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Appellate Division

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Code of Civil Procedure (V of 1908)

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Article 102(2)—Where the government has taken a policy for leasing out the vessels in open auction, the Court will not interfere with the matters of government policy. In such situation the courts of law have to be very wary and must exercise their jurisdiction with circumspection for, they must not transgress into the realm of policy making unless the policy is inconsistent with the Constitution and the laws or the action is arbitrary, irrational or in abuse of power, the Court will not interfere with the matters. *Monowarul Huq vs Bangladesh (Civil)* 148

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Police Force—Serious allegation regarding a member of the disciplined force, who was entrusted with protection of the public and who allegedly himself became the perpetrator against the public, cannot be set at naught for technical defects in the departmental inquiry and proceedings. *Bangladesh vs Md Bazlur Rashid (Civil)* 157

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,

Additional District Judge rightly observed that the averments made in the subsequent suits were sufficient for rejection of the plaints of both the suits.

17. The High Court Division also observed that the learned District Judge disposed of two revisions, Civil Revision Nos.58 and 59 of 2004 and that the plaintiff being aggrieved by the judgment of Civil Revision No.59 of 2004 obtained a Rule from it and that the petitioner did not file any revisional application against the impugned judgment so far as it relates to Civil Revision No.58 of 2004 which weakened the case of the petitioner.

18. What is important to note here is that the learned Additional District Judge rejected the plaints of both the suits as according to him those were barred under section 11 of the Code of Civil Procedure. This is not the correct exposition of law. 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 of Civil Procedure for rejection of plaint.

19. Having gone through the plaints of both the suits, we are of the view that the plaints of both the suits were rightly rejected by the learned Additional District Judge but that should have been done by resorting to the provision of section 151 of the Code of Civil Procedure. Therefore, the plaints of both the suits shall be deemed to have been rejected under section 151 of the Code of Civil Procedure as the materials on record justify to do so.

20. We are of the view that the ultimate decision made by learned Additional District Judge and the learned Single Judge are based on proper appreciation of materials on record."

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

Ed.

Appellate Division
(Civil)

Nazmun Ara Sultana J
Syed Mahmud Hossain J
Md Imman Ali J } Secretary, Ministry of Land and others.....Appellants

vs

Judgment
March 5th, 2014. } Las Nur Miah.....
.....Respondent*

Ejusdem Jeneris

The expression 'other tax' would not include VAT because of the doctrine of *ejusdem generis* applicable in interpretation of statutes and documents. This doctrine is not only applicable in construction of statutory terms but also applicable in respect of terms used in contracts and other non-statutory terms. .....(14 & 15)

Thames and Mersy Insurance Company vs Hamilton, Fraser and Company [(1987) 12 App Cas 448, 419] and Tillmanns and Company vs SS Knutsford Co. (1908) 2 KB 358, ref.

Rajik-al-Jalil, Deputy Attorney-General, instructed by Madhumalati Chowdhury Barua, Advocate-on-Record—For the Appellants.

Fakhrul Islam, Advocate-on-Record—For Respondent.

Judgment

Syed Mahdud Hossain J: This appeal, by leave, by the appellants, arises out of the judgment and order dated 2-12-1999 passed by a Division Bench of the High Court Division in Writ Petition No. 4660 of 1997 making the Rule absolute.

*Civil Appeal No.132 of 2002.

(From the judgment and order dated 2-12-1999 passed by the High Court Division in Writ Petition No. 4660 of 1997).

2. The facts involved in this appeal, in brief, are:

The tender was invited by the Deputy Commissioner, Sunamgonj for leasing out Bardai Castro Ganga Group Jalmahal for the year 1404-1406 BS. The writ-petitioner and others participated in the tender invited for leasing out the Jalmahal and the writ-petitioner's bid was the highest. On acceptance of the writ-petitioner's bid, he was directed to deposit Taka 1,64,000 within three days from receipt of the letter dated 14-5-1997. The writ-petitioner by filing an application prayed for extension of time to deposit the lease money for the year 1404 BS and he was allowed time up to 24-5-1997. On 22-5-1997, the writ-petitioner approached the Revenue Deputy Collector, Sunamgonj, who directed the writ-petitioner to pay 15% VAT and 5% LR fund. On 22-5-1997, the writ-petitioner filed an application to the Additional Deputy Commissioner (Revenue) stating that as per terms of the tender and the letter intimating acceptance of his bid, demand of 15% VAT is illegal and he requested the authorities to accept the lease money with 3% income tax. Having not received any reply of the letter dated 22-5-1997, the writ-petitioner submitted another letter to the Deputy Commissioner, Sunamgonj on 27-5-1997. On 8-5-1997, he received a letter intimating him that his prayer made in letter dated 27-5-1997 was rejected and that lease was cancelled on forfeiture of his earnest money.

3. The writ-petitioner thereupon moved to the High Court Division in its writ jurisdiction challenging the legality of the action of the writ-respondent No.2 cancelling the lease upon forfeiting the earnest money deposited at the time of submitting tender inviting bid for leasing out Bardai Castro Ganga Group Jalmahal and obtained Rule Nisi in Writ Petition No. 4660 of 1997.

4. The writ-respondents contested the Rule by filing affidavit-in-opposition denying the material averments made in the writ petition.

5. Upon hearing the parities, a Division Bench of the High Court Division, by its judgment and order dated 2-12-1999 made the Rule absolute so far as it relates to the forfeiture of the security money amounting to Taka 1,64,000 (one lac sixty four thousand) and the impugned order dated 8-6-1992 (Annexure-G) forfeiting the security money of the writ-petitioner was declared to have been passed without any lawful authority and the writ-petitioner was accordingly entitled to get back the money from the respondents.

6. Feeling aggrieved by and dissatisfied with judgment and order dated 2-12-1999 passed by the High Court Division, the writ-respondents as the leave-petitioners moved this Division by filing Civil Petition for Leave to Appeal No.838 of 2000, in which, leave was granted resulting in Civil Appeal No.132 of 2002.

7. Mr Rajik-al-Jalil, learned Deputy Attorney-General, appearing on behalf of the appellants, submits that the High Court Division misconstrued clause-6 of the tender document and erred in holding that the writ-petitioner was not required to pay 15% VAT and, as such, the impugned judgment should be set-aside.

8. Mr Fakrul Islam, learned Advocate-on-Record, appearing on behalf of the respondent, on the other hand, supports the impugned judgment, stating that, there is no scope for payment of 15% VAT.

9. We have considered the submissions of the learned Deputy Attorney General for the leave-petitioners, the learned Advocate-on-Record for the respondent, perused the impugned judgment and the materials on record.

10. At the very outset, it would be proper

to go through the ground, on which, leave was granted as under:

> "The High Court Division misconstrued Clause-6 of the tender document and erred in holding "But how the terms of the tender documents when there was no express provision in the forfeiture clause for payment of VAT along with the lease money" and this has resulted an error in the decision of the case on its merit."

11. The writ-petitioner participated in the tender by depositing Taka 1,64,000 as security money and became the highest bidder. On 15-5-1997, the bid of the writ-petitioner was approved. The writ-respondent No. 3, Additional Deputy Commissioner (Rev), Sonamgonj, issued a letter dated 14-5-1997 asking the writ-petitioner to deposit Taka 1,64,000 within 3 days of the receipt of the letter. The writ-petitioner filed an application praying for time to deposit the entire money and the prayer was allowed up to 24-5-1997. On 22-5-1997, the writ-petitioner went to respondent No.4 and offered to deposit the bid money along with 3% income tax when writ-respondent No.4 verbally asked the writ-petitioner to pay 15% VAT and 5% LR fund. Since there was no express provision in the tender document for payment of 15% VAT, he requested writ-respondent Nos. 3 and 4 for exemption of payment of VAT but to no avail.

12. It is pertinent to quote clause 6 of the tender document, which is under:

> "নির্বাচিত দরপত্র দাতাকে সিদ্ধান্ত গ্রহনের দিনে প্রথম বছরে ইজারা মূল্যের ৫০% এবং ৩% উৎস করসহ সরকারের অন্যান্য কর প্রদান করতে হবে। অবশিষ্ট ৫০% ইজারা মূল্য ঐদিন থেকে ৭(সাত) দিনের মধ্যে পরিশোধ করতে হবে। অন্যথায় দাদনের টাকা/জমাকৃত টাকা ইত্যাদি বাজেয়াপ্ত করা হবে এবং দরপত্র দাতার বিরুদ্ধে আইনানুগ ব্যবস্থা গ্রহন করা হবে এবং সংশ্লিষ্ট মহালটি পুনরায় ইজারা প্রদানের কার্যক্রম কার্যক্রম গ্রহণ করা হবে।"

13. The only questions to be resolved was whether the writ-petitioner was liable to pay 15% VAT. The settled principle is that forfeiture clause should be strictly construed. When the Government is dealing with the citizen or the public in the matter of leasing out fishery for a particular period on certain terms and the terms are not expressed, the Government must be fair and clean in such dealing. Reading the forfeiture clause of the tender document it does not appear to us that it contained the expressed provision for payment of VAT.

14. The expression 'other tax' would not include VAT because of the doctrine of ejusdem generis applicable in interpretation of statutes and documents. Dealing with this doctrine, Lord Halsbury LC states in *Thames and Mersy Insurance Company vs Hamilton, Fraser and Company [(1987) 12 App Cas 448,419]* as follows:

> "Two rules of construction now firmly established as part of our law. One is that words, however general, may be limited in respect to subject matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words that precede them."

15. This doctrine is not only applicable in construction of statutory terms but also applicable in respect of terms used in contracts and other non-statutory terms. Referring to the case of *Tillmanns and Company vs SS Knutsford Co. (1908) 2 KB 358*, odgers in his book, the Construction of Deeds and Statutes, 5th Edition at page 184, furnished an example stating, "A ship was to be relieved from liability for not delivering cargo at a certain port or ports if it was in the opinion of the master unsafe to do so 'in consequence of war, disturbance or any other cause'. The question arose whether a port inaccessible in the opinion of the master through ice was within the exception. It was held not to be so:"any other cause" must be construed to apply to causes ejusdem generis or similar to 'war or disturbance'."

In the light of the findings made before, we are of the view that the writ-petitioner is not required to pay 15% VAT. The findings and decision arrived at by the High Court Division having been based on proper appreciation of law and fact do not call for interference. Accordingly, the appeal is dismissed without any order as to costs.

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
October 15th & 16th, 2012.

Monowarul Huq...
.....Petitioner
vs
Bangladesh, represented by the Secretary, Ministry of Ports, Shipping and BIWTC and others
.....Respondents*

Constitution of Bangladesh, 1972
Article 102(2)

Where the government has taken a policy for leasing out the vessels in open auction, the Court will not interfere with the matters of government policy. In such situation the courts of law have to be very wary and must exercise their jurisdiction with circumspection for, they must not transgress into the realm of policy making unless the policy is inconsistent with the Constitution and the laws or the action is arbitrary, irrational or in abuse of power, the Court will not interfere with the matters. .....(16)

*Civil Petition for Leave to Appeal Nos. 474 of 2012 and 1525 of 2011.

(From the judgment and order; dated 17-1-2011 passed by the High Court Division in Writ Petition Nos. 4189 and 4188 of 2009)

Bangladesh PDB vs Md Asaduzzaman Sikdar, 9 BLC (AD) 1, Superintending Engineer, RHD vs Md Ennus, 31 BLD (AD) 1 = 16 BLC (AD) 73, Har Shankar vs The Deputy Excise and Taxation Commissioner, (1975) 3 SCR 254, India Thermal Power Ltd vs State of MP, AIR 2000 SC 1005 ref.

Mainul Hosein, Senior Advocate, instructed by Nurul Islam Bhuiyan, Advocate-on-Record—For the Petitioner. (In both the cases)

Mahbubey Alam, Senior Advocate, instructed by Md Zahirul Islam, Advocate-on-Record—For the Respondents. (In both the cases)

Judgment

Surendra Kumar Sinha J: The facts and the law points involved in these petitions being identical, these petitions are disposed of analogously by this judgment.

2. Civil Petition No. 474 of 2012 arose out of a judgment of the High Court Division in Writ Petition No.4189 of 2009. The Bangladesh Inland Water Transport Corporation (BIWTC) chartered out the vessel in question to the writ petitioner Monowarul Huq and the parties executed a charter party agreement on 1st June, 2003 for 5(five) years. Thereafter, on the prayer of the writ petitioner, BIWTC renewed the lease for a further period of 5 (five) years with effect from 22nd October, 2008 by order dated 10th November, 2008 subject to the fulfillment of terms set out in the order. The writ-petitioner consented to the terms of renewal of lease. Thereafter, BIWTC by letter dated 4th June, 2009 cancelled the order of renewal and directed him to return the vessel on the reasoning that it had decided to lease out the chartered vessel in open auction.

3. Civil Petition No. 1525 of 2011 arose out of the judgment of the High Court Division in Writ Petition No. 4188 of 2009, in which, BIWTC chartered another vessel to the writ

petitioner Kazi Azmal . A charter party agreement was executed on 14th January, 1991 for a period of 1 (one) year. Thereafter, BIWTC by order dated 14th February, 2006 accepted the proposal of the writ petitioner to renew the lease for a further period of 3(three) years subject to the fulfillment of the conditions mentioned therein. The period of lease was again renewed by order dated 17th November, 2008 with effect from 22nd October, 2008 for 5 (five) years subject to fulfillment of terms and conditions mentioned therein. Thereafter, BIWTC by order dated 4th June, 2009 cancelled the previous order of renewal and directed the writ petitioner to return the vessel on the reasoning that it had decided to lease out the vessel in open auction.

4. The High Court Division discharged the rules following the decisions of this Division and Indian jurisdiction on the reasoning that the impugned orders are not reviewable by it under Article 102 of the Constitution, inasmuch as, the writ petitioners entered into trading contracts, the breach of such contracts could not be judicially reviewed. Mr Mainul Hosein, learned counsel appearing for the petitioners urged that the High Court Division's opinion as to the maintainability of the writ petitions is not based on sound principle of law, inasmuch as, BIWTC was Constituted by PO 28 of 1972, which having entered into the contracts in the capacity as statutory body for leasing out the vessels, it could not be said that the contracts were not statutory contracts and that since BIWTC directed to return the vessels during the subsistence of the period of lease, which directions being made by a public functionary in exercise of statutory powers, such orders are reviewable by writ jurisdiction

5. Admittedly BIWTC chartered the vessels to the writ petitioners for specified periods and the charter party agreements were also executed for specified periods subject to the conditions set out in the renewal clauses. In the agreements BIWTC reserved its right to take back the vessels before the expiry of the period by serving prior notice to the lessees. BIWTC issued notices to return the vessels in exercise of powers conferred by the clauses of the charter party agreements. The writ petitioners claimed that the cancellation of renewal orders of leases were arbitrary, inasmuch as, they had renovated the engines on the expectation that they would be allowed to use the vessels for the entire period of renewals. Thus it is demonstrably established that the writ petitioners were trying to enforce through writ petitions the right to enjoy the vessels as per terms. The first question is whether such contractual obligations can be enforced by writ jurisdiction.

