 24(10) of Non-Agricultural Tenancy Act and section 97(17) of the State Acquisition and Tenancy Act, right of pre-emption under Mohammadan Law shall get preference as it lays down as 'Nothing in this section shall take away the right of pre-emption conferred on any person by the Mohammadan Law as such right is a personal right.

31. Mohammadan Law demand some formalities, which according to *19 DLR 759 (Mohammad Lokman Mondal vs Amir Ali Mondal and others).* Same decision also reported in *21 DLR-211.* are:-

"Requirement of making reference to talab-i-mowasibat, while making a

talab-i-ishhad is set out in Mulla's principle of Mahomedan Law at page 22: in the following terms:

"Defendants for pre-emption-No person is entitled to the right of pre-emption unless.

(1) he has declared his intention to assert the right immediately on receiving information of the sale. This formality is called talab-i-mowsabit (literally, demand of jumping, that is, immediate demand): and unless

(2) he has with the least practicable delay affirmed the intention, referring expressly to the fact that that the talab-i-mowasibat had already been and has made a formal demand (a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale and.

(c) in the presence at least of two witnesses. This formality is called talab-i-ishhad (demand with invocation of witnesses).

32. It will, therefore, be seen that after having made talab-i-mowasibat, the pre-emptor has to affirm his intention with the least practicable delay referring expressly to the fact that talab-i-mowasibat had been made. It, therefore, requires the pre-emptor to make an express reference to talab-i-mowasibat. In this case there is no finding, nor has any evidence been pointed out to me that a reference was made to talab-i-mowasibat while making talab-i-ishhad. This omission at the time of making the talab-i-ishhad is indeed fatal to the claim of pre-emption.

33. In *16 DLR 45, (Monajal Huq vs Shafiullah and another)* it is held as:

"7. A person entitled to pre-emption must make the immediate claim to the right of pre-emption called Talab-e-Mowasibat as soon as the fact of sale is known to him. The right is lost if there be any delay in claiming it. This view is supported by authorities on Muhammadan Law.

34. In Hedaya, second edition page 550, it is observed:

"Claims to Shaffa are of three kinds, the first of these is termed Talb-Mawasibat, or immediate claim, where the shafee prefers his claim the moment he is apprised of the sale being concluded, and this it is necessary that he should do, in so much that he make any delay his right is thereby invalidated, for the right of Shaffa is but of a feeble nature, as has been already observed, and the Prophet, moreover has said the established in him who prefers his claim without delay."

35. If the Shafee receive a letter which, either in the beginning or the middle, apprises him of the circumstances of his Shaffa, and he read it on to the end, his right of Shaffa is thereby invalidated. Many of our modern doctors accord in this opinion, and it is in one place recorded as the doctrine of Muhammed"

8. In Baillie's Digest of Muhammadan Law Part I, second Edition, at page 487, there is the following observation in which the law on the point is stated :—

"The right of pre-emption is founded on contract and neighbourhood, is confirmed by tulab, or demand, and ish-had, or invocation, and is perfected by taking possession. The demand is of three kinds, tulab-i-moowathubut, or immediate demand, tulub tukreer, or confirmatory demand, also styled tulub-ishhad, or demand with invocation, and tulub tumleek, or demand of possession also styled tulub khusoomut, or demand by litigation.

36. By tulub-i-moowathubut is meant, that when a person who is entitled to pre-emption has heard of a sale, he ought to claim his right

immediately on the instant (whether there is any one by him or not), and when he remains silent without claiming the right, it is lost."

37. 10. In the case of Jadu Lal Sahu and others vs Maharaji Jnki and others, the following observation was made by their Lordships of the Privy Council:

> "The Mussalman Law insists that the first formality technically called the immediate demand should be observed by the pre-emptor or some one on his behalf immediately on receipt of the news of the sale otherwise the right of pre-emption falls to the ground."

38. Now to the point in our hand. In rare cases this type of conflict arises. After searching through different law digest of India, Pakistan and Bangladesh, I could find one such type of case reported in *AIR 1936 Cal. 398 (Rai Nalinaksha Dutta Bahadur vs Kazi Abdul Jalil),* it is held as:

> "On getting the notice the petitioner made an application for pre-emption under S. 26-F, Tenancy Act, in the Court of Second Munsif at Krishnagar on 6th June 1934. The transferees, namely opposite parties 1 to 3 were made parties defendants to that application. While this application was pending Muhamad Soleman instituted in the same Court a suit to enforce the right which he had to pre-empt under the Mohammedan law. The landlord was made defendant 10. This suit for pre-emption and the application under section 26-F were heard together and one judgment was pronounced. ***At the date of the order, in Misc. Case No.42 of 1935 the right, title and interest in the holding had already vested in Mohamed Soleman by reason of the pre-emption decree in the suit. There was no right, title and interest left to opposite parties 1 to 3 on which the pre-emption order, if made under S. 26-F, sub-section (5), can operate. That is to my mind a difficulty in the way of the landlord in the present case. The title in the holding which formerly belonged to the Kolas has now vested in Mohamed Soleman. There can be no order for pre-emption against Mohamed Soleman by reason of the provision of S.26-F, sub-section (1), Clause (a) ." Wherein it is held that competition between the right given under Mohammadan Law and right created under statutes, the right under the former will prevail. If plaintiff of suit under Mohammadan Law, whether heard analogously, simultaneously or separately, succeed on merits the application under the provision of statutes should be dismissed."

39. As such we are of the view that the decision passed in the instant suit prevailed over the compromise order obtained in the miscellaneous case. In the present case, plaintiff did make the immediate demand, that is, he did perform the ceremony of talabe mowasibat immediately on coming to know of the sale and also talab-i-ishad in presence of witnesses, which the PWs univocally proved. Moreover, section 24(10) of Non Agricultural Tenancy Act and section 96(17) of the State Acquisition and Tenancy Act speak that right of pre-emption under Muhammadan Law shall prevail which cannot be defeated by these statutory laws. We find no substance in these rules.

40. In the result, both the rules i.e. Civil Revision No.1769 of 2012 with Civil Revision No. 1772 of 2012 are discharged. No costs.

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

Before parting with the decision we appreciate both the parties particularly Mr Md Ziaul Haque, learned Advocate for enlighting us on this subject.

Ed.

High Court Division
(Original Civil Jurisdiction)

Zubayer Rahman Chowdhury J

Bangadesh Power Development Board (BPDB) .....Petitioner

vs

Summit Industrial and Mercantile Corporation (Pvt.).....Respondents*

Judgment December 9th, 2012.

Arbitration Act (I of 2001)
Sections 7A and 20

The parties clearly intended that any dispute arising between them should be settled through arbitration. The express intention is re-enforced by clause 19.4(h), which stipulates that the parties to be agreement irrevocably agree not to initiate any proceeding, file any action or suit in any Court of competent jurisdiction except proceedings for the purpose of recognition and enforcement of the arbitral award. The scope for approaching the Court for determination of any issue including the jurisdiction of the arbitral tribunal has been expressly excluded by both the parties in writing. The incumbent, being a citizen of Bangladesh, appears, *prima facie*, to be disqualified to be appointed as arbitrator for settlement of any dispute between the parties, as per the provisions of clause 19.4 (c) of the RPF. .....(23 & 25)

Forrukh Rahman, Advocate with Husainul Kabir, Advocate—For the Petitioner.

Karishma Jahan, Advocate with Narita Navin Khan, Advocate—For Respondent Nos. 1 & 2.

Judgment

Zubayer Rahman Chowdhury J: Supplementary affidavits dated 6-12-2012 do form part of the substantive applications both in Arbitration Application No. 18 of 2012 and Arbitration Application No. 19 of 2012.

2. Arbitration Application No. 18 of 2012 is at the instance of Bangladesh Power Development Board (briefly, BPDB) under section 20 read with section 7A of the Arbitration Act, 2001 seeking an order dismissing the Arbitral Tribunal along with an interim order staying the arbitration proceeding of the said Arbitral Tribunal with regard to the settlement of a dispute between the parties with regard to the development of HFO Fired Power Generation Facility of 104, 4108 MW at Syedpur, Bangladesh.

3. Arbitration Application No. 19 of 2012 is also at the instance of Bangladesh Power Development Board (briefly, BPDB) under section 20 read with section 7A of the Arbitration Act, 2001 containing a similar prayer as the one made in Arbitration Application No. 18 of 2012, however, in relation to a different project at a different location, namely, the construction of HFO Fired Power Generation Facility of 104, 4108 MW at Shantahar, Naogaon, Bangladesh.

4. It is to be noted that the construction of both the projects were to be undertaken by Summit Industrial and Mercantile Corporation (Pvt) Ltd (respondent No.1).

5. Since the petitioners and the respondents in both the Arbitration applications are one and same and since the issues involved in the two Arbitration applications are identical, they were heard together and are being disposed of by this single judgment. Mr Forrukh Rahman, the learned Advocate appears along with Mr H Kabir, Advocate for the petitioner, while the respondents are being represented by Ms Karishma Jahan, Advocate appearing with Ms Narita Navin Khan, Advocate.

6. Mr Forrukh Rahman, the learned Advocate appearing in support of both the applica-

*Arbitration Application Nos. 18 & 19 of 2012.

tions submits that the opposite-parties had initiated the Arbitration proceeding for settlement of the alleged dispute between the parties. Mr Rahman has challenged the formation of the Tribunal on a substantive ground as well as a procedural ground. As regards the substantive ground, Mr Rahman submits that the reference to Arbitration made by the opposite-party is without any basis whatsover in as much as, no contract has been executed between the parties and therefore, the invocation of the Arbitration clause and the subsequent reference to Arbitration is absolutely without any basis. Mr Rahman further submits that, from a procedural point of view, even if it is accepted, but not conceded, that there is a validly concluded agreement between the parties, the constitution of the Arbitral Tribunal with a sole Arbitrator is not tenable in law in view of the fact that the sole Arbitrator happens to be a shareholder in the holding company of the opposite-party.

7. Elaborating his submission, Mr Rahman submits that it is evident from Annexure Gl of the application that the sole Arbitrator appointed by the opposite-party is a shareholder in the said company. Mr Rahman submits that due to such conflict of interest the sole Arbitrator is disqualified to act as an Arbitrator for settlement of any dispute between the parties.

8. Mr Rahman has strenuously argued that even through, in the meantime, the sole Arbitrator has resigned and a new Arbitrator has been nominated in his place, nevertheless, since both the parties have already appeared before this very Court, it would be proper if the dispute is settled before this Court rather than referring the matter back to Arbitration.

9. Placing reliance on the provision of section 20 of the Arbitration Act 2001, Mr Rahman submits that this Court is empowered to decide the dispute between the parties when such determination by this Court is likely to produce substantial saving in cost. Mr Rahman submits that the petitioners have fulfilled the other two requirements as laid down in section 20 of the Act and, therefore, there is no reason while the matter should not be settled by this Court.

10. Both the applications are being opposed by the respondents by filing respective affidavits-in-opposition.

11. Ms Karishma Jahan, the learned Advocate appearing on behalf of the opposite-party submits that the instant application has become somewhat infructuous as because the concerned Arbitrator has already resigned from his position as sole Arbitrator pursuant to filing of the application by the respondents and a new Arbitrator has already been appointed in his place. Ms Jahan further submits that it is open to the petitioner to accept the new Arbitrator nominated by the opposite-party to act as sole Arbitrator for settlement of the dispute between the parties.

12. Turing to a more substantive issue, Ms Jahan submits that it is incorrect that there is no agreement between the parties. Referring to the Request for Proposal (briefly, RIP) as well as the letter of intent (briefly, LoI), Ms Jahan submits that from a combined reading of the two, it is evident that, the opposite-parties intended to enter into a contract upon settlement of the initial issues between them.

13. Referring to Annexure 1 of the affidavit-in-opposition dated 17-7-2012, Ms Jahan submits that the concerned sole Arbitrator, against whom the petitioner had a grievance on the ground that he was a shareholder in the respondent company, had already tendered his resignation from the office of the sole Arbitrator on 5-7-2012. Ms Jahan further submits that subsequently, the opposite-party has appointed Mr Manzur Hasan, Barrister-at-law as the sole Arbitrator and had also intimated the same to the petitioner by letter dated 15-7-2012. There-

fore, according to Ms Jahan, the first limb of the petitioner's grievance, so far as it relates to the appointment of the sole Arbitrator, does not hold good any further.

14. In response to the argument advanced by Mr Rahman as to the non-existence of a formally executed agreement or contract between the parties, Ms Jahan submits that a conjoint reading of the RPF and LoI makes it abundantly clear that the parties have entered into a contractual relationship and therefore, it is both proper and legal for the opposite-party to invoke the Arbitration proceeding for settlement of the dispute between the parties.

15. Refuting the argument advanced by Mr Rahman with regard to the cost/expenses of the Arbitration proceeding under section 20 of the Act, Ms Jahan submits that the projects in respect of which the dispute arose between the parties runs into hundreds of crores of Taka and therefore, a fee of Taka 1,00,000 per day for the sole Arbitrator, which is to be borne equally by both the parties, is too insignificant to attract the provision of section 20 (2) (a) of the Act. Ms Jahan concludes her submission with a prayer that the Arbitration proceeding before the sole Arbitrator may be allowed to proceed.

16. I have perused the applications, the connected documents and the relevant provisions of law. I have also considered the submissions advanced and the decisions cited by the learned Advocates of the contending sides.

17. At the very outset of my discussion, it would be pertinent to refer to section 20 of the Arbitration Act, 2001, which reads as under :

> "20. Powers of the High Court Division in deciding jurisdiction -(1) The High Court Division, may, on the application of any of the parties to the arbitration agreement, after serving notice upon all other parties, determine any question as to the jurisdiction of the arbitral tribunal.
>
> (2) No application under this section shall be taken into account, unless the High Court Division is satisfied that-
>
> (a) The determination of the question is likely to produce substantial savings in costs.
>
> (b) The application was submitted without any delay; and
>
> (c) There is good reason why the matter should be decided by the Court.
>
> (3) The application shall state the reasons on which the matter should be decided by the High Court Division.
>
> (4) Unless otherwise agreed by the parties, where any application is pending before the High Court Division under this section, the arbitral tribunal shall continue arbitration proceedings and make an arbitral award."

18. Having noted the relevant provisions of law, bet me now turn to the request for Proposal (RFP) which contains certain provisions with regard to settlement of dispute between the parties.

19. The provisions with regard to settlement the dispute between the parties are contained in section 19(4) of the request for Proposal, which reads as under,

> "In the event that (i) any request for arbitration made in pursuance of section 19.4 (a) and Article 6 of the Convention is not registered by the Secretary-General under Article 36(3) of the Convention or (ii) the Centre or the arbitral tribunal fails or refuses to assume or to exercise jurisdiction or to continue to exercise jurisdiction with respect to any dispute referred to it or (iii) for any other reason the Dispute cannot be finally determined by arbitral proceedings pursuant to the ICSID Rules, then any such dispute shall be determined by means of arbitration in accordance with the Rules of

Arbitration of the International Chamber of Commerce ("the ICC Rules"), provided, that, notwithstanding the foregoing, any arbitration to be conducted in Dhaka, Bangladesh pursuant to this section 19.4 shall be carried out under the provisions of Bangladesh Arbitration Act of 2001, (Act I of 2001)."

20. Section 19.4 (c), (d) and (e) read as under :

"19.4 (c) Any arbitral proceeding under this section 19.4 shall be conducted in Dhaka, Bangladesh; provided, that if the Company desires that the arbitration be conducted outside of Bangladesh, the arbitration shall be carried out at the seal of the Singapore International Arbitration Centre in the Republic of Singapore and the Company shall pay all of BPDB's costs of the arbitration, as and when incurred by BPDB, including the out of pocket costs of the arbitration of BPDB in excess of the costs that would have been otherwise incurred by BPDB had the arbitration been conducted in Dhaka, Bangladesh (the "incremental Costs"). The arbitrator shall resolve any disputes as to whether a cost would have been incurred in connection with the arbitration in Dhaka, Bangladesh or are incremental costs. The arbitrator may order that BPDB bear its own incremental costs in part or in full if he find that BPDB's claim or defence in the arbitration was spurious and without any merit whatsoever, and BPDB shall pay the amount ordered; provided, however, that if a matter in dispute involves a sum of U.S. ten million Dollars or more, or the legality, validity or enforceability of this Agreement, or the termination of this Agreement, the arbitration shall, unless otherwise agreed by the parties, be conducted in Singapore, and, in such case, each Party shall pay its own costs of arbitration as and when incurred, unless such cost's are ordered by the arbitrator to be paid by one Party, in which case they shall be paid by such Party."

(d) The Parties agree that the arbitral tribunal constituted in pursuance of a request for arbitration made under Section 19.4 (n) or (b), shall consists of a sole arbitrator or, if the Parties agree, three arbitrators, two of which shall be appointed by the Parties and the third arbitrator appointed by the two Party selected arbitrators who shall be a person who has held judicial office for a period of not less than three (3) years in a court of record in England or in a jurisdiction whose laws are substantially derived from the common law of England.

(e) No arbitrator appointed pursuant to this section 19.4 shall be a national or resident of the jurisdiction of either party or of any shareholder or group of shareholders owing directly jurisdiction of either Party or of any shareholder or group of shareholders owing directly or indirectly five percent (5%) or more of the Ordinary Share Capital, nor shall any such arbitrator be an employee or agent or former employee or agent of or have any material interest in the business of or in any Party or any such person."

21. Section 19.4 (h) reads as under :

"19.4 (h) Until such time as any arbitral proceedings begun in pursuance of section 19.4(a) or (b) have been finally concluded (and, for this purpose, all rights of appeal, if any, shall have been exhausted), each Party irrevocably agrees not to initiate any proceedings, file any action or suit in any court of competent jurisdiction or before any judicial or other authority arising under, out of, in connection with or relating to this Agreement, the arbitration agreements set forth in this section 19.4, any Dispute (whether or not any such Dispute

shall have been referred to arbitration in pursuance of Section I9.4(a) and (b), the subject matter of any Dispute or any arbitral proceeding begun, in pursuance of Section 19.4(a) or (b), including without limitation (i) proceedings brought with a view to recourse or appeal against or revision or the annulment of any arbitral award or procedural order made by the arbitral tribunal or proceedings or (ii) proceedings in which relief or remedy is sought by way of injunction or other judicial order (interlocutory or final) which would have the effect (directly or indirectly) of restraining or impeding the maintenance or prosecution by either Party of any arbitral proceeding initiated in pursuance of Section 19.4(a) or (b), except proceedings brought exclusively for the purpose of recognition and enforcement of any arbitral award or procedural order made by the arbitral tribunal."

22. Section 19.05 (a) (iii) reads as under:—

"(a) .....

(i) .....

(ii) .....

(iii) it consents generally to the jurisdiction of, any court of competent jurisdiction (including courts in Bangladesh) for any action tiled by the Company to enforce any award or decision of any arbitrator who was duly appointed under this Agreement to resolve any Dispute between the Parties (including without limitation, the making, enforcement or execution against or in respect of any of its assets (other than the Protected Assets) regardless of its use or intended use and specifically waives any objection that any such action or proceeding was brought in an inconvenient forum and agrees not to plead or claim the same. BPDB agrees that service of process in any such action or proceeding may be affected in any manner permitted by the law applicable to the aforementioned court."

23. A careful perusal of the provisions, quoted above, leaves no room for doubt that the parties clearly intended that any dispute arising between them should be settled through Arbitration. The express intention is re-enforced by clause 19.4 (h), which stipulates that the parties to be agreement irrevocably agree not to initiate any proceeding, file any action or suit in any Court of competent jurisdiction except proceedings for the purpose of recognition and enforcement of the Arbitral award. Therefore, the scope for approaching the Court for determination of any issue including the jurisdiction of the Arbitral Tribunal has been expressly excluded by both the parties in writing.

24. However, there is another issue which appears to have been overlooked by both the sides. Clause 19.4(e) of the RPF reads as follows:

"No arbitrator appointed pursuant to this Section 19.4 shall be a national or resident of the jurisdiction of either Party."

25. From the affidavit-in-opposition dated 17-7-2012 it appears that the respondents have appointed Mr Manzur Hasan, MBA, Barrister-at-law as Arbitrator for settlement of the dispute between the parties. The incumbent, being a citizen of Bangladesh, appears, *prima facie,* to be disqualified to be appointed as Arbitrator for settlement of any dispute between the parties, as per the provisions of clause 19.4 (c) of the RPF.

26. Therefore, having regard to the facts and circumstances of the case and the relevant

provisions of law as contained in the Arbitration Act, 2001 as well as the relevant provisions contained in the RPF, this Court is of the view that the dispute, if any, between the parties is to be settled through Arbitration and the parties are to appoint the Arbitrator (s) in accordance with this stipulation made in the RPF.

27. With the observations made above, both the Arbitration Applications are hereby disposed of.

28. There will be no order as to cost.

Ed.

High Court Division
(Civil Appellate Jurisdiction)

Sharif Uddin Chaklader J
Md Shawkat Hossain J

Judgment
May 3rd, 2010.

Raihan Nazrul and others...Appellants
vs
Abul Khair and others.....
.....Respondents*

Registration Act (XVI of 1908)
Section 47

A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. .....(10)

Transfer of Property Act (IV of 1882)
Section 52

Section 52 of Act protect the right of a transferee that pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent. It operate in a suit where the rights to immovable property are involve and transaction is subject to the decree of the Court. .....(13)

Transfer of Property Act (IV of 1882)
Section 52

When plaintiffs purchased the suit property in 1987 when the suit of defendant was pending as such, the transaction in favour of plaintiffs during continuation of the suit is hit by doctrine of lis pendency. Transaction of the plaintiffs is hit by section 52 of the Act i.e. lis-pendency and the plaintiffs of the suit will be abide by the decree passed against their vendor and by virtue of the decree the suit land was transferred to defendant No.1 from the date of execution of bainama i.e. from 1985 as such, when the suit land was transferred to the plaintiffs, plaintiffs did not acquire any title but only they purchased litigation on some paper transaction. .....(18)

KM Zahirul Haque vs Shahida Khanam, 12 BLC (AD) 65; Jamaluddin vs Rabeya Begnm, 32 DLR 63; Muzaffor Ali vs Monwora Hospital, 19 BLD 484 = 51 DLR 341; Hochenaddi Shaikh vs Esrnail Sikder, 9 DLR 294; Debendra Chandra Saha, decree-holder vs Nabin alias Nalini Chandra Pal, 7 DLR 186; Secretary, Board of Trustee, RAJUK Karmachari Kalyan Trust vs Dhaka City Corporation and others, 2 MLR (AD) 101; Abdur Rashid vs Abdul Bashir, 20 BLD (AD) 262 = 5 BLC (AD) 185; Mir Abdul Ali vs Md Rafiqul Islam, 8 BLD (AD) 149 = 40 DLR (AD) 75, Haji Md Ishaque vs Rupali Bank, 43 DLR 621 and Azizuddin vs Abu Taleb Sarder, 35 DLR 360 ref.

Md Shah Alam, Advocate with Md. Serajul Islam Miah, Advocate—For the Appellants.

Abdul Wadud Bhuiyan, Advocate—For the Respondents.

*First Appeal No.90 of 2007.

Judgment

Sharif Uddin Chaklader J : This appeal by the defendants directed against judgment and decree dated 18-1-2007 passed by the learned Joint District Judge, first Court, Narayangonj decreeing Title Suit No.80 of 1999.

2. Plaintiff-respondents instituted the aforesaid suit for declaration of 16 annas title of 'ka' schedule land and further declaration that the decree passed in Title Suit No.20 of 1995 on 18-7-1996 by the learned Additional Subordinate Judge Narayangonj, to be declared as void, illegal, collusive and not binding upon the plaintiffs. With further declaration that kabala deed in favour of the defendants as mentioned in 'kha schedule to be declared as illegal, fraudulent not acted upon with the averments that the suit land was originally belonged to Ashutosh Chandra Bondhopaddhya and later on, the father of defendant No.2, Kalu Mia, by a registered deed in 1950 purchased the suit land and thereafter, on amicable partition, defendant No.2 got absolute title over the suit land. Defendant No.2 having in need of money, gave out selling of the suit land, to which, plaintiffs agreed and by 12 saf kabalas plaintiffs purchased the suit land on 3-12-87, 6-12-87 and 9-12-87 and after purchase, plaintiffs mutated their names and opened separate khatians and gradually, constructed pucca and kanccha homesteads, giving rents to different tenants and by realizing rents, plaintiffs are enjoying the suit properties. In the first week of July, 1999, plaintiffs found process server of the Court loitering on the suit property. Plaintiff No.2 came to learn from the process server that defendant No.1 obtained a decree over the suit property in connivance with men of the Court and wanted to take delivery of the suit property. Plaintiff No.2 went to Court and through the lawyer, came to know that defendant No.1 filed Other Class Suit No.20 of 1995 against defendant No.2 for specific performance of a contract and obtained a decree by suppressing the real fact and by executing in Title Execution Case No.4 of 1996, obtained saf kabala deed through court. Plaintiffs getting such knowledge, filed an application under section 151 of the Code of Civil Procedure for staying the proceeding of Title Execution Case No.4 of 1996 which was fixed for hearing on 28-7-1999. The plaintiffs obtained entire order sheets including the judgment and decree of Title Suit No.20 of 1995 on 25-7-1999 and came to know that for entire suit land the price of the suit property was fixed at Taka 2,40,000 and after taking Taka 10,000 from defendant No.1, defendant No.2 executed bainama on 9-9-1985 and on the strength of the said baina defendant No.1 filed Title Suit No.246 of 1987 in the Court of Subordinate Judge, first Court, which was transferred to the Court of Additional Subordinate Judge, first Court and re-numbered as Title Suit No.20 of 1995, in which defendant No.2 filed written statement but did not contest the suit and in connivance with defendant No.1, allowed the suit decreed exparte on 18-7-1996. In that suit, defendant No.2 in written statement stating that the period mentioning in the bainama being expired, defendant No.1 having not paying the balance consideration money, said baina was cancelled and defendant No.2 sold the property to different persons. Plaintiffs being subsequent purchasers with valuable consideration without notice of the alleged bainapatra and having been in possession of the suit land from 3-12-1987 by constructing pucca, semi-pucca structure on the suit land but defendant No.1 obtained decree in Title Suit No.20 of 1995 stating in the plaint that defendant No.1 is in possession of the suit land from 9-9-1985 and obtained the aforesaid decree fraudulently.

3. Appellant as defendant No.1 contested the suit by filing written statement wherein appellant disclosed that he being a simple school teacher, agreed to purchase the suit land at Taka 2,40,000 and out of that money he paid in cash Taka 10,000 to defendant No.2 and

baina was executed on 9-9-1985 with condition that kabala deed is to be executed and registered within 3 months and if defendant No.2 did not act as per terms of the baina then defendant No.1 through Court can execute and register the kabala. Defendant No.2 on 17-9-1985 took further Taka 12,000 as per terms of the bainapatra and defendant No.1 was prepared with remaining Taka 2,18,000 and through his witness, requested defendant No.2 to execute and register the kabala but defendant No.2 did not execute and register the kabala on this and that pretext. Defendant No.2 while trying to sell the suit land to some other persons, defendant No.1 instituted Criminal Case No.30 (7)86 with Demra police station. The local people knew about the bainapatra and when defendant No.2 was not agreeable despite requested of the plaintiffs to execute and register the kabala, on 27-6-1987 he instituted the suit.

4. In the suit, defendant No.2 also filed written statement almost supporting the case of the plaintiffs.

5. In the suit plaintiffs' examined 7 witnesses and for the defendants' 8 witnesses were examined.

Learned Judge decreed the suit.

6. In the body of the judgment the learned Judge found *inter alia* that it is admitted position that defendant No.2 executed a bainama in favour of defendant No.1 on 9-9-1985. Learned Judge also found that the deeds in favour of the plaintiffs are of 3-12-1987, 6-12-1987 and 9-12-1987. Learned Judge also found that bainapatra in point of time was earlier then the deeds in favour of plaintiff. Learned judge thereafter put a question on himself as to whether plaintiffs aware of the bainapatra and whether defendant No.1 after the bainapatra got delivery of possession and answered that plaintiffs were in possession of the suit property after the kabala executed by defendant No.2 in favour of the plaintiffs. Learned Judge further found that defendant No.1 got possession of the suit land on executing decree passed in Title Suit No.20 of 1995. Learned Judge, thereafter, found that although the bainapatra was executed in 9-9-1985 but possession was not delivered to defendant No.1. Learned judge upon an application for mandatory injunction filed on 1-2-2000 directed defendant No.1 to give delivery of possession of the suit land to the plaintiffs by order dated 6-2-2000. Learned Judge thereafter hold that by executing a bainapatra, no title was establish in favour of the bainapatra holder and although bainapatra was executed earlier but no title was passed in favour of defendant No.1 and by saf kabala deed the title of the plaintiffs have been established over the suit property. Learned Judge also found that pursuant to the decree obtained in Title Suit No.20 of 1995, the saf kabala deed was executed and registered on 1-12-1997. Learned Judge also found that deeds were registered in 1997 but the suit land already transferred to the plaintiffs in 1987. Learned judge thereafter held that defendant No.2 ought to implead plaintiffs in Title Suit No.20 of 1995 and the plaintiffs although being necessary parties, they were not impleaded in that suit and further held that although in the bainama it was stipulated execution and registration of the deed within 3 months from the date of execution of bainama but that have not been done as such the bainama stand as void. Learned Judge thereafter hold that defendant No.1 in this way, failed to prove that during the period of bainama, defendant No.1 ever made 'Tagid' to defendant No.2 for executing and registering the saf kabala deed. Thereafter, the learned judge held that defendant No.1 as plaintiff, failed to prove the bainama patra and also execution payment of the consideration money. On the question of possession by defendant No.1, learned judge held that defendant No.1 with some miscreants (shontrashi lok) dismantle 13 premises of the plaintiff out of 17 premis-

es and looted away the valuables. Thereafter, learned Judge decreed the suit.

7. Mr. Md. Shah Alam, learned Advocate appearing for the appellants assail the judgment particularly on the ground that Other Class Suit having been filed prior to the kabala of these plaintiffs and common vendor of the plaintiffs, defendant No.l contested the earlier suit by filing written statement the transaction made in favour of the plaintiffs is hit by section 52 of Transfer of Property Act. Learned Advocate submits that, during continuation of the suit if there be any change made by any parties by transfer, the purchaser will be bound by the result of the suit. Learned Advocate on reference to the plaint, submits that, from the plaint it appears that plaintiff admitted that bainapatra was executed on 9-9-1985 and defendant No.l filed Title Suit No.246 of 1987 on 19-6-1987 and the plaintiffs admitted that they have purchased the suit land in December, 1987 as such all transactions is hit by principal of lis-pendency. Learned Advocate relied on the decisions of *KM Zahirul Haque vs Shahida Khanam, 12 BLC (AD) 65,* the case of *Jamaluddin vs Rabeya Begnm, 32 DLR 63,* the case of *Muzaffor Ali vs Messrs Monwora Hospital, 19 BLD 484 = 51 DLR 341,* the case of *Hochenaddi Shaikh vs Esrnail Sikder, 9 DLR 294,* the case of *Debendra Chandra Saha, decree-holder vs Nabin alias Nalini Chandra Pal, 7 DLR 186.*

8. Mr Abdul Wadud Bhuiyan, learned Advocate, appearing for the plaintiff-respondents, on the other hand, submits that, in the instant case the question calls for determination as to whose documents executed earlier. Learned Advocate further submits that, it is not denied that the deed of the plaintiffs were later in point of time than the bainama of the defendant No.l but the kabalas of the plaintiffs executed much earlier than the kabala of the defendant No.l which was executed in 1997 and on reference to section 47 of the Registration Act, submits that, section 47 of the Registration Act provides when there is conflict in between the parties as to their purchase from the same vendor the question of title to be acquired by the person whose deed was executed earlier and submits that since the deed of the plaintiffs being earlier in point of time before the kabala of the defendant No.l executed through Court and by this time the suit property transferred to the plaintiffs and after kabalas, plaintiffs mutated their names, paying rents and taxes and also constructed pucca and semi pucca structures on the suit land, as such deed in favour of the plaintiffs acted upon, as such the decree passed by the learned judge should not be interfere. Learned Advocate in support of his submission relied on the decision of *Secretary, Board of Trustee, RAJUK Karmachari Kalyan Trust vs Dhaka City Corporation and others, 2 MLR (AD) 101,* the case of *Abdur Rashid vs Abdul Bashir, 20 BLD (AD) 262 = 5 BLC (AD) 185,* the case of *Mir Abdul Ali vs Md Rafiqul Islam, 8 BLD (AD)149 = 40 DLR (AD) 75,* the case of *Haji Md Ishaque vs Rupali Bank, 43 DLR 621.*

9. In this case the simple question calls for determination as to whether the instant suit is governed by section 47 of the Registration Act or by section 52 of the Transfer of Property Act. Let us quote both the sections.

10. Section 47 of the Registration Act speaks time from which registered document operates- A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

11. Section 52 of the Transfer of Property Act speaks that during the pendency in any Court in Bangladesh of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit

or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

12. Lis means a suit and pendents means pending and it imposes conditions,

(i) The existence of a continuous suit,

(ii) Transfer took place during its active prosecution.

(iii) Its a constructive notice to a purchaser that he will be bound by the decree of the suit.

13. Having noted the character of the people of this region as they can do anything for self interest, law makers in section 52 of Transfer of Property Act protect the right of a transferee that pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent. It operate in a suit where the rights to immovable property are involve and transaction is subject to the decree of the Court.

14. Section 47 of the Registration Act as we see is that if there be any conflict in between two parties of the same property transferred by same vendor then the deed in favour of person executed earlier will prevail over the other deed, when the deed registered then it will take effect from the date when it was executed. In the case of *Azizuddin vs Abu Taleb Sarder, 35 DLR 360,* where the Court found the defendant's kabala was executed earlier than the plaintiffs kabala which though executed later was, however, registered before the defendant's kabala; it was held that execution of the defendant's Kabala being earlier in point of time will have precedence over the plaintiff's kabala.

15. Mr Wadud Bhuiyan, learned Advocate, on section 47 of the Registration Act relied on the case of *Mir Abdul Ali vs Md Rafiqul Islam, 8 BLD (AD)149 = 40 DLR (AD) 75,* where the question was when there be successive documents of transfer by self-same vendor, question as to which document is valid and it was decided that 'a document that has been registered relates back to the date of its execution. The question of title as between the two contestants claiming on the basis of successive documents executed by the self-same vendor must be determined with reference to the title to the later on the date of execution and not of registration'. Other decisions cited by the learned Advocate for the plaintiff respondent were of the same line.

16. The fact is that common vendor in the instant case executed the baina in 1985 and kabala in 1987; defendant No.l filed suit in 1987 which was decreed in 1997 and kabala was registered in 1997, as such, even we fall back on section 47 of the Registration Act then also the title passed to defendant No.l from the date of execution of the bainama i.e. from 1985. The decisions cited by the learned Advocate for the plaintiff-respondents also propounded same proposition of law that registration of the document goes back to the date of execution.

17. The question calls for determination as whether the plaintiffs' suit is maintainable on the ground of lis-pendency. It appears from the plaint that plaintiff purchased the suit property subsequently when the suit of defendant No.l was already filed and proceeded. The best case for the plaintiff is that plaintiffs kabalas being registered document and defendant No.l is armed with only a bainama through which title did not pass, but since the suit was decreed that title of the suit land was passed to defendant No.l from the date of execution of baina in 1985 i.e. before registration of kabala of the plaintiffs which were registered in 1987. In the instant suit the question is very much clear that when the suit was filed in 1987 plaintiffs even did not

go near to the suit property as their kabalas were executed more than two years after institution of the suit.

18. It is an admitted fact that when plaintiffs purchased the suit property in 1987 when the suit of this defendant appellant i.e. Title Suit of 1987 was pending as such, the transaction in favour of plaintiffs during continuation of the suit is hit by doctrine of *lis pendency*. Transaction of the plaintiffs is hit by section 52 of theTransfer of Property Act i.e. lis-pendency and the plaintiffs of the instant suit will be abide by the decree passed against their vendor in Suit No.20 of 1995 and by virtue of the decree passed in Suit No.20 of 1995, the suit land was transferred to defendant No.l from the date of execution of bainama i.e. from 1985 as such, when the suit land was transferred to the plaintiffs, plaintiffs did not acquire any title but only they purchased litigation on some paper transaction.

19. The plaintiffs claimed that defendant No.2 in his written statement disclose the fact that he has already transferred the suit land to some one. We have gone through the written statement but no where defendant No.2 stated to whom he has sold the suit land as such we are of the view that this statement made by the defendant No.2 is totally vague and on the basis of vague statement no one can be brought into the suit or impleaded in the suit.

20. We find substance in this appeal.

21. In the result, this appeal is allowed without any order as to costs.

22. The impugned judgment and decree dated 18-1-2007 passed by the learned Joint District Judge, Narayangonj in Title Suit No.80 of 1999 is set-aside. The suit is dismissed.

Send down the lower Court records at once.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Sheikh Hassan
Arif J
Mustafa Zaman Islam J
Judgment
October 10th, 2013.

Shajeda Begum.....
.....Informant-Appellant

vs

State and another.....
.....Respondents*

Nari-o-Shishu Nirjatan Daman Ain (8 of 2000)
Section 28

Mere mentioning of the words 'person aggrieved' in an observation under paragraph-13 has no bearing or any manner of application in the issue either raised in *MK Malaker's case* or in the present case. The disagreement of the said Bench in *MK Malaker's case* with the decision of *Feroza Begum's case [40 DLR 161]* was not in fact based on the ratio decidendi, or even obiter made, by the Appellate Division in *Abdul Halim's case*. In so far as such reliance on the Appellate Division's ratio to disagree with the decision in *Feroza Begum's Case* is concerned, the decision in MK Malaker's case is per-incuriam. The decision in *Fefoza Begum's Case, 40 DLR 161,* is the correct proposition of law and the same is supported by the ratio emerged from the decision of the Appellate Division in *Fazar Ali's case, 43 DLR (AD) 129.* .....(12)

MK Malaker vs State, 42 DLR 349; Fazar Ali vs Fazar Ali, 43 DLR (AD) 129; Feroza Begum vs. Hormuz Ali, 40 DLR 161 and Abdul Halim vs Member, Appellate Tribunal, 34 DLR (AD) 309 ref.

MA Quddus, Advocate with AKM Haibur Rahman, Advocate—For the Appellant.

KM Zahid Sarwar, DAG with Md. Ali Zinnah, AAG

*Criminal Appeal No. 1118 of 2013.

and Yesmin Begum Bithi, AAG—For the Respondent No.1.

Judgment

One Mrs Shajeda Begum, informant and alleged victim of Nari-o-Shishu Case No. 193 of 2011, arising out of Purbadhala PS Case No. 7(8)2011 under sections 9(1) of the Nari-o-Shishu Nirjaton Daman Ain, 2000 (amended upto 2003) ("the said Ain"), has preferred this appeal against order dated 07-1-2013 passed by the Nari-o-Shishu Nirjaton Daman Tribunal, Netrakona ("the Tribunal")in the aforesaid case rejecting her Naraji application filed against final report submitted by the investigating officer.

2. The core question, as has arisen in this matter, is whether the aforesaid appeal, as preferred by the said informant in a government register case against order passed by the Tribunal, is maintainable under section 28 of the said Ain.

3. The background, in short, is that upon a petition of complaint lodged by this appellant with allegations of rape against respondent No. 2, the Tribunal sent the said complaint to the concerned police station for treating the same as FIR. Thereupon, Purbadhala Police Station case No. 07(8)11 dated 10-8-2011 under section 9(1) of the said Ain commenced against respondent No.2. Police, however, after investigation, found the allegations false and, accordingly, submitted Final Report Untrure No. 46 dated 22.10.2011 recommending legal action against the appellant for lodging false case. The appellant then filed Narazi against the said Final Report, whereupon the Tribunal directed the concerned Police Station to do further investigation. The further investigation of the case having also ended up with final report, being Final Report Untrue No. 32 dated 16-6-2012, with the same recommendation of taking action against her, the appellant filed further Narazi against the same, whereupon the Tribunal, by impugned order dated 7-1-2013, rejected the same and, accordingly, discharged respondent No. 2 from the case upon accepting the said final report. Being aggrieved by this order dated 7-1-2013, the appellant now has preferred this appeal purportedly under section 28 of the said Ain. Thus, the question arises whether this very purported appeal is maintainable at all in view of the provisions of appeal under section 28 of the said Ain read with the relevant provisions of the Code of Criminal Procedure, which have been made applicable by the said Ain pursuant to section 25.

4. Mr AKM Habibur Rahman, learned advocate appearing for the informant-appellant, submits that the appellant/informant is the victim of rape and, as such, she is the main aggrieved person in this case. Therefore, he submits, she should be allowed to prefer this appeal against the order of the Tribunal rejecting her Naraji application. In support of his submission, Mr Rahman refers to an earlier decision of a divisional Bench of this Court in *MK Malaker vs State, 42 DLR 349 ("MK Malaker's case").* Mr Rahman submits that in a similar situation in the said *MK Malaker's case*, the High Court Division, relying on a decision of the Appellate Division, namely *Abdul Halim vs Member, Appellate Tribunal, 34 DLR (AD) 309,* held that the informant, who was the father of the victim girl, was entitled to prefer appeal under section 30 of the Special Powers Act, 1974 in a case under the then Cruelty to Women (Deterrent Punishment) Ordinance, 1983. Thus, he submits that, this Court should also admit this appeal preferred by the victim-informant applying the Rato Decidendi in *MK Malaker's case.*

5. Appeal is a statutory right and has to be conferred by statute in clear terms. At the same time, the Nari-o-Shishu Nirjaton Ain, 2000 is a special law enacted for giving some offences against women and children special status for early disposal of the case and to give strong

deterrent effect by way of harsher punishment and quick procedure. Section 28 of the said Ain is the provision of appeal, which is quoted below:—

"২৮। আপীল–ট্রাইবুনাল কর্তৃক প্রদত্ত আদেশ, রায় বা আরোপিত দন্ড দ্বারা সংক্ষুব্ধ পক্ষ, উক্ত আদেশ, রায় বা দন্ডাদেশ প্রদানের তারিখ হইতে ষাট দিনের মধ্যে, হাইকোর্ট বিভাগে আপীল করিতে পারিবেন। *(Underlines supplied)*

6. It appears from the clear words of the above provision of appeal that the statute has conferred the right of appeal only on aggrieved parties to a case under the said Ain.

7 Since provisions under the Code of Criminal Procedure ("the Code") have been made applicable to the cases under the said Ain by virtue of section 25, this provision of appeal as provided under section 28 of the said Ain has to be interpreted in line with the provisions of appeal as provided under Chapter XXXI of Part VII of the Code of Criminal Procedure ("the Code"). Section 404 of the Code provides that no appeal shall lie from any judgment or order of a criminal Court except as provided for by the Code or by any other law for the time being in force. Sections 408 and 410 of the Code conferred statutory rights on the convicted persons to prefer appeal against conviction and sentence before the Court of Sessions or the High Court Division, as the case may be. At the same time, while right to prefer appeal against original or appellate order of acquittal has been conferred on the government under Sub-section (1) of section 417 of the Code, Sub-section (2) of section 417 has conferred a right of appeal upon a complainant, in any case instituted upon complaint, to prefer appeal either before the High Court Division or the Court of Sessions within sixty days against original order of acquittal. Therefore, it appears that the Legislature has given right of appeal to some specific persons or parties to the criminal cases under some specified situations, and the persons or parties not falling under such specific persons/parties and specified situations as provided by the provisions of the Code or any other law for the time being enforce, do not have any right to prefer any appeal against sentence, acquittal or order passed by the criminal Courts.

8. Since the Nari-o-Shishu Nirjaton Daman Ain, 2000 comes under "any other law for the time being in force" as provided in section 404 of the Code, none except the individuals or parties, who have been conferred with the right of appeal by the relevant provisions of the said Ain, will enjoy such right, regard being had to the rule of interpretation that the provisions of special law like the said Ain are to be interpreted strictly. Plain reading of section-28 of the said Ain reveals that the said Ain has conferred right of appeal only on the aggrieved party (সংক্ষুব্ধ পক্ষ) to prefer the same before the High court Division from any order, judgment or penalty passed by the Tribunal within 60 (sixty) days from the date of such order, judgment or penalty. It is clear from the above use of words namely সংক্ষুব্ধ পক্ষ"-meaning 'aggrieved party', that the Legislature intentionally excluded other individuals or parties except the 'aggrieved parties' to a case under the said Ain from the scope of right of appeal.

9. Now, in the instant case, though the informant initially lodged a Petition of Complaint before the Tribunal, the Tribunal did not accept the same as Complaint Register case. Rather, the Tribunal sent it to the concerned police station for registering the same as FIR, namely to initiate the case as Government Register case. Accordingly, the same was registered as FIR, being Purbadhala PS Case No. 7(8)2011 under sections 9(1) of the said Ain. Thus, this case never took the character of Complaint Register case, but from the beginning it was a government register case-meaning a case instituted not upon complaint, but upon FIR. Therefore, in a Government Register case (or GR Case as commonly known), the victim, or for that matter the informant, does not become a party to the said case. They are rather

mere witnesses, though very vital witnesses. Thus, in a Government Register case like the instant one, the word 'parties' include only the government and the accused. Therefore, since the Legislature, in clear terms mentioned the words সংক্ষুব্ধ পক্ষ (aggrieved parties) in section 28 of the said Ain, only two parties, namely the government and the accused, have the right to prefer any appeal under section 28 of the said Ain against any order, judgment or penalty imposed by the Tribunal. We find support of this view in a case of the Appellate Division in *Fazar Ali @ Manik Chand vs Fazar Ali, 43 DLR (AD) 129 ("Fazar Ali's case").*

10. We have also examined the decision in *MK Malaker's case* as cited and strongly relied upon by Mr Rahman. It appears from the said decision that a Division Bench of this Court held that in a case under Cruelty to Women (Deterrent Punishment) Ordinance-1983 (now repealed), the informant, who was the father of the victim, had right to prefer appeal before the High Court Division under section 30 of the Special Powers Act, 1974. According to the said decision, the said Bench held so relying on a decision of the Appellate decision in *Abdul Halim vs Member, Appellate Tribunal, 34 DLR (AD) 309 (Abdul Halim's Case).* Further, in deciding so, their Lordships of the said Bench disagreed with an earlier decision of another Division Bench of this Court on the same issue in *Feroza Begum vs. Hormuz Ali, 40 DLR 161 ("Feroza Begum's case"),* and observed that since their Lordships were disagreeing relying on a decision of the Appellate Division, namely the decision in *Abdul Halim's case,* they were not required to refer the matter to the Hon'ble Chief Justice for sending the same to a Full Bench.

11. For better understanding of the decision in MK Malaker's case, we have also carefully examined the decision of our Appellate Division in the said *Abdul Halim's case.* Upon such examination, surprisingly we have found that in *Abdul Halim's case* the right of the informant to prefer any appeal in a government r ister case was not an issue at all. The releva issue for which the leave was granted a decided was "whether upon a true constructi of section 30 of the Special Powers Act, t Appellate Tribunal has the power to he appeal against the order of acquittal". Sin Sub-section (1) of section 30 only mention "an appeal from judgment, or sentence pass by a Special Tribunal.....", the questi arose in the said case was whether the jud ment included the 'acquittal' as well. Thou the word 'acquittal' was not specifically me tioned in section 30, the majority of the Lordships in the Appellate Division held th the expression "an appeal from the judgmen as occurring in Sub-section (1) of section 30 w wide enough to include both appeals fro order of conviction and appeals from order acquittal since the judgment concludes the pr ceeding either in conviction or acquittal.