6. The vessels were chartered purely for commercial purposes which could be construed from the charter party agreements and the averments made in the petitions. It was provided that the leases would use the vessels for carrying merchandise items other than explosive substance, chemicals etc. The High Court Division on consideration of the agreements held that the contracts being for trading purposes, any breach thereof could not be judicially reviewable. In arriving at such conclusion, the High Court Division has considered some cases of this Division and the Supreme Court of India. This Division in *Bangladesh PDB vs Md Asaduzzaman Sikdar, 9 BLC (AD) 1*, after reviewing all its previous decisions and those of the Supreme Court of India on the question of maintainability of writ petition for violation of contract held that such contracts could not be enforced by writ jurisdiction. It had summed up its opinion in paragraph 11 that for breach of contracts writ jurisdiction could be invoked in six categories of cases. The opinion expressed in that case was approved in a later case in *Superintending Engineer, RHD vs Md Ennus, 31 BLD (AD) 1 = 16 BLC (AD) 73.*

7. Mr Mainul Hosein has stressed upon the category (e) of paragraph 11, and submits

that the views taken therein support the cases of the writ petitioners. In paragraph 11(e) it was held when contract is entered into by a public authority invested with the statutory power, in case of breach thereof relief in writ jurisdiction may be sought as against such on the plea that the contract was entered into by the public authority invested with a statutory power. According to Mr Hosein, since the contracts were admittedly executed by BIWTC, a statutory organization, the actions taken were in exercise of the statutory power and therefore, the writ petitions are maintainable.

8. Mr Hosein failed to explain what is meant by statutory contract or in the alternative, what are the elements of a statutory contract. Only because a Corporation or a statutory body executes a contract that will not by itself constitute a statutory contract.Therefore, I find fallacy in the contention of Mr Hosein. BIWTC was created by PO 28 of 1972 for the purpose of operation, promotion and development of coastal and inland shipping and other transport services and for the vesting in the Corporation of the assets and liabilities of East Pakistan Shipping Corporation. The Corporation, as per Article 3(2), is a body corporate with power to acquire, hold and dispose of property and shall sue and be sued. The business of the Corporation shall be conducted by a Board and while discharging its functions the Board shall act 'on commercial considerations' keeping in view the 'public interest generally' as is provided in Article 5(2). Article 12(2)(a) authorizes the Corporation 'to acquire, charter, hold or dispose of vessels' and in exercise of that power, it has chartered the vessels.

9. The rights and liabilities of the writ petitioners, if there be any, arose out of charter party agreements which were though executed by a statutory authority, the recitals therein clearly disclosed that the vessels were chartered purely on commercial considerations. So, if there is any breach of the agreements, the remedy lay elsewhere. The Corporation has entered into the charter party agreements with the writ petitioners just as any other individual can execute the contracts or agreements, as such, do not change its legal character merely because the other party to the contract is the Corporation. The claims of the writ petitioners are nothing but enforcement of a term of the charter party agreements. Ordinarily a party complaining breach of contract may sue for specific performance or damages, if the contract is capable of being specifically performed. Generally, a right to relief flowing from a contract has to be claimed in a civil court. However, the question arises whether the breach of such a contract or agreement executed by a statutory organization or the State, can be enforced by the High Court Division in its writ jurisdiction.

10. In *Har Shankar vs The Deputy Excise and Taxation Commissioner, (1975) 3 SCR 254,* Chandrachud, J speaking for the Court in this-connection argued:

> "Those who contract the open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not for their enforceability upon whether a contracting party finds it 'prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force'.

11. The writ petitioners claimed that BIWTC displayed ingenuity in their action of rescinding the orders of renewals but a writ petition is not an appropriate remedy for impeaching contractual obligations. It should not be lost sight of the fact that private laws may involve a State, a statutory body and a

public body in contractual or tortious actions. I fail to see how a lessee or a licencee of a Corporation can ask for a constitutional remedy in the event of a breach of a contract or agreement by passing the normal channels of civil litigation. What is relevant is not whether the lessor is the State or Statutory Corporation or public authority but whether what is enforced is a statutory contract or sovereign obligation or public function of a public authority.

12. The controversy before the High Court Division in substance turned on the construction and scope of charter agreements which could not be decided in writ jurisdiction without going back on well settled procedures subverting the normal procedural law except perhaps in extreme cases which shock the conscience of the Court. The writ petitioners did not claim that the breach of charter party agreements, itself violates their fundamental rights which could have involved constitutional issues or that the breach involves the breach of a statutory obligation, that is to say, where the order complained of was made by a statutory authority for violation of statutory contract in exercise of its statutory power or that where the act of the statutory authority is arbitrary or *malafide.*

13. To constitute a statutory contract one must comprehend from the recitals made in it. A contract which has been executed by an officer of a statutory body in pursuance of the power conferred by a law or statute itself does not constitute it as statutory contract. If the statute contains terms and conditions which have to be incorporated in the contract while dealing with the statutory organization's property and if those prescribed terms contained in the statute have been incorporated in the contract-that contract becomes a statutory contract; or if the statute provides promulgation of rules or regulations for the purpose of dealing with such statutory organization's property or business and the terms incorporated therein are violated, then of course, such violation can be looked into by writ jurisdiction. Where there is a breach of contract which involves statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, brings it within the sphere of public law because the power exercised is apart from the contract.

14. But, the cases in hand, the terms and conditions contained in the charter party agreements are mutual. There is no indication that those terms were incorporated in PO 28 of 1972 or in the rules or in the regulations framed by the Board. Therefore, there is no doubt that the parties have executed commercial contracts pure and simple. The Government or statutory organization has the freedom to enter into business with anybody it likes and if it so executes, it becomes a general contract pure and simple and it falls purely in a contractual field. This is the statement of law enunciated by this Division in the cases considered by the High Court Division and we find no reason to depart from the said views. Similar opinion has been expressed in *India thermal Power Ltd vs State of MP, AIR 2000 SC 1005,* in which, G,T Nanavati, J argued:

> "Merely because a contract is entered into in exercise of an enacting power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of a mutual agreement between the parties. Therefore, the PPAS can be regarded as statutory only to the

extent that they contain provisions regarding determination of tariff and other statutory requirements of section 43A(2). Opening and maintaining of an Escrow Account or an Escrow Agreement are not the statutory requirements and, therefore, merely because PPAS contemplate maintaining Escrow Accounts that obligation cannot be regarded as statutory. In view of the authoritative pronouncements of this Division in series of cases dealing with the scope of interference by the High Court Division in exercise of its writ jurisdiction in cases of non-statutory contracts like the ones in hand, I am constrained to hold that the High Court Division is justified in its findings about the maintainability of writ petitions.

15. Moreso, the orders of renewal were made with retrospective effect after the expiry of the period of lease. There was clear recital in the orders of renewal that after expiry of the period of lease, on the prayers of the writ petitioners the orders of renewal were made. One of the terms was that the lessee would have to execute the lease deed afresh as per new terms and conditions. Admittedly, the writ petitioners did not execute the charter party agreements as per terms of the orders of renewal. Mr Mainul Hosein contended that it was obligatory on the part of the BIWTC to execute the fresh lease deed and for the laches of BIWTC, the writ petitioners should not suffer. Clause '(গ)' to the orders of renewal clearly stated নবায়নকৃত মেয়াদের জন্য আপনাদের পুনরায় চুক্তিপত্র সম্পাদন করতে হবে। So apparently the submission of Mr Hosein is devoid of substance. It is the responsibility of the writ-petitioners to execute the lease deeds but they failed to take steps for execution of the same. The writ petitioners did not make any statement that despite their eagerness to execute the charter party agreements BIWTC with ulterior motive did not execute the deeds. Since no charter party agreements were executed, the orders of renewal were not acted upon. Therefore, the writ petitioners could not claim any right to hold on the vessels till the expiry of the period of renewal and it could not be said that BIWTC, recalled the orders of renewal in violation of law.

16. What's more, the decisions were taken in public interest for the purpose of leasing out the vessels in public auction. So, apparently these decisions were taken in conformity with Article 5(2) of PO 28 of 1972. It was stated that the concerned Ministry decided to lease out the vessels in open tender. Thus, the question of arbitrary or malafide action does not arise at all. The Corporation took the decision in the public interest for leasing out the vessels by open public auction in accordance with the policy taken by the government. Where the government has taken a policy for teasing out the vessels in open auction, the Court will not interfere with the matters of government policy. In such situation the courts of law have to be very wary and must exercise their jurisdiction with circumspection for they must not transgress into the realm of policy making unless the policy is inconsistent with the Constitution and the laws or the action is arbitrary, irrational or in abuse of power, the Court will not interfere with the matters.

17. As regards the claim of legitimate expectation, the writ petitioners have failed to make out a case that they had taken certain steps on the basis of or on the assurance of BIWTC that their leases would not be cancelled before the expiry of the period. Rather, the terms of charter party agreements show otherwise. BIWTC reserved its right to rescind the agreements even during the subsistence of the period of lease. In view of the above, it cannot be said that the writ petitioners have had legitimate expectation to hold on to the vessels. In the premises, the High Court Division is justified in holding that the writ petitions are not maintainable.

18. These petitions merited no consideration, which are accordingly dismissed.

Ed.

Appellate Division
(Civil)

Nazmun Ara Sultana J
Syed Mahmud Hossain J
Md Anwarul Haque J } Ibrahim Khalique @ Ibrahim Salik .....Appellant

vs

Judgment
April 1st, 2014. } Ayesha Bibi and others..... .....Respondents*

Code of Civil Procedure (V of 1908)
Order IX, rule 4(2)

The vokalatnama remains valid unless cancelled with the leave of the Court by the client or Advocate or until the client or the Advocate dies or until all proceedings in the suit are ended so far as regards the client. As soon as the all proceedings under Order IX, rule 13 came to an end, all proceedings in relation to the pre-emption case shall be deemed to have come to an end and the vokalatnama executed by the pre-emptor shall be deemed to have been terminated or lost its efficacy according to sub-rule (2) of rule 4 of Order III of the Code of Civil Procedure. .....(15)

Civil Rules and Orders
Rule 388(2)

Communication of arrival of the case record from the High Court Division to the learned Advocates of the pre-emptor was not a sufficient compliance with the direction of the High Court Division. What's more, in the absence of pendency of any proceeding in the Court below, fresh initiation thereof in the Court below must be intimated to the parties to the proceeding and not their learned Advocates. .....(21)

Mokbul Ahmed vs Md Ullah, 54 DLR 399 and Md Wahab vs Abul Kalam, 44 DLR (AD)13 ref

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

Khijir Ahmed, Advocate, instructed by Nurul Islam Bhuiyan, Advocate-on-Record—For Respondent Nos.1-3.

None represented—Respondent Nos.4-5.

Judgment

Syed Mahmud Hossain J: This appeal by leave by the pre-emptee-appellant arises out of the judgment and order dated 17-6-2003 passed by the High Court Division in Civil Revision No.6541 of 2001 making the Rule absolute and setting aside the order dated 6-9-2001 passed by the learned Senior Assistant Judge, Kanaighat, Sylhet in Miscellaneous Case No.18 of 2001 dismissing the miscellaneous case for restoration of Pre-emption Case No.58 of 2984 of the said Court.

2. The facts, leading to this appeal, in brief, are as follows:

The respondent filed Pre-emption Case No.82 of 1980 in the then Second Court of Munsif (now Assistant Judge), Sadar, Sylhet under section 96 of the State Acquisition and Tenancy Act,1950 for pre-emption. The case of the pre-emptor, in short, is that the case holding originally belonged to Hason Miah, the predecessor-in-interest of the pre-emptors and some of the respondents of the pre-emption case and the khatian was accordingly prepared

*Civil Appeal No.189 of 2005.

(From the judgment and order dated 17-6-2003 passed by the High Court Division in Civil Revision No.6541 of 2001).

and finally published. On the death of Hason Miah, the pre-emptor's predecessor, Barkatullah and others became owners and subsequently, on the death of Barkatullah, the pre-emptor and others became co-sharers in the case holding. Respondent Nos.2-7 of the original miscellaneous case transferred the case land behind the back of the pre-emptor to the pre-emptee-appellant who is a stranger to the case holding.

3. The pre-emptee in the original miscellaneous case took no step in spite of service of notice and also did not appear in the case. As a result, the pre-emption case was allowed ex-parte on 14-3-1985. After that, the pre-emptor got delivery of possession through Court. The pre-emptee then filed Miscellaneous Case No.15 of 1985 for setting aside the ex parte judgment and order dated 14-3-1985. On getting notice of the case, the pre-emptors submitted a written objection denying the allegations raised in the application for hearing and upon hearing the Court dismissed the case by its judgment and order dated 19-11-1985. The pre-emptee preferred a revisional application before the High Court Division and upon hearing, the Rule was made absolute by setting aside the ex parte judgment and order dated 14-3-1985.

4. The pre-emptor engaged an Advocate to represent him before the High Court Division but because of his financial constraint he could not keep contact with his engaged Advocate and as such, he could not know about the disposal of the case. The pre-emptee expressed in the locality on 10-8-2001 that he had got the judgment in his favour in the original pre-emption case from the High Court Division. Subsequently, after enquiry, the pre-emptor came to know about the restoration of the original pre-emption case and subsequent disposal of the same. The pre-emptor then filed Miscellaneous Case No.18 of 2001 under Order IX, rule 9 read with section 151 of the Code of Civil Procedure for restoration of the original pre-emption case upon setting aside the default order, stating that, pre-emptor No.1 is a woman and other pre-emptors are minors and they could not keep contact with the engaged Advocate in the High Court Division and as such, they were in the dark about the result of the revisional application.

5. The learned Senior Assistant Judge, Kanaighat, Sylhet by his judgment and order dated 6-9-2001 dismissed the case on the ground that the engaged lawyers of both the parties were informed with due notice to the parties and as such, the application for restoration of the pre-emption case was not within time and the pre-emptor also failed to file any application for condonation of delay and as such, the application for restoration was barred by limitation.

6. Being aggrieved by and dissatisfied with the judgment and order dated 6-9-2001, the pre-emptor filed a revisional application before the High Court Division and obtained Rule in Civil Revision No.6541 of 2001. The learned Single Judge of the High Court Division, after hearing the parties, by his judgment and order dated 17-6-2003 made the Rule absolute restoring the miscellaneous case for pre-emption to its original file and number.

7. Feeling aggrieved by and dissatisfied with the judgment and order dated 17-6-2003 passed by the High Court Division, the pre-emptee-appellant moved this Division by filing Civil Petition for Leave to Appeal No.1608 of 2003, in which, leave was granted on 27-7-2005, resulting in Civil Appeal No.189 of 2005.

8. Mr Md Nawab Ali, learned Advocate-on-Record, appearing on behalf of the appellant, submits that the learned Single Judge of the High Court Division failed to appreciate that the pre-emptor never asserted in Miscellaneous Case No.18 of 2001 filed under Order IX, rule 9 of the Code of Civil Procedure

that Mr Monwar Hossain Khan and Mr Abdul Munim, learned Advocates were no longer the Advocates of the pre-emptor and that no material was placed to show that the vokalatnama of the said Advocates was revoked after disposal of Miscellaneous case under Order IX, rule 13 of the Code of Procedure and the learned Single Judge of the High Court Division misdirected himself in holding that showing the order of the Court to the said learned Advocates was not proper communication of the order to the pre-emptor and in that view of the matter, the impugned judgment is bad in law.

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

10. At the very outset, it is necessary to go through the grounds, on which, leave was granted, which are quoted as under:

> "The learned Single Judge of the High Court Division failed to appreciate that the pre-emptor never asserted in his application under Order IX, rule 9 of the Code of Civil Procedure in Miscellaneous Case No.18 of 2001 that Mr. Monwar Hossain Khan and Mr Abdul Munim, learned Advocates were no longer the Advocates of the pre-emptor and that no materials was placed to show that the vokalathnama of the said Advocates were revoked after disposal of Miscellaneous Case under Order IX, rule 13 of the Code of Procedure and the learned Single Judge of the High Court Division misdirected himself in holding that showing the order of the Court to the said learned Advocates was no proper communication of the order of the Court to the pre-emptor and in that view of the matter, the impugned judgment is bad in law. The learned Single Judge of the High Court Division failed to appreciate correctly the principle of law enunciated in the case of *Mokbul Ahmed and others vs Md Ullah and others reported in 54 DLR 399* and the same has no manner of application in the instant case. In the facts and circumstances of the present case, the principle enunciated in the case of *MA Wahab and others vs Abul Kalam and others* reported in *44 DLR (AD)13* also has no manner of application in the present case. Hence the learned Judges of the High Court Division was not justified in placing reliance on the said decisions. The High Court Division erred in failing to appreciate that the pre-emptor-respondent did not allege before the trial Court that appointment of the lawyers who had endorsed the order of the Court on behalf of the pre-emptor-respondent was terminated but for the first time in the revisional application the pre-emptors stated that their relationship with the lawyer ceased after disposal of the miscellaneous case under Order IX, rule 13 of the Code of Civil Procedure which is an afterthought and in that view of the matter, the impugned order is bad law.