12. It further appears that in *MK Malaker case,* the said Division Bench reproduced a observation (at paragraph-24) of his Lordshi Mr Justice Ruhul Islam (who delivered th majority view for the Appellate Division wherein the words "the State or the perso aggrieved will have no remedy against such a illegal order of acquittal" were mentioned Their Lordships in *MK Malaker's case* the regarded such mention of the words 'perso aggrieved' as an approval by the Appellat Division to the proposition that any aggrieved person had the right to prefer an appeal unde section 30 of the Special Powers Act. Thei Lordships in *MK Malaker's case* reproduced th said observation of his Lordship Mr Justice Ruhul Islam from paragraph-13 of the said *Abdul Halim's case* wherein his Lordship Justice Islam made a reference, by way of analogy, to an appeal-provision, namely section 23A(6) o the Foreign Exchange Regulation Act, 1947 under which in addition to the Bangladesh Bank 'any other person aggrieved' was given a

right to prefer appeal before the High Court Division. However, nowhere in the four corners of the said judgment of the Appellate Division, a single word has been mentioned that 'a person aggrieved' may prefer an appeal under section 30 of the Special Powers Act, 1974. Since who may or may not prefer appeal was not an issue at all in that case, rather against what appeal may be preferred was an specific issue, mere mentioning of the words 'person aggrieved' in an observation under paragraph-13 (which was in fact mentioned in an oblique reference to the words 'person aggrieved' specifically mentioned in section 23A(6) of the Foreign Exchange Regulation Act, 1947) has no bearing or any manner of application in the issue either raised in *MK Malaker's case* or in the present case. Therefore, it is evident that the disagreement of the said Bench in *MK Malaker's case* with the decision of *Feroza Begum's case [40 DLR 161]* was not in fact based on the ratio decidendi or even obiter made, by the Appellate Division in *Abdul Halim's case*. Thus, we are constrained to humbly hold that in so far as such reliance on the Appellate Division's ratio to disagree with the decision in *Feroza Begum's Case* is concerned, the decision in *MK Malaker's case* is per-incuriam. Accordingly, we are inclined to disregard the same. At the same time, we are of the view that the decision in *Fefoza Begum's Case, 40 DLR 161,* is the correct proposition of law and the same is supported by the ratio emerged from the decision of the Appellate Division in *Fazar Ali's case, 43 DLR (AD) 129* cited above.

13. Having regard to the above discussions of law and facts, we have no option but to hold that the present appeal, as preferred by the informant, is not maintainable as she is a mere witness and not a party to the proceeding concerned.

Accordingly, the appeal is dismissed summarily.

Ed.

High Court Division
(Special Original Jurisdiction)

Naima Haider J
Farid Ahmed J

Judgment
March 14th, 2012.

HKD International (CEPZ) Ltd and another.....
.....Petitioners

vs

Bangladesh Export Processing Zones Authority (BEPZA) and others.....
.....Respondents*

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

Promissory Estoppel—The principles of approbate and reprobate envisage that once a party takes a stand which ends in some kind of compromise and also acts on the compromise, such a party cannot be allowed to take a contrary stand unless the earlier stand is against all known principles of law. .....(16)

Raisuddin Ahmad with Md Aktaruzzaman, Advocates—For the Petitioners.

Ahmed Sohel. Advocate—For the Respondents Nos.1 & 2.

Judgment

Naima Haider J : In this application under Article 102(2)(a)(i) and (ii) of the Constitution of the People's Republic of Bangladesh, a Rule Nisi was issued calling upon the respondents to show cause as to why the Memo under reference No.00.314.014.01.00.057.1991-1187 (1) dated September 27, 2011 (Annexure-J to the writ petition) refusing to withdraw the cancellation of No Objection Certificate and cancellation of No Objection Certificate vide Memo No. IP:O-57/660 dated May 3, 2009 (Annexure-H to the petition) to transfer assets etc. of the company named HKD (BD) Ltd to petitioner No.I company as was granted earlier under Memo No.IP: 0-57/1643 dated August 26, 2008

*Writ Petition No. 10779 of 2011.

(Annexure-C to the petition) as already been acted upon shall not be declared as have been issued and made without any lawful authority and of no legal effect and/or such other or further orders passed as to this Court may seem fit and proper.

2. The brief facts necessary for the disposal of the writ petition are that petitioner No. 1 is a private limited Test Manutacturing and Exporter Company named HKD International (CEPZ) Ltd. and the petitioner No.2 is the Managing Director. A Company named HKD International (Bangladesh) Ltd set up an export oriented industry in Chittagong Export Processing Zone, an Export Processing Zone (EPZ) under respondent No. 1. The said Company decided to voluntarily wind up their company and sell all its assets and liabilities to the petitioners Company. Accordingly, petitioners and HKD International (Bangladesh) Ltd. signed a Deed of Agreement on 14-7-2008 to sell and purchase machinery etc. of HKD International (Bangladesh) Ltd. by the petitioners.

3. While HKD International (Bangladesh) Ltd. have been carrying out its business within Chittagong EPZ area, they applied to respondents by their letter dated 14-7-2008 to wind up their company voluntarily and also to sell all their assets and liabilities to petitioners. They have also prayed to respondent No.4 for issuance of 'No Objection Certificate' (NOC) in this regard. The respondent No. 3 by its Memo No. IP: O-57/1643 dated August 26, 2008 conveyed to Managing Director, HKD International (Bangladesh) Ltd. that the authority of respondent No.1 BEPZA was pleased to issue NOC in favour of them subject to fulfil ment of ten conditions thereby consenting to selling of assets and liabilities covering building machinery, equipments and materials of HKD International (Bangladesh) Ltd to petitioners HKD International (CEPZ) Ltd.

4. Accordingly, the company HKD International (Bangladesh) Ltd. was wound up in accordance with the provisions of Companies Act, 1994 and such winding up was duly published in the Bangladesh Gazette on 23-9-2008 and Certificate of filing No. 516 dated 24-3-2009 was issued from the Office of Assistant Registrar of the Joint Stock Companies and Firms consequently the company HKD International (Bangladesh) Ltd. stood dissolved in the eye of law.

5. All on a sudden BEPZA by their letter date May 03, 2009 cancelled its NOC dated August 26, 2008 issued by General Manager (investment Promotion) BEPZA which was earlier granted in favour of HKD International (BD) Ltd. primarily alleging that HKD International (BD) Ltd. transferred its assets, liabilities etc. to HKD International (CEPZ) Ltd. "for availing the tax holiday facility". Though the cancellation letter was issued in May 03,2009 but BEPZA has been asking the petitioners to run business in the name of HKD International (BD) Ltd, whereas said company was wound up with the permission of Registrar of Joint Stock Companies, who had already issued certificate of winding up on March 24, 2009. In the eye of law HKD International (BD) Ltd ceased to exist with effect from March 24, 2009 so there is no scope to restart any business under that name. Further, according to BEPZA web page under the heading "EPZ Benefits and Incentives," 10 years tax holidays is one of the inbuilt incentives granted to any investor for investing in EPZs and availing of tax holiday facilities are itself inbuilt in the process of process of investments in EPZs which cannot be termed as an offence and that cannot be a ground for cancellation of NOC. Further, no basis of BEPZA's coming to a decision "that it seems to the Authority" has been explained in their cancellation of NOC letter dated May 03, 2009. It is further stated that no authority has been conferred upon the Bangladesh Export Processing Zones Authority Act, 1980 to cancel a NOC

granted in favour of any entity and which has already been acted upon on grounds of "it seems to the Authority" as no reference of taking any of such decision by competent autohority of BEPZA as to its seeming has been cited and no decision of Authority to support cancelling the NOC for alleged "availing the tax holiday facility" which is inbuilt incentive for investment in EPZs, has been cited in the letter of cancellation of NOC, which is nothing but colourable exercise of power not vested in the BEPZA. It is further stated that the respondents have retracted from their own promises made to petitioners and actions against which promise have already been taken by petitioners as well as respondents and even Custom Authorities on the basis of BEPZA issued NOC, that is, in the light of their promise made, well before illegal cancellation of NOC. The petitioners company having facing serious difficulties in running their business, under anomalous situation created by respondents in course of business, made series of representations to respondents to withdraw their cancellation of NOC letter dated May 03, 2009 and made last representation to that effect on August 27, 2011. But the respondent No.3 by his letter dated September 27, 2011 finally refused to reconsider their decision and conveyed their unwillingness to withdraw cancellation of NOC dated August 26, 2008.

6. Being aggrieved by and dissatisfied with the cancellation of NOC dated May 3, 2009 the petitioners moved this Court and obtained the Rule Nisi.

7. The case of the respondent Nos. 1 & 2 is that the HKD International (BD) Ltd. had started commercial operation on 1-1-1991 and HKD international (CEPZ) Ltd started operation on 01-01-2005. HKD International (BD) Ltd enjoyed 10 years of tax holiday. But the company tried to enjoy the same facility again by selling all assets and liabilities to newly formed sister concern HKD International (CEPZ) Ltd, upto 1-1-2014. So, as and when the authority identified their intention of selling all its assets and liabilities in order to evade tax, the authority cancelled the NOC for protecting financial loss of the Government before final permission. The further case of the respondents is that as per clause No.(g) of NOC the company did not propose for cancellation of plots from the account of HKD International (BD) Ltd. and allot the same plot in favour of HKD International (CEPZ) Ltd. The cancellation of plots from transferee and alloting the same plots to transferor is the 3rd phase activity and it will be completed as and when the transferee gets final permission from the authority.

8. Mr Rais Uddin Ahmad, learned Advocate for the petitioner submits that HKD International (BD) Ltd. ceased to exist with effect from March 24, 2009 in the eye of law after having been wound up and there is no scope to restart any business under that name. He next submits that according to Board of Investment web page under the heading "EPZ" Benefits and Incentives", 10 years tax holidays is one of the inbuilt incentives granted to any investor for investing in EPZs and hence as availing of tax holiday facilities is itself inbuilt in the process of investments in the EPZs which cannot be termed as an offence. Mr Rais Uddin Ahmad next submits that the cancellation of NOC is *ex facie*, illegal and *void ab initio* as BEPZA's coming to a decision "that it seems to the Authority" has not been explained in their cancellation of NOC letter dated May 03, 2009. Further, Foreign Private Investment (Promotion and Protection) Act, 1980 also provides for granting tax holiday subject to NBR approval. So, availing of tax holiday by any investor in EPZ cannot be termed to be a wrong doing warranting cancellation of NOC on that ground. He further submits that two plots of wound up Company HKD International (BD) Ltd. has already been transferred in the name of petitioner HKD International (CEPZ) Ltd. by respondent No. 4 by its letter dated 26-1-2009.

9. Mr Ahmed Sohel, learned Advocate on behalf of the respondent Nos. 1 & 2, submits that the respondents did not violate any provision of BEPZA Act, 1980 or Foreign Private Investment (Promotion and Protection) Act, 1980. They acted in accordance with law for greater public interest. Mr Sohel further contends that the company failed to submit necessary documents for final permission in favour of sale/transfer as per the clauses of NOC, so the company has the existence in the eye of law and as per the terms of the land lease agreement they were requested to commence commercial operation.

10. We have considered the submissions of the learned Advocates of respective parties and perused the application, affidavit-in-opposition and annexure appended thereto.

11. The question which arises for our consideration is whether the memo under challenge cancelling the NOC dated August 26, 2008 issued by the respondent can be sustained.

12. It transpires from record that HKD International (BD) Ltd. by its letter dated July 14, 2008 requested the Chittagong Export Processing Zone Limited to issue them No Objection Certificate (NOC) to wind up their company. Accordingly, BEPZA Dhaka Office by its letter dated August 26, 2008 granted permission to sell assets etc. of HKD International (BD) Ltd. to HKD International (CEPZ) Ltd. The NOC was granted subject to the fulfilment of some conditions. The conditions were met and in the process BEPZA by its letter dated November 18, 2008 granted permission to transfer some vehicles of HKD International (BD) Ltd. to HKD International (CEPZ) Ltd. Thereafter, BEPZA on January 25, 2009 allowed insertion of name of HKD International (CEPZA) Ltd. against Plot Nos. 10-12, Sector-4 of CEPZ in place of HKD International (BD) Ltd.

13. For facility of reference the letter dated January 26, 2009 as it appears from Annexure-G is reproduced below:

BEPZA/CEPZ/SEE/91
26/01/2009
M/s HKD International (CEPZ) Ltd.
Plot 10-12, Sector-4
Chittagong EPZ
Chittagong

Subject : Regarding name of M/s HKD International (CEPZ) M/s HKD International (BD) Ltd.

Ref: (1) Our letter reference No. IP:O-51/1643 dated 26-8-2008.

(2) Your letter reference No. nil dated 4-12-2008.

Please refer to above

This is to inform you that the Authority has accorded your factory name M/s HKD International (CEPZ) Ltd. instead of M/s HKD International (BD) Ltd. at Plot No. 10-12, sector-4, of CEPZ according to your prayer. All utilities bills like Electricity, Water and Land rent shall be issued with effect from 04-1-2009 in the name of M/s HKD International (CEPZ) Ltd.

Thanking and assuring you of our best co-operation at all time.

Bd/-
27-1-2009
(Abdul Alim)
Superintending Engineer
Chittagong EPZ
Phone : 741441

14. This Court notes that when the said NOC was already acted upon, BEPZA by their subsequent letter dated May 3, 2009 cancelled its NOC granted earlier on August 26, 2008 alleging that HKD International (BD) Ltd.

transferred its assets and liabilities etc. to HKD International (CEPZ) Ltd. "for availing the tax holiday facility:"

15. It appears that HKD International (BD) Ltd. was wound up and the Registrar of Join Stock Companies issued Certificate of Winding up on March 24, 2009. The said company ceased to exist in the eye of law and it was not possible to restart any business in the name of a wound up company. Further, the impugned memo cancelling the NOC does not narrate as to why it has taken such a step when BEPZA itself had given the NOC. BEPZA's coming to a decision "that it seems to the authority" is very vague and does not reflect any ground for cancelling the NOC.

16. By issuing the NOC in favour of HKD International (CEPZ) Ltd. the respondents are now estopped from coming with the different plea that the company earlier in the name of HKD International (BD) Ltd. has not been wound up. BEPZA in view of the earlier stand cannot resile from the same and, thus, its action would be barred by the principle of promissory estoppel. There is another aspect of the matter. Should the Court allow the parties to take a stand and then resile on the stand taken? The principles of approbate and reprobate envisage that once a party takes a stand which ends in some kind of compromise and also acts on the compromise, such a party cannot be allowed to take a contrary stand unless the earlier stand is against all known principles of law. Reverting back to the case in hand, we find that the respondents earlier have treated the petitioner's company to be wound up and now they cannot take a different stand and are stopped to resile from their earlier stand on their own action.

17. In view of the discussions made hereinabove, we are of the view that the Rule deserves to succeed.

18. Accordingly, the Rule is made absolute. The impugned cancellation of No Objection Certificate vide Memo No. IP: O- 57/660 dated May 3, 2009 (Annexure-H to the petition) is hereby set-aside and declared to have been made without lawful authority and of no legal effect.

No order as to costs.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Md Nuruzzaman J
Quazi Reza-ul-Hoque J

Judgment
February 20th, 2012.

World Trade Shipping Corporation, New York.....Appellant

vs

Sonat International Inc. and others.....Respondents*

Waiver

It is now a well settled principle that if any party by disregarding the arbitration clause institutes a suit, the other party must raise objection before filing of the written statement, otherwise that would be deemed as an waiver of the condition. .....(15)

Government of Bangladesh vs Ekramul Haque, 2 BLC (1997) 411, ref.

M. Ohiullah, Advocate—For the Appellant.

Md Aminul Islam, Advocate—For the Respondent No. 5.

Judgment

Quazi Reza-ul-Hoque J: The instant appeal has been preferred against the judgment and decree dated 31-3-1996 passed by the learned Subordinate Judge, 3rd Court, Chittagong, dismissing the Money Suit No. 161 of 1994.

*First Appeal 446 of 1996.

2. The facts, in short, as has been stated by the plaintiff in the plaint, *inter alia*, is that the plaintiff as desponent owner of MS Safir, a ship, sub chartered it to the defendant No. 1 under an uniform General Charter dated 24-10-1988 for carriage of 14,700 M/Ts (metric ton) of Bulk TSP (Tri Super Phosphate) to be delivered to BADC (Bangladesh Agricultural Development Corporation), 5% more or less at the owners option at the port of Chittagong, whilst defendant No. 3 was the contractor for supply of the cargo and defendant No. 4 was the consignee. The cargo was carried on FLOS basis and the ship 'MS Safir' arrived at the Port of Chittagong on 1-2-89. The ship was under the control of the charterer's agent, the defendant No. 2, who arranged for discharge of 4,600 M/Ts of the consignment up to 15-2-79 and thereafter under the instructions and insistance of defendant No. 4, the ship was compelled to proceed on to Mongla Port for discharging the balance cargo. In the charter- party agreement it was specifically mentioned that the goods were to be discharged at the Port of Chittagong only. The B/L (Bill of Lading) issued by the defendant No. 1, specified the port of discharge as Chittagong. The defendant No. 4 without raising any objection whatsoever negotiated the B/L to the voyage. Due to such deviation of the ship from Chittagong to Mongla, the plaintiff has been subjected to extra port charges at Mongla Port and other incidental expenses, and, as such, the plaintiff claimed reimbursement of the port and other incidental expenses incurred by the ship. The plaintiff further claimed demurrage on account of 28 days detention of the ship altogether amounting to Taka 96,28,140 from the defendants. The plaintiff praved for decree for Taka 96,28,140 against the defendants jointly and severally with cost and interest.

3. Defendant No. 1 by filing written statement contested suit and alleged that the suit is not maintainable, as much as, the plaintiff had no *locus standi* to file the suit and there was cause of action in this suit. It contended that the plaintiff was not a party to the charter party agreement. The USTS Inc. was the desponent owner of the vessel 'MV Safir' and USTS Inc. entered into a charter party agreement dated 24-10-1998 with the defendant No. 1 and that's why the plaintiff is not entitled to get any relief against the defendant No. 1. clause No. XVI of the said charter party agreement provided that the receiver will have the option of three safe berth anchorage at the port of discharge and shifting expenses will be on the owners account. The discharge of cargo was made in accordance with the terms and conditions of the said charter party agreement. It also contained that any dispute arising out of the said charter party agreement shall be referred arbitration as provided in the said charter party, so the present suit is not maintainable without referring the matter to arbitration.

4. Defendant. No. 4 contested the suit by filing written statement stating in brief that it had no relation with the plaintiff in any manner and no concern with the defendant No 1. The suit has been filed by defendant No. 3 in connivance with defendant No. 1 in the name of the plaintiff to defeat th obligation of defendant No. 3. Defendant No. 4 who is not a party to the alleged sub-charter of the said ship and is not bound bv the terms and conditions of the alleged sub charter party. The plaintiff is apparently not a party to the Sub-Charter dated 24-10-88. The Managers of defendant No. 4 at Chittagong and Khulna are the ultimate consignee of the cargo carried by the ship. As per terms of the contract defendant No. 1 and 3 were required to discharge the cargo at Chittagong and Mongla Port at the option of the defendant No. 4 for discharging cargo from the said ship, which was controlled and managed by the defendant Nos. 1 and 3, as sub charterer and agent respectively, and not by the defendant No. 4. The contract between defendant No. 4 on the one hand are defendant Nos.

1 and 3, the later were required to furnish a performance guarantee in favour of defendant No. 4, as security for supply of 14,700 MTs of fertilizer and accordingly they furnished performance guarantee in the form of Bank Guarantee issued by BCCI Ltd, Dhaka Branch. The defendant No. 4 is the beneficiary of the said Bank Guarantee and the plaintiff cannot claim any amount against the said performance bond. Defendant No. 4 further alleged that the suit is false, fraudulent, collusive and is intended to protect the interest of defendant Nos. 1 and 3 against the possible claim of defendant No. 4 against them. The suit is therefore, liable to be dismissed with cost and compensation.

5. Mr M Ohiullah, the learned Advocate for the appellant has began by referring to the decision passed in *Government of Bangladesh vs Ekramul Haque, 2 BLC 411 at page 412,* wherein it was observed *inter alia* that:

> "It is by now well settled that in spite of an arbitration clause in the contract made between the parties a party may file a suit against the other party and in that case section 34 of the Arbitration Act provides that other party may apply to the Court to stay further proceedings of the suit, but the defendant who wants to take advantage for an arbitration clause must file such an application before submitting to the jurisdiction of the Court by filing his written statement. In this case defendant Bangladesh Railway filed written statement and contested the suit by adducing evidence. Therefore, it is too late to say that the trial Court proceeded with the suit in violating the provision of section 34 of the Arbitration Act"

6. As the instant suit falls within the ambit of Arbitration Act, 1940, so, the provisions of section 38 of the Act shall be applicable, wherein it has clearly embraced that once any of the party had jumped over the provisions of the arbitration than the other party, if feels aggrieved for not invoking the provisions of the arbitration should make prayer for arbitration before the trial Court before submission of the written statement, otherwise, it would be deemed to have been waived and in this regard the above judgment has very clearly observed so.

7. He further submitted that since the defendant respondent No. 1 was the time charterer of the ship, so its liability along with the other respondents are co-extensive due to illegal deviation and detention of the ship for 28 days. The respondent No. 1 accepted the extension of time chartar vide letter dated 7-12-1988, without any objection, therefore the present appellant-plaintiff has the *locus standi* to institute the suit. The said letter also very clearly embraced that all the conditions of the C/P (Charter Party) shall remain unaltered, i.e. the defendants remained obliged to the charter party and also to the owner of the ship, i.e. the appellant-plaintiff.

8. He again submitted that since the Charter Party very precisely mentioned that the port of landing be only at Chittagong Port, so taking the ship to another port, i.e. to Mongla Port was beyond the contractual terms as stated in the Charter Party, i.e. taking the ship to Mongla port and detaining it for another 28 days and rearing extra expenses were unjustified and therefore the appeal is liable to be allowed.

9. Mr Md Aminul Islam, the learned Advocate appearing for the respondent No. 5 pointed out that none of the evidences were examined and even the claim of the plaintiff itself had not been supported by witness, so the instant appeal is liable to be dismissed.

10. In reply, Mr Ohiullah, the learned Advocate appearing for the appellant took us to the order dated 27-1-1996 of the trial Court that both the parties agreed to substantiate respective claims and defence through documentary

evidences by waiving oral evidence, as such, the claim that evidences were examined through witnesses is not tenable as the learned Judge of the trial Court accepted the same through pleadings of the learned Advocates of both the parties.

11. On perusal of the memo of appeal, the submissions made by the learned Advocate for the appellant and the learned Advocate for the respondent No. 5 and the LC record it transpires that the issues are limited to- (1) who were the parties to the contract, therefore the charter party dated 24-10-1998; (2) whether the plaintiff has the *locus standi* to file the instant suit; and (3) whether the deviation was justifiable.

12. The Charter Party very clearly shows that the contract was entered for charter of the shin in between USTS Inc.. Monrovia, Liberaia, Sonat Incorporated (the defendant No.1-respondent No. 1). The record clearly reveals that Sonat International Inc. corporate received a letter dated December 7, 1988 in the following terms:

> "This is to confirm that the cancelling date under above charter party has been extended until December 30th 1988. Owners are nominating the 'MV Safir' built 1973-Panameniam Flag- 15,251 dWT- Flash Twin decker. All other terms and conditions under above C/P to remain unaltered."

13. The letter was addressed to the respondent defendant No. 1, Sonat laternational Inc, so by accepting the extension of the time charter of the ship and the terms of the charter party, they became amenable to the owners of the ship, i.e. World Trade Shipping Corporation, the present appellant-plaintiff, otherwise the whole voyage would have stood illegal due to expiry of the time charter. So, the appellant-plaintiff has the *locus standi* to institute the present suit.

14. The Charter Party clearly reveals that- "One safe berth Chittagong, Bangladesh where Charterers guarantee 8 meter water draft fresh" and therefore any deviation from a single port entourage without permission or authority of the ship owner is an unjustified deviation as it was beyond the scope of the charter party.

15. As per terms of the Charter Party any dispute was supposed to be referred to an arbitration, which was not done in the instant case. The learned Judge of the trial Court opined that the dispute ought to have been referred to an arbitration as entailed in the charter party. It is now a well settled principle that if any party by disregarding the arbitration claus institutes a suit, the other party must raise objection before filing of the written statement, otherwise that would be deemed as an waiver of the condition as has been decided in *Government of Bangladesh vs Ekramul Haque, 2 BLC 411 (ante).*

16. From the discussions made hereinabove, we find that the appellant-plaintiff entered into an agreement of charter with the defendant No. 1 and the other respondents entered into contract with respondent No. 1. So, the liability to the appellant-plaintiff remains with the respondent No. 1. The deviation was also found not justified and the terms of arbitration has been waived by subsequent act of the respondents and therefore we find part merit in the appeal.

17. In the result, the appeal is allowed in part against the defendant respondent No. 1 as responsible and liable for the unjustified deviation and the damage of the cause of the plaintiff. Appeal is dismissed against respondent Nos. 2, 3, 4 and 5.

The suit is decreed against the defendant-respondent No. 1.

Ed.

High Court Division
(Civil Appellate Jurisdiction)

Nuruzzaman J
Quazi Reza-ul Hoque, J

Judgment
June 14th, 2012.

Meghna Petroleum Ltd....
.....Plaintiff-Appellant
vs
Thakur Shipping Company Limited and others...
...Defendant Respondents*

Limitation Act (IX of 1908)
Article 30, First Schudule

Article 30 of the First schudule of the Act prescribed the time limit 1 (one) year for bringing any suit against a carrier for compensation for loss or injury to goods. Suit being measurably time barred. .....(30)

Abdul Momen Chowdhury, Advocate—For the Plaintiff-Appellant.

Md. Ohiullah, Advocate—For the Defendant Respondent Nos. 1 and 2.

Manzur-ur-Rahim, Advocate with Afreen Mohiuddin, Advocate—For the Defendant-Respondent No.3.

Judgment

Quazi Reza-ul-Hoque J : The instant appeal has been preferred against the judgment and decree dated 27-6-1993 and 3-7-1993 respectively passed in Money Suit No. 74 of 1992, by the learned Sub-Judge, 3rd Artha-Rin-Adalat, Chittagong.

2. The fact, in short, as has been stated by the plaintiff-appellant in the plaint, is that the plaintiff is a limited liability company and the business of the company is to import oil and other petroleum products from abroad and sell them in this Country.

3. The plaintiff wanted to import furnace oil from Kuwait, therefore made arrangements with M/s Kuwait National Petroleum Co (KSC), who delivered 19,908 long tons of furnace oil to 'SS Varuna Kanchan' belonging to the defendant No. 1, for carrying the consignment to Bangladesh. A Bill of Lading (B/L) dated 7th December 1973 was given by the master of the ship to the supplier and on that basis the supplier received its payment. The quantity of the consignment was described as 19,908 long tons of furnace oil. The consignment was insured with the defendant No. 3 and due premium was paid and the insurance policy covered all the risks including the risk of contamination, leakage and shortage. The ship arrived at its port of destination, i.e. Chittagong Port on or about 31-12-1973 and informed its readiness to deliver. The hull survey of the tanks of the vessel was taken and it was found that there was a shortage of 554 long tons of 'Furnace Oil' as against the quantity mentioned in the B/L and therefore, the plaintiff refused to take delivery without proper survey, however, on admittance of the master of the ship that there was shortage of 552 tons and assurance that the carrier will be responsible for the same and thereby requested the plaintiff to take delivery and therefore immediately the plaintiff took delivery of the consignment.

4. In the meanwhile, on 3rd January, 1974, the ship was in trouble as there was leakage in the pump room and thereby the engine room of the ship got flooded. To save disaster, the master had to pump oil over board the ship. The master of the ship informed his principal by telegram and gave copy of the telegram to the plaintiff confirming that there was further loss. And as a result, the plaintiff could only wait to take the measurement of oil at the shore tanks. The final measurement ought to have been taken at the shore tanks of the plaintiff, therefore the plaintiff started taking delivery with information to the carrier and made particular request to them to be present when the measurements is taken at the shore tanks, and thereby measurement was taken in presence of the

*First Appeal No. 15 of 1994.

Custom Officials. At the beginning they presumed the shortage to be about 1,008.50 long tons but later, after taking measurement at the shore tanks the shortage was reduced to 741.69 long tons.

5. The plaintiff immediately claimed compensation for the same from the defendant No. 2, the local agent of the carrier, and always kept informed of the happenings to the defendant No. 3 giving them all particulars.

6. The defendant No. 3 requested the plaintiff to have a joint survey with the surveyor of the defendant No. 1. The plaintiff asked the defendant No. 2 for report of hull survey. The defendant No. 2 neither gave the report of the hull survey, nor came for further joint survey. As a matter of fact, they were also satisfied with the report of loss and the amount of loss acquired from the 'out turn' report of the plaintiff, which was made in presence of the Custom Authorities.

7. The plaintiff demanded payment from the defendants who directed the plaintiff to pursue the defendant No. 1 for payment and they also wrote to defendant No. 2 for early settlement of the claim bill of the plaintiff. The defendant No. 2 informed the defendant No. 1 and later on informed the plaintiff that the documents were forwarded to the P & I correspondent in Chittagong for scrutiny. The plaintiff repeatedly demanded payment and the defendant No. 2 kept the plaintiff waiting for reply from the P & I correspondent.

8. On plaintiff's repeated pursuance, the defendant No. 2 informed that the matter was under scrutiny of the P & I Club, London and at long last the defendant No. 2 clarified that the carrier is unable to entertain the claim as the B/L stated that oil was said to weigh 19,908 long tons and as there was no definite figure and in absence of any 'short lading certificate, the claims cannot be entertained.

9. The plaintiff reiterated its demand with copy of invoice and certificate of the quantity supplied by the supplier, which was signed by the master of the ship. In the meantime the plaintiff kept the defendant No. 3 informed of all the correspondences between the plaintiff and the defendant No. 2, and the defendant No. 3 was satisfied that all reasonable measures were taken to safeguard the interest of the plaintiff or that of the defendant No.3. The defendant No. 3 by letters dated 18-12-1974 and 23-12-1974 informed the plaintiff to keep the defendant No. 3 informed of the gradual developments.

10. Defendant No. 2 just kept silent and after much pressure gave a reply only on 18-9-1975 that the claim now stands apparently time barred.

11. It was also submitted that the claim of the plaintiff against the defendant No. 1 and 2 cannot be made time barred in this way, when there is clear admission by the master of the ship that the carrier will be responsible, so there is a novation of the contract.

12. The plaintiff also claimed that neither the defendant Nos. 1 nor 2 have come forward with payment, nor the defendant No. 3 has made payment for loss of the plaintiff as insurer. The loss occurred due to the negligence, carelessness, inefficiency of the carrier, so the carrier is bound to compensate the plaintiff for the loss and having no other remedy available resorted to institute the instant suit.

13. The defendant Nos. 1 and 2 contested the suit by filing written statement, wherein they have stated *inter alia* that after the carrying ship had arrived at the outer anchorage at Chittagong and before the discharge of the said cargo had been commenced, a hull survey was carried out by a qualified surveyor in presence of the customs officials for ascertaining the actual quantity of cargo on board the ship. The

quantity of cargo found on board the ship was 19,353.50 long tons although in the B/L and in the manifest submitted by the master of the ship it was stated to be 19,908 long tons. The ship, however, before arriving at Chittagong did not call at any other port, so it was revealed that a quantity of 554.5 long tons out of the said cargo was not shipped by the shipper at the port of loading as otherwise there could be no reason for the quantity to have been reduced on board the ship during its sole voyage and therefore none of these defendants are liable for the short shipped 554.5 long tons of cargo. The liability for the short shipped cargo therefore is that of the shipper, so the suit is not maintainable without impleading the shipper.

14. At the beginning of discharging of the cargo the master discovered a leak in the cargo line out of which oil started to rush and accumulate in the engine and pump room and fearing the danger, in order to ensure safety of the ship, the situation required discharging of approximately 187.19 long tons over board, which was ultimately controlled. The said leak in the cargo line was such that it could not be detected by the master in due diligence and hence the loss of oil resulting from such leakage could not be prevented before it had actually occurred.

15. The B/L was issued subject to the Laws of England incorporating the Hague Rules relating to Carriage of Goods by Sea Act, 1924 'and under the provisions of the Hague Rules the defendant No. 1 as the carrier of the cargo or its agent i.e. the defendant No. 2 are exempt from any liability for the loss of 187.19 long tons out of the said cargo, which resulted from latent defect in the carrying ship that had to be pumped over board in order to ensure safety of the ship.

16. On 18-9-1975, the defendant No. 2 wrote to the plaintiff that the plaintiffs claim, if any, which is denied for the alleged shortage in the said cargo stood time barred but it is denied that the defendant No. 2 wrote that letter under any pressure as alleged by the plaintiff. They also denied that there was any admission by the master of the ship to the effect that the carrier would be responsible for the quantity of the allegedly short landed cargo or that there was a novation of the contract of carriage as between the plaintiff and the defendant No. 1.

17. The defendant No. 3, contested the suit by filing a separate written statement, wherein it stated that the Insurance Policy No. DAC/A/MP-392/75 was issued against cover note No. SBC/D-1/MC-530/12/75 and from the said insurance policy it appears that Pubali Bank on account of M/s Padma Petroleum obtained the said insurance policy covering 8,921 long tons of Furnace Oil shipped per 'SS Varuna Kanchan' from Kuwait to Chittagong. The said insurance policy was neither issued to the plaintiff, nor for the suit consignment and, as such, the plaintiff is not entitled to any relief against this defendant. The said insurance policy contained that the insurer shall have no liability for loss of 1% of the consignment, so, this defendant is not liable for the claimed amount of the plaintiff. The plaintiff did not obtain any valid and effective insurance policy for the suit consignment of 19,908 long tons of Furnace Oil and therefore the present suit against this defendant is not maintainable according to law. It further asserted that this defendant is not liable for the alleged short delivered cargo since admission of the plaintiff vide its claim bill to the admission of the plaintiff vide bill dated 15-1-74, a quantity of 554.50 long tons was short carried by the carrying tanker and 187.19 long tons was pumped overboard, which are not covered by the insurance policy. The alleged losses are not due to any of the risks covered by the said insurance policy and, as such, this defendant is not liable for any part of the claim of the plaintiff.

18. The liability of the Insurer is secondary one and it is subject to the liability of the carri-

er, the bailess and the other third parties. The alleged loss, if found to be correct, and the same according to plaintiff being due to fault, carelessness and negligence of defendants Nos. 1 and 2, so the damage is recoverable from them not from this defendant.

19. Mr. Abdul Momen Chowdhury, the learned Advocate appearing on behalf of the plaintiff-appellant submitted that this is a case for damage against the defendant Nos. 1 and 2 as carrier and defendant No. 3 as insurer of the cargo for an amount 741.69 metric tons of furnace oil that has been imported from Kuwait by M/s Padma Petroleum Ltd. The learned Subordinate Judge has not taken to his judicial notice that the plaintiff positively averred in his plaint that there was novation of the contract, as such, dismissal of the suit without considering the said positive averments made in the plaint has occasioned a total failure of justice.

20. He further submitted that the learned Subordinate Judge has ignored the clear admission of the master of the ship that the carrier will be responsible for the loss, which is very crystal clear from the correspondences between the appellant and the respondent No. 2 and, as such, the averments made by the defendant Nos. 1 and 2 that the claim is apparently time barred is not sustainable in law, which the learned Judge failed to accede, as such, the judgment and decree passed upon wrong computation of limitation of time makes those not sustainable and are liable to be reversed.

21. He also submitted that the learned trial Court Judge gravely erred by holding that the case was not filed within one year from 18-9-1975, in as much as, the plaintiff appellant conclusively proved and it was admitted by respondents that there are loss of cargo at the port due to negligence of the carrier, as such, the limitation of the suit is governed by Articles 115 of the Limitation Act, 1908 as during the whole period the parties were negotiating for the claim of the plaintiff, even long after the discharge of the cargo, as such, the special limitation provided by the Carriage of Goods by Sea Act is not attracted, as such, the judgment upon misdirection is liable to be reversed.

22. He further asserted that there was a novation of the contract as the captain of the ship undertook to pay the damages independent of the B/L, as such, the failure on the part of the defendant respondents instituting the suit falls within purview of Articles 115 of the Limitation Act, as such, dismissal of the suit holding that the same is barred by limitation is unwarranted and prayed for allowing the appeal.

23. Mr Md Ohiullah, the learned Advocate appearing on behalf of the defendant-respondent Nos. 1 and 2 submitted that it is admitted that under a contract of carriage entered into between Kuwait National Petroleum Company and the defendant No, 1 a consignment of Furnace Oil in bulk said to weight 19,908 long tons was shipped by the 'SS Varuna Kanchan' from Kuwait for delivery at Chittagong to the order of Pubali Bank, Motijheel, Dhaka in terms of a bill of lading Export No. 264/73 dated the December 1973 in course of the hull survey, the quantity of the said cargo found on board the ship was 19,353.50 long tons although in the said bill of lading and in the manifest submitted by the master of the ship it was said to weight 19,908 long tons. The ship, however, before arriving at Chittagong did not call on any other port. From the hull survey it was apparent that a quantity of 554.4 long tons out of the said cargo was not shipped by the shipper at the port of loading as otherwise there could be no reason for the quantity to have been reduced on board the ship during the voyage. The master of the ship discovered a leak in the cargo line and oil started to rush and accumulate in the engine and pump room and that on rush of oil to a dangerous level, to ensure safety of the ship, the situation required discharge of

approximately 187.19 long tons over board. He firmly asserted there was no novation of the contract.

24. Mr Manzur-ur-Rahim, the learned Advocate with Ms Afreen Mohiuddin, the learned Advocates appearing on behalf of the defendant-respondent No. 3 submitted that this defendant-respondent is the Sadharan Bima Corporation the insurer of the cargo and since the plaintiff could not produces any evidence of shortage by way of survey conducted as per Carriage of Good Act, 1924 as such, any insurance claim cannot be substantiated. An insurer in the absence of any survey report is not liable for any damage. Further, he pointed out that the plaintiff-appellant could not even produce the charter party. The insurance policy is said to have been constituted in between this defendant-respondent and M/s Padma Petroleum Ltd but the instant plaintiff is M/s Meghna Petroleum Ltd a completely separate legal entity, who has no *locus standi* to file the instant suit and therefore the appeal is liable to dismissed. He further submitted that it quite apparent from cover note No. SBC/D-1/MC-530/12/75 and from the said insurance policy that Pubali Bank on account of M/s Padma Petroleum obtained the said insurance policy covering 8,921 long tons of Furnace Oil shipped per 'SS Varuna Kanchan' from Kuwait to Chittagong. The said insurance policy was neither issued to the plaintiff or to Padma Petroleum Ltd, nor for the suit consignment and, as such, the plaintiff is not entitled to any relief against this defendant. So, this defendant is not liable for the claimed amount of the plaintiff.

25. On perusal of the submission made by the learned Advocates of both the parties, the memo of appeal, the LC Record containing plaint, written statements and exhibits, it clearly reflects that the plaintiff M/s Meghna Petroleum Ltd nowhere in the claim or in its pleadings stated as to how M/s Padma Petroleum Ltd, brings the suit while the contract was not in its name. It is a well settled principle of corporate law that even a holding company cannot sue or be sued for its subsidiary and similarly not even a sister concerns, which M/s Padma Petroleum and M/s Meghna Petroleum Ltd are not, cannot replace each other. Mr Chowdhury, on query took us through the order sheet dated 1-1-1984 that an amendment to the plaint was made with regard to the name from the M/s Padma Petroleum Ltd to Meghna Petroleum Ltd, as it was merged with M/s Meghna Petroleum Ltd by an administrative order by the government and therefore the contention that M/s Meghna Petroleum Ltd does not have the *locus standi* is not sustainable. However, we hold that merger of two limited liability companies with two separate legal entities cannot be merged together by passing the provisions of the Companies Act 1913 (now Companies Act, 1994), and therefore M/s Meghna Petroleum did not have the *locus standi* to bring the suit against the plaintiffs.

26. On point of limitation it is clearly encompassed in the Carriage of Goods by Sea Act, 1924. The instant case, as per terms of the B/L the laws of England shall prevail, however, the Carriage of Goods by Sea Act 1925, applicable in Bangladesh also have the same provision in Article III rule 6 that any suit for damage be brought within 1(one) year from the date of delivery of the consignment. Article- III, rule 6 of the Carriage of Goods by Sea Act, 1924, which read as follows: "...Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

27. The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

28. In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

29. In the case of any actual or apprehended loss or damage, the carrier and the receiver shall give all reasonable facilities to each other for inspection and tallying the goods.

30. The plaint clearly asserted that the cause of action being dated 31-12-1973 and the instant case was filed on 30-12-1976. On the other hand, Article-30, to the First Schedule of the Limitation Act, 1908, also has prescribed the same time limit therefore i.e. 1 (one) year for bringing any suit against a carrier for compensation for loss or injury to goods. Therefore, we find the suit being measurably time barred.

31. On perusal of the records it is also quite apparent that the plaintiff did not exhibit the charter party, which is the basis of the claim as being the contract. There was no joint survey of the consignment and no short landing certificate was issued by any authority with regard to quantum of the loss.

32. The insurance policy, as has been issued by the defendant-respondent No. 3 was for the quantity of 8,921 long metric tons, however, the plaintiff imported 19,908 long metric tons of Furnace Oil, out of which the lost amount could not be distinguished and as the damage is not being supported by any survey, so any claim against the insurer is also not sustainable.

33. From the discussions set forth above, we do not find any merit in the appeal and therefore the appeal ought to fail.

34. In the result, the appeal is dismissed.

35. Send a copy of this judgment to the concern Court below immediately.

Ed.

High Court Division
(Special Original Jurisdiction)

Syed Refaat Ahmed J
Ashraful Kamal J

Judgment
March 7th, 2012.

Nuran Nabi and others.....Petitioners
vs
Government of Bangladesh and others
.....Respondents*

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

The core demand of the petitioners is one of *"restitutio in integrum"*, that is, one of placing the aggrieved petitioners in the situation as by law ought to have been allowed to operate and prevail to their benefit at the material time had no prejudice been sustained by them by the inability of the respondents to meet their own obligations mandated under the law. .....(19)

Syed Mamun Mahbub, Advocate with Zainul Abedin, Advocate—For the Petitioners.

Mahbubey Alam, Attorney-General, with Murad Reza, Add Attorney-General Israt Jahan, AAG Kashefa Hussain, AAG—For the Respondents.

Judgment

Syed Refaat Ahmed J : In this Application under Article 102 of the Constitution a Rule Nisi was issued calling upon the Respondents to show cause as to why the inaction of the

*Writ Petition No. 9195 of 2011.

Respondents evident in not paying the MPO (Monthly Payment Order) to the Petitioners in No. 6 Grade Taka 18,500 instead of from Pay Code Nos. 7, 8 and 9 (basic Taka 15,000, Taka 12,000 and Taka 11,000) shall not be declared to be illegal *mala fide*, without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The nine Petitioners before this Court are Principals of various Technical Business Management Colleges asserting a right, that they submit, has accrued to them further to বেসরকারী শিক্ষা প্রতিষ্ঠান (সকুল, কলেজ, মাদ্রাসা ও কারিগরি শিক্ষা প্রতিষ্ঠানসমূহ) এর শিক্ষক ও কর্মচারীদের বেতন-ভাতাদির সরকারী অংশ প্রদান এবং জনবল কাঠামো সম্পর্কিত নির্দেশিকা, ২০১০ ("২০১০ নির্দেশিকা") as issued by the Ministry of Education by means of a "পরিপত্র" dated 4-2-2010 under Reference No. স্মারক নং-শাঃ"১৩/এমপিও-১২/২০০৯/৭৫ Reliance in this regard, in particular, is placed on Clause 11 (kha) of the ২০১০ নির্দেশিকা which reads thus:

> "১১ (খ) এ নির্দেশিকা জারির পূর্বে বিধি মোতাবেক নিয়োজিত প্রতিষ্ঠান প্রধান বা সহ-প্রধানগণ এমপিওভুক্তির সময়ে এবং ইনডেক্স ধারী প্রতিষ্ঠান প্রধান ও সহপ্রধানগন পরিশিষ্ট-'ঘ' অনুযায়ী শিক্ষাগত যোগ্যতা (বিভাগ/শ্রেণী) ও কাম্য অভিজ্ঞতা না থাকলে বর্ণিত স্কেলের নীচের ধাপের বেতন স্কেলে বেতন-ভাতাদি পাবেন। তবে শিক্ষাগত যোগ্যতা ও অভিজ্ঞতা পূর্ণ হলে (পরিশিষ্ট-'ঘ') অনুযায়ী বেতন-ভাতাদি পাবেন।

3. It is stated that predicated on Clause 11(kha) the Respondent No. 2, Director General, Directorate of Technical Education issued a letter to the Secretary, Ministry of Education, vide Memo No. কাশিঅ/এমপিও/স্কেল/২০১০/৬২২ dated 19-10-2010 recommending Principals of the status as the Petitioners to be entitled to a scale one step lower, that is, scale of Taka 18,500 (Pay Code 6) by reason of the conditions specified in Clause 11 (kha) being attracted to them. This communication of the Directorate, as is found to be the first official recognition of such entitlement arising under the ২০১০ নির্দেশিকা, is reproduced hereinbelow :

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
কারিগরি শিক্ষা অধিদপ্তর
এফ-৪বি, পশ্চিম আগারগাঁও,
প্রশাসনিক এলাকা, শেরেবাংলা নগর, ঢাকা-১২০৭

স্মারক নং- কাশিঅ/এমপিও/স্কেল/২০১০/৬২২ তারিখঃ ১৯-১০-১০

বিষয়ঃ এমপিওভূক্ত বেসরকারী কারিগরি কলেজ (বিএম) এর প্রতিষ্ঠান প্রধানের স্কেল প্রদান প্রসঙ্গে।

উপর্যুক্ত বিষয়ের প্রেক্ষিতে জানান যাচেছ যে, ২০১০ সালে নতুন এমপিওভূক্ত প্রতিষ্ঠানে ০৪-০২-১০ তারিখের পূর্বে নিয়োজিত অধ্যক্ষ গণ জনবল কাঠামো ২০১০ এর ১১(খ) অনুচ্ছেদের বর্ণিত "এ" র্নিদেশিকা জারির পূর্বে মোতাবেক নিয়োজিত প্রতিষ্ঠানে প্রধান বা সহ-প্রধানগণ এমপিওভূক্তির সময়ে এবং ইনডেক্সধারী প্রতিষ্ঠান প্রধানগণ পরিশিষট 'ঘ' অনুযায়ী শিক্ষাগত যোগ্যতা (বিভাগ/শ্রেণী) ও কাম্য অভিজ্ঞতা না থাকলে বর্ণিত স্কেলের নীচের ধাপের বেতন স্কেলে বেতন-ভাতাদি পাবেন। তবে শিক্ষাগত যোগ্যতা ও অভিজ্ঞতা পূর্ণ হলে পরিশিষ্ট 'ঘ' অনুযায়ী বেতন-ভাতাদি পাবেন। এ অনুচ্ছেদের সুবিধা বর্তমানে এমপিওভুক্ত প্রতিষ্ঠানে নিয়োজিত এমপিও বিহীন প্রতিষ্ঠান প্রধান গণের ক্ষেত্রে ও প্রযোজ্য হবে। এ নির্দেশিকা জারির পর এ ধরনের কোন নিয়োগ প্রদান করা হলে তা এমপিওভুক্তির জন্য বিবেচিত হবে না" এ অনুযায়ী অধ্যক্ষ স্কেলের একধাপ নিচে অর্থাৎ ১৮৫০০ (পে-কোড ৬) স্কেলে এমপিওভুক্ত হয়েছেন ।

১৯৯৫ এর জনবল কাঠামো অনুযায়ী নিয়োজিত অধ্যক্ষগণ কাম্য অভিজ্ঞতা না থাকার কারণে/কম অভিজ্ঞতা থাকার কারণে পদবী হিসাবে 'PR' কিন্তু প্রভাষক স্কেল (পে-কোড ৯) এ বেতনভাতাদির সরকারী অংশ পাচ্ছেন। এ ক্ষেত্রে বেসরকারী কারিগরি কলেজ (বিএম) শিক্ষাক্রমের এমপিওভুক্ত প্রতিষ্ঠানের ইনডেক্সধারী যে সকল অধ্যক্ষগণ ১১০০০ (পে-কোড ৯) স্কেলে বেতনভাতাদি উত্তোলন করছেন তারা ২০১০ জনবল কাঠামোর ২২(খ) অনুচ্ছেদ অনুযায়ী ১৮৫০০ (পে-কোড ৬) বেতনভাতাদি দাবী করছেন। উক্ত অনুচ্ছেদের অধীনে তাদেরকে অধ্যক্ষ স্কেলের এক ধাপ নিচে অর্থাৎ১৮৫০০ (পে-কোড ৬) স্কেলে বেতনভাতাদির সরকারী অংশ প্রদান করা যেতে পারে। সদয় অনুমতির জন্য অনুরোধ জানান হলো।

(প্রফেসর ডঃ নিতাই চন্দ্র সূত্রধর)
মহাপরিচালক
কারিগরি শিক্ষা অধিদপ্তর

4. The above request made on 19-10-2010 with the objective of seeking the approval of the Ministry of Education elicited the necessary response on 3-11-2010 as simply but clearly and

significantly endorsed the Directorate's recommendation in acknowledgement of the right accrued under clause 11 (kha) thus:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
শিক্ষা মন্ত্রনালয়
শাখা-৫ (কারিগরি-১)
www.moedu.gov.bd

নং শা ঃ ১৫/এমপিও/১৬-২/২০৯৯/৫২৯ তারিখ ঃ ৩-১১-২০১০ খ্রিঃ।

বিষয় ঃ এমপিওভুক্ত বেসরকারী কারিগরি কলেজ (বি এম) এর প্রতিষ্ঠান প্রধানের স্কেল প্রদান সংক্রান্ত।

সুত্র ঃ কাশিঅ/এমপিও/স্কেল/২০১০/৬২২, তারিখ ঃ ১৯-১০-২০১০ খ্রিঃ

উপর্যুক্ত বিষয় ও সুত্রের প্রেক্ষিতে এমপিওভুক্ত বেসরকারী কারিগরি কলেজ (বি এম) এর প্রতিষ্ঠান প্রধানের স্কেল প্রদান সংক্রান্ত বিষয়টি জনবল কাঠামো সম্পর্কিত নির্দেশিকা,২০১০ এর ১১ (খ) অনুচ্ছেদ অনুযায়ী নিষ্পত্তি করার জন্য নির্দেশক্রমে অনুরোধ করা হল।

(আফসারী খানম)
সিনিয়র সহকারী সচিব
ফোন ঃ ৯৫৬৯৭২৬

মহাপরিচালক
কারিগরি শিক্ষা অধিদপ্তর
এফ-৮বি, পশ্চিম আগারগাঁও
প্রশাসনিক এলাকা,শেরেবাংলা নগর, ঢাকা।

5. There followed, thereafter, an initial phase of preparatory activity by the Directorate itself as evident, for example in a notice dated 15-11-2010 inviting Principals enjoying the status as the petitioners and drawing salary on the basis of Pay Codes 7, 8 and 9 (basic 15,000, 12,000 and 11,000) to file applications in the requisite prescribed forms with supporting documentation with a view to claiming pay assessed at Pay Code 6. Thereafter, another initiative of the Directorate is evident in a notice of 3-1-2011 inviting submission of relevant academic certificates and credentials by such applicants. The Petitioners' grievances arise with regard to the inertia and inaction on the part of the Respondents collectively to act on their applications so submitted and the corresponding failure to inform any of the petitioners of the progress, if any, made pursuant to an active consideration of the same, such inaction and inertia submitted to have given rise to an illegality.