11. The pre-emption case was allowed ex-parte and the pre-emptee filed an application for setting aside the ex parte judgment and order allowing pre-emption. The miscellaneous case filed under Order IX, rule 13 of the Code of Civil Procedure was dismissed on 19-11-1985. After that, the pre-emptee filed Civil Revision No.204 of 1985 renumbered as Civil Revision No.9227 of 1991 before the High Court Division and obtained Rule, which was made absolute on 8-8-1999 and as a result, the ex parte order allowing the miscellaneous case was set-aside.

12. While making the Rule absolute, the High Court Division stated as follows:

> "As the case is a very old one, the trial Court is directed to dispose of the pre-emption case within a period of 1 (one) year from the date of receipt of the record from this Court after giving due notice to the concerned parties."

13. But the Court concerned notified Mr Monwar Hossain and Mr MA Matin, who were the learned Advocates of the pre-emptor and they also signed the order-sheet. Therefore, it appears that no notice was served upon the pre-emptor after receipt of the case record from the High Court Division.

14. There is no gainsaying the fact that all the proceedings relating to the pre-emption case ended after disposal of the miscellaneous case filed under Order IX, rule 13 of the Code of Civil Procedure. It is alleged that the learned Advocates who were intimated about the receipt of the record did not inform the pre-emptor. In this connection, it is pertinent to quote sub-rules (1) and (2) of rule 4 of Order III of the Code of Civil Procedure:

> "4.(1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment.
>
> (2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client."
>
> *(emphasis supplied)*

15. Having gone through the sub-rule (2) of rule 4 of Order III, we find that the vokalatnama remains valid unless cancelled with the leave of the Court by the client or Advocate or until the client or the Advocate dies or until all proceedings in the suit are ended so far as regards the client. As soon as the all proceedings under Order IX, rule 13 came to an end, all proceedings in relation to the pre-emption case shall be deemed to have come to an end and the vokalatnama executed by the pre-emptor shall be deemed to have been terminated or lost its efficacy according to sub-rule (2) of rule 4 of Order III of the Code of Civil Procedure.

16. Therefore, the arrival of the case record in the Courts below must be intimated by issuing notice upon the parties and not their learned Advocates.

17. The High Court Division rightly relied upon the case of *Mokbul Ahmed vs Md Ullah and others* reported in *54 DLR 399* wherein it has been held that it was incumbent upon the learned Judge to communicate the order to the parties about the arrival of the record from the High Court Division.

18. We approve of the principle laid down in the above case.

19. In this connection, reliance may be placed on paragraphs 4, 5 and 6 of the case of *Md Wahab vs Abul Kalam, (1992) 44 DLR (AD)13* which are quoted below:

> "4. Rule 466(2) of the erstwhile High Court Civil Rules and Orders were the same as present Rule 388(2) of the Civil Rules and Orders. On Rule 466(2) CJ Choudhury observed in the case reported in 15 DLR 99 as follows:
>
> "This Rule contemplates that if on the date fixed any important order is passed this order is to be signed by the Pleader and endeavour should be made to get the signature of the Pleader. But if an order is passed on an off date, in a case not appearing in the cause list or on a date not fixed for a case, it is still more incumbent on the Court to see that the order is communicated."
>
> 5. The above interpretation of former Rule 466(2) (now Rule 388(2)) is being consistently followed by the High Court Division (see *Md Wasiq Khan vs Md Sabiq*

Khan, 33 DLR 35 and Jaharun cessa vs Safed Ali Bepary and others, 36 DLR 253).

6. The suit in question was transferred from one Court to another by virtue of a Gazette notification. The transfer was given effect to on an off-date. It was incumbent upon the Court to inform the parties or their Advocates of the transfer. Proceedings continued (sic) in the new Court to the prejudice of one of the parties and in his ignorance of the order of transfer is not valid (see *Rahela Khatun vs Seraj Sarker, 35 DLR 345*). An order of the Court affecting one of the pillars of the suit, namely, place of trial, cannot be meant for communication to the Pleader Commissioner only. It was meant for communication to all the parties involved. Since the Court's order was not communicated and the course of the suit took an adverse turn to the prejudice of the defendant behind his back and without his knowledge, the suit was rightly restored by the High Court Division on terms and we find no ground for interference.""

20. In the above case, the case was transferred from one Court to another in the same Judgeship pursuant to a Gazette notification and this Division held that non-communication of the Court's order took an adverse turn to the prejudice of one of the parties.

21. Admittedly before placing the miscellaneous case for pre-emption for hearing the provision, the learned Advocates of the pre-emptor were notified about the receipt of the case record from the High Court Division. On the facts and in the circumstances of the present case such a notice is not a compliance with Rule 388(2) of the Civil Rules and Orders. We are of the view that the communication of arrival of the case record from the High Court Division to the learned Advocates of the pre-emptor was not a sufficient compliance with the direction of the High Court Division. What's more, in the absence of pendency of any proceeding in the Court below, fresh initiation thereof in the Court below must be intimated to the parties to the proceeding and not their learned Advocates.

22. In the light of the findings made before, we do not find any ground in this appeal for our interference.

Accordingly, the appeal is dismissed and the trial Court is directed to dispose of the case after notifying the parties and not their learned Advocates as expeditiously as possible.

Ed.

Appellate Division
(Civil)

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

Judgment
November 21st, 2013.

Bangladesh, represented by the Secretary, Ministry of Home Affairs and another.....
.....Petitioners

vs

Md Bazlur Rashid
... .Respondent*

Police Force

Serious allegation regarding a member of the disciplined force, who was entrusted with protection of the public and who allegedly himself became the perpetrator against the public, cannot be set at naught for technical defects in the departmental inquiry and proceedings. .....(8)

*Civil Petition For Leave To Appeal No. 2150 Of 2010

(From the judgment and order dated 3rd of April, 2010 passed by the Administrative Appellate Tribunal in AAT Case No. 66 of 2007)

Sujit Kumar Majumder vs Ministry of Local Government and Rural Development, Dhaka, 51 DLR AD 145 ref.

Rajik-al-Jalil, Deputy Attorney-General, instructed by Gias Uddin Ahmed, Advocate-on-Rexord —For the Petitioner.

Pankaj Kumar Kundu, Advocate, instructed by Md Nawab Ali, Advocate-on-Record —For the Respondent.

Judgment

Md Imman Ali J: This civil petition for leave to appeal is directed against the judgment and order dated 3-4-2010 passed by the Administrative Appellate Tribunal in AAT Case No. 66 of 2007 allowing the appeal in part.

2. The facts relevant for disposal of the instant Civil Petition for Leave to Appeal are as follows:

The respondent Md Bazlur Rashid (hereinafter referred to as the respondent) was appointed as a Constable in the Police Force on 7-6-1998, his appointing authority being the Commandant (sp) Force, Uttara, Dhaka (respondent No. 3 before the Administrative Appellate Tribunal). A departmental proceeding was drawn up against the respondent for which the inquiry officer was the Senior Police Superintendent. On the basis of his report the Commandant framed charge against the respondent on 16-2-2002. At the same time a separate criminal case was filed against the respondent. The respondent submitted written reply in the departmental proceedings which having not been considered in his favour, he was suspended on 28-2-2002. The respondent requested copies of the inquiry report and the statement of the witnesses on 5-3-2002 but those were not supplied to him. On 11-3-2002 he submitted his written reply claiming to be innocent and praying for discharge from the departmental case. He was dismissed by order dated 21-3-2002 passed by respondent No.3. Thereafter, the respondent before us filed appeal before the Inspector General of Police on 24-3-2002 which having been dismissed on 22-4-2002 he filed the case before the Administrative Tribunal.

3. The respondent No. 3 contested the case before the Administrative Tribunal by filing written statement stating that the respondent before us had been charged under section 5 (Kha) of the Jana Nirapatta (Bishes Bidhan) Ain, accused of, *inter alia* hijacking and misconduct. After hearing both the parties the Administrative Tribunal by judgment and order dated 8-2-2007 allowed the case of the respondent and ordered his reinstatement in service and for payment of arrear salary and benefits. On appeal by the petitioners before us the Administrative Appellate Tribunal by the impugned judgment and order allowed the appeal in part directing the authority concerned to reinstate the respondent in service, but ordered that he will not be entitled to arrear salary and benefits from the date of his suspension on 28-2-2002 until his reinstatement and that period shall be counted as special leave.

4. Mr Rajik-al-Jalil, learned Deputy Attorney-General appearing on behalf of the petitioners submits that the charge against the respondent was serious in nature. The respondent being a Constable appointed for maintaining law and order and for protection of the general public was himself involved in hijacking and, as such, his reinstatement should not be allowed for technical defects in the inquiry and departmental proceedings.

5. Mr Pankaj Kumar Kundu, learned Advocate appearing on behalf of the respondent submits that the criminal case which was brought against the respondent was ultimately

dismissed and the respondent was acquitted from the charges levelled against him. He further submits that the preliminary inquiry held against the respondent was carried out by someone other than the appointing authority which is in contravention of the Police Officers (Bishes Bidhan) Addhadesh 1976, which requires that the inquiry must be done by the appointing authority. He finally submits that the inquiry report and statement of witnesses having not been supplied to the respondent, he was prejudiced and the whole proceeding stands vitiated being in gross violation of the principle of natural justice. Learned advocate has referred to the decision in the case of *Sujit Kumar Majumder vs Ministry of Local Government and Rural Development, Dhaka* reported in *51 DLR AD 145,* wherein this Division upheld the decision of the Administration Appellate Tribunal where the employee had been reinstated in service without arrear salary and financial benefits. He also referred to the unreported decision in *Government of Bangladesh vs Syed Ali Imam* wherein Civil Petition for Leave to Appeal No. 720 of 2001 was dismissed upholding the order of the Administrative Appellate Tribunal and Administrative Tribunal setting aside the dismissal as the employee was not given an opportunity to cross-examine the witnesses.

6. We have considered the submissions of the learned Advocates for the parties concerned and perused the materials before us the first decision of this Division referred by the learned advocate which was also the basis of the decision of the Administrative Appellate Tribunal is one where the delinquent employee was absent from his duty on the ground of illness without prior permission. In that case the dismissal by the authority concerned was set-aside by the Administrative Tribunal on the ground that the dismissal was imposed without giving any second show cause notice to the petitioner. That decision was upheld by the Administrative Appellate Tribunal and also by this Division.

7. In the second decision referred by the learned Advocate on behalf of the respondent the employee had been charged with commission of an unnatural offence (sodomy) with mess boys and of writing an anonymous letter to his authority making false allegation against his fellow police personnel.

8. In the instant case we find that the allegations against the respondent are very serious in nature. He is alleged to have been part of a group of 3 Constables who were involved in hijacking and extortion. It is our view that such a serious allegation regarding a member of the disciplined force, who was entrusted with protection of the public and who allegedly himself became the perpetrator against the public, cannot be set at naught for technical defects in the departmental inquiry and proceedings.

9. We are of the view that the earlier decisions of this Division referred by the learned Advocate for the respondent can be distinguished in the facts of the instant case.

In the result the civil petition for leave to appeal is disposed of in the light of the above observations. The authority concerned is directed to proceed afresh with departmental proceedings against the delinquent Police Constable in accordance with the relevant law and regulations, upon supplying him with all the evidence found against him and giving him an opportunity to make proper representation in respect of the evidence and materials supporting the allegations against him.

Ed.

Appellate Division
(Criminal)

Md Muzammel Hossain CJ
Surendra Kumar Sinha J
Md Abdul Wahhab Miah J
Hasan Foez Siddique J } Anti-Corruption Commission.....Petitioner

vs

Dr Md Rezaul Haque Chowdhury alias Dr Md Rezaul Karim and another...Respondents*

Judgment
February 10th, 2014.

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

This Court, time and again, has held that entertainment of an application under section 561A of the Code for quashing of a criminal proceeding when trial already commenced and witnesses have been examined is not desirable, but as it appears that the High Court Division failed to consider this apparent legal aspect in quashing the proceedings. In that view of the matter, the High Court Division ought not to have entered into the merit of the application. .....(9)

Anti-Corruption Commission Act (V of 2004)
Section 32

If the accused can really show that no sanction was accorded by the Commission before submission of the charge-sheet against him; then the trial Court shall definitely consider the same in the light of the relevant provisions of the Ain, 2004. .....(9)

*Criminal Petition for Leave to Appeal No. 440 of 2013.

(From the judgment and order dated the 14th day of March, 2013 passed by the High Court Division in Criminal Miscellaneous Case No.11155 of 2008)

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

Whether the accused had involvement with the occurrence as alleged by the prosecution or not is a question of fact and that has to be decided by the trial Court through sifting of evidence to be adduced by the prosecution. .....(10)

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

Trial had already commenced before the filing of the application for quashing the proceedings and 18(eighteen) witnesses were already examined. The filing of the application before the High Court Division for quashing the proceedings does not appear to us *bona fide*. .....(9)

Observations

High Court Division was not also correct in observing that "a Civil Surgeon should not be implicated for alleged theft committed at a store, which remains under the control of a store keeper, not under the direct control of a Civil Surgeon, "as such, observation is absolutely based on guess and surmises. ...(10)

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

KM Saifuddin Ahamed, Advocate instructed by Mahmuda Begum, Advocate-on-Record—For the Respondents.

Judgment

Md Abdul Wahhab Miah J: This petition for leave to appeal has been filed by the Durnity Daman Commission (the Commission) against the judgment and order dated the 14th day of March, 2013 passed by a Division Bench of the High Court Division in Criminal

52. Be that as it may, it appears from the affidavit-in-opposition of the respondents that before enacting the impugned Rule in question the respondents had discussions with the representatives of the petitioners. This statement of the respondents has not been controverted by the petitioner meaning that the authority had some discussions with the representative of the petitioners is an admitted fact. Such discussions/consultation appears to have been made keeping in mind the principle of Rule 6. Rule 6 reads as follows:

> লাইসেন্সিং কর্তৃপক্ষ উহার দায়িত্ব ও কার্যাবলী সুষ্ঠভাবে সম্পাদনের উদ্দেশ্যে বাংলাদেশ ডাক বিভাগ এবং মেইলিং ও কুরিয়ার ব্যবসার সাথে সম্পৃক্ত অভিজ্ঞ ব্যাক্তিবর্গের সমন্বয়ে এক বা একাধিক পরামর্শ কমিটি গঠন করিতে পারিবে।

53. Thus, it appears that the stake holders namely, the petitioners have opportunity of expressing their grievances, if any, and the forum being always open, so long Rule 6 is there, the petitioners have the opportunity of suggesting the authority about the pros and cons of the law and benefits of the service providers or bring the notice of the authority the advantage or disadvantage of the service providers and service receivers. Thus, we find that 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.