6. The Petitioners now contend that this Rule should be made absolute in recognition of their entitlement to draw salary at the level of Pay Grade 6 inclusive of payment of arrears as have accrued to them during the period that the Respondents have failed to implement their otherwise officially recognized and endorsed rights under Clause 11 (kha) of the ২০১০ নির্দেশিকা. The apparent recognition and endorsement of the Petitioners' entitlement under Clause 11 (kha) having been so readily forthcoming from the Directorate as well as the Ministry of Education as early as in October and November 2010, this Court was rather intrigued by the absolute silence, thereafter, on the part of the Respondents to follow up on such recognition concretely and on meaningful terms by enabling the Petitioners to enforce their rights in terms of drawing salary at Pay Grade 6 at the earliest opportunity. Clearly such opportunity was denied the Petitioners for a considerable period before this Court was called upon to intervene in the manner of issuing the Rule Nisi on 27-10-2011. It would take further initiatives of this Court to be fully apprised of the Respondents' official position in this regard. Such initiatives took the form of two further Orders issued necessitating the presence of various government functionaries to explain first hand to this Court the Government's policy position in this regard. The first such Order of 1-2-2012 reads thus:

> "The learned Assistant Attorney General shall positively file an Affidavit-in-Opposition within a 'week's time incorporating a firm response from the concerned Respondents as to why notwithstanding the Directorate's letter of 19-10-2010 issued under reference No. কাশিঅ/এমপিও/স্কেল/২০১০/৬২২ (Annexure-'B') and that of the Ministry of

Education dated 3-11-2010 issued under reference No. শাঃ১৫/এমপিও/১৬-২/২০৯৯/৫২৯ (Annexure-'C') the Petitioners' applications have not met with any consideration/decision thus far. This Court, hereby, also directs the personal presence in Court at 10-00 AM on 9-2-2012 of the Respondent No. 2, Director General, Directorate of Technical Education. F-413, West Agargaon Administrative Area, Sher-e-Bangla Road, Dhaka-1207 to assist further in this Court's understanding of the Respondents ' inaction thus far in this regard. "

7. That particular Order had the desired result of Professor Md Abul Kashem, Director General, Directorate of Technical Education and Dr Khan Rezaul Karim, Director (VOC) of the said Directorate appearing in person in Court on 12-2-2012 and from whose statements, as substantiated in an Affidavit-in-Opposition subsequently filed, this Court was first apprised of certain financial/practical constraints that have thus far prevented the concerned authority to accord full implementation to the admittedly recognized legal claims of the nine Petitioners. The said Affidavit-in-Opposition and the statements made in Court by the said functionaries have been particularly revealing with regard to two aspects of this case. First and foremost, these endorse afresh the legitimate claims of the Petitioners to be granted a Grade 6 pay scale as per the ২০১০ নির্দেশিকা. In evidence of that stance it is shown that as early as on 2-3-2011 a list of 29 individuals, including four of the Petitioners in this Writ Petition, namely, Mohammad Mujibur Rahman Index No. 841808, Mr Delwar Hossain, Index No. 3010936, Mr Md Nuran Nabi, Index No. 3004879 and Mr Md Abdul Kader, Index No. 845708, were sent to the Ministry of Education with a view to securing for them time scale at Grade 6 in accordance with Clause 11 (kha) of the ২০১০ নির্দেশিকা. In this regard, significantly, and aptly so, neither the Director General, nor the Director, (VOC) has adopted the position that the other five petitioners are not to be treated in equal terms as the aforementioned four petitioners.

8. The second revelation that has had a farreaching consequence in operation to the financial prejudice of the nine petitioners is the frank admission on oath that though the petitioners are qualified to be granted a Grade 6 pay scale the impediment faced in implementing the same has been the Government's financial constraints to fund the same. An assurance, however, was given by the Director General in court on 20-2-2012 by reference to the Affidavit-Opposition that the Government, however, remains willing to meet the claims of individuals like the petitioners for such time scale gradually as and when funds become available, thereby, meeting the Government's commitment reflected, in particular, in clause 11(kha) of the ২০১০ নির্দেশিকা .Equipped with these facts, this court deemed it prudent on 12-2-2012 to additionally require the presence in this court of the Secretary representing the Respondent No.1, Ministry of Education, Government of Bangladesh on 16-2-2012 to further queries by this court. It was also made incumbent upon the above two functionaries of the Directorate to be present in court on that other date as well. This court's objective in requiring the presence of the secretary, Ministry of Education was primarily to elicit a film commitment as to the time and mode in which the Government would be able and willing to effectively meet the admittedly legally sanctioned entitlements and claims of the nine petitioners. The objective of this court in the regard was to explore, with the aid of the secretary, Ministry of Education, all avenues for a satisfactory disposal by the Government of the petitioner's claims and to impress upon the concerned authority to act reasonably and fairly in meeting these legitimate claims and to fully address in that regard, in any manner possible, the financial privations

already suffered by the Petitioners for a period of approximately one year leading to the filing of this Writ Petition.

9. On 19-2-2012, pursuant to this Court Order of 12-2-2012, the Secretary, Ministry of Education, Dr Kamal Abdul Naser Chowdhury, upon personal appearance, explained at great length the impediments thus far faced in meeting the due claims of many teachers in the position of the nine Petitioners before us. The learned Attorney General, Mr Mahbubey Alam, and the learned Additional Attorney General, Mr Murad Reza, made supporting submissions in the context of the facts asserted in Court by Dr Chowdhury from which, at the very least, it became evident to this Court that the Ministry of Education has already decided upon meeting the claims of the nine Petitioners as of February, 2012, albeit prospectively. That particular aspect of the Government's perspective of this case led this Court to direct Dr Chowdhury to affirm an affidavit bringing all his assertions on record as substantiated further by documents as may provide a comprehensive account of the Government's position in this regard. The Affidavit-in-Opposition consequentially filed reveals at the outset a sorry picture of the Ministry of Education and the Ministry of Finance being sparring partners in the implementation, in particular, of the obligations imposed Clause ll(kha) of the ২০১০ নির্দেশিকা. The context to such discordance of views of these two crucial Ministries is succinctly stated in the said Affidavit-in-Opposition as thus:

> অর্থ মন্ত্রনালয়ের ২২-১-১৯৯৫ তারিখের অম/অরি (বাস্ত-২/১১২ টাইমস্কেল/৯৮/৮নং স্মারকে শিক্ষা মন্ত্রনালয়ের অধীনে বেসরকারি শিক্ষা প্রতিষ্ঠানের শিক্ষক/কর্মচারীদের টাইম স্কেল দানের আদেশ দেয়া হয় এবং তদানুযায়ী টাইম স্কেল প্রদান অব্যাহত ছিল। কিন্তু পরবর্তীতে শিক্ষা মন্ত্রনালয়ের ০৮-১-২০০৫ তারিখের আদেশ বেসরকারি শিক্ষা প্রতিষ্ঠানের প্রভাষকের টাইম স্কেল প্রদান স্থগিত করা হয়। এ সিদ্ধান্তের বিরূদ্ধে ৬২ জন প্রভাষক মহামান্য হাইকোর্টে রিট মামলা নং ৫৩৯০/২০০৭ দায়ের করেন। মহামান্য হাইকোর্ট ২৪-৩-২০১০ তারিখের রায়ে ৬২ জনকে টাইমস্কেল সহ বেতন ভাতা প্রদানের আদেশ প্রদান করেন। মহামান্য হাইকোর্ট ২৪-৩-২০১০ তারিখের রায়ে ৬২ জনকে টাইম স্কেল সহ বেতন ভাতা প্রদানের আদেশ প্রদান করেন। রায়ের আলোকে শিক্ষা মন্ত্রনালয় হতে ২০১১ সনের নভেম্বর হতে ডিসেম্বর পর্যন্ত সকল প্রভাষকের টাইম স্কেল প্রদান করা হয়। এত মাউশি ও কারিগরি শিক্ষা অধিদপ্তরের সকল খাতে বরাদ্দের তুলনায় অতিরিক্ত অর্থ বরাদ্দের প্রয়োজন হয়।

10. It is evident that compliance with the judgment in Writ Petition No. 5390 of 2007 by the Ministry of Education appears now to have snowballed into a notable discord with the Ministry of Education coupled with the Directorate eager and willing to meet their obligations under the ২০১০ নির্দেশিকা without the benefit, however, of any financial commitment or tangible assistance on the part of the Ministry of Finance. That state of affairs is painfully evident in the further statement made by Dr Chowdhury in the Affidavit-in-Opposition:

> "কারিগরি শিক্ষা অধিদপ্তরের বাজেটে অর্থের সীমাবদ্ধতা থাকায় উক্ত দপ্তর হতে অতিরিক্ত ৩০,৮৯,০২,০০০ টাকা বরাদ্দের জন্য শিক্ষা মন্ত্রনালয়কে অনুরোধ করেন। কারিগরি শিক্ষা অধিদপ্তরের চাহিদা মতে অর্থ বিভাগে অতিরিক্ত বরাদ্দের জন্য প্রস্তাব প্রেরণ করা হলে অর্থ বিভাগ হতে বরাদ্দ পাওয়া যায়নি। পরবর্তীতে মাননীয় শিক্ষা মন্ত্রীও অতিরিক্ত বরাদ্দ চেয়ে মাননীয় অর্থ মন্ত্রী বরাবর উপানুষ্ঠানিক পত্র লেখেন। মাননীয় শিক্ষা মন্ত্রীর অনুরোধের প্রেক্ষিতে এবং এ বিষয়ে অর্থ মন্ত্রনালয়ের সাথে শিক্ষা মন্ত্রনালয়ের এর অব্যাহত যোগাযোগের ফলে মাননীয় অর্থ মন্ত্রী ডি, ও পত্রের মাধ্যমে বেসরকারি শিক্ষা প্রতিষ্ঠানের শিক্ষক/কর্মচারিকে টাইম স্কেল প্রদানে নীতিগত সিদ্ধান্ত প্রদান করেন। তবে এজন্য অতিরিক্ত অর্থ বরাদ্দ করা যাবে না মর্মে জানান। তবে ১১-৯-২০১১ তারিখে অর্থ মন্ত্রী শিক্ষা মন্ত্রনালয়ের বিপরীতে বরাদ্দকৃত রিসোর্স সিলিং এর মধ্যে আন্তঃখান সমন্বয়ের মাধ্যমে টাইম স্কেল প্রদানের বিষয়টি নিষ্পত্তি করার জন্য অনুরোধ করেন।

11. Inter-ministerial exchanges between the Ministry of Education and the Ministry of Finance from 12-1-2011 to 11-9-2011 reveal further in particular, the Ministry of Finance's displeasure with the manner in which the Government, from that Ministry's point of view, now risks being saddled unduly with a

financial burden that could have easily been avoided should the Ministry of Education have exercised greater prudence for its part in respect to principally two matters. First, there is raised the issue of a perceived lack of prudence evident ostensibly in the Ministry of Education having acted far too generously by granting time scale to all non-government college and Madrasa teachers in November-December, 2010 over and beyond the sixty-two petitioners in Writ Petition No. 5390 of 2007. Questioned also is the absence of any initiative on the part of the Ministry of Education to appeal against the High Court's judgment in Writ Petition No. 5390 of 2007. Second, evident also is the dissatisfaction of the Ministry of Finance with MPO provisions being written into the ২০১০ নির্দেশিকা apparently at the sole initiative of the Ministry of Education without prior consultation with the Ministry of Finance. Given the reality on the ground, however, of the ২০১০ নির্দেশিকা being presently in effect, the Ministry of Finance appears willing to concede the acceptance, only in principle, of the existence and currency of the ২০১০ নির্দেশিকা while being firmly adamant in not releasing any fund to meet the financial obligations imposed there under. It is evident that the Ministry of Finance has, therefore, left it entirely to the Ministry of Education to scout for necessary and additional funds if, as and when the Ministry of Education selects to meet the demands of numerous individuals finding themselves in the same predicament as the nine Petitioners. As asserted by Dr Chowdhury in Court on 19-2-2012, and as comes across clearly in his Affidavit-in-Opposition, the best that the Ministry of Education has been able to muster, as per the proposal of the Ministry of Finance, has been the creation of a fund by আন্তঃখাত সমন্বয় or internal adjustment within the resource ceiling set for the Ministry of Education. That fund, however, declaredly will only go so far as meeting the salaries and benefits of individuals like the nine petitioners at their respective entitled scale at Grade 6 prospectively from February 2012 onwards. It is specifically declared in the Affidavit-in-opposition that the petitioners will be entitled to get their salaries and other benefits at the scale of pay Grade 6 as per clause 11(kha) of the ২০১০ নির্দেশিকা with the important qualification that such payments will be made prospectively as of February, 2012 simply by reason of the storage and/or limitation of funds available for that purpose, thereby, wholly negating any claim or entitlement to payment of such salary or benefit in arrears. Interestingly, the Secretary, Ministry of Education, submits that under this scenario the principle of natural justice will not have been violated vis-a-vis the petitioners.

12. The issue of natural justice raised by Dr Kamal Abdul Naser Chowdhury, in the view of this court, goes to the very core of the petitioners' grievances in this case and the issue in that regard is essentially one of fairness in public administration. Admittedly, we are dealing here with a set of substantive rights that have accrued to the petitioners under the ২০১০ নির্দেশিকা as have also evidently matured long ago resulting in the petitioners expectations of receiving tangible financial benefits further to those rights. In that regard this court fails to see why the petitioners may now not question the manner in which their legitimate expectation, i. e, the expectation that something positively will be done by the Government in recognition of their right, now stands to be frustrated. In that regard, the selective and partial consideration of their lawful claims as placed forth before this Court by the various functionaries citing one reason or the other appears to this Court to be a denial of a full implementation of a benefit to which any reasonable person in the position of the nine Petitioners would expectantly have an entitlement to and the frustration of which in the circumstances of this case appears to border on an abuse of power by the concerned authority. The facts of this case clearly and unambiguously endorse the justifiability, legally and otherwise, of the Petitioners' expectations to be

paid the salaries and benefits as and when the right to such payments accrued to them under the law. Endorsed also is the fact that public interest, of which the interests of the nine Petitioners and numerous others of their fraternity is an essential microcosmic component, shall be best served by meeting such demands and claims. In that regard, happily the Ministry of Education and the Ministry of Finance have not sought to override or reevaluate their present obligations vis-a-vis such payments as reflected in the ২০১০ নির্দেশিকা . But that notwithstanding, it cannot also be ignored that the refusal and inability to allocate requisite funds by the Ministry of Finance to meet the legitimate demands of the Petitioners can very readily translate into a negation of such existing obligation. It is here that this Court is inclined to intervene on behalf of the Petitioners to remind the concerned authority of the obligation imposed on them under the law and alert them to the need of meeting such obligation with fairness, transparency and utmost expediency.

13. The Ministry of Education has repeatedly sought to impress upon this Court the fact of the paucity of funds coupled with administrative constraints that shall prevent the Ministry from meeting the Petitioners' demands for a period commencing any date earlier than February, 2012. In this regard, the following extract found in Annexure '2' of the Affidavit-in-Opposition on behalf of the Respondent No. 1 from a communication addressed by the Ministry of Finance to the Ministry of Education on 22-5-2011 is particularly telling. Expressing his dissatisfaction with the manner in which the Ministry of Education has thus far progressed in the recognition of substantive rights of teachers, the Minister of Finance states thus:

> "উচ্চ আদালতের রায়ের প্রতি সম্মান জানিয়ে বেসরকারী শিক্ষা প্রতিষ্ঠানের শিক্ষক/কর্মচারীদের টাইম স্কেল প্রদানের বিষয়টি নীতিগতভাবে অনুমোদন করা হল এবং গুরুতর ব্যত্যয় সত্ত্বেও কেবল সামগ্রিক পরিস্থিতি বিচার করেও এমপিও নির্দেশিকা-২০১০ ও এর জনবল কাঠামো নীতিগতভাবে অনুমোদন দেয়া হ'ল। তবে এ বাবদ কোন অতিরিক্ত বরাদ্দ প্রদান করা হবে না। অর্থ বিভাগ থেকে পরীক্ষা করে দেখা যায় যে,এমটিবিএফ মন্ত্রনালয় হিসেবে আপনার মন্ত্রনালয়কে আগামী ২০১১-১২ অর্থ বছরে যে রিসোর্স সিলিং দেয়া হয়েছে তার মধ্যে আন্তঃখাত সমন্বয় করে এ বাবদ প্রয়োজনীয় অর্থের সংস্থান রাখা সম্ভব হবে"।

14. It is clear that the general drift of the Minister of Finance's communication is to remind the Ministry of Education that better financial administration and oversight on the part of the latter Ministry would considerably reduce the risk of inability to meet various financial commitments inclusive of the claims of teachers like the nine Petitioners. That particular reminder in the communication of 22-5-2011 pertinently alerting the Ministry of Education to the existence of unutilized funds and the need for a more efficient fiscal management of the same to possibly meet such demands reads thus:

> "অন্য যে গুরুত্বপূর্ণ বিষয়টি আপনার নজরে আনা প্রয়োজন মনে করছি তা হল ২০০৯-১০ অর্থ বছরের মাধ্যমিক ও উচ্চ শিক্ষা অধিদপ্তর এবং কারিগরি শিক্ষা অধিদপ্তরের এমপিওভুক্ত শিক্ষকদের বেতন/ভাতা পরিশোধ বাবদ সরকারী খাত হতে ছাড় কৃত অর্থের মধ্যে আনুমানিক ১৪৩.১৯ কোটি টাকা বিভিন্ন ব্যাংক একাউন্টে অব্যয়িত রয়েছে মর্মে জানা গেছে। অব্যয়িত অর্থ ৩০ জুন,২০১০ তারিখের মধ্যে সরকারী খাতে জমা দেয়ার বিধান থাকলে ও তা জমা না নেয়া গুরুতর আর্থিক অনিয়মের পর্যায়ে পড়ে। সে পরিপ্রেক্ষিতে ৩০ জুন, ২০১০ তারিখ পর্যন্ত অব্যয়িত সমুদয় অর্থ অবিলম্বে সরকারী কোষাগারে জমা দেয়া প্রয়োজন। এ বিষয়ে আপনার হস্তক্ষেপ কামনা করছি। অপরদিকে, চলতি ২০১০-১১ অর্থ বছরে বেসরকারি শিক্ষা প্রতিষ্ঠানের শিক্ষক/কর্মচারীদের বন্ধ থাকা টাইম স্কেল বাবদ দাবীকৃত অতিরিক্ত ৩৬.০০ কোটি টাকা চলতি অর্থ বছরে এমপিও খাতে ব্যাংকে অব্যয়িত ১৩৭.০০ কোটি টাকা হতে সংকুলান হয়ে যাবে বলে আমি মনে করি।"

15. The above revelation is declaratory to this Court of the fact that the grounds cited as

to the inability to fully meet the Petitioners' claims due to unavailability of funds are unsatisfactory, not fully justified or completely borne out by facts or realities on the ground. Rather the facts as asserted above by the Ministry of Finance speak of the urgent need for the concerned authority simply to have the will to act concertedly, fairly and reasonably under the law and, accordingly, meet their obligations in full discharge of the same.

16. Based on the findings and observations above, this Court finds that the impugned inaction of the Respondents individually and collectively in failing to secure to the Petitioners their full entitlement in tangible financial terms assessed at Pay Scale Grade 6 Taka 18,500 has indeed been illegal and without lawful authority.

17. Undeniably furthermore, the Orders of this Court of 12-2-2012 and 19-2-2012 have thus far inured to the benefit of the Petitioners in that failing such intervention the Petitioners would, in all likelihood, not even had a commitment from the Government for payment of their salaries and benefits at Pay Grade 6 as of February, 2012 as stated thus by the Ministry of Education:

> "কারিগরি শিক্ষা অধিদপ্তর উক্ত অর্থ থেকে শিক্ষা মন্ত্রনালয়ের নির্দেশনা মোতাবেক শিক্ষক কর্মচারীকে টাইম স্কেল ইনডেক্সধারী শিক্ষক কর্মচারীদের বেতন ভাতাদি প্রদান শুরু করেছে এবং বিবেচ্য মামলাভূক্ত পিটিশনারদের ফেব্রুয়ারী/২০১২ হতে দাবীকৃত ৬ গ্রেডে বেতন প্রদান করা সম্ভব হবে না।"

18. Based on the findings and observations above, this Court's additional directive has to be that the concerned authority has now to make the necessary extra effort to additionally meet the legitimately claimed salaries and benefits of all nine Petitioners as admittedly has long accrued to them and matured over a year ago but with regard to which the Government is now seeking to absolve itself of all liability for nonpayment by a limited and qualified recognition of the Petitioners' claims prospectively as of February, 2012. That endeavour at avoidance of responsibility, this Court finds in addition to its finding above, if fully materialized, shall be an example of gross abuse of power made most arbitrary by insufficient reasons shown and must, therefore, be deterred.

19. It is here that this Court has also had to consider the submissions of the learned Additional Attorney General Mr Murad Reza that any imposition of liability for payment on the Government over and above its own commitment to meet the Petitioners demands from February, 2012 onwards shall be tantamount to compensating the Petitioners for their claimed financial loss and this the Court may not do given the judicial wisdom reflected in various judgments of this Court finding against the rationale of such compensation being awarded. Inherent in Mr Murad Reza's argument, therefore, is an interpretation of the facts and circumstances of this case as involving an act of mitigating, offsetting or correcting an undesired effect or deficiency by devising a counterbalancing mechanism aimed at recompensing a loss or injury. This Court's understanding of the Petitioners' case and their predicament is, however, fundamentally different from that as understood by Mr Reza. This Court finds that the core demand of the petitioners is one of "restitutio in integrum", that is, one of placing the aggrieved Petitioners in the situation as by law ought to have been allowed to operate and prevail to their benefit at the meterial time had no prejudice been sustained by them by the inability of the Respondents to meet their own obligations mandated under the law. The objective of this court will, therefore, be in these circumstances to reposition the petitioners to their original status as admittedly and undeniably accrued to or attached to them under the law on a given material date. In other words, the claim in this case is for a restoration of such *status quo* ante. That act of reparation and restoration of the petitioners to a previous status or position is found to be fundamentally different from the

act of offsetting a supposed deficiency by a compensation or award as argued by Mr Murad Reza. In the facts and circumstances, this Court finds that the question here is, therefore, not one of the Respondents being directed to make grants of financial relief to diminish or mitigate the effect of loss admittedly suffered by the petitioners. Rather, the respondents are directed to act positively in full discharge of their legal obligations to wholly adjust or alter the petitioners' financial status as if the interim period of financial deprivation marred by inaction by the concerned authority had not transpired at all. Indeed, the Affidavit-in-Opposition of the Respondent No.2 Director General acknowledges the reality of such state of affairs evident in the submission that "unreasonable delay has occerred to take action regarding the petitioners entitlement for which the instant respondents craves your Lordships unconditional apology....."In accepting such apology this court can merely condone such delay as being a temporal aberration in the entire scheme of affairs, but shall not to any extent excuse the substantive liability to pay as otherwise remained in abeyance during such period of protracted non-performance by the respondents. This Court finds, therefore, that in these circumstances the Court has aptly been called upon by the Petitioners to play a restitutory as opposed to a mere compensatory role.

20. Proceeding on the facts and circumstances, this Court finds that a process initiated at the behest of the Directorate on 19-10-2010 to bring to fruition the rights recognized under Clause 11 (Kha) of the ২০১০ নির্দেশিকা having met the Ministry of Education's approval, resulted in the publication of notices in November, 2010 and January, 2011 inviting applications from claimants with proof of credentials. In the absence of any fact asserted or established to the contrary in the Writ Petition or the Affidavits filed, it is also this Court's reading that by or around March, 2011 the Directorate was in a satisfactory position to proceed upon all such applications in making recommendations for financial benefits due to various individuals including four of the nine Writ Petitioners before tins Court as stated in its communication of 2-3-2011 to the Ministry of Education. In extensive deliberations before this Court, the Respondents have notably, and aptly, refrained from any further effort to deny the five other Petitioners their status as valid claimants under Clause 11(kha) of the ২০১০ নির্দেশিকা or indeed of these other Petitioners being on an equal substantive footing under the law with the other four Petitioners. That being the case, this Court is satisfied that the nine Petitioners have placed similar claims for this Court's consideration and are to benefit collectively and individually from this Court's findings above in that regard. Reminding the Respondents of the commitment made under oath to meet the demands and claims of the Petitioners as of February, 2012 prospectively, this Court further finds on the legitimacy of the Petitioners' claims for arrears as accrued to them under Clause 1l(kha) of the ২০১০ নির্দেশিকা Predicated on that finding, this Court, hereby, directs the concerned Ministry of Education to ensure payment to all nine Petitioners of any arrear salary and/or benefit as accrued to them by application of Pay Scale at Grade 6 with such arrear calculated and deemed payable no later than from March, 2011 onwards. The Respondents are further directed to absolutely and positively without any qualification to discharge their liabilities for the payment of such arrear salaries and benefits to the nine Petitioners within a period not exceeding or beyond 30 June, 2012.

21. In light of the above, we find merit in the Application and substance the Rule issued. In the result, the Rule is made absolute with the specific directions above.

There is no order as to costs.

Ed.

High Court Division
(Special Original Jurisdiction)

Mirza Hussain Haider J
Md Khurshid Alam Sarkar J

Judgment
February 28th, 2012.

Nurul Imran Chisty and others.....
.....Petitioner (in WP No. 9391 of 2011)
vs
State and others.....
.....Respondents*

Mailing Operator & Courier Service Rules, 2011
Rule 6

Rule 6 has provided a forum of representative capacity of the mailing operators/courier service in the form of advising upon sitting with the postal department and give proper advice by which the interest of the petitioners can be protected under the Rule. .....(53)

Interpretation of Statute

Whether a particular piece of delegated legislation confers excessive power on the delegate has to be determined with reference to the specific provisions contained in the relevant statute conferring the power to make the Rule, Regulation, etc. and also the object and purpose of the Act as can be gathered from various provision of the enactment. ...(45)

R vs Immigration Appeal Tribunal, (1986) Imm AR 385 of Queen's Bench Division; Chartsey Urban District Council vs Mixnam's Properties Limited, (1964)) 2 All ER 627; R vs Customs and Excise Commissioner, (1986) 2 All ER 164; Bangladesh Krishi Bank vs Meghna Enterprise, 50 DLR (AD) 194; Chandpur Subordinate Judge, 2 BLC 50; Abdul Gaffar Chowdhury vs Joint District Judge, 57 DLR-138; Bangladesh vs Syed Anwar Ali, 27 DLR (AD) 16; Urban District Council vs Mixnam's Properties Limited, All England Law Reports Volume 2 (1964) 627; R vs Customs and Excise Commissioners, All England Law Reports (1986) Valume-2 page 164; Chandra Bali V R, AIR 1952 All 795; Mohd Yasin vs Town Area Committee, AIR 1952 SC 115; Tata Iron and Steel Company vs Workmen, (1972) 1 SCC 38; State of TN vs Hind Stone, (1981) 2 SCC 205; and Supreme Court Employees Welfare Association vs Union of India, (1989) 4 SCC 187 ref.

Fida M Kamal with Md Oziullah, and Md Iqbal Kabir, Advocates—For the Petitioners.

Mahbubey Alam, Attorney-General with Md Al-Amin Sarker, Deputy Attorney-General and Dr Shahdeen Malik with Zahirul Alam Babor and Manjurul Ahsan—For the Respondents.

Judgment

Md Khurshid Alam Sarkar J: Since both the writ petitions involve common question of law and fact, they were heard together and disposed of by a single judgment.

2. In Writ Petition No. 9391 of 2011 Rule was issued calling upon the respondents to show cause as to why Rules 4; 5; 7(8); 8; 9(1) (Kha), (Gha), (Cha), (Jha), (Neo); 11; 13(1) (Gha), (Uma), (2); 14, 16(4), (9), (12); 17 and Schedule-7 of the Mailing Operator and the Courier Service Rules, 2011 published vide SRO No. 288-Ain/2011 dated 13-9-2011 (Annexure-D) should not be declared unconstitutional and to have been issued without lawful authority and is of no legal effect as the same is violative of Articles 27, 31 and 40 of the Constitution of the Peoples' Republic of Bangladesh and further to show cause as to why the respondents should not be directed to make necessary amendments to the Mailing Operator and Courier Service Rules, 2011 (SRO No. 288-Ain/2011 dated 13-9-2011) in comparison to the other existing laws, rules and convention.

*Writ Petition Nos. 9391 of 2011 *with* 9414 of 2011.

3. In Writ Petition No. 9414 of 2011Rule was issued calling upon the respondents to show cause as to why the impugned Rules 4, 5(l)(Kha), 9(1) (Kha) (Ja), 11(2) (Ka) (Kha), 16(4) (Ka) (Kha) (Gha) and Schedule-7 of the Mailing Operator and Courier Service Rules, 2011 (মেইলিং অপারেটর ও কুরিয়ার সার্ভিস বিধিমালা, ২০১১) issued under SRO No.288-Ain/2011 dated 13-9-2011 (Annexure-E) should not be declared to have been made without lawful authority and are of no legal effect as those are violative of section 4C and 58 of the Post Office Act, 1898 as amended in 2010 and Articles 27, 31 and 40 of the Constitution of the People's Republic of Bangladesh and further to show cause as to why the respondents should not be directed to make necessary amendments to the Mailing Operator Courier Service Rules, 2011 (SRO No, 288-Ain/2011 dated 13-9-2011) in comparison to other existing laws, rules and convention.

4. The short facts, as stated in the writ petitions, for disposal of the Rules are that the petitioners in both the writ petitions are reputed Domestic and International Courier Service Operators in Bangladesh having been engaged in their respective businesses since 1983 upon obtaining valid trade license and necessary permission from the concerned authorities and are paying VAT, Income Tax and other charges to the Government. It is the petitioners' claim that they generate a substantial amount of the revenue earned by the Courier and Express Industry as a whole in Bangladesh. It is stated that the petitioners are, per force, contractually affiliated to various overseas Agencies, Franchisee Service Providers, Contractors and Joint Ventures as they do not possess their own international network in the relevant field. It is further stated that before enactment of the Post Office (Amendment) Act 2010, the mailing operators and courier service providers were regulated by the following laws, namely, the Post Office Act 1898, the Customs Act 1969, the Value Added Tax Act 1991, the Foreign Exchange Regulation Act 1947 and Import and Export Control Act, 1950. It is stated that by amendment to the Post Office Act 1898 on 28-1-2010 and framing Rules thereunder, namely, "(মেইলিং অপারেটর ও কুরিয়ার সার্ভিস বিধিমালা, ২০১১)" the Postal Department was relieved from the obligation to pay any compensation and demurrage against loss, wrong delivery and delay in delivery whereas penalties and compensatory fines were imposed on the petitioners for the commission of the said actions, which is a clear violation of Article 27 of the Constitution. It is further stated that the Rules, insofar as they relate to payment of compensations to foreign companies in Bangladesh and their Agencies, are inconsistent with the Rules and Regulation framed by the World Trade Organization (WTO) and, therefore, implementation of the Rules, as has been framed by the respondents, requires consent of, and ratification by, the principals of foreign companies operating in Bangladesh and their governments. It is further stated that the Post Office Act, 1898 has been amended by Parliament in 2010 incorporating certain new provisions to regulate universal postal service and for international communication by the National Public Postal operation. Section 4B of the said Act empowers the concerned authority to issue license to the mailing operators and courier service providers. The licensing authority has been constituted under section 4C of the said Act and by virtue of the said section, power has conferred upon the Government to frame Rules for the purposes, amongst others, to determine appropriate License fees and other charges and commis-sions for operating mailing and courier services. The amended law has authorised the licensing committee to regulate the aforesaid financial matters. The Rules framed thereunder, insofar as they relate to the said matters, are contrary to the amended law and beyond jurisdiction and hence illegal and void. It is further stated that the Postal Department of the Government of Bangladesh is a direct competitor of the petitioners and

both parties are engaged in the same business. But while inserting the provision in the Post Office Act, 1898 by the amendment of the Act in 2010, imposing penalty upon the petitioners, no provision has been laid down in the amended Act of 2010 or in the Rules of 2011 for imposing similar penalty upon the Postal Department. It is alleged that the government has thus given special privilege to the Postal Department by exempting them from liability. It is further stated that after enactment of the Post Office (Amendment) Act 2010, Secretary of the Ministry of Post and Telecom- munication held a meeting on 14th of August, 2010 regarding the purpose of the said amendment as well as the necessity and purpose of framing proposed Rules thereunder to carry out the purpose of the parent law. The meeting was attended by the representatives from the petitioners and some officials from the Ministry of Post and Tele-communication. In the meeting the following resolutions were adopted: (ক) "International Air Express Association of Bangladesh এবং Courier Service Association of Bangladesh এর পক্ষ হতে ১ (এক) সপ্তাহের মধ্যে 'মেইলিং অপারেটর ও কুরিয়ার সার্ভিস বিধিমালা-২০১১' এর সার সংক্ষেপের উপর স্ব স্ব এসোসিয়েশনের মতামত মন্ত্রনালয়ের প্রেরণ করবে। (খ) কুরিয়ার প্রতিষ্ঠানের নিকট হতে বিধিমালার উপর মতামত প্রাপ্তির পর বিধিমালা প্রণয়নের জন্য গঠিত কমিটি পুনরায় সভা আহ্বান করবে।" It is stated that as per the resolution of the meeting the petitioners submitted their recommendation to the respondents on 19-9-2010 which was received by the respondent No.2 on 20-9-2010 but, in total disregard to the petitioners' suggestions, respondent No. 1 published "(মেইলিং অপারেটর ও কুরিয়ার সার্ভিস বিধিমালা, ২০১১)" in the Official Gazette on 13-9-2011 vide SRO No.288-Ain/2011. The petitioners found the impugned Rules to be *ultra vires* of Articles 27, 31 and 40 of the Constitution and inconsistent and repugnant to sections 4C and 58 of the Post Office Act, 1898 which prompted the petitioners to file the instant writ petitions. Hence these Rules.

5. The two Rules were opposed by the respondents by filing affidavits-in-opposition contending, *inter-alia*, that the Mailing Operator and Courier Service Rules, 2011 has been made under the authority given to the government by section 4B read with section 4C(3) of the Post Office Act, 1898 and hence it was duly done with lawful authority and none of the Rules and Schedule of the Mailing Operator and Courier Service Rules, 2011 are *ultra vires* of Articles 27, 31 and 40 of the Constitution and not violative of any of the provisions of the Post Office Act, 1898. It is stated that the petitioners were conducting their businesses without any approval or license from the appropriate authority and, therefore, Mailing Operator and Courier Service Rules, 2011 was framed. They do not contradict Articles 27, 31 and 40 of the Constitution. Rather, through the enactment of the Post Office Act, 2010 and by framing Rules thereunder opportunities have been created for conducting business lawfully and, as such, the Rules are neither detrimental to the petitioners' right nor are they unconstitutional. It is further stated that considering the fact that any person or organization may start a business and resort to cheating in the absence of any statutory laws, these Rules have been framed in the public interest. It is further stated that some individual agencies started mail transportation business from 1983 in the absence of proper Rules and laws but merely upon obtaining some approval from VAT, Customs, Bank and Post Office authorities. It is stated that even after obtaining license under the impugned Rule, the businessmen are required to continue to deal with the concerned government agencies. Furthermore, the Bangladesh Post Office is also legally required to abide by the provisions of the domestic Customs Act, Value Added Tax Act, the Foreign Exchange Regulation and Import and Export Act in exchanging international mail.

6. Mr Fida M Kamal with Mr Md Oziullah and Mr Md Iqbal Kabir, appearing for the petitioners, places before us sections 4B(1), 4B(2), 4B(3), 4B(4) and "Explanation" to the sec-

tions:

"4B. License for Mailing Operators and Courier Services, etc—

(1) Notwithstanding anything contained in section 4, any person or company may be granted license under subsection (2) for operating the business of Mailing Operators or Courier Service to provide the specialized and premium postal services to the people.

(2) Where the Licensing Authority is satisfied that the provisions of this Act and the rules made thereunder have been complied with, it shall grant a license to the applicant.

(3) If it is found that the applicant has not complied with the provisions of the Act and the Rules made thereunder, Licensing Authority may refuse to grant license applied for and inform the applicant in writing within thirty days of its refusal.

(4) Notwithstanding anything contained in this section, any person or company who has already been operating the business of Mailing Operator or Courier Service shall apply to the Licensing Authority for license within three months from the date of constitution of the Licensing Authority under section 4C of this Act.

"Explanation": For the purpose of this section—

(a) "Mailing Operator" means an operator other than the designated national public postal operator which provides certain specific mailing or postal service or delivery services but is not responsible for providing Universal Postal Services. Its services may include Parcels, Logistics, Delivery, Courier & Express services;

(b) "Courier Service" means a person or company which provides mailing services to certain customers other than Universal Postal Services with higher or premium standard and price. Its services may include Parcels, Logistics, Delivery, Courier & Express Services.

7. Mr Kamal then places before us section 4C(1)(2)(3) and 3(a)(b)(c)(d) which are as follows:

4C. Licensing Authority, etc.—

(1) The Government may by notification in the official Gazette, constitute a Licensing Authority to grant licenses and to regulate the licensed Mailing Operators and Courier Services.

(2) The Authority mentioned in sub-section (1) shall consist of three members of whom one shall be appointed as chairman by the Government.

(3) The Government may, by rule,—

(a) provide conditions for granting licence and operating the business of mailing services by such Licensed Mailing Operator and Courier Services;

(b) fix appropriate license fees and other charges and commission for operating the Mailing services and Courier services;

(c) reserve certain rights and fix jurisdiction and areas for service and may also charge compen-satory fees to cover the Govern-ment's cost of postal service coverage; and

(d) keep provisions regarding standards, restrictions, rewards, dispute settlement, penalties for non-compliance and punishment for default and violation of the rules

made under this Act by the Licensed Mailing Operators and Courier Services.

8. Mr Fida M Kamal then places before the Court section 58 of the Act—

"58. Penalty for contravention of sections 4 and 4B—

(1) Whoever, in contravention of the provisions of section 4 or 4B, carries, receives, tenders or delivers letters, or collects letter, or operates the business of Mailing Operator or Courier Service, shall be punishable with fine which may extend to Taka fifty thousand for every incident for every such letter or such business.

(2) Whoever, having already been convicted of an offence under the section, is again convicted there under, shall, on every such subsequent conviction, be punishable with fine which may extend to Taka two lakhs".

9. Mr Fida M Kamal then places before us Rule 4, Rule 5(1) (Kha), Rule 7(7)(Kha)(Dha), Rule 8, Rule 9(l)(Kha), Rule 9(l)(Gha), (Cha), Rule l0(l), Rule 11(2), (Ka)(Kha), Rule 13(1)(Ka) and (Gha), Rule 13(1)(Uma), Rule 14, Rule 16(4)(Ka) and (Gha), Rule 17 and Schedule-7, which run as follows:

৪। **লাইসেন্সিং কর্তৃপক্ষ**।–(১) আইনের ধারা 4C(1) এর উদ্দেশ্য পূরণকল্পে, নিম্নবর্ণিত সদস্য সমন্বয়ে লাইসেন্সিং কর্তৃপক্ষ গঠিত হইবে, যথাঃ—

(ক) ডাক ও টেলিযোগাযোগ মন্ত্রণালয় কর্তৃক মনোনীত উক্ত মন্ত্রণালয়ের অন্যূন যুগ্ম-সচিব পদমর্যাদার একজন কর্মকর্তা, যিনি উহার চেয়ারম্যানও হইবেন;

(খ) ডাক ও টেলিযোগাযোগ মন্ত্রণালয় কর্তৃক মনোনীত উক্ত মন্ত্রণালয়ের অন্যূন উপ-সচিব পদমর্যাদার একজন কর্মকর্তা;

(গ) ডাক ও টেলিযোগাযোগ মন্ত্রণালয় কর্তৃক মনোনীত বাংলাদেশ ডাক বিভাগের একজন অতিরিক্ত মহাপরিচালক;

and submits that Rule 4 is violative of section 4C of the Post Office Amendment Act, 2010 inasmuch as, the said section 4C provides for constituting a Licensing Authority through publication of separate notification in the official Gazette but in the instant case the said Authority has been constituted through the promulgation of impugned Rule 4 directly. Further, among the three members, only the chairman of the said committee is to be appointed by the Government but, under Rule 4, all the three members, including the chairman, have been appointed by the Government.

10. Then he places before us Rule 5(l)(Kha) of the impugned Rules before the Court "সরকার কর্তৃক নির্ধারিত লাইসেন্স ফিস, জামানত, চার্জ, কমিশন ও অন্যান্য ফিস আদায় ও আদায়ের পদ্ধতি নির্ধারণ" and submits that this provision is violative of section 4C(3)(b) of the Post Office Amendment Act, 2010 since in the Act there is no provision for deposit of security money.

11. Then he places before us Rule 5(4) "ডাক পরিসেবা প্রদান ও ইহার সম্প্রসারণের জন্য মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানের প্রদত্ত সেবার উপর সরকার কর্তৃক সময় আরোপিত ক্ষতিপূরণমূলক ফিস, চার্জ, লেভী বা কমিশন এর আদায় সংক্রান্ত পদ্ধতি নির্ধারণ করিতে পারিবে" and submits that this Rule is liable to be struck down as it is ambiguous and uncertain in that it does not specify the cost of different categories of services or the amount of compensatory fees.

12. Then he places before us Rule 7(7)(Kha)(Dha), which runs as follows:

(৭) এই বিধির অধীনে লাইসেন্সের জন্য আবেদনকারী মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানের নিম্নবর্ণিত বিধিমালা থাকিতে হইবে, যথাঃ–

(ক) কমপক্ষে ২০টি বুকিং ও বিতরণ অফিস থাকিতে হইবে;

(খ) ব্যবসা পরিচালনার জন্য একটি প্রধান কার্যালয় থাকিতে হইবে;

(গ) গ্রাহকের নিকট হইতে গৃহীত দ্রব্যসামগ্রী প্রেরকের গন্তব্যে প্রেরণের জন্য পরিবহন ব্যবস্থা থাকিতে হইবে;

(ঘ) লাইসেন্সিং কর্তৃপক্ষ কর্তৃক নির্দিষ্টকৃত আয়তন ও মানের গুদামঘর থাকাসহ উক্ত গুদামঘরে উক্ত কর্তৃপক্ষ কর্তৃক গ্রহণযোগ্য সুবিধাদি থাকিতে হইবে;

(ঙ) লাইসেন্সি কর্তৃপক্ষ কর্তৃক নির্দিষ্টকৃত আয়তন ও মানের গুদামঘর থাকাসহ উক্ত গুদামঘরে উক্ত কর্তৃপক্ষ কর্তৃক গ্রহনযোগ্য সুবিধাদি থাকিতে হইবে;

(চ) প্রেরণযোগ্য বা গৃহীত দ্রব্যসামগ্রী হারানো, চুরি প্রভৃতি ক্ষেত্রে ক্ষতিপূরণের জন্য লাইসেন্সিং কর্তৃপক্ষ কর্তৃক অনুমোদিত সুনির্দিষ্ট নীতিমালা থাকিতে হইবে;

(ছ) গ্রাহক অভিযোগ ব্যবস্থাপনার জন্য কেন্দ্রীয়ভাবে প্রতিটি মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানের ন্যূনতম ৮ ঘন্টার জন্য অন্ততঃ পক্ষে ১(এক) টি কল সেন্টার থাকিতে হইবে;

(জ) প্রদত্ত সার্ভিসমূহের মূল্য তালিকা সকল কার্যালয়ে প্রদর্শন করিতে হইবে;

(ঝ) প্রেরণযোগ্য বা গৃহীত দ্রব্যসামগ্রী নিরাপদে প্রাপকের নিকট পৌছানো পর্যন্ত পর্যাপ্ত নিরাপত্তা ব্যবস্থা থাকিতে হইবে;

(ঞ) কোন মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানের নাম বাংলাদেশ ডাক বিভাগ, পোস্ট অফিস এবং ইউনিভার্সাল পোস্টাল ইউনিয়নের নামের সাথে সাজুয্যপূর্ণ (identical) হইতে পারিবে না;

(ট) সিটিজেন চার্টার থাকিতে হইবে;

(ঠ) আর্থিকভাবে স্বচ্ছল হইতে হইবে এবং ঋণ খেলাপী হইতে পারিবে না;

(ড) এজেন্সী বা যৌথ অংশীদারিত্বের ভিত্তিতে আন্তর্জাতিক কুরিয়ার ব্যবসায়ে নিয়োজিত মেইলিং অপারটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানকে প্রিন্সিপাল কোম্পানীর সহিত লিখিত চুক্তি থাকিতে হইবে।

and submits that Rule (খ) constitutes an unnecessary requirement as there are companies who do not wish to expand their business country wide and Rule (ছ) is also an unnecessary requirement.