54. A question may arise whether the advisory committee constituted under rule-6 is or will be an effective committee for looking after the interests of both service provider and the recipients and thereby provide proper and better service to the members of the society through their effective participation. The answer depends on the participation of the members of the advisory committee consisting of experienced persons of the petitioners group and the postal department. If they do not perform their part or in the alternative, if the authority do not take the responsibility of making the rule an effective one, then under no circumstances rule 6 will be a meaningful legislation. Having gone through the said rule, we find that, like other advisory committees of different organizations, the advisory committee provided in rule 6 appears to be an effective committee of course if it is with proper representations from the experienced person of the service providers i.e. the petitioners as well as from the authority of the postal department. Only then the advisory committee, provided in Rule 6 will be an effective committee which will serve the purpose of the service providers and the service receivers and the interests of all concerned including the stake-holders, like the petitioners and their interests will be protected. Thus we are of the view that such committee should be formed immediately, to resolve the difficulties, including the disputes as to imposing fees/penalties and also to look after the interest of both the service providers and the service receivers.

55. Moreover, since Rule 6 does not make any limitation to the number of the members of the committee, so we expect that the authority should come forward with open mind and for the purpose of meaningful participation from the petitioners group to fulfil the proper objective of the rule and thereby to remove the difficulties of all concerned for the purpose of smooth running of business upon forming a committee taking a good number of representatives from the experienced people on mailing and courier service business as well as from the postal department and thereby make a consolidated, effective, reasonable and meaningful committee.

With these observations, I fully agree with the decision arrived at by my brother.

Ed.

High Court Division
(Criminal Miscellaneous Jurisdiction)

Mirza Hussain Haider J
Md Rezaul Haque J

Kalimuddin alias Karimuddin (Md).....Convict-Petitioner

vs

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

Judgment
January 31st, 2011.

Children Act (XXXIX of 1974)
Section 66

Investigating officer having mentioned the age of the petitioner as 15/16 years particularly having mentioned him as *"Kishore"* it was the duty of the Court concerned to determine the actual age of the petitioner and treat him accordingly. .....(21)

Children Act (XXXIX of 1974)
Preamble

The enactment, has been made for custody, protection and treatment of the children and trial and punishment of the youthful offenders. .....(20)

Children Act (XXXIX of 1974)
Sections 2(f) and 66

When the children are being used in various manners by different culprits including using them as carriers of the arms, drug, narcotics and the petitioner being a child should not have been dealt with in the manner as he has been dealt with in this case. .....(21)

Children Act (XXXIX of 1974)
Sections 66 and 67

A general instruction should be given to all the Judges concerned to take into consideration sections 66 and 67 of the Act, and determine the age of any accused, boy/girl, in accordance with law and thereafter deal with the same as it is specifically provided for in the Act, to protect the interest of the children.....(22)

Code of Criminal Procedure (V of 1898)
Section 561A
Children Act (XXXIX of 1974)
Section 2(f)

The petitioner being a child ought to have been dealt with in accordance with the Act. Having not done so we hold that the trial, conviction and sentence passed therein which has been challenged in this Rule, without jurisdiction. .....(24)

Tuta Pramanik vs State, 59 DLR 492 and Talebur Rahman vs State, 49 DLR 167 ref.

Md Khurshid Alam Khan, Advocate—For the Petitioner.

Md Shaifuzzaman, AAG with Md Shamim Ahsan, AAG—For the State Opposite Party.

Judgment

Mirza Hussain Haider J: This Rule has been obtained, on an application under section 561 A of the Code of Criminal Procedure, by the convict-petitioner Md Kalimuddin alias Karimuddin, challenging the judgment and order dated 3-11-2003 passed by the Metropolitan Special Tribunal No. 11, Dhaka, in Metropolitan Special Tribunal Case No. 1542 of 2001 convicting the petitioner and another under section 19A of the Arms Act and sentencing them to suffer rigorous imprisonment for a period of 14 years.

2. Fact leading to the issuance of the Rule in short is that one Md Abdur Rob, Sub-Inspector, Detective Branch, Dhaka Metropoli-

*Criminal Miscellaneous Case No. 14085 of 2003.

tan Police lodged First Information Report (hereinafter referred to as 'FIR') on 3-6-2001 with the Demra Police Station Dhaka alleging *inter alia* that the informant and other police officers of Detective Branch, Dhaka Metropolitan Police, led by Assistant Commissioner, were conducting the operation for nabbing terrorists and for recovery of narcotics within Demra area at midnight on 2-6-2001. At about 22.45 hours the said team received the secret information that the accused Jabed Akter was illegally manufacturing arms at his lathe machine workshop at Kazla, under Demra Police Station and the said Jabed Akter kept the arms for selling to specific terrorist which would deteriorate the law and order situation at Dhaka City. Thereafter the said accused Jabed Akter was chased upon by the Officer in Charge of the Demra Police station along with other police personnel nearly to the place of occurrence and upon capturing him, on interrogation he admitted before the police that he kept 13 guns, prepared for selling and his employee accused Kalimuddin was engaged in colouring the said arms. Accordingly, the members of the Detective Branch along with the Officer in charge of Demra police station upon opening the door of the workshop of Jabed Akter found that the accused petitioner Md Kalimuddin is colouring one arm and upon entering into the workshop they found the guns and upon preparing a seizure list took all the arms at their control and arrested the accused Jabed Akter, the owner of the said workshop and the present petitioner Kalimuddin. The seizure list was prepared on the same day on 2-6-2001 by the police upon seizing the arms and other materials in presence of the local witnesses. The accused persons including this petitioner were produced before the Magistrate, who allowed remand on the prayer of the police fixing 13-7-2001 for report. The police upon investigating the case found preliminary proof of the allegation against the accused persons and submitted charge sheet against them on 14-8-2001 under section 19A of the Arms Act.

3. The case was then transferred to the Metropolitan Special Tribunal, Dhaka and the same was registered as Metro Special Tribunal Case No. 1542 of 2001. On trial, charges were framed against both the accused persons under section 19A of the Arms Act which was read over to them and the accused persons pleaded not guilty. The prosecution examined 12 witnesses out of 15 witnesses named in the charge sheet and the defense examined none. After conclusion of the evidence the tribunal examined the accused persons under section 342 of the Code of Criminal Procedure where the accused persons further pleaded not guilty and claimed to be tried and the learned Judge of the said tribunal thereafter convicted both of them and sentencing each of them to suffer 14 years rigorous imprisonment and the tribunal directed to deduct the total period the accused persons suffered in custody from the sentence, by the judgment and order of conviction and sentence dated 3-11-2003.

4. Being aggrieved by the said judgment and order of conviction and sentence dated 3-11-2003, the present petitioner filed this instant application under section 561A of the Code of Criminal Procedure upon which the instant Rule has been issued.

5. The learned advocate for the convict-petitioner, Mr Md Khurshid Alam Khan, at the very outset submitted that the trial, the conviction and the sentence are not at all maintainable as well as sustainable as the accused petitioner Kalimuddin was a minor boy of less than 16 years on the date of occurrence as well as during the trial and he, being minor, was not dealt with in accordance with the provision of Children Act, 1974 as such the trial, conviction and sentence conducted and passed by the Metropolitan Special Tribunal is without juris-

diction for which the conviction and sentence is liable to be quashed.

6. In his second count of argument the learned advocate Mr Khan drew our attention to Criminal Appeal No. 4445 of 2003 filed by the co-accused (co-convict) Jabed Akter wherein the Division Bench of this Division, upon hearing the learned advocate for the appellant and on examining the materials on record, was pleased to allow the appeal and accordingly the convict appellant Jabed Akter was acquitted and was set free upon setting aside the judgment and order of conviction and sentence dated 3-11-2003 as the Division Bench of this Division did not find that the prosecution was able to prove the case against the accused beyond reasonable doubt.

7. Relying on the said judgment delivered on 24-4-2007 in Criminal Appeal No. 4445 of 2003 and upon pointing out from the evidence on record the learned advocate, Mr. Khan submits that no witness supported the prosecution case as to the recovery of the alleged arms from the control and possession of the present petitioner and the arms having not been sent to expert for examination, the prosecution case has not at all been proved beyond reasonable doubt.

8. The learned advocate Mr Khan further submits that all the seizure list witnesses i.e. PWs 1 to 5 categorically stated that none of them saw the recovery of alleged arms from the control and possession of the accused petitioner for which all the seizure list witnesses were declared hostile, but on cross examination the prosecution could not bring out anything new from them.

9. He further submits that the other PWs namely PWs 9 to 12 were tendered by the prosecution and only PWs 6, 7, and 8 remained to prove the prosecution case. But the learned advocate Mr. Khan submits that none of these three witnesses could prove specifically that the arms were recovered from the control and possession of the present petitioner.

10. Mr Khan drawing our attention to the charge sheet submits that the Investigating Officer mentioned the age of the petitioner Kalimuddin as 15/16 years and categorically stated therein as 'Kishore' and the petitioner being an employee under Jabed Akter, the owner of the said workshop has nothing to do beyond the permission of the owner of the workshop i.e. the other accused person Jabed Akter. Under such circumstances he submits that it is a case actually of no evidence at all against the petitioner as such the judgment and order of conviction and sentence complained of herein is liable to be quashed.

11. Mr Sheikh Shaifuzzaman, the learned Assistant Attorney-General, appearing for the state opposite party, on the other hand, submits that the contentions of the learned advocate for the convict-petitioner that the judgment and order of conviction and sentence is liable to be quashed on the ground of no evidence, is not tenable in the eye of law. Referring to the case of *Tuta Pramanik vs State,* reported in *59 DLR 492,* he submits that even if independent witnesses and the seizure list witnesses do not support the prosecution case, conviction can be given relying only upon the evidence of police witness if it inspires confidence or they are worthy of credit. He submits that in the present case, the informant, investigating officer, PW 6, Sub-Inspector police personal who filled up the form, categorically proved the prosecution case of keeping the arms which were produced before the Court by the informant and marked as Annexures-I to I (12). He further submits that from the trend of cross examination of the witnesses, it appears that the defence could not bring out anything new contrary to what has been stated by the three witnesses, as such the prosecution was able to prove the case beyond

all reasonable doubt.

12. Referring to the case of *Talebur Rahman vs State,* reported in *49 DLR 167* he submits that the accused may be convicted solely on the basis of a solitary witness like the police officer or the person who made the search and seizure, the judge must ensure that such witness is disinterested. He submits that of course such witness required to be disinterested which is very much present in the present case. Thus the conviction and sentence relying upon the witness of at least PWs 6, 7, 8 is fully in accordance with law and, as such, the application under section 561A of the Code of Criminal Procedure is liable to be dismissed.

13. Heard the learned advocates, perused the papers placed before us including the lower court records which has been called in this case.

14. We find from the submissions of Mr. Khan and from the evidence as to PWs 1 to 5, who were the seizure list witnesses, that they did not disclose anything as to prosecution case of recovery of arms from the accused petitioner's control, rather all the said seizure list witnesses were declared hostile and the prosecution has failed to make out the case in their favour. As PWs 9 to 12 were tendered, nothing is required to be discussed about the same. Thus only thing to see was what the PWs 6 to 8 have said. In this respect we had the opportunity of going through the judgment passed in Criminal Appeal No. 4445 of 2003, preferred by co accused (co-convict) Jabed Akter, therein their Lordship categorically discussed all the witnesses. Wherefrom we find that PW6 SI Mahbub Alam Chowdhury was the duty officer of Demra police station on 3-6-2001 and he filled up the formal column of FIR on receiving the same and lodged the FIR which was marked Ext-2.

15. PW7 SI Md Shahjahan investigated into the case, visited the place of occurrence, prepared the sketch map with the index of place of occurrence which were marked Ext 3 /4 respectively, recorded the statement of witnesses under section 161 of the CrPC and submitted charge sheet against the accused Jabed Akter with Kalimuddin under section 19A of the Arms Act. During cross examination it was suggested that PW 7 submitted charge sheet being influenced by the informant without making any proper investigation which PW7 denied.

16. PW8 SI Md Abdur Rob is the informant of the case and he deposed corroborating the statement of FIR stating that he along with other force under the leadership of Assistant Commissioner of DB Md Akteruzzaman, went to the place of occurrence in the night of 2-6-2001 and on interrogation accused Jabed Akter admitted that he has made 13 guns by his Lathe Machine and those are kept in the workshop for selling. At that time his employee Kalimuddin was colouring those guns inside the workshop. Accused Jabed called his employee Kalimuddin who opened the shutter of workshop and informant along with his force recovered 13 guns. PW 8 also saw huge spare parts of guns inside the workshop and he seized 13 guns with spare parts and prepared the seizure list and took the signature of witnesses therein. PW8 proved his signature in the seizure list marked Exhibit 1/3. Accused persons could not show any valid license for the recovered arms and accordingly PW8 lodged FIR with Demra police station through Constable Joynal and the FIR was marked Ext-5 while the signature of informant was marked Exhibit 5/1. Informant PW8 identified 13 guns marked Article Exhibits 1-13 along with accused persons present in the dock. In reply to cross examination, informant PW8 admitted that one Abdur Rashid is the owner of the place of occurrence and he did not seize any paper to prove that accused Jabed is the owner of the workshop. PW 8 admitted that

he did not recover any bullet from the workshop. It was suggested that accused Jabed was not the owner of workshop and he does not posses the same which PW 8 denies. PW 8 further admitted that he did not get any paper relating to the ownership of place of occurrence workshop.

17. PW9 SI Md Jahangir Hossain, PW 10 SI Kazi Wazed Ali, PW 11 Habilder Nazrul Islam and PW 12 Constable Joynal Abedin are all tendered by the prosecution and the defence declined to cross examine them. After recording the deposition of PWs accused persons including convict-petitioner Kalimuddin were examined under section 342 of the CrPC to which they pleaded not guilty but did not adduce any DW.

18. Having gone through the same and materials on record we do not find any reason to analyze the said three PWs in a different manner. It is to be noted that the PW 7, IO was recalled and cross examined by the defence. He in his cross examination admitted that he did not seize the arms and the lathe machine was not seized as alamats nor during investigation the PW7 found anything that the fire arms are serviceable. Apart from this, the investigating officer said nothing about the involvement of the petitioner with the offence in the place of occurrence. Thus the contentions of the learned Assistant Attorney-General that there are sufficient evidence, at least PWs 6, 7, and 8, for convicting the convict-petitioner has no basis and since the deposition of the said three witnesses is not unimpeachable and since no other evidence specifically PWs 9 to 12, having been examined rather tendered, the depositions of the said PWs cannot be taken into consideration relying upon which the petitioner can be convicted.

19. Now the second question comes about the trial conducted by the regular special tribunal in respect of the present petitioner, who is claimed to be a minor when the trial commenced. In this respect the learned Assistant Attorney-General could not make any submission rather conceded that the law, specifically the Children Act, 1974, is clear and, as such, he cannot go beyond the same. At this moment we have examined the record and it appears from the FIR that in the FIR the age of the accused petitioner has not been mentioned. Similarly in the forwarding letter dated 3-6-2001 by the police of Demra police station the age of the Jabed Akter with the other accused persons have been shown as 36 years but for the reasons best known to the authority the age of present petitioner has not been given. It appears from the charge sheet that the Investigating Officer mentioned therein the age of both the accused persons to be 36 years old for Jabed Akter and "15/16 years (Kishore)" against the name of Kalimuddin, the present petitioner. Interestingly when the accused persons were examined under section 342 of the CrPC the said form was filled up showing Jabed Akter as 33 years of age and Md Kalimuddin the present petitioner as 15 years of age. So from the charge sheet as well as the examination under section 342 it appears that at least on the date of examining the accused person under section 342 of the CrPC i.e. on 13-10-2003 he was under 16 years of age i.e. he was a minor. In this respect we need to see the preamble of the Children Act, 1974 which runs as follows:

> "An Act to consolidate and amend the law relating to the custody, protection and treatment of children and trial and punishment of youthful offenders.
>
> Whereas it is expedient to consolidate and amend the law relating to the custody, protection and treatment of children and trial and punishment of youthful offenders....."