13. Then he places before this Court Rule 8, which runs as follows:—

৮। বিদ্যমান মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানের লাইসেন্স গ্রহণ সম্পর্কিত বিশেষ বিধান।–(১) বিদ্যমান প্রতিটি মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানকে এই বিধিমালার অধীন লাইসেন্সিং কর্তৃপক্ষ গঠিত ৩(তিন) মাসের মধ্যে তফসিল ১ এ বর্ণিত আকারে আবেদন ফরম পূরণ, তফসিল ২ এ বর্ণিত আকারে একটি অঙ্গীকারনামা এবং তফসিল ৩ এ বর্ণিত কাগজপত্রাদিসহ লাইসেন্সের জন্য উক্ত কর্তৃপক্ষের নিকট আবেদন করিতে হইবে।

(২) উপ-বিধি (১) এর অধীন লাইসেন্সের জন্য আবেদন করিতে ব্যর্থ হইলে, উপযুক্ত কারণ ব্যাখ্যপূর্বক বিলম্ব ফি বাবদ ৫,০০০ (পাঁচ হাজার) টাকা বাংলাদেশ ডাক বিভাগের অর্থনৈতিক কোড ১-৫৪৩১-০০০০-৩২৫১ এ যে কোন জেনারেল পোস্ট অফিস (জিপিও) বা জেলা সদরে অবস্থিত প্রধান ডাকঘরে চেয়ারম্যান, লাইসেন্সিং কর্তৃপক্ষ এর অনুকূলে জমাদানপূর্বক পরবর্তী ১৫(পনের) টি কর্মদিবস এ মধ্যে লাইসেন্সের জন্য আবেদন করিতে হইবে।

(৩) উপ-বিধি (১) বা, ক্ষেত্রমত, উপবিধি (২) অনুযায়ী কোন আবেদনপত্র দাখিল হইলে বিধি ৭ এর উপ-বিধি (৩), (৪), (৫), (৬), (৭) এবং (৮) অনুসরণপূর্বক লাইসেন্স প্রদান করা যাইবে।

and submits that the conditions as contemplated under this Rule for failure to apply in the stipulated time is excessively harsh and unreasonable.

14. Then he places before us Rule 9(l)(Kha) "কমপক্ষে দুই বছর ব্যবসায় পরিচালনা করিতে হইবে" Rule is violative of the Act since before starting any lawful business, imposing conditions for year limit is arbitrary and against fundamental rights as guaranteed under Articles 27, 31 and 40 of the Constitution.

15. He then refers to Rule 9(l)(Gha), "গ্রাহকদের সহিত কোনরূপ হয়রানিমূলক আচরণ করা যাইবে না; ৯(১)(চ) সরকার কর্তৃক সময় সময় আরোপিত ক্ষতিপূরণ ফিস Compensatory fees) নিয়মিত পরিশোধ করিতে হইবে" and submits that no proper explanation regarding unnecessary harassment or compensatory fees has been provided thereby conferring arbitrary and unfettered exercise of power to the authority.

16. Then he places before us Rule 10(1), which runs as follows:

১০। এজেন্সী, ইত্যাদি।–(১) লাইসেন্সপ্রাপ্ত কোন মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠান এজেন্ট নিয়োগের মাধ্যমে কুরিয়ার ব্যবসায় পরিচালনা করিতে পারিবে, তবে উক্ত ক্ষেত্রে নিম্নবর্ণিত শর্ত প্রযোজ্য হইবে, যথাঃ–

(ক) আর্থিকভাবে স্বচ্ছল ব্যক্তি বা প্রতিষ্ঠানকে এজেন্সী প্রদান করা যাইবে;

(খ) প্রিন্সিপাল মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানের সহিত এজেন্টের লিখিত চুক্তি থাকিতে হইবে;

(গ) লাইসেন্সের শর্তাবলী এজেন্টকে পরিপালন করিতে হইবে;

(ঘ) এজেন্ট কর্তৃক লাইসেন্সের শর্তাবলী ভঙ্গ করা হইলে উহার দায়-দায়িত্ব প্রিন্সিপাল মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানের উপর বর্তাইবে;

(ঙ) কোন এজেন্ট সাব-এজেন্ট নিয়োগ করিতে পারিবে না।

and submits that same conditions upon the principal and agent and any fault of the agent, liabilities lies upon the principle which is arbitrary.

17. Then he places before us Rule 11(2) (Ka) and (Kha), which runs as follows:

(ক) 'ডকুমেন্ট সার্ভিস' অর্থ ২(দুই) কেজি পর্যন্ত ওজনের হস্তলিখিত বা মুদ্রিত, মোড়ক, বান্ডিল বা এনভেলপের মধ্যে আটকানো কোন দ্রব্য প্রেরকের নিকট হইতে নির্ধারিত মাশুল গ্রহণ সাপেক্ষে পরিবহনপূর্বক প্রেরক কর্তৃক লিখিত ঠিকানা মোতাবেক প্রাপকের নিকট রশিদমূলে বিতরণ সেবা:

(খ) 'ডকুমেন্ট সার্ভিস' অর্থ ডকুমেন্ট ব্যতীত ২০(বিশ) কেজি পর্যন্ত ওজনের কোন দ্রব্য, মোড়ককৃত হউক বা না হউক, প্রেরকের নিকট হইতে নির্ধারিত মাশুল করিয়া উক্ত দ্রব্য পরিবহনপূর্বক উহাতে বিধৃত প্রাপকের ঠিকানায়, তাহার প্রাপ্তি স্বীকারপূর্বক, বিতরণের জন্য প্রদত্ত সেবা:

and submits that these Rules are violative of the Act as they impose weight limit for document and purchase service is wholly contrary to the actual necessity for the goods. Therefore, the courier service of all kinds of apparel, sample, calendar, diary and all kinds of catalogue etc. be carried to the global market and if the restriction is not withdrawn, Bangladesh will not be able to earn foreign exchange from the said sector. Mr Kamal in this regard, by giving some examples, submits that there is no weight restriction in freight forwarders Rules and C & F Agent Rules. Then he places before us Rule 13(1), which is as under:

শ্রেণী বিভাগ, জামানত ও লাইসেন্স ফি

১৩। **মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানসমূহের শ্রেণীবিন্যাস**।–(১) এই বিধিমালার অধীন লাইসেন্সিং কর্তৃপক্ষ মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানকে নিম্নবর্ণিত ৫টি শ্রেণীর লাইসেন্স প্রদান করিতে পারিবে, যথাঃ–

(ক) রাজধানী ঢাকা এবং অন্যান্য সিটি কর্পোরেশন এলাকায় অভ্যন্তরীণ মেইলিং ও কুরিয়ার ব্যবসায়ের জন্য 'এ' শ্রেণীর লাইসেন্স;

(খ) রাজধানী ঢাকা এবং অন্যান্য সিটি কর্পোরেশন এলাকাসহ জেলা সদরে অভ্যন্তরীণ মেইলিং ও কুরিয়ার ব্যবসায়ের জন্য 'বি' শ্রেণীর লাইসেন্স;

and submits that this Rule is discriminatory as these are for the Domestic Courier Service providers and though classification is there but the same amount of fees for obtaining license are same, it should have been fixed according to classification.

18. Then Mr Kamal places Rule 13(l)(Uma) "আন্তর্জাতিক মেইলিং ও কুরিয়ার ব্যবসায়ের জন্য "ই" শ্রেণীর লাইসেন্স" and submits that this class is not classified as there are several types of inter-national courier like multinational DHL/FED-EYUPS etc.), joint venture local and inter-national. As such, qualifications for getting license must be imposed according to their class and as per government Rules. He submits that some International Courier Service Companies carrying their business like Dhaka-Singapore, Dhaka-Dubai, Dhaka-Calcutta only and some are worldwide and, as such, fees are to be imposed according to their services.

19. Then Mr Kamal places before us the Rule 14, which is as under:

১৪। **লাইসেন্স ফি, নবায়ন ফি, জামানত, ইত্যাদি**।–(১) মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানকে লাইসেন্স গ্রহণের নিমিত্ত বাংলাদেশ ডাক বিভাগের অর্থনৈতিক কোড ১৫৪৩১-০০০০-৩২৫১ এ যে কোন জেনারেল পোস্ট অফিস (জিপিও) বা জেলা সদরে অবস্থিত প্রধান ডাকঘরে চেয়ারম্যান, লাইসেন্সিং কর্তৃপক্ষ-এর অনুকূলে তফসিল-৭ এ বর্ণিত সংশ্লিষ্ট লাইসেন্স ফি জমা প্রদান করিতে হইবে।

(২) প্রতিটি মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানকে

লাইসেন্স গ্রহনের সময় ঘোষিত শাখা ব্যতীত পরবর্তীতে নতুন শাখা খোলার নিমিত্ত বাংলাদেশ ডাক বিভাগের অর্থনৈতিক কোড ১-৫৪৩১-০০০০-৩২৫১ এ জিপিও বা জেলা সদরে অবস্থিত প্রধান ডাকঘরে চেয়ারম্যান, লাইসেন্সিং কর্তৃপক্ষ-এর অনুকূলে তফসিল-৭ এ বর্ণিত সংশ্লিষ্ট ফি জম করিতে হইবে।

(৩) এজেন্সী লাইসেন্স গ্রহনে আগ্রহী প্রতিষ্ঠানকে বাংলাদেশ ডাক বিভাগের অর্থনৈতিক কোড ১-৫৪৩১-০০০০-৩২৫১ এ জিপিও বা জেলা সদরে অবস্থিত প্রধান ডাকঘরে চেয়ারম্যান, লাইসেন্সিং কর্তৃপক্ষ-এর অনুকূলে তফসিল-৭ এ বর্ণিত সংশ্লিষ্ট ফি জমা প্রদান করিতে হইবে।

(৪) প্রতিটি মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানের ও এজেন্টের অনুকূলে লাইসেন্সিং কর্তৃপক্ষ কর্তৃক ইস্যুকৃত লাইসেন্স ইস্যুর তারিখ হইতে পরবর্তী দুইটি অর্থবছরের জন্য কার্যকর থাকিবে এবং উক্ত লাইসেন্সের মেয়াদ শেষ হইবার পূর্বেই লাইসেন্স নবায়ন ফি প্রদানপূর্বক নবায়ন করিতে হইবে।

(৫) প্রতিটি মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানকে লাইসেন্স এবং এজেন্সী লাইসেন্স নবায়নের নিমিত্ত বাংলাদেশ ডাক বিভাগের অর্থনৈতিক কোড ১-৫৪৩১-০০০০-৩২৫১ এ জিপিও বা জেলা সদরে অবস্থিত প্রধান ডাকঘরে চেয়ারম্যান, লাইসেন্সিং কর্তৃপক্ষের অনুকূলে তফসিল-৭ এ বর্ণিত সংশ্লিষ্ট ফি জমা প্রদান করিয়া নবায়ন করা যাইবে।

(৬) প্রতিটি মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানকে লাইসেন্স গ্রহণের নিমিত্ত জিপিও বা জেলা সদরে অবস্থিত প্রধান ডাকঘরে পোস্ট অফিস সঞ্চয় বাহকের সাধারণ হিসাবে চেয়ারম্যান, লাইসেন্সিং কর্তৃপক্ষের অনুকূলে.... বন্দী (প্লেজ) করিয়া তফসিল এ বর্ণিত হারে জমানতের অর্থ প্রদান করিতে হইবে।

(৭) কোন মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠানের ব্যবসায় অবসায়ন বা অবসান ঘটিলে বা কোন অপরাধের কারণে লাইসেন্সিং কারণে লাইসেন্সিং কর্তৃপক্ষ প্রশাসনিক জরিমানা বা জামানত বাতিল না করিলে, লাইসেন্সিং কর্তৃপক্ষের নিকট লিখিত আবেদনের পরিপ্রেক্ষিতে মাজানত বাবদ জমাদানকৃত বা ইহার অংশবিশেষ বা জরিমানাকৃত অর্থ ব্যতীত অবশিষ্ট জামানতের অর্থ ফেরত প্রদান করা যাইবে।

(৮) লাইসেন্সিং কর্তৃপক্ষ কর্তৃক আরোপিত প্রশাসনিক জরিমানা বাংলাদেশ ডাক বিভাগের অর্থনৈতিক কোড ১-৫৪৩১-০০০০-৩২৫১ এ যে কোন জেনারেল পোস্ট অফিস (জিপিও) বা জেলা সদরে অবস্থিত প্রধান ডাকঘরে চেয়ারম্যান, লাইসেন্সিং কর্তৃপক্ষ-এর অনুকূলে জমা প্রদান করিতে হইবে।

and submits that this Rule is violative of the Act as deposit of cash amount for license fees, renewal fees and security deposits are very harsh compared to other laws and Rules like Freight Forwarders Rules and C&F Agent Rules etc. He further submits that deposit of license and other fees through bank guarantee is also an unworkable provision.

20. Then he places before us the Rule 16(4)(Ka)(Ga), which is as under:

(৪) লাইসেন্সিং কর্তৃপক্ষ শুনানি গ্রহনের পর সংশ্লিষ্ট রেকর্ডপত্র, তদন্ত কমিটি কর্তৃক দাখিলকৃত তদন্ত প্রতিবেদন এবং অভিযুক্ত মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠান কর্তৃক প্রদত্ত ব্যক্তিগত শুনানি পর্যালোচনাপূর্বক নিম্নরূপ প্রশাসনিক জরিমানা আরোপ বা যথাযথ আদেশ জারি করিতে পারিবে, যথাঃ–

(ক) বিধি ৯(১) এর (ক), (খ), (গ), (ঘ), (ঙ) বা (ঠ) এ বর্ণিত শর্ত ভঙ্গ করিলে অনুর্ধ্ব ২০,০০০ (বিশ হাজার) টাকা প্রশাসনিক জরিমানা এবং তদাতিরিক্ত জামানতের শতকরা বিশ ভাগ অর্থ বাজেয়াপ্তকরণ বা উভয়ই;

(খ) বিধি ৯(১) এর (চ), (ছ) বা (জ) এ বর্ণিত শর্ত ভঙ্গ করিলে অনূর্ধ্ব ৪০,০০০ (চল্লিশ হাজার) টাকা প্রশাসনিক জরিমানা এবং তদাতিরিক্ত লাইসেন্স স্থগিতকরণ বা জামানতের শতকরা পঞ্চাশ ভাগ অর্থ বাজেয়াপ্তকরণ বা উভয়ই;

(গ) বিধি ৯(১) এর (ঝ), (ঞ) বা (ট) এ বর্ণিত শর্ত ভঙ্গ করিলে অনূর্ধ্ব ৫০,০০০ (পঞ্চাশ হাজার) টাকা প্রশাসনিক জরিমানা এবং তদাতিরিক্ত লাইসেন্স বাতিল বা জামানতের সকল অর্থ বাজেয়াপ্তকরণ বা উভয়ই;

and submits that this Rule is violative of the Post Office Amendment Act, 2010 inasmuch as section 58 of the Act prescribes for a penalty of Taka fifty thousand for every incident and Taka two lacs for subsequent convictions but these Rules authorise the licensing authority to impose additional penalties for Domestic and International Courier Companies. He adds that penalty ought to have been imposed according to service charge or booking service.

21. Then Mr Kamal places before us Rule 17, which runs as follows:—

১৭। **দণ্ড, ইত্যাদি।**–এই বিধির অধীন আরোপিত কোন প্রশাসনিক জরিমানা যদি লাইসেন্সের শর্ত ভঙ্গের অভিযোগে অভিযুক্ত

কোন মেইলিং অপারেটর ও কুরিয়ার সার্ভিস প্রতিষ্ঠান নির্ধারিত সময়ের মধ্যে জমা না দেন বা বিধি ১৬ বা ১৮ এর অধীন প্রদত্ত নোটিশের প্রেক্ষিতে হাজির না হন তাহা হইলে উক্ত লঙ্ঘন আইনের ধারা ৫৮ এর অধীন একটি অপরাধ হিসেবে গণ্য হইবে এবং তদানুসারে লঙ্ঘনকারীর বিচার হইবে।

and submits the same is violative of the Act as same and similar penalty for Domestic and International Company has been imposed instead of fixing it according to service or fixing charge.

22. Then he places before us schedule 7 of the Rules, which is as under:—

তফসিল-৭

[জামানত, লাইসেন্স ফি, নবায়ন ফি ইত্যাদি]

ক্রমিক নং	মেইলিং অপারেটর ও কুরিয়ার সার্ভিসের শ্রেণী	জামানত	লাইসেন্স ফি	নবায়ন ফি
১.	এ শ্রেণী	৫,০০,০০০	১,০০,০০০	৫০,০০০
২.	বি শ্রেণী	১০,০০,০০০	২,০০,০০০	১,০০,০০০
৩.	সি শ্রেণী	১৫,০০,০০০	৩,০০,০০০	১,৫০,০০০
৪.	ডি শ্রেণী	২০,০০,০০০	৪,০০,০০০	২,৫০,০০০
৫.	ই শ্রেণী	২৫,০০,০০০	১০,০০,০০০	৫,০০,০০০

এজেন্সী লাইসেন্স ফি ও নবায়ন ফি

ক্রমিক নং	মেইলিং অপারেটর ও কুরিয়ার সার্ভিসের শ্রেণী	লাইসেন্স ফি	নবায়ন ফি
১.	এ শ্রেণী	৩,০০০	১,০০০
২.	বি শ্রেণী	৫,০০০	২,০০০
৩.	সি শ্রেণী	৭,০০০	৩,০০০
৪.	ডি শ্রেণী	১০,০০০	৪,০০০
৫.	ই শ্রেণী	১৫,০০০	৫,০০০

নতুন শাখার জন্য লাইসেন্স ফি

ক্রমিক নং	মেইলিং অপারেটর ও কুরিয়ার সার্ভিসের শ্রেণী	লাইসেন্স ফি
১.	এ শ্রেণী	৫,০০০
২.	বি শ্রেণী	১০,০০০
৩.	সি শ্রেণী	১৫,০০০
৪.	ডি শ্রেণী	২০,০০০
৫.	ই শ্রেণী	৫০,০০০

and submits that this schedule is violative of fundamental right as guaranteed under Articles 27, 31 and 40 of the Constitution. Compared to other Rules, the aforesaid rates are excessively high and unreasonable and if the same are imposed, operation of courier service business become untenable. He further submits that imposing fees upon the agent and new branches is also arbitrary and against the right to conduct business.

23. Mr Fida M Kamal branded the said impositions as laid down in sub-rule (7) of Rule 7, Rule 8, Rule 9, Rule 10, Rule 11 and Rule 14 to be harsh and unreasonable. He submits that these conditions, in practice, are too harsh to implement and thus it has been an impossible task for the intended licensees to carry out their business of courier service and mailing operations. Furthermore, he refers to schedule 7 of the Rule and draws our attention to the prescribed amount of deposit, license fees and renewal fees and submits that these are excessive amounts, which are unaffordable. In this regard he refers to the following *English cases (i) R vs Immigration Appeal Tribunal* reported in *(1986) Imm AR-385 of Queen's Bench Division (ii) Chartsey Urban District Council vs Mixnam's Properties Limited* reported in *(1964)) 2 All ER-627 vs (iii) R vs Customs and Excise Commissioner* reported in *(1986) 2 All ER 164* and submits that in all these cases sub-ordinate legislations were declared to be invalid or void on the ground of being harsh and unreasonable.

24. Mr Fida M Kamal also placed 2 cases from our jurisdiction, namely, the case of (i) *Bangladesh Krishi Bank vs Meghna Enterprise* and others *50 DLR (AD) 194* and (ii) the case of *Chandpur Sub-ordinate Judge, 2 BLC 50.* Finally, Mr Kamal submits that by framing the impugned Rules, the concerned authority has been vested with arbitrary powers and therefore the same are liable to be declared *ultra vires* to the Constitution and the parent Act. By making the aforesaid submissions Mr Fida M Kamal prays for making the Rules absolute.

25. Mr Mahbubey Alam, the learned Attorney General and Dr Shahdeen Malik with Mr Zahirul Alam Babor, the learned Advocates appearing on behalf of respondents submit that none of the Rules confer excessive powers and the same are not contrary to or violative of the amended sections 4A, 4C and 4D of the Post Office Act, 1898 and hence there is no ground for declaring any of the impugned Rules *ultra vires* the Constitution or repugnent to the Act.

26. To elaborate, the learned Attorney-General submits that Rule 4 of the Mailing Operator and Courier Services Rule, 2011 is not violative of section 4C as section 4C (1) and (2) provided that the government may constitute licensing authority and, secondly, that the licensing authority consists of three members of whom one shall be appointed as Chairman by the government. Rule 4, stemming from the above sub-section (1) and (2) of section 4C, provides that the licensing authority shall consist of three members of whom one shall be the Chairman. The Chairman and members of the licensing authority shall be officials of designated rank of the Ministry of Post and Tele-communication while the second Member shall be a person of the rank of Additional Director General of the Postal Department, all to be nominated by the Ministry of Post and Telecommunication. Consequently, Rule 4, providing for the composition of the licensing authority, does not, in any way or manner confer excessive power upon the government. Moreover, under Rule 4C, the licensing authority, is empowered to form committee or more Advisory Committees comprising of experienced person of the Postal Department and the Mailing Operators and courier businessmen to assist the licensing authority to carry out its functions and responsibilities effectively and, as such, the licensing authority can rely on the advice and call upon the service and assistance of all concerned.

27. He continues to submit that Rule 4(l)(Kha) is not violative of 4C(3)(b) which authorises the Government to make Rule to fix appropriate license fees and "other charges", and commissions and the jamanot. He, in an endeavour to explain the word "other charges," submits that the security deposit is a form of other charges. Moreover, Rule 14(c) provides that such security, as provided in schedule 7 of the Rules, shall be deposited in a "pledge account", meaning that the amount will be deposited in an account of the Mailing Operator or Courier itself and not paid to the licensing authorities on the condition that the depositor shall not be able to withdraw the money from the account without the authorization from the licensing authority. This is clearly a liberal way of depositing security in an account in his own name and is entitled to interest or profit credited to that account.

28. He further submits that the conditions provided under Rule 7 are all reasonable and rational, including the requirement of 20 offices and a "call centre" only in the main or head office and that too only for 8(eight) hours-a-day to receive complaints and enquiries from the customers. This requirement is completely different from the "call centre business" which receives and responds to queries as sub-contractors of other businesses. Under the Rules, the "call centre" is actually meant to be an "information centre" of the Mailing Operator or the Courier Service provider to ensure efficient and prompt service to their customers. He submits that Rule 9(Kha) providing for a minimum duration of business of two years, is premised on the fact that such business cannot "run away" with letters, documents, parcels, and other valuables of customers. Many businessmen have a tendency to cheat and defraud by closing down their business after a short while and this require-ment of two years of conducting the business is designed to safeguard the interest of the customers and, as such, is beneficial to the public. Similarly, Rule 9(Ja), by prohibiting transfer of license to others, only safeguards the interest of the public and ensures that unscrupulous persons or entities do not enter into this sensitive and highly responsible business, under the convenience of a transferred license. He submits that Rule 11 (2)(Ka) and (Kha) ensure distinction between the Mailing Operator and Courier Service provider on the one hand, and Freight Forwarding and Clearing & Forwarding businesses, on the other. The rationale for the weight restriction is to eliminate abuse and misuse of Mailing Operators and Courier Service businesses and prevent illegal transportation, sending and receiving of contraband and other illegal items. Such restrictions are necessary under present-day circumstances as dangerous and destructive devices and objects are becoming less bulky and of lighter weight. Weight-limits in air-transportation is not even remotely connected with any fundamental rights but are matters of practical convenience and to minimise the scope of misuse and abuse of facilities and safety. As such there is no right to a minimum weight and the limitations vis-a-vis weight are essential and normal part of any business.