20. Upon going through the same as above

it appears that the said enactment, has been made for custody, protection and treatment of the children and trial and punishment of the youthful offenders. In the said Act section 6 provides:

> "6. No joint trial of child and adult—(1) Notwithstanding anything contained in section 239 of the Code or any other law for the time being in force, no child shall be charged with, or tried for any offence together with an adult.
>
> (2) If a child is accused of an offence for which under section 239 of the Code or any other law for the time being in force such child but the provision of sub-section (1) could have been tried together with an adult, the Court taking cognizance of the offence shall direct separate trials of the child and the adult. "

21. Section 66 of the Children Act, 1974 categorically empowers the judge of the Criminal Courts 'to take necessary steps to determine the age of the persons concerned when the persons is with the offence or is brought before any Criminal Courts other than for the purpose of giving evidence and the said Court shall take evidence as may be forthcoming as the evidence of the case and shall record the findings therein on stating his age as nearly as may be'. But in the present case the Investigating Officer having mentioned the age of the present petitioner as 15/16 years particularly having mentioned him as "Kishore" it was the duty of the Court concerned to determine the actual age of the petitioner and treat him accordingly. Moreover, when the Judge of the Special Tribunal at the time of examining the convict-petitioner under section 342 of the Code specifically filled up the age mentioning 15 years, meaning the petitioner was a child under the Children Act 1974, how and why the petitioner was tried in the general court instead of being tried separately by the Juvenile Court or in the manner as prescribed in the Children Act, 1974. We do not understand as to how and why the learned Judge of the tribunal having come to know about the age of the petitioner, at least from the examination of the petitioner under section 342 of the CrPC that he is a child, did not take any appropriate steps under the Children Act, 1974 and why after conclusion of trial he was sent to jail along with other common convicts instead of in any of the correction centers/safe home etc. Such trial, conviction and sentence of a Child is totally, disapproved by the Children Act, 1974. If it is due to misconception of law or due to some other reasons like mistake or non application of mind, the learned Judge cannot shake off the responsibility of such carelessness. It is not at all expected from a Judge, no less than a judge of the Special Tribunal, holding a minimum status of Assist-ant Sessions Judge, dealing with the case of various offences like Arms Act. When the children are being used in various manners by different culprits including using them as carriers of the arms, drug, narcotics and the petitioner being a child should not have been dealt with in the manner as he has been dealt with in this case.

22. For the aforesaid reasons, we are of the view that a general instruction should be given to all the Judges concerned to take into consideration sections 66 and 67 of the Children Act, 1974 and determine the age of any accused, boy/girl, in accordance with law and thereafter deal with the same as it is specifically provided for in the Children Act, 1974 to protect the interest of the children.

23. However, from the discussions made hereinabove, on merit as well as in respect of age of the petitioner and considering the submissions of Mr. Khan that the petitioner is in jail since the date of his arrest i.e. from 3-6-2001 and he is languishing therein for nearly last 10 years residing with many other criminals and almost he has served out his sentence, we find sub-

stance in the submissions of the learned Advocate for the convict-petitioner Kalimuddin.

24. Accordingly, we hold that the petitioner being a child ought to have been dealt with in accordance with the Children Act, 1974. Having not done so we hold that the trial, conviction and sentence passed therein which has been challenged in this Rule, is without jurisdiction.

25. Moreover, on a close scrutiny of the witnesses and on considering the observations of the Division Bench made in the judgment passed in the said Criminal Appeal No. 4445 of 2003, we are of the opinion that the prosecution has miserably failed to prove the involvement of the present convict-petitioner with the alleged offence leveled/brought against him. Thus we are of the view that the judgment and order of conviction and sentence complained of herein is both without jurisdiction as well as is a judgment based on no evidence and the same is liable to be quashed.

26. Hence this Rule succeeds.

27. In the result, the Rule is made absolute and the judgment and order of conviction and sentence dated 3-11-2003, passed by the Metropolitan Special Tribunal No. 11, Dhaka, in Special Tribunal Case No. 1542 of 2001 arising out of GR Case No. 2058 of 2001 corresponding to Demra PS Case No. 10(6)01, complained of herein, is quashed. Accordingly, the convict-petitioner Md Kalimuddin alias Karimuddin, son of Dendu Mia, of Village-Mankasha PS-Nandail, District-Mymensingh; at present-30/1, Dakkin Kazla (Jabed Akbarer Bari) PS-Demra, District-Dhaka, be acquitted and set free, at once, if not wanted in connection with any other case (s).

Send down the lower court records at once.

Ed.

High Court Division
(Civil Appellate Jurisdiction)

Mamnoon Rahman J
Abu Zafor Siddique J

Novorossiysk Shipping Company USSR.. .....Appellants

vs

Lever Brothers Bangladesh Ltd and others.....Respondents*

Judgment
May 27th, 2012.

Customs Act (IV of 1969)
Section 156(1), Clause 24(II)
Code of Civil Procedure (V of 1908)
Section 115

International Trade and Practice—The carrier is entitled to 1% ocean allowance as inevitable loss while carrying bulk cargo like oil/tallow and, as such, the shortage of 5.984 is well covered by 1% ocean allowance allowed as per international trade and practice. .....(15)

—Ullage Survey Report—In the event of conflict between 2 reports one by ullage survey report and the other by shore tank survey report the ullage survey report must prevail over the shore tank survey report. .....(15)

Erria Shipping Pvt Ltd and another vs Lever Brothers (Bangladesh) Ltd 61 DLR 801; Botany Bay Parcel Tankers International vs Lever Brothers Bangladesh Ltd 15 BLC 737 and Lever Brothers Bangladesh Ltd vs Botany Bay Shipping Co (Aust) Pvt Ltd, 9 BLC 218 ref.

Muhammad Ohiullah, Advocate—For the Appellants.

No one Appears—For the Respondents.

*First Appeal No. 303 of 1998.

Judgment

Mamnoon Rahman J: This Appeal at the instance of the defendant Nos. 1, 2 and 3 Appellants is directed against the judgment and decree dated 20-8-1997 and 27-8-1997 respectively passed by the 3rd Court of Joint District Judge, Chittagong in Money Suit No. 181 of 1994 decreeing the suit.

2. The short facts leading to the filing of this Appeal are that the respondent Nos. 1 & 2 instituted a money suit being No.7 of 1994 (subsequently re-numbered as money suit No. 181 of 1994) in the then Third Court of Subordinate Judge (now Joint District Judge), Chittagong.

3. The plaintiff's case in short is that the plaintiff No. 1 imported two consignments one of 499.446 metric tons of inedible tallow and other of 1,448.819 metric tons of inedible tallow both covered by Invoice No. 1077 dated 6-12-1992 of M/s Kerry (New Zealand) Ltd, Auckland, New Zealand. The said consignment of 499.446 metric tons of inedible tallow and 1,448.819 metric tons of inedible tallow in bulk were shipped at the port of Auckland/Portland/Fremantle, New Zealand under Tanker Bill of Lading No.ANT/11/92/CGP-O dated 6-12-1992 for carriage to and delivery at Chittagong port per 'Motor Tanker Antares VII' belonging to the defendant, No.1 of which the defendant No.3 is the local agent at Chittagong. The carrying Tanker, 'MT Antares VII' with the consignments in suit arrived at the port of Chittagong on or about 6-1-1993 and took her berth at River Mooring No.3 of the Chittagong Port on 9-1-1993 and discharged her cargo on 9-1-1993 and 10-1-1993 into the shore tanks, Customs Bonded Warehouse of the defendant No.4 under the constant strict supervision of the surveyor appointed by the concerned parties and on completion of discharge of the cargo from the carrying motor tanker into the shore tanks, the surveyor issued their survey report to their respective appointing authorities about the quantity delivered from the vessel into the shore tanks. As per the survey report dated 16-1-1993 of the surveyor Messrs NA Survey and Inspection Co. Ltd a quantity of 496.032 metric tons out of 499.446 metric tons and 1420.232 metric tons out of 1448.819 metric tons of inedible tallow in bulk were received at the shore tanks of M/s. International Tank Terminal (Bangladesh) Ltd, since re-named as M/s Van Ommeren Tank Terminal Bangladesh Ltd (defendant No.4) with a shortage of 3.414 metric tons and 28.587 metric tons out of the total consignments 499.446 metric tons and 448.819 metric tons in the suit respectively. Due to short receipt of 32.001 (3.44 + 28.587) metric tons of inedible tallow in bulk out of the two consignments in the suit the plaintiff No.1 suffered a loss of Taka 7,40,538.36. The defendants are liable for the shortages and are bound to compensate the loss sustained by the plaintiff No.1. The consignments were insured with the plaintiff No.2. The plaintiff No.1 having lodged its claim with the plaintiff No.2 as insurer of the suit cargo and as per terms of the insurance policy, the plaintiff No.2 has paid a sum of Taka 3,55,324 to the plaintiff No.1 who in consideration of such payment executed a Letter of Subrogation subrogating and abandoning all of its rights, title and interest in the short discharged cargo upto the extent of the amount so paid in favour of the plaintiff No.2. The plaintiff lodged claim to the defendants for the short delivery of 32 metric tons out of the two consignments of inedible tallow. Since the claim of the plaintiff has not been settled by the defendants inspite of repeated demands the plaintiffs were obliged to institute the instant suit.

4. The defendant Nos.1, 2 and 3 and the defendant No.4 contested the suit by filing two separate written statements denying all the material allegations made in the plaint. In the written statement of the defendant Nos.1, 2 and 3 it is contended that on arrival of the carrying motor tanker at the port of Chittagong an ullage survey was conducted on board the vessel before the discharge of the cargo in presence

of the surveyors appointed by the plaintiffs, defendants and all concerned parties together with the customs officials and as per the ullage survey report a quantity of 1942.281 metric tons of tallow was found board the vessel that is only 5.984 metric tons were found allegedly short out of the two consignments as such 1942.281 metric tons of tallow were discharged in full into the shore tanks of the defendant No.4 from the carrying motor tanker by hose pipe connection. After completion of discharge of the cargo into the shore tanks, all the surveyors inspected the carrying vessel's tanks and issued a Dryness Certificate and a Discharge Certificate confirming that there was no cargo left at the carrying vessel's tanks which were found dry. The defendant No.4 also issued a letter to the surveyor of the plaintiff No. 1 stating that the entire cargo was discharged into the shore tanks. The further case of these defendants is that the carriers are entitled to 1% ocean allowance in carrying oil and such kind of cargo as per provisions of law and international trade and practice. The Customs Authority of Bangladesh also allow 1% ocean allowance. So these defendants cannot be held in any way liable for the alleged shortage, as such, the suit is liable to be dismissed.

5. In the written statement of the defendant No. 4 it is contended that this defendant is not a necessary party to the suit and this defendant has been unnecessarily impleaded in the suit without any reason.

6. In view of the above the defendant No. 4 is not at all liable for the plaintiffs' claim and the plaintiffs are not entitled to recover any compensation from this defendant, as such, the suit is liable to be dismissed as against them.

7. Based on the pleadings filed by the parties, the trial Court framed the following issues:

1. Is the plaintiff's suit maintainable or not?
2. Does the plaintiff have any cause of action for filing the instant suit?
3. Is the plaintiff's suit barred by limitation or not?
4. Is the plaintiff's suit bad for defect of parties or not?

8. In support of its case, the plaintiff examined one witness. The defendant Nos.l, 2 and 4 did not examine any witness. The documents of the plaintiff were marked as Exhibit-1 Power of Attorney dated 20-3-1997, Exhibit-2 Invoices, Exhibit-3 Bills of lading dated 6-12-1992, Exhibit-4 Survey report dated 28-1-2093 issued by NA Survey and Inspection Co Ltd., Exhibit-5 Shore tank survey report, Exhibit-6 letter dated 27-1-1993 from the plaintiff No.1 to the defendant No.3, Exhibit 6(Ka) letter dated 24-2-1993 from the defendant No.3 to the plaintiff No. 1, Exhibit 6(Kha) letter dated 1-3-1993, Exhibit 6(Ga) letter dated 22-4-1993 from the plaintiff No. 1 to the defendant No.3, Exhibit 6(Gha) letter dated 20-11-1993 from the plaintiff No.1 to the defendant No.3, Exhibit 7 letter dated 20-11-1993 from the plaintiff No. 1 to the defendant No.3, Exhibit 7(Ka) letter dated 15-7-1993 from the defendant No.3 to the plaintiff No.1; Exhibit 7(Kha) letter dated 24-2-1993 from the defendant No. 3 to the plaintiff No.1 and Exhibit 8, Marine Certificate of Insurance.

9. The 3rd Court of Joint District Judge after considering the pleadings, issues, evidence and other materials on record decreed the suit against the defendant Nos.1, 2 and 3.

10. The learned Advocate appearing for the Appellants submits that after arrival of the carrying motor tanker at the port of Chittagong and prior to commencing the discharge of the cargo an ullage survey was conducted on board the vessel in presence of the surveyors appointed by the plaintiffs, defendants and all concerned parties together with the customs officials and as per the aforesaid ullage survey report a quantity of 1942.281 metric tons of tallow were found on board the vessel i.e. 5.984

metric tons of tallow were found allegedly short out of the total consignment of 1948.265 metric tons of tallow which was discharged in full into the shore tanks of the defendant No.4 from the carrying motor tanker by hose pipe connection; that after discharge of the cargo all the surveyors inspected the carrying vessel's tanks and issued Dryness Certificate and Discharge Certificate confirming that there was no cargo left at the carrying vessel's tanks and the tanks were found to be empty and dry. The learned Advocate for the appellants submits that the Court below erred in law in holding the appellant defendants liable for the alleged shortage of the cargo although the cargo of tallow was of evaporating nature and the carrier is not at all liable for any alleged shortage under the Carriage of Goods by Sea Act, 1925. He also submits that the carrier is entitled to 1% ocean allowance as inevitable loss while carrying the cargo of tallow and accordingly the appellants cannot be saddled with any liability whatsoever for any alleged shortage. The learned Advocate for the Appellant further submits that the trial Court erred in law in holding the appellant defendants liable on the basis of shore tanks figures although they had discharged the cargo in full and that in case of conflict between the shore tank survey and ullage survey carried out on board the vessel prior to discharge of the cargo, the ullage survey report will prevail over the shore tank figures survey report and in support of his submission he cited the decisions reported in *61 DLR 801, 15 BLC 737* and *9 BLC 218* that the trial Court ought to have considered that the appellant/defendants are not liable for the alleged shortage of cargo and, as such, the decree passed by the trial Court cannot be sustained.

11. No one appears on behalf of the respondents.

12. In order to appreciate the submissions advanced by the learned Advocate for the appellants, let us now weigh the evidence on record adduced by both the sides as well as other materials on record.

13. It appears that one Mr Prodip Mojumder is the attorney of the plaintiff No. 1. He as PW1 has deposed that the plaintiff No. 1 imported two consignments one of 499.446 metric tons and another of 1448.819 metric tons of tallow in bulk from Auckland, New Zealand and the said cargo was shipped in motor tanker belonging to the defendant Nos.1, 2 and 3 and the carrying motor tanker arrived at the port of Chittagong on 9-1-1993 and discharged her cargo on 9-1-1993 and 10-1-1993 into the shore tanks of the defendant No.4 under the constant strict supervision of the surveyors appointed by the concerned parties and in presence of the customs officials. He further deposed that a quantity of 32.001 metric tons of tallow were short discharged from the carrying motor tanker and, as such, the plaintiff No.1 suffered a total loss of Taka 7,40,538.36. PW1 in his cross-examination stated that they have taken delivery of the cargo from the defendant No.4 and the PW1 did not know whether the defendant No. 4 is liable for the alleged loss of the plaintiff or not. PW1 further stated in his cross-examination that he was not present at the joint survey at the terminal, that they have taken the delivery of the cargo from the tank terminal and not from the vessel, that they have received less cargo from the tank terminal, that he was not present when the surveyors signed their respective survey reports, that it is stated in the bill of lading that the vessel is not liable for the quantity, measurement, weight, quality, nature and the value of the cargo. He denied the suggestion that the imported cargo of the plaintiff No.1 was discharged in full into the shore tanks from the carrying motor tanker.

14. These are all the evidences adduced by the parties. We have heard the learned Advocate for the appellants at length and perused the materials on record including the pleadings and deposition of PW1 and the

Exhibits. It appears from the materials on record that the plaintiff No.1 imported the 499.446 metric tons and another of 1448.81 metric tons of tallow in bulk totalling 1948.265 metric tons of tallow in bulk from Auckland, New Zealand and the vessel 'MT Antares VII' carried the cargo. The defendant No.1 is the owner of the vessel, the defendant No.2 is the despondent owner of the vessel, the defendant No.3 is the local agent of the vessel. The vessel 'MT Antares VII' arrived at the port of Chittagong on 6-1-1993 and took her berth on 9-1-1993 and discharged her cargo on 9-1-1993 and 10-1-1993 into the shore tanks of the defendant No.4 under the constant strict supervision of the surveyors appointed by the concerned parties. It appears that as per the survey report dated 28-1-1993 carried out by NA Survey and Inspection Co Ltd (Exhibit 4) after arrival of the vessel at the port of Chittagong and prior to discharge of the cargo an ullage survey was conducted on 9-1-1993 on board the vessel 'MT Antares VII' in presence of the surveyors appointed by all the parties concerned and as per the ullage survey a quantity of 1942.281 metric tons of tallow in bulk were found on board the vessel i.e. 5.984 metric tons were found allegedly short out of the total consignment of 1948.265 metric tons of tallow. But as per the shore tank survey report (Exhibit 5) a quantity of 32.001 metric tons of tallow was short discharged from the vessel 'MT Antares VII' into the shore tanks of the defendant No.4.

15. It may be reiterated that at the time of making his submission, the learned Advocate for the plaintiffs cited three decisions of this Court as mentioned above of which in the case of *Erria Shipping Pvt Ltd and another vs Lever Brothers (Bangladesh) Ltd* reported in *61 DLR 801*, the case of *Botany Bay Parcel Tankers International and another vs Lever Brothers Bangladesh Ltd and another* reported in *15 BLC 737* and the case of *Lever Brothers Bangladesh Ltd vs Botany Bay Shipping Co (Aust) Pvt Ltd and another* reported in *9 BLC 218* it has been held that in the event of conflict between 2(two) reports one by ullage survey report and the other by shore tank survey report the ullage survey report must prevail over the shore tank survey report. It has also been held in the case reported in *61 DLR 801* as mentioned above that the carriers are entitled to 1% ocean allowance in the carriage of bulk cargo like oil. As per the ullage survey report there was an alleged shortage of 5.984 metric tons of tallow. As per international trade and practice the carrier is entitled to 1% ocean allowance as inevitable loss while carrying bulk cargo like oil/tallow and, as such, the aforesaid shortage of 5.984 metric tons of tallow. As per international trade and practice the carrier is entitled to 1% ocean allowance as inevitable loss while carrying bulk cargo like oil/tallow and, as such, the aforesaid shortage of 5.984 is well covered by 1% ocean allowance allowed as per international trade and practice.

16. Therefore in view of the above facts and circumstances of the case and in view of the reported decisions cited above, we hold that the assessment of compensation in the instant case was not made in accordance with law, facts and circumstances of the case and the impugned judgment and decree passed by the Court below is liable to be set-aside and the suit is liable to be dismissed.

17. For the reasons stated above and having regard to the facts and circumstances of the case and the principles and position of the law laid down in the aforementioned decisions we find merit in this appeal.

18. In the result, this appeal is allowed without any order as to costs. The impugned judgment and decree dated 20-8-1997 and 27-8-1997 respectively passed by the 3rd Court of Joint District Judge, Chittagong in Money Suit No. 7 of 1994 (subsequently renumbered as 181 of 1994) is hereby set-aside and the suit is dismissed.

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

Ed

High Court Division
(Criminal Miscellaneous Jurisdiction)

Khondker Musa
Khaled J
Md Nazrul Islam
Talukder J

Judgment
January 20th, 2013.

Sabira Sultana.....
.....Petitioner

vs

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

Anti-Corruption Commission Act (V of 2004)
Section 27(2)

The accused-petitioner is under the obligation to clear his position and account for in respect of the possession of the property allegedly disproportionate to his known sources of income to the satisfaction of the Court.

The allegations made in the FIR and charge-sheet and the settled propositions of law, we are not in a position to dispose of the disputed questions of fact which may be traced out or decided during trial of the case and the disputed questions may be resolved only on evidence to be adduced by the concerned parties. .....(22)

Rahela Khatun vs Abul Hasan, 48 DLR (AD) 213; Ali Akkas vs Enayet Hossain, 17 BLD (AD) (1997) 44 = 2 BLC (AD) 16; Hussain Mohammad Ershad vs State reported in 43 DLR (AD) 50; Faruk Ahamed vs Abdul Kader Chowdhury, 30 DLR (AD) (1986) 18; Hussain Mohammad Ershad vs State, 14 BLD (AD) (1994) 161; Amal Cabraal vs Golam Murtaza, 55 DLR 492 and Hussain Mohammad Ershad vs State, 45 DLR (AD) 48 ref.

AFM Mesbahuddin, Ahsanul Karim with Tanvir Hossain, Advocates—For the Petitioner.

Md Jashimuddin with Shah Abdul Hatem, Assistant Attorneys-General—For State-Opposite-Party No. 1

Shahidul Islam Khan, Advocate—For Opposite-Party No. 2.

*Criminal Miscellaneous Case No. 10132 of 2011.

Judgment

Md Nazrul Islam Talukder J : On an application under section 561A of the Code of Criminal Procedure filed by the accused-petitioner, a Rule was issued calling upon the opposite-parties to show cause as to why the impugned proceedings of Special Case No. 13 of 2010 arising out of Dhanmondi Police Station Case No. 21 dated 26-11-2009 under sections 26(2) and 27(1) of the Anti-Corruption Commission Act, 2004, now pending in the Court of Special Judge, Court No. 7, Dhaka should not be quashed and/or pass such other or further order or orders as to this Court may seem fit and proper.

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

On 26-11-2009, one Syed Ahmed, Assistant Director of Anti-Corruption Commission, Jessore as informant lodged an ejahar with Dhanmondi Police Station against the accused-petitioner alleging, *inter-alia*, that on the basis of an allegation as to acquisition of property by the accused-petitioner illegally and unlawfully, the Anti-Corruption Commission, Dhaka directed the Anti-Corruption Commission, Jessore to make enquiry into the allegation. During preliminary enquiry, it is found that the petitioner has acquired wealth or is in possession of the property which is disproportionate to her legal sources of income. Under the circumstances, a notice under section 26(1) of the

Anti-Corruption Commission Act, 2004 was served upon the accused-petitioner directing her to submit statement of assets and liabilities, moveable or immoveable, either in her own name or in the name of her husband and children or in the name of any other person on her behalf. On receipt of the aforesaid notice, the accused-petitioner prayed for 7 days time to submit written statement of assets and liabilities in compliance with the notice. Subsequently, she submitted wealth statement to the Secretary, Anti-Corruption Commission putting her signature thereon. On receiving the wealth statement, the Anti-Corruption Commission, Dhaka sent the same to Anti-Corruption Commission, Divisional Office, Khulna wherefrom it was sent to Anti-Corruption Commission, Jessore for verification. During verification of information, it is found that the accused-petitioner is a tax payer under Circle-2, Jessore and her TIN is No. 427-107-086. From the record of income tax, it appears that the accused-petitioner submitted income tax return for the tax assessment year 2008-2009 showing net assets of Taka 76,71,271 without any liability; but she showed net assets of Taka 1,06,86,027.84 in the wealth statement submitted to the Anti-Corruption Commission. Accordingly, she showed assets of Taka 30,14,755.84 excess than the assets shown in the income tax return. The petitioner could not provide any satisfactory and plausible explanation in support of illegal acquisition of wealth. The above mentioned property appears to have been acquired by dishonest means and the same stands disproportionate to her known source of income. It is further alleged in the ejahar that the petitioner purchased a flat of 1777 square feet from Advance Development Technology at Road No.12, House No.8, Dhanmondi at an amount of Taka 38,48,000 and paid registration fee amounting to Taka 3,59,600 that is, in total Taka 42,07,680 but she submitted wealth statement showing value of the same amounting to Taka 16,44,300. However, the Petitioner submitted wealth statement concealing (Taka 42,07,680 – Taka 16,44,300) = Taka 25,63,380 which was actually paid for the purpose of purchase of the flat. The aforesaid fact reveals that the petitioner provided false and baseless information in respect of genuine value of the apartment. Apart from these, it is alleged in the ejahar that the petitioner purchased a shop measuring 400 square feet for a consideration of Taka 45,00,000 from one AHM Mostafa who initially gave booking for that shop to the concerned office of Garden View Construction and thereafter requested the Chairman of that Construction Company to give ownership and possession of that shop to the accused-petitioner and induct one Bipul Kumar Saha into possession of the same upon execution of a rent agreement. In spite of acquisition of property, the petitioner neither disclosed about purchase of the shop by Taka 45,00,000 in the income Tax return nor did she mention this matter in the wealth statements. In this way, the petitioner concealed the property worth Taka 45,00,000. In aggregate, the petitioner has acquired the properties of Taka 45,00,000 + Taka 30,14,755.85 + Taka 25,63,380 =Taka 1,00,78,135.85 which appear to have been acquired by dishonest means and stand disproportionate to her known sources of income. The allegations brought against the petitioner are punishable under sections 26(1) and 27(1) of the Anti-Corruption Commission Act, 2004. Hence, this ejahar against the petitioner under sections 26(1) and 27(1) of the Anti-Corruption Commission Act, 2004.

3. During investigation of the case, the Assistant Director Anti-Corruption Commission, Jessore being appointed as investigating officer went to the place of occurrence, recorded the statements of witnesses and seized the necessary papers and documents.

4. Having found a *prima-facie* case, the investigation officer submitted charge-sheet No.139 dated 25-7-2010 against the accused-

petitioner under sections 26(2) and 27(1) of the Anti-Corruption Commission Act, 2004. It may be mentioned here that the accused-petitioner appeared before the Court with an application under section 498 of the Code of Criminal Procedure for pre-arrest bail. Upon hearing the parties, this Court by an order dated 8-12-2009 enlarged the accused-petitioner on *ad-interim* anticipatory bail for a period of 6 (six) months or till submission of the police report whichever is earlier. After expiry of the anticipatory bail, the accused-petitioner voluntarily surrendered before the Court of Special Judge, Court No.7, Dhaka for regular bail and the learned Judge upon hearing the parties enlarged her on regular bail and the aforesaid fact is very much evident from the order No.7 dated 9-1-2011 passed by the Special Judge, Court No.7, Dhaka.

5. During commencement of the trial, the learned Special Judge, Court No.7, Dhaka framed charge against the accused-petitioner under sections 26(2) and 27(1) of the Anti- Corruption Commission Act, 2004 and the same was read over to the accused-petitioner who denied the charge, claimed to be innocent and prayed for trial in accordance with law.

6. Being aggrieved by and dissatisfied with the impugned proceedings, the accused-petitioner approached this Court with an application under section 561A of the Code of Criminal Procedure with a view to quashing the impugned proceedings and obtained this Rule and stay order in connection with the impugned proceedings.

7. Mr AFM Mesbahuddin, learned Advocate and Mr Ahsanul Karim, learned Advocate alongwith Mr Tanvir Hossain, learned Advocate have appeared on behalf of the accused-petitioner.

8. At the very outset, Mr Ahsanul Karim, learned Advocate appearing on behalf of the accused-petitioner, submits that in view of the allegation that the accused-petitioner has concealed the properties worth Taka 30,14,755.84 in the income tax return in the tax assessment year 2008-2009, it may so happen that subsequently, the accused-petitioner has acquired the said property after the closure of the tax assessment year 2008-09, and accordingly, she showed the properties worth Taka 30,14,755.84 in the wealth statement submitted to the Anti-Corruption, and on this score, it cannot be said that the petitioner has committed any offence under sections 26(2) and 27(1) of the Anti-Corruption Commission Act, 2004 and, as such, the petitioner cannot be held liable for the alleged concealment of properties in the income tax return. He next submits that even if the accused-petitioner committed any offence in respect of fiscal claim, the accused-petitioner may be brought within the ambit of offence punishable under sections 165/166 of the Income Tax Ordinance, 1984, and, as such, the allegation allegedly brought against the accused- petitioner cannot be brought within the preview of offence punishable under sections 26(2) and 27(1) of the Anti-Corruption Commission Act, 2004, and in such a posture of things, the accused-petitioner cannot be held liable for the alleged offence brought against her. He then submits that according to the allegation, the accused-petitioner purchased a flat for a consideration of Taka 16,44,300 but during investigation, it was found that actually, she purchased the flat for a consideration of Taka 38,48,000. Mentioning the aforesaid fact, the learned Advocate submits that the consideration money as stated in the registered document has been properly shown in the wealth statement but the certificate or receipt allegedly procured from a developer company cannot prevail over the registered instrument in view of section 58(c) of the Registration Act, and in such a position, it cannot be said that the accused-petitioner has committed any offence under sections 26(2) and 27(1) of the Anti-Corruption Commission Act, 2004. He lastly

submits that the shop allegedly mentioned in the FIR was not purchased by the accused-petitioner, rather she only entered into an agreement for purchasing the same, and in view of section 54 of the Transfer of Property Act and section 49 of the Registration Act, no immovable property can be acquired without registration of document, and, as such, accused-petitioner was not under the obligation to show the said property (shop) in her wealth statement or in the income tax return. He lastly submits that the allegations which have been brought against the accused-petitioner are totally unfounded, baseless and concocted, and, as such, the initiation and continuation of the impugned proceedings amount to sheer abuse of process of the Court, and under the given context, the accused-petitioner has prayed for quashing the impugned proceedings, and considering the aforesaid aspects of the case, the impugned proceedings initiated against the accused-petitioner should not be continued and the same should be quashed.

9. On the other hand, Mr Md Shahidul Islam Khan, learned Advocate appearing on behalf of the informant-opposite-party No.2, the Anti-Corruption Commission, submits that there is no valid ground for quashing the impugned proceedings and that the allegations levelled against the petitioner in the FIR and in the charge-sheet attract the elements of offence under sections 26(2) and 27(1) of the Anti-Corruption Commission Act, 2004. He next submits that the grounds taken in the application are based on defence materials and defence pleas which cannot be gone into in the present forum for quashing the impugned proceedings. Learned Advocate for opposite-Party No.2, in support of his submission, relied on the decisions taken in the cases of *Rahela Khatun vs Abul Hasan, 48 DLR (AD) 213* and *Hossain Mohammad Ershad vs State, 43 DLR (AD) 50.* He then submits that none of the grounds taken in the application falls within the principle as set out in the decision taken in the case of *Ali Akkas vs Enayet Hossain, 17 BLD (AD) (1997) 44 = 2 BLC (AD) 16.* He lastly submits that there are specific allegations against the accused-petitioner and that the aforesaid allegations were *prima-facie* found true by the investigating officer and the learned trial Judge accordingly framed charge against the accused-petitioner under the aforesaid relevant laws, and considering all the aspects of the case, the impugned proceeding cannot be quashed.