29. He further submits that Rule 16(4)(Ka)-(Ga) relates to administrative penalties for liabilities for violations of the Mailing Operator and Courier Services Rules, 2011, while section 58 of the Post Office Act, 1898 provides for contravention of sections 4 and 4B of the Act, and not the Rules. Rule 16 provides for administrative penalties and measures for violation of Rule 9, while section 58 of the Post Office Act, 1898 provides for penal conse-quences for violations of section 4 and 4B of the Act and not the 2011 Rules. He lastly submits that various amounts specified in Schedule 7 is neither *ultra vires* of the Act nor repugnant to Article 40, and, even if it is submitted for the sake of argument that these amounts are "too much high and harsh", as submitted by the petitioner, the

schedule cannot be declared *ultra vires* or repugnant to the Constitution only on the ground of being "high and harsh". He submits that, in fact, these amounts are not "high and harsh". By making the aforesaid submissions the learned Attorney-General and Dr Shahdeen Malik prayed for discharging the Rules with exemplary costs.

30. Dr Shahdeen Malik, learned advocate for the respondents, refers to the case of *Anisur Rahman vs Government of Bangladesh 12 BLC 122* and submits that harshness is not a ground, as has been held in this case, for declaring a law to be *ultra vires* to the Constitution. He then referred to the case of *Abdul Gaffar Chowdhury vs Joint District Judge, 57 DLR 138* and submits that harshness has been rejected to be a ground for declaring an Act of parliament to be repugnant to the Constitution. He also refers the case of Solicitor, *Government of Bangladesh vs Syed Anwar Ali 27 DLR (AD) 16* and submits that it has been held that "where the words used in a law are clear and unambiguous, Courts are bound to apply the same law even if such application causes hardship and injustice".

31. We have heard the learned advocates, perused the writ petitions, affidavit-in-opposition, supplementary affidavits, relevant laws, Rules, Texts and the decisions placed before us and we have given our careful consideration to the same.

32. The precise question for determination by this Court is whether the impugned Rules, which have been published in the official Gazette vide SRO No.288-Ain/2011, are *ultra vires* of Article 27, 31 and 40 of the Constitution and whether these Rules are incompatible or inconsistent with any provision of the parent Act, i.e., the Post Office Act, 1898.

33. In order to examine the issues pre-sented before us, it is essential to comprehend the essence of the provisions of the parent Act *vis-a-vis* the Rules framed thereunder.

34. Usually sub-ordinate legislation, such as Rules, Regulations and bye laws are framed with a view to carry out or put into effect the purpose of any particular Act. In other words, Rules under any particular Act are made in order to provide necessary details. It is very common for the legislature to provide for a general Rule making power to carry out the purpose for the Act. When such a power is given, it is permissible to ascertain the object of the enactment and the limitations imposed upon the delegate.

35. It appears from a plain reading of section 4C(1) that a licensing authority is to be constituted for the purpose of (a) granting licenses and (b) regulating the concerned licensees. Thus, in the instant cases the purpose behind framing of the Rules under this Act has been specifically asserted to be for a. granting license and b. regulating the licensed mailing operator and courier services as empowered by section 4C(1) of the Parent Act. It further appears from a plain reading of section 4C(3) that the parent Act provides clear guidelines as to the subject matter falling within the scope of the Rules and the areas of operation intended to be covered by the proposed Rules. In terms of the language of section 4C(3) of the parent Act, the Rules to be framed in order to provide details regarding (a) prescribing conditions for granting licenses and operating the business of mailing services; (b) determine appropriate license fees and other charges and commissions for operating the mailing services and courier services; (c) reserving certain rights and conferring jurisdiction and areas of service as well as charging compensatory fees to cover the government's cost of postal service; and (d) enabling the concerned authority to make provisions regarding standards, restrictions, rewards, dispute, settlement, penalties for non-compliance and arrangements for default and violation of the rules made under the Act. Upon going through the aforementioned provisions of the parent Act

vis-a-vis the impugned Rules, we find it difficult to notice any inconsistency between the impugned Rules and the parent Act.

36. We have carefully considered the submissions advanced by Mr Fida M. Kamal, who has endeavoured to make out a case of repugnancy between section 4B & 4C and the impugned Rules but we could not detect any inconsistency. He has tried to impress upon us that the impugned Rules, are completely in contradiction to the section 4C(1) and (2) of the parent Act inasmuch as section 4C(1) provides for constituting a licensing authority by notification in the official Gazette and section 4C(2) prescribes that the licensing authority will consist of 3 members of whom only one Member will be appointed by the Government and the other 2 members, as implied by law, will be nominated subsequently from the stake holders. He submits that by constituting the said licensing authority vide the Rule 4 of the impugned Rules there has been a clear violation of section 4C(1) and (2) of the parent Act but we do not find any indication to that effect as there is nothing in the parent Act to show that the remaining 2 Members were required to be appointed from the relevant business community.

37. With regard to the alleged inconsistency of Rule 4 with section 4B concerning non-publication of a separate Gazette notification for appointment to the post of Chairman, we find it difficult to accept it as a ground for declaring Rule 4 to be void.

38. From a careful reading of the cited cases by the learned advocate for the peti-tioners, we find that in the case of *Chertsey Urban District Council vs Mixnam's Properties Limited* reported in *all England Law reports Volum-2 (1964) 627,* the local authority framed Rules under Caravan Sites and Control of Development Act, 1960 and by the majority judges' decision, 6 Rules, among all the Rules, were declared to be void for being uncertain and ambiguous, not on the ground of harshness or unreasonableness as Mr Fida M Kamal submitted before us. Then, in the case of *R vs Immigration Appellate Tribunal* reported in *(1986) Imm AR-385,* the Queen's Bench Division declared "Paragraph 52", which is a Rule framed under the Immigration Act 1971, to be invalid terming the Rule to be a Mirage, in other words, "illusion" and, as such, not on the ground of "harshness" or "unreasonableness" as Mr Fida M Kamal submitted before this Court. Then, in the case of *R vs Customs and Excise Commis-sioners* reported in *All England Law Reports (1986) Valum-2-164,* the Court found Regulation 8 to be ultravires of section 93(2) of the Customs and Excise and Amendment Act, 1979 as it created a new and radically more extensive set of powers, again it is to be noted that the case was decided not on the ground of "harshness" or "unreasonableness". We also fail to see how the principles laid down in the cases of ft) *Bangladesh Krishi Bank vs Meghna Enterprise, 50 DLR (AD) 194* and *(ii) Chandpur Subordinate Judge, 2 BLC 50* in his favour. We find that both the cited cases relate to challenging the constitutionality of an Act of Parliament on the ground of "harshness" but the contentions were rejected by our Courts. The other aspect to be noted here is that in those cases an act of parliament was challenged, not the Rule as being *ultra vires* the Constitution or void for being inconsistent with the parent Act, as has been done in the instant cases.

39. He submits that in our jurisdiction till date no Act of parliament has been declared *ultra vires* on the ground of unreasonableness and harshness but the instant case is different from those cases as in those unsuccessful cases "Act/enactment" of parliament were challenged to be *ultra vires* of the provision of the Constitution but here, in the instant cases, the Rules have been challenged to be *ultra vires* the Constitution and to be void for being inconsis-

tent as well as for being harsh and unreasonable in relation to the parent Act.

40. It appears to us that section 4B and 4C have clearly provided the guidelines as to the purpose of framing Rules under the Post Office Act, 1898 and, upon a careful reading of all the impugned Rules and tallying the language of the impugned Rules with that of section 4B and 4C, we find that the impugned Rules framed under section 4C are a legitimate aid to a better construction of the Post Office Act as contemporaneas expositio (rules contemplated refer to gap filling *exercise*). So, we find nothing in the impugned Rules to be inconsistent with the parent Act.

41. The submissions advanced by Mr Fida M Kamal as to the amount of fees and other charges, it is our view that this Court is not in a position to assess and determine the suitable/affordable amounts of money for the peti-tioners. We find that the mailing and courier service businesses have been running in our country without regulation by any laws and Rules for decades and it is in the public interest that the government, although belatedly, enacted a law, namely, the Post Office Act (Amendment), 2010 which prescribes the constitution of a licensing authority, whose prime purpose is to grant licenses and regulate the licensees by framing a Rule. We find that the government before framing the Rules under the Act endeavoured to consult and elicit suggestions from the stake holders such as the petitioners and thereafter finally the government has published the Rules in the Official Gazette.

42. We find that Rule 6 contains a provision for the stake holders, like the petitioners, who have been placed as advisors to the Licensing Authority and, although apparently, this platform for the petitioners, may not seem to be as effective and useful as the petitioners might have expected but, nevertheless, with the passage of time, we think the said body would be able to lobby the government to accommodate their vital interest. The provision as laid down in Rule 6 appears to be supportive to the petitioners but certainly is not inconsistent with other provisions of the impugned Rules. Even if a particular provision of any Act is found to be inconsistent with the other provision of the said Act or if a specific Rule is found to be inconsistent with the other provision of the same Rules, there is hardly any scope to declare an Act or a Rule to be ultravires. Mr Mahmudul Islam in his book "Interpretation of Statutes and Documents'" writes at page 86, 2nd edn "when two provisions, whether in the same Act or in different Acts, are apparently inconsistent, it is the duty of the court to harmoniously inter-pret those provisions so that both the provision may be operative. It is only when this is not possible that the non-obstante clause comes into play and the provision containing the non-obstante clause shall prevail". However, it seems to us that/had the respondents been a bit more liberal in incorporating the scope of Rule 6, probably the petitioners' grievance could have been mitigated to a considerable extent. In this regard we wish to leave it to the good conscience of the respondents to make a better provision under Rule 6 so that the petitioners can represent them effectively in all the spheres of their business, which we believe to be supplemental body in a true sense and may assist in achieving the aim of framing the impugned Rules.

43. As to the submissions advanced by Mr Fida M Kamal to the effect that the impugned Rules are arbitrary, the learned advocate for the petitioner failed to place any authority before us in support of his submission. However, at page 178 of Constitution of Law of Bangladesh, 2nd Edn, Mr Mahmudul Islam writes that "Issue is whether the statute challenged is so clearly arbitrary that the legislators acting reasonably could not have believed it necessary or appropriate for the legitimate governmental objective sought to be achieved". Here the leg-

islators appear to have believed that it was the demand of the time to legislate and amend the Post Office Act and frame Rules thereunder. From a reading of the book by Craies on Statute Law, it transpires that a Sub-ordinate law/bye law may be treated as *ultra vires* on the following grounds- (a) the Rules are not made, sanctioned and published in the manner prescribed by the statute which authorizes making of them, (b) they are repugnant to the laws of the land, (c) they are repugnant to the statute under which they are made, (d) that they are uncertain, (e) they are unreasonable. The meanings as can be derived from the above (a) to (c) are that a Rule can be struck down if it is found to have exceeded the powers conferred upon it by the parent Act and also if a Rule is found to be uncertain in its interpretation or unreasonable in its application. Exceeding power means framing new set of power, which the parent law has not mandated. The aforesaid position is supported by bunches of Indian cases.

44. In the case of *Chandra Bali vs R, AIR 1952 All 795* it was held that a Rule must be struck down if it cannot be reconciled with the parent Act. In the case of *Mohd Yasin vs Town Area Committee, AIR 1952 SC 115,* it was observed that under the parent Act the Municipality was empowered to charge fee only for the use and occupation of some property of the committee, but the Town Area Committee framed by-laws and imposed levy on wholesalers irrespective of any use or occupa-tion of property by them. The Supreme Court in the said case held that the bye-laws were beyond the powers conferred on the committee and were *ultra vires* the parent law. But in the cases before us, we do not find that the rule making authority travelled beyond the powers conferred by the parent Act.

45. Whether a particular piece of delegated legislation confers excessive power on the delegate has to be determined with reference to the specific provisions contained in the relevant statute conferring the power to make the Rule, Regulation, etc. and also the object and purpose of the Act as can be gathered from various provision of the enactment. In the case of *Tata Iron and Steel Company vs Workmen, (1972) 1 SCC-38* the relevant statute empowered the central Government to frame a bonus scheme for employees. In exercise of the power, the central Government created Quasi Judicial Tribunal to decide certain dispute. Rejecting the contention that such a Tribunal can only be created by the legislature and not by an executive fiat, the Supreme Court observed that it was a matter of detail "which is subsidiary or ancillary to the main purpose of the legislative measure for implementing the scheme. Similarly in the case of *State of TN vs Hind Stone, (1981) 2 SCC-205,* the parent Act empowered the state Government to make Rules for regula-ting the grant of minerals. Rule 8C framed by the said Government totally prohibited quarrying in Black Granite by Private Enter-prise. It was contended that the Rule was *ultra vires* of the parent Act and was, therefore, bad. Negativing the contention and interpreting the connotation "regulation" in a wider sense, the Supreme Court observed "we have no doubt that the prohibiting of leases in certain cases is part of the regulation as contemplated by section 15 of the Act". In the case of *Supreme Court Employees Welfare Association vs Union of India, (1989) 4 SCC 187,* the Supreme Court, after referring to a number of leading cases, observed) "where the validity of a Sub-ordinate legislation is in question, the Court is to consider the nature object and the scheme of the instructions as a whole, on the basis of that examination, it has to consider what exactly was the area for which, and the purpose for which, power has been delegated by the Governing law ".

46. In the premises discussed above, we do not find the impugned Rules to be in violation of Articles 27, 31 or 40 of the Constitution and, thus, we find that the submissions advanced by Mr Fida M Kamal, the learned Advocate,

appearing for the petitioner has got no substance inasmuch as, the grounds agitated before us for declaring the impugned Rules to be *ultra vires* of the Constitution and to be void for being incompatible with the parent Act have not been substantiated.

47. In the result, these Rules are discharged.

48. However, considering the facts and circumstances as stated in these writ petitions and also as has been elaborated in the submissions advanced by the learned advocate for the petitioners and, further, in view of the fact that since the date of filing of the application for registration has already expired on 12-12-2011 and since the petitioners obtained permission from this Court to continue with their business till disposal of the Rule and since we have discharged both the Rules, we direct the res-pondents to consider the petitioners' applica-tions for registration under the impugned Rules, if they submit their respective applica-tions within 3(three) months from the date of receipt of this order.

49. There, however, shall be no order as to costs.

Mirza Hussain Haider J: I have heard the deliberations of my brother on the question raised in this Rule and I fully agree with the decisions arrived at by him. But I would like to add a few sentences of my own in addition to the reasoning and observations made by my brother.

50. The substance of submissions of Mr Fida M Kamal is the enacted Rule is harsh and unreasonable, specifically on the ground of imposition of fees/security/penalties/ fine. Mr Fida M Kamal tried to impress upon us by drawing our attention to the Customs and Freight Forwarders Licensing Rules 2008, which is similar in nature to the present enactment in question. Having taken us through the said Rules, Mr. Kamal submits that the authority took opinion of the representatives of the business community for protecting the interest of the stake-holders so that their interests are protected. Whereas in the impugned Rules such protection has not been given to the stake holders as at the time of enacting the same the stake holder's representative was absent. He thus raised a question as to whether such sub-ordinate legislation, in respect of some other class or type of organization, would be a yeard-stick for consideration of framing any Rule under any other statute. To answer the above question it may be said that any Rule/bye-law/ regulations/customs etc. i.e. any sub-ordinate legislation can never be of equal status to any other Rule. Because interpretation of the statute clearly said that 'the enactment of legislation of an Act is an Act of the Parliament and it is the parent Act and the sub-ordinate legislation is also an enactment which is to, or must, contain further clarification in its provisions in the form of Rule/Regulation/ bye laws: Article 152 of the Constitution defines law giving effect of a law up to the extent of Act, ordinance, rule, bye-law, regulation, and other legal instruments or any custom having force of law in Bangladesh. So, it is clear that the enactment, whatever it be, is made by the authority under the provision of the statute empowering them to do so, is also a law. But to justify the constitutionality of any such law, which is the prime question of this Rule, one has to see whether the sub-ordinate legislation or child legislation clashes or is inconsistent with the parent law or is violative of any part of the Constitution, specifically the fundamental rights incorporated in Part III of the Constitution only then the same can be declared *ultravires*. To decide the question as to whether the impugned sub-ordinate legislation enacted in the name of "Mailing Operator and Courier Service Rules, 2011" is inconsistent or unconstitutional for the reasons being harsh and unreasonable as has been submitted by Mr, Kamal, we are to analyze his submissions. From

the whole submission of Mr. Kamal it appears that he has stretched much not on unconstitutionality of the impugned Rule on the basis of contradictory or inconsistency of law but he has fully stretched on its applicability on the petitioners of both the Rules on the point of its "harshness" and "unreasonableness". In the main judgment, my brother has rightly pointed out and held that harshness or unreasonableness of any enactment cannot be a ground for declaring any law unconstitutional or illegal as decided by several jurists.

51. Now we are to consider the submissions as to "unreasonableness" or "harshness" of imposing high fees/security/ licence/penalty etc., in the Mailing Operator Courier Service Rules 2011, which is the main grievance of the petitioner. From his submissions it appears that Rule 58 empowers the authority to impose certain amount of fees/security and penalty fixed by the schedule 7 of the Rule. With the development of science and technology it is well established throughout the world that with the passage of time each and every man on earth would believe on speedy communication as well as speedy delivery of services, which, admittedly the postal department under the present circumstances cannot render as provided by the other private Mailing Operator/ Courier Service Providers. Side by side admittedly at present there is no enactment to bring the persons in the business of the mailing operator courier service under a system or in order. For that reason the business of mailing operator-courier service providers have boomed up in the country like mushroom. It is true that in last 10/15 years, it has boomed up very rapidly. But the authority did not give attention for bringing the said system of business in order by enactment or by introducing some methods of control over the said business and put them under some accountability since the citizen's money/property/instrument are at stake in the hands of the stake-holders. It is also true that when the postal department at a nominal charge is rendering services regarding delivery of letters, instrument, goods and money to the people, the petitioners are charging at a much higher rate in providing the same service to the people of the country, upon giving assurance of faster/speedier and assured delivery services of the letters, articles, money and goods. But such business in the private sector has boomed up in such a manner that many anomalies have taken place and some illegal activities are also been found to have been reported to the authority. Thereby the business has given rise to offences like money laundering, missing/misplacement of articles, money and goods causing offence against the society including loss to the citizen who paid extra amount of money to such service providers. Under such circumstances the authority, though lately, has come up with the legislation upon amending the Postal law of 1898 by the amendment dated 28-1-2010. By the said amendment the main provisions of the Postal Act have been amended. Mr Kamal's final submissions is while amending the law the authority should have consulted the stake holders. Thus one of the criterion of attacking the rule as it appears from the submissions of the learned advocate for the petitioner is that there should have been some representations from the petitioners to safe guard their interests in respect of issuance of licence and controlling and managing the business of the petitioners. It is to be remembered that none of the such rules framed for managing and controlling such business, in any other fields of similar nature, the representation of the stake holders has been taken. It is also true that Rule 6 as has been enacted for empowering the stake holders to represent the petitioners community for considering and determining the reasonable and beneficial aspect of the stake holders, namely, the Mailing Operator Courier Service. Thus before enactment of the Rule there was no scope for the petitioners to advance their grievances but the same has been provided by Rule 6.

Limitation Act (IX of 1908)

Article 30, First Schudule—Article 30 of the First schudule of the Act prescribed the time limit 1 (one) year for bringing any suit against a carrier for compensation for loss or injury to goods. Suit being measurably time barred. *Meghna Petroleum Ltd. vs Thakur Shipping Company Ltd (Civil)* 306

Mailing Operator & Courier Service Rules, 2011

Rule 6—Rule 6 has provided a forum of representative capacity of the mailing operators/courier service in the form of advising upon sitting with the postal department and give proper advice by which the interest of the petitioners can be protected under the Rule. *Nurul Imran Chisty vs State (Spl. Original)*... ... 320

Non Agricultural Tenancy Act (XXIII of 1949)

Section 24(10)—Section 24(10) of Non Agricultural Tenancy Act and section 96(17) of the State Acquisition and Tenancy Act speak that right of pre-emption under Muham-madan Law shall prevail which cannot be defeated by these statutory laws. *Rokeya Begum vs Advocate Abdul Awal (Civil)* 274

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

Section 28—Mere mentioning of the words 'person aggrieved' in an observation under paragraph-13 has no bearing or any manner of application in the issue either raised in *MK Malaker's case* or in the present case. The disagreement of the said Bench in *MK Malaker's case* with the decision of *Feroza Begum's case* [40 DLR 161] was not in fact based on the ratio decidendi, or even obiter made, by the Appellate Division in *Abdul Halim's case*. In so far as such reliance on the Appellate Division's ratio to disagree with the decision in Feroza Begum's Case is concerned, the decision in *MK Malaker's case* is per-incuriam. The decision in Fefoza Begum's case, 40 DLR 161, is the correct proposition of law and the same is supported by the ratio emerged from the decision of the Appellate Division in *Fazar Ali's case*, 43 DLR (AD) 129. *Shajeda Begum vs State (Criminal)* ... 294

Registration Act (XVI of 1908)

Section 47—A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. *Raihan Nazrul vs Abul Khair (Civil)* 289

Section 53(A)—The Registrar/Sub-Registrar has been given a guideline as to which property can be registered and which property cannot be registered. If the Registrar/Sub-Registrars are restrained by the two impugned Memos at the instance of the Manager, Court of Wards, even if the criteria of section 53A is fulfilled, it would be an unwarranted interference by an unauthorized person in the lawful function of the Registrar/sub-Registrar which is not permitted under the law. Nor the respondents have any right to issue such direction upon respondents and the Registrar, under the law, is not obligated to abide by such illegal directions issued by unauthorized persons. *Hamdu Miah (Md) vs Government of Bangladesh, (Spl. Original)* 262

State Acquisition and Tenancy Act, 1950 (XXVIII of 1951)

Section 96(17)—Section 24(10) of Non Agricultural Tenancy Act and section 96(17) of the State Acquisition and Tenancy Act speak that right of pre-emption under Muham-madan Law shall prevail which cannot be defeated by these statutory laws. *Rokeya Begum vs Advocate Abdul Awal (Civil)* 274

Section 144—After final publication of the records under the Revisional Survey and the Dhaka City Survey in

the names of the predecessors in interest of the petitioners and the respondents having not taken any step against the same till date by producing any evidence to prove that the entries in those records are incorrect, the law clearly provides that the names of the predecessors in interests of the petitioners recorded in those surveys are presumed to be correct. *Hamdu Miah (Md) vs Government of Bangladesh, (Spl. Original)* ... 262

Transfer of Property Act (IV of 1882)

Section 10—Even the owner of the property cannot impose any condition upon the transferee, in his transfer deed prohibiting its transfer and enjoyment by the transferee, as it violates the principle of 'rule against perpetuity'. *Hamdu Miah (Md) vs Government of Bangladesh, (Spl. Original)* 262

Section 52—Section 52 of Act protect the right of a transferee that pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent. It operate in a suit where the rights to immovable property are involve and transaction is subject to the decree of the Court. *Raihan Nazrul vs Abul Khair (Civil)* 289

Section 52—When plaintiffs purchased the suit property in 1987 when the suit of defendant was pending as such, the transaction in favour of plaintiffs during continuation of the suit is hit by doctrine of lis pendency. Transaction of the plaintiffs is hit by section 52 of the Act i.e. lis-pendency and the plaintiffs of the suit will be abide by the decree passed against their vendor and by virtue of the decree the suit land was transferred to defendant No.l from the date of execution of bainama i.e. from 1985 as such, when the suit land was transferred to the plaintiffs, plaintiffs did not acquire any title but only they purchased litigation on some paper transaction. *Raihan Nazrul vs Abul Khair and others (Civil)* 289

Interpretation of Statute—Whether a particular piece of delegated legislation confers excessive power on the delegate has to be determined with reference to the specific provisions contained in the relevant statute conferring the power to make the Rule, Regulation, etc. and also the object and purpose of the Act as can be gathered from various provision of the enactment. *Nurul Imran Chisty vs State (Spl. Original)* ... 320

Projabily Property—Property enlisted/shown in the "projabily property" Gazette are the properties of "projas" who have been accepted as "owners" and the "rent receiving" interest whatsoever it had therein, of the Zamindars all vested to the Government by operation of SAT Act, 1950. *Hamdu Miah (Md) vs Government of Bangladesh, (Spl. Original)* 262

Waiver—It is now a well settled principle that if anv partv bv disregarding the arbitration claus institutes a suit, the other party must raise objection before filing of the written statement, otherwise that would be deemed as an waiver of the condition. *World Trade Shipping Corporation vs Sonat International Inc. (Civil)* ... 302

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 [May-4.0 k Paper Tech 65 gsm, Taka HG-81, AYY]