10. We have also gone through the application under section 561A of the Code of Criminal Procedure and the materials annexed thereto. We have also considered the grounds taken in the miscellaneous case and the submissions advanced by the learned Advocates for the respective parties. In view of the submissions and counter-submissions advanced by the learned Advocates for the respective parties, a pertinent question arises whether the impugned proceedings initiated against the accused-petitioner should be quashed. To decide this issue, it is necessary to see the extent of the principles and categories of cases in which High Court Division may invoke its extra-ordinary power and authority under section 561A of the Code of Criminal Procedure for quashing the proceedings.

11. In the case of *Ali Akkas vs Enayet Hossain, 17 BLD (AD) (1997) 44 = 2 BLC (AD) 16,* it has been spelt out that in order to bring a case within the purview of section 561A of the Code of Criminal Procedure for the purpose of quashing a Criminal proceeding, one of the following conditions must be fulfilled:

(1) Interference even at an initial stage may be justified where the facts are so preposterous that even on admitted facts no case stands against the accused.

(2) Where the institution and continuation of the proceeding amounts to an

abuse of the process of the Court.

(3) Where there is a legal bar against the initiation or continuation of the proceeding.

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

(5) The allegations against the accused although constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge".

12. In order to dispose of the Rule, we want to quote the relevant laws for the convenience of discussions and arriving at a proper decision. Now, we would like to quote sections 26(2) and 27(1) of the Anti-Corruption Commission Act, which run as follow:—

২৬। সহায় সম্পত্তির ঘোষনা।-(১) কমিশন কোন তথ্যের ভিত্তিতে এবং উহার প্রয়োজনীয় তদন্ত পরিচালনার পর যদি এই মর্মে সন্তুষ্ট হয় যে, কোন ব্যক্তি, বা তাহার পক্ষে অন্য কোন ব্যক্তি, বৈধ উৎসের সহিত অসঙ্গতিপূর্ণ সম্পত্তির দখলে রহিয়াছেন বা মালিকানা অর্জন করিয়াছেন, তাহা হইলে কমিশন, লিখিত আদেশ দ্বারা, উক্ত ব্যক্তিকে কমিশন কর্তৃক নির্ধারিত পদ্ধতিতে দায়-দায়িত্বের বিবরণ দাখিলসহ উক্ত আদেশে নির্ধারিত অন্য যে কোন তথ্য দাখিলের নির্দেশ দিতে পারিবে।

(২) যদি কোন ব্যক্তি—

(ক) উপ-ধারা (১) এ উল্লেখিত আদেশ প্রাপ্তির পর তদনুযায়ী লিখিত বিবৃতি বা তথ্য প্রদানে ব্যর্থ হন বা এমন কোন লিখিত বিবৃতি বা তথ্য প্রদান করেন যাহা ভিত্তিহীন বা মিথ্যা বলিয়া মনে করিবার যথার্থ কারণ থাকে, অথবা

(খ) কোন বই, হিসাব, রেকর্ড, ঘোষনা পত্র, রিটার্ণ বা উপ-ধারা (১) এর অধীন কোন দলিল পত্র দাখিল করেন বা এমন কোন বিবৃতি প্রদান করেন যাহা ভিত্তিহীন বা মিথ্যা বলিয়া মনে করিবার যথার্থ কারণ থাকে,

তাহা হইলে উক্ত ব্যক্তি ৩(তিন) বৎসর পর্যন্ত কারাদন্ড বা অর্থদন্ড বা উভয়বিধ দন্ডে দন্ডনীয় হইবেন।

২৭। জ্ঞাত আয়ের উৎস বাহির্ভূত সম্পত্তির দখল।-(১) কোন ব্যক্তি তাহার নিজ নামে, বা তাহার পক্ষে অন্য কোন ব্যক্তির নামে, এমন কোন স্থাবর বা অস্থাবর সম্পত্তির দখলে রহিয়াছেন বা মালিকানা অর্জন করিয়াছেন, যাহা অসাধু উপায়ে অর্জিত হইয়াছেন এবং তাহার জ্ঞাত আয়ের উৎসের সহিত অসংগতিপূর্ণ বলিয়া মনে করিবার যথেষ্ট কারণ রহিয়াছে এবং তিনি উক্তরুপ সম্পত্তি দখল সম্পর্কে আদালতের নিকট বিচারে সন্তোষজনক ব্যাখ্যা প্রদান করিতে ব্যর্থ হইলে উক্ত ব্যক্তি অনুর্ধ ১০(দশ) বৎসর এবং অন্যূন ৩(তিন) বৎসর পর্যন্ত যে কোন মেয়াদে কারাদন্ডে দন্ডনীয় হইবেন এবং তদুপরি অর্থ দন্ডেও দন্ডনীয় হইবেন; এবং উক্তরুপ সম্পত্তিসমূহ বাজেয়াপ্ত যোগ্য হইবে।

13. Keeping in mind the settled propositions of law in the matter of quashing the impugned proceedings and the relevant law relating to the offence of concealment of properties which are disproportionate to one's legal sources of Income, we have gone through the prosecution materials on record. On going through the same, we have found that the accused-petitioner submitted income tax return for the tax assessment year 2008-09 showing the asset worth Taka 76,71,272 without showing any liability; but subsequently she submitted wealth statement to the Anti-Corruption Commission showing the net asset of Taka 1,06,86,027.84. In view of discrepancy of asset mentioned in the income tax return and the wealth statement, the property shown in the wealth statement appears to have been acquired illegally and unlawfully. The asset appears to have been acquired apparently by dishonest means as the same was found disproportionate to her legal sources of income.

14. On going through the ejahar, we have also found that as per allegation mentioned in the ejahar, the petitioner purchased an apartment of 1,777 sft from Advance Development Technologies at Dhanmondi for a consideration of Taka 38,48,000 but she submitted wealth statement showing value of the same amounting to Taka 16,44,300. From the aforesaid fact, it

clearly shows that the petitioner provided some false and baseless informations in the matter of acquisition of apartment. We have also found in the ejahar that the petitioner purchased a shop measuring 400 sft. at a consideration of Taka 45,00,000 from one AHM Mostafa who for the first time gave booking of the same to the concerned office and thereafter requested the Chairman of the Company to give ownership and possession to the petitioner. It appears that the accused-petitioner did not disclose about the purchase of shop by Taka 45,00,000 either in the income tax return or in the wealth statement. From this fact, it clearly shows that there is *prima-facie* allegation of concealment of asset by the accused-petitioner which has not been shown in the wealth statement. In this way, the accused-petitioner has become owner of property worth Taka 1,00,78,135 which appears to have been acquired by dishonest means as it stands disproportionate to her legal sources of income. After an investigation, the allegation brought against the accused-petitioner was *prima-facie* found true by the investigating officer duly appointed by the Anti-Corruption Commission. It appears from the charge-sheet that the investigating officer has submitted charge-sheet stating in one place of the charge-sheet as follows:

> অন্য দিকে মিসেস সাবিরা সুলতানা তার নিজ নামে অর্জিত ঢাকাস্থ গার্ডেন ভিউ কনসোর্টিয়াম কর্তৃক নির্মিত ধানমন্ডিতে মেট্রো শপিং মলের ২০৫ নং দোকানটির বিপরীতে ৪৫,০০,০০০ টাকা পরিশোধ করে দোকানটির পজেশন গ্রহন করে দোকানটি গত ৩-৭-২০০৬ তারিখে জনাব বিপ্লব কুমার সাহার নিকট ৫,০০,০০০ টাকা অগ্রিম নিয়ে মাসিক ৩৮,০০০ টাকায় ভাড়া প্রদান করলেও সেটি তিনি তার আয়কর নথিতে, এমনকি দুর্নীতি দমন কমিশনে দাখিলকৃত সম্পদ বিবরণীতে প্রদর্শন না করে গোপন করেছেন।

15. It may be mentioned here that the investigating officer also gave a schedule of immovable and movable properties in the charge-sheet. It appears from the series of immovable properties that the accused-petitioner purchased a flat of 1,777 sft. for a consideration of Taka 38,48,000 and also paid registration fee separately amounting to Taka 3,59,600 in total Taka 42,07,000 but in the registered deed, she showed value of the flat at Taka 16,44,300 showing registration fee separately concealing Taka 25,63,380 which she actually spent, and, as such, the investigating officer submitted a investigation report to that effect in the following manner:—

> "তদন্তকালে দেখা যায়, মিসেস সাবিরা সুলতানা দুর্নীতি দমন কমিশনে দাখিলকৃত সম্পদ বিবরণীর ৭নং ক্রমিকে বর্ণিত তার নিজ নামে অর্জিত ঢাকাস্থ রোসেতা, ফ্লাট নং সি/৫, রোড নং ১২, বাড়ী নং ৮, ধানমন্ডি আবাসিক এলাকায় ১৭৭৭ বর্গফুটের ফ্লাটের মূল্য রেজিষ্ট্রেশন সহ প্রদর্শন করেছেন ১৬,৪৪,৩০০ টাকা। কিন্তু ফ্লাটের নির্মাতা প্রতিষ্ঠান এডভ্যান্সড ডেভলপমেন্ট লিঃ, ১৭৬, গুলশান এভিনিউ, গুলশান (উত্তর) এর নির্বাহী পরিচালক, মার্কেটিং জনাব মোঃ তসলিম স্বাক্ষরিত পত্র এবং টাকা পরিশোধের (মানি রিসিপ্ট) কপি ও একাউন্ট ষ্টেটমেন্ট পর্যালোচনায় দেখা যায় মিসেস সাবিরা সুলতানা উক্ত ফ্লাটের বিপরীতে উক্ত নির্মাতা প্রতিষ্ঠানকে ফ্লাটের মূল্য ৩৮,৪৮,০০০ টাকা এবং ট্রান্সফার পারমিশন ও রেজিষ্ট্রেশন মূল্য বাবদ ৩,৫৯,৬০০ টাকা অর্থাৎ মোট ৪২,০৭,৬৮০ টাকা পরিশোধ করেছেন। অর্থাৎ এক্ষেত্রে মিসেস সাবিরা সুলাতানা (৪২,০৭,৬৮০ – ১৬,৪৪,৩০০) = ২৫,৬৩,৩৮০ টাকার বিষয়ে ভিত্তিহীন/মিথ্যা তথ্য প্রদর্শন করেছেন।"

16. In view of the allegations levelled against the accused-petitioner in the ejahar and the charge-sheet, we find *prima-facie* allegation of concealment of assets and sources of income for the purpose of purchasing the flat. In view of the allegations levelled in the ejahar and charge-sheet, a *prima-facie* offence has been disclosed against the accused-petitioner under sections 26(2) and 27(1) of the Anti-Corruption Commission Act, 2004. It is contended by the learned Advocate for the accused-petitioner that though the accused-petitioner purchased a shop by some money from one AHM Mostafa but the fact remains that the petitioner has not yet acquired ownership to the shop by making any registration of transfer deed in respect of that property, and, as such, it cannot be said

that the accused-petitioner has acquired any title to the shop. Under the circumstances, the allegations brought against the accused-petitioner as to concealment of property amounting to Taka 45,00,000 does not constitute any offence. He has also contended that even if the petitioner purchased the flat measuring 1777 sft by an amount of Taka 38,48,000 but she got title to the flat by executing and registering a deed of purchase showing value of the same as Taka 16,44,300 and paying registration fee as Taka 2,60,300. Learned Advocate of the petitioner has pointed out that in view of sections 58(c) and 49 of the Registration Act, the value of the registered deed shall prevail over an amount shown in a certificate or in any receipt procured from the government's offices or from the developer's offices, and in that view of the matter, the accused-petitioner has not committed any offence for concealment of property of Taka 25,63,380.

17. We have stated earlier that we have gone through the ejahar, charge-sheet and relevant provisions of law. On going through the same, we find *prima-facie* allegation of concealment of asset and acquisition of property beyond known sources of income.

18. It is now well-settled that whether the allegations levelled against the accused-petitioner are true or false can only be thrashed out or gone into during trial of the case.

It is settled principle of law that a disputed question of fact cannot be decided by this Court and that a Criminal proceedings cannot be quashed on the basis of defence materials or on the basis of defence plea. The aforesaid view finds support in the case of *Rahela Khatun vs Abul Hossain* reported in *48 DLR (AD) (1996) 213* wherein it has been held:

> "A Criminal proceeding cannot be quashed on the basis of defence materials which are still not part of the materials for the prosecution. The High Court Division deviated from a well-known norm of disposal of an application for quashing criminal proceeding by taking into account the defence version of the case."

19. Similar view has been expressed in the case of *Hussain Mohammad Ershad vs The State* reported in *43 DLR (AD) 50* wherein it has been decided:

> "The question whether the proceeding should be quashed or not should be decided on facts alleged in the FIR and charge-sheet. The accused's general denial that the facts disclosed in the FIR are not true will not do. To succeed the accused must show that the facts alleged by the prosecution do not constitute any offence or that the prosecution is otherwise barred by law."

20. The aforesaid view finds support in the decision in the case of *Faruk Ahamed vs Abdul Kader Chowdhury, 30 DLR (AD) (1986) 18, Hussain Mohammad Ershad vs State, 14 BLD (AD) (1994) 161* and *Amal Cabraal vs Golam Murtaza* reported in *55 DLR 492.* Moreover it is also settled principle of law that under section 561A of the Code of Criminal Procedure, this Court is not in a position to draw inquiry as to truth or otherwise of the asserted facts.

21. In the case of *Hussain Mohammad Ershad vs State* reported in *45 DLR (AD) 48* wherein it has been laid down:

> "In a proceeding under this provision, the Court should not be drawn in an enquiry as to the truth or otherwise of the facts which are not in the prosecution case."

22. In view of the circumstances of the case, the allegations made in the FIR and charge-sheet and the settled propositions of law, we are not in a position to dispose of the disputed questions of fact which may be traced out or decided during trial of the case and the disputed questions may be resolved only on evidence to be adduced by the concerned parties.

Moreover, as per section 27(2) of the Anti-Corruption Commission Act, 2004, the accused-petitioner is under the obligation to clear his position and account for in respect of the possession of the property allegedly disproportionate to her known sources of income to the satisfaction of the Court.

23. From the averments made in the FIR and charge-sheet, it is manifestly clear that a *prima-facie* allegation has been disclosed against the accused-petitioner and the same cannot be brushed aside at this stage.

24. We have gone through the decisions referred to by the learned Advocate for opposite-party No.2. We find that the sum and substance of those cases is that the impugned proceedings cannot be quashed unless the allegation falls within the categories and principles for quashing the impugned proceedings. Under the circumstances, the decisions referred to by the learned Advocate for opposite-party No.2 appear to be applicable to the instant proceedings.

25. We have also gone through the relevant laws which have been mentioned by the learned Advocates for the petitioner during their submissions. Within the four corners of those laws, we do not find that the prosecution case initiated against accused-petitioner is barred by any law, and, as such, there is no legal bar to proceed with the case against the accused-petitioner.

26. From the foregoing discussions and regard being had to the facts and circumstances of the case, and the propositions of law discussed above, we are led to hold that the impugned proceeding initiated against the accused-petitioner cannot be quashed and the same is maintainable and sustainable in the eye of law.

27. Having considered all the aspects of the case, we do not find any merit in this Rule. Accordingly, the Rule fails.

28. In the result, the Rule is discharged.

The order of stay granted at the time of issuance of Rule stands vacated.

The learned Special Judge is directed to proceed with the trial of the case in accordance with law.

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

Ed.

High Court Division
(Special Original Jurisdiction)

Md Ashfaqul Islam J
Md Ashraful Kamal J } Mohammad Ali.....Petitioner

vs

Judgment
March 12th, 2014. } Judge, Artha Rin Adalat and another .....Respondents*

Artha Rin Adalat Ain (VIII of 2010)
Sections 22 and 24

Adalat should remember that after amendment of section 22 in the year 2010 mediation has been made mandatory on the part of the Adalat itself. When amended section 22 be read together with section 24 of the Ain it makes the proposition more clear. Now the law stands that right after filing of the written statement, the duty is incumbent upon the Court to initiate mediation. .....(6)

Lokman Karim with Md Rafiqul Islam, Advocates—For the Petitioner.

Md Faridul Islam,Advocate—For the Respondent No. 3.

*Writ Petition No. 6112 of 2013.

Judgment

Md Ashfaqul Islam J: At the instance of the petitioner, Mohammad Ali, this Rule Nisi was issued calling upon the respondents to show cause as to why the impugned order No. 14 dated 17-4-2013 passed by the learned Judge, Artha Rin Adalat, No.l, Chittagong in Artha Rin Suit No. 22 of 2012 shall not be declared to have been passed without any lawful authority and is of no legal effect.

2. The background leading to the Rule, in short, is that the respondent No. 2 Prime Bank Limited, Head Office Motijheel Commercial Area, Dhaka and Prime Bank Limited Jubilee Road Branch, Chittagong jointly as plaintiff on 22-3-2012 filed Artha Rin Suit No.22 of 2012 before the Artha Rin Adalat, Chittagong (hereinafter referred to as Adalat) for recovery of outstanding dues against the petitioner along with other 10 (ten) defendants. Defendant No. 1 and 2 filed written statement on 24-7-2012 in that suit. Defendant Nos. 3 to 11 also contested the suit by filing separate written statements.

3. On 28-8-2012 the petitioner (defendant No. 2 in the suit) made an application before the Adalat for appointment of mediator for mediation which was allowed by the Adalat on the same date and one Mr Mahmudur Rahman, Advocate of the Bar was appointed as mediator. Thereafter, the Adalat by order No. 12 dated 23-1-2012 observed that the parties in the suit were not supplied with the copy of the order dated 9-9-2012 and accordingly ordered to supply the same to the respective parties. On 17-4-2013 by the order impugned against the Adalat rejected the application by which the mediator himself asked for some time to submit his report. It is at this stage the petitioner moved this Division and obtained the present Rule and order of stay.

4. Mr Lokman Kabir, the learned counsel appearing for the petitioner submits that if the proximity of the orders as discussed above is considered it would give a clear picture that the Adalat absolutely misdirected itself and without giving any reason passed the impugned order which cannot be sustained legally.

5. Mr Md Faridul Islam, the learned counsel appearing for the respondent No. 3 bank also candidly submits that the impugned order is not at all in keeping with the relevant provision of law and on that score this Rule should he discharged with an order for making the mediation effective.

6. That being the situation we have considered the submissions of both sides. The order impugned against is not at all speaking order. It has been passed in a slip shod manner. The Adalat should remember that after amendment of section 22 in the year 2010 mediation has been made mandatory on the part of the Adalat itself. Moreso when amended section 22 be read together with section 24 of the Ain it makes the proposition more clear. Now the law stands that right after filing of the written statement, the duty is incumbent upon the Court to initiate mediation. Regardless of any application whatsoever from the parties. Here in the instant case though there was an initiative and the court also allowed for mediation but all of a sudden by impugned order the matter was stopped which does not make any sense. We cannot reconcile why this was done by the Adalat.

7. However, under this scenario the Rule is made absolute. The order impugned against is declared to have been passed without lawful authority and is of no effect and, as such, set-aside. The adalat has been directed to arrange for an effective mediation in accordance with law forthwith.

Communicate this order at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Farah Mahbub J
Abdur Rob J

Abrechai Mog and others.....Petitioner
vs
District Judge, Khagrachari and others.....
.....Respondents*

Judgment
October 7th, 2012.

Chittagong Hill Tracts Regulations, 1900 **Regulations 38 and 39**

Law of Succession—Since admittedly there is no written law of Marma community hence, the respondent No. 2 is hereby directed to resolve the issue question afresh on the basis of the pleadings of both the contending parties and other relevant documents and in particular upon consultation with the respective Circle Chief and Headman, as has been envisaged in the Chittagong Hill Tracts Regulations,1900. .....(78)

Karatala and Bihar vs HR Chowdhury, 40 DLR (AD) 137, Karatala L Bihar vs HR Chowdhury, 40 DLR (AD) (1988) 137, AS Prue Chowdhury vs KS Prue Chowdhury, 6 BLT (AD) (1998) 109 = 50 DLR (AD) 73, Kamtala L Bihar vs HR Chowdhury, 40 DLR (AD) (1988) 137, Rajkumari Unika Devi vs Bangladesh, 12 BLT (AD) (2004) 141 = 9 BLC (AD) 181.

Ekramul Islam and Sheikh Reajul Haque Advocates—For the Petitioners.

Munsurul Haq Chowdhury, Senior Advocate with Quamrul Hoque Siddiquee, SM Rezaul Karim, Md Abdul Mannan Bhuiyan, Advocates—For the Respondent.

Raja Debashish Roy Chowdhury, Advocate with Sara Hussain, Advocate (the Intervenor)—For the Respondent.

* Writ Petition No. 3285 of 2009 & No.2829 of 2006.

Judgment

Farah Mahbub J: Since common question of law and facts are involved in both the Rules Nisi as such, those have been heard together and are being disposed of by this single judgment.

2. In writ petition No. 3285 of 2009 a Rule Nisi has been issued under Article 102 of the Constitution of the Peoples' Republic of Bangladesh, calling upon the respondents concerned to show cause as to why the impugned judgment and order dated 22-9-1996 (Annexure-A) passed by the respondent No.2, the Deputy Commissioner, Khagrachari and the *ex-officio* Civil Judge in connection with Civil Suit No. 20 of 1992 which has been upheld upto the Land Appeal Board, Dhaka directing vide order dated 12-3-2006 to make partition of 24.30 acres of land and opening a separate khatian in Volume 6, page 81 by the respondent No. 5 in favour of respondent Nos. 9-13 pursuant to Namjari Case No. 165 of 1997 (Annexure-B) should not be declared to have been passed without any lawful authority and are of no legal effect.

3. In writ petition No. 2829 of 2006 the impugned judgment and order dated 12-3-2001 passed by the Additional Divisional Commissioner, Chittagong Division, Chittagong, respondent No. 4 in Civil Appeal (Khagrachari) Case No. 84 of 1997 (Annexure-C) disallowing the appeal and affirming the judgment and order dated 22-9-1996, passed by the Deputy Commissioner, and *ex-officio* Civil Judge, Khagrachari, in Civil Suit No. 20 of 1992 allowing the suit for partition, is under challenge.

4. Common facts, in brief, are that late Dogyo Mog (a member of Marma community) was the original owner of the land in question measuring 24.30 acres of land who died in the year 1974 leaving behind two daughters, named Aowa Mogini and Abetu Mogini who

had inherited the said property being the successive heirs bearing Dag Nos. 689(full), 887 (full), 1037 (part), 1038 (part), 1040 (part), 1041 (part), 1065 (full), 1072 (full), 1073 (full), 1075 (full), 1076 (full), 1077 (full), 1078 (full), 1079 (part), 1112 (part), 1118 (part), 1143 (full), 1144 (full), 1040/1236 (part), look to 2676/3361 (full), 2675 (full), 1242 (full), 1180 (part), 1276 (full) appertaining to khatian No. 159 under 262 Golabari Mouza, Police Station-Khagrachari Sadar, District-Khagrachari Hill District (Annexure-B).

5. It has been stated that Aowa Mogini, one of the daughters of late Dogyo Mog, was insane as well as unmarried; thus, Abetu Mogini, her other sister became the sole successor of the entire property i.e., 24.30 acres of land. However, Abetu Mogini had 3(three) daughters named, Kraynori Mogini, Pusuma Mogini and Aungkra Mogini.

6. It has also been stated that during the lifetime of Dugyo Mog, Abetu Mogini, one of his daughters, had divided the said property along with possession amongst her 3(three) daughters giving Kraynory Mogini 8.10 acres(113), Pusuma Mogini 10.00 acres, for she was looking after the welfare of Aowa Mogini and gave the rest about 6.20 acres to Aunkra Mogini. It was, however, verbally settled amongst them that after the death of Aowa Mogini, the excess land (about 2.00 acres) would be vested back to Aungkra Mogini from Pusuma Mogini, so that each would get 1/3 share equally (8.30 acres out of 24.30) according to the "social custom" of the Marma community.

7. It has further been stated that Dugyo Mog expired in the year 1974 while he was in the house of Kraynori Mogini, one of his grand daughters who earlier died in 1972 with the aforesaid 8-10 acres of land as inherited from her mother Abetu Mogini. However, Kraynori Mogini had 3(three) daughters named Krajai Mogini, Aproaprue (Apaprue) Mogini (Writ Petitioner No. 8) of writ petition No. 3285 of 2009, Krasong Mogini and one son Chailapru Marma (respondent No.6).

8. It has also been stated that petitioner No.l of writ petition No. 3285 of 2009 Abrechai Marma married 2(two) daughters of Kraynori Mogini, firstly he got married to Krajai Mogini and after her death, Krasong Mogini who also died at a later period. Consequent thereto Dugyo Mog while he was alive was the only *de-facto* guardian of all the sons and daughters of Kraynori Mogini including respondent No. 6, Chailapru Marma, for they were minors in the year 1972 to 1974.

9. However, Aungkra Mogini died leaving behind two sons named, Niyong Chowdhury and Sathong Chowdhury (respondent Nos. 7 and 8). It has been contended that Pusuma Mogini died in 1982 with 10 acres of land before the death of her insane aunt Aowa Mogini, who died in 1996. As such, question of giving back 2.00 acres of land during her life time to her sister Aunkra Mogini and her successors could not arise.

10. However, Pusuma Mogini died leaving behind 5(five) sons named Mongsajai Mog, Suijai Mog, Aungpru Mog, Hola Hathoi Mog and Apaise Mog, respondent Nos. 9-13.

11. In this regard it has been stated that out of 6.00 acres of land, as devolved upon Aungkra Mogini, the respondent government had meanwhile acquired 2 (two) acres of land in connection with the land acquisition case.

12. It has been contended emphatically that it was known to all that after the expiry of Aowa Mogini 2(two) acres of land, which was earlier given to Pasuma Mogini to look after her aunt Aowa Mogini being insane, would go to the respective successors of Aungkra Mogini named, Niyong Chowdhury and Sathaung Chowdhury, from the respective successors of

Pusuma Mogini.

13. The cause of action arose when in violation of the Marma social custom and with *malafide* intention not to give back that 2.00 acres of land to the successors of Aungkra Mogini some of the successors of Pusuma Mogini (respondent Nos. 9-13) had managed to procure a succession certificate in the name of Aowa Mogini showing her as one of the successors of late Dugyo Mog.

14. Under the situation 2(two) sons of Aungkra Mogini named Niyong Chowdhury and Sathaung Chowdhury (respondent Nos. 6 and 7) as plaintiffs instituted Civil Suit No. 20 of 1992 on 9-6-1992, before the Court of Deputy Commissioner and the *ex-officio* Civil Judge, Khagrachari, respondent No. 2, for separate khatian as per possession and title of the inherited land of late Dogyo Mog impleading the respective successors of late Pusuma Mogini as defendant Nos. (Ka) 1-7 and also the successors of late Kraynori Mogini as defendant Nos. (Kha) 8-11 (Annexure-C). The defendants, however, duly entered appearance in the said civil suit by filing written statement controverting the statements so made therein (Annexure-C-2).

15. However, prior to that on 2-6-2002 (Annexure-C-1) the concerned Mouza Headman sent an office letter to the Deputy Commissioner, Chittagong, respondent No. 2 for a detail report regarding the property of late Dogyo Mog. He also made a prayer for staying operation of the succession certificate so obtained in connection with Miscellaneous Case Nos. 110, 65, and 98 all of 1990 with a view to settle the issue amicably.

16. Conversely, Chailaprue Marma, son of Kraynori Mogini, the defendant No.8 of Civil Suit No. 20 of 1992, as plaintiff instituted another Civil Suit bearing No. 20 of 1990 impleading Abrechai Mog, Apaprue Mogini, (petitioner-8), Krasong Mogini both daughters of Baikyo Mog, and Niyong Chowdhury, Sathong Chowdhury, both sons of Aungkra Mogini as defendant Nos. 1-6 respectively contending, *inter-alia*, that he was entitled to entirely get 1/3 share (8.30 acres of land) of late Kraynori Mogini being her only son, but the defendant No. 1 (petitioner No.l of writ petition No. 3285 of 2009) being the brother-in-law of his two sisters Krajai Mogini and after her death Krasong Mogini was enjoying possession of 4.00 acres of land. However, the defendants duly submitted written statement denying the assertions so made by the said plaintiff.

17. Initially, trial of both the suits was held before the Additional Deputy Commissioner, Chittagong on behalf of the Deputy Commissioner, Chittagong who subsequently conducted an inquiry in the presence of the respective contending parties through the Thana Nirbahi Officer, Khagrachari. In the enquiry report he duly opined for division of the property in question in 3(three) parts and to give share to each of the 3(three) daughters of late Dogyo Mog. The said report was duly sent to the Deputy Commissioner, Chittagong for necessary approval on 22-2-1993(Annexure-D).

18. Ultimately, the Additional Deputy Commissioner (Rev), Khagrachari considering the plaint, written statement, report of the Headman, the inquiry report of the Thana Nirbahi Officer, Khagrachari Sadar and after hearing both the parties recommended, *inter alia*,

"দুগ্য মগের দুই কন্যা আওয়া ও আবেতু মগিনী। আওয়া মগিনী বোবা, কালা, নিঃসন্তান অতিশয় বদ্ধা হওয়ার দরুন পিতার সম্পত্তি থেকে বঞ্চিত হইবে । তবে আওয়া মগিনীর বোনের কন্যারা আওয়া মগিনীর লালন পালনের জন্য যে দুই একর সম্পত্তি পুসুমা মগিনীর স্বামী ক্যসাই মগের নিকট থাকিবে। ক্যসাই মগের মৃত্যুর পর আবেতু মগিনীর তিন কন্যার পুত্রদের মধ্যে সমান তিন অংশে ভাগ হইবে। মোট সম্পত্তি ২৮.৩০ একর। ২.০০ একর বাদে অবশিষ্ট ২২.৩০ একর সম্পত্তি সমান তিন অংশে ভাগ হইলে প্রত্যেকের অংশে ৭.৪৩৩৩ অর্থাৎ ৭.৪৩ এক ক্রয়োরী মগিনীর

১(এক) পুত্র চাইলাপ্রু র্মামা পাইবে ৭.৪৩ একর এবং অংক্রাই মগিনীর পুত্রদ্বয় পাইবে ৭.৪০৩ একর।

উপরোক্ত হারে বাদীরা ৭.৪৩ এর স্থলে ৮.১০ শতাংশ দখলে থাকাতে ০.৬৭ শতাংশ জমি বিবাদীদের বরাবর ছাড়িয়ে দিবে এবং চাইলাপ্রু র্মামা ৪.০০ একর দখলে আছে আর ৩.৪৩ শতাংশ পাইবে তাহার ভগ্নিপতিদের নিকট থেকে। ভগ্নিপতিদেরকে অবশিষ্ট সম্পত্তি ২ থেকে ৬ নং বিবাদীদের বরাবরে ছড়িয়ে দেওয়ার আদেশ হইল।" "Vide order dated 12-9-1993 (Annexure-D-1)for consideration by the respondent No. 2. The said respondent having not considered the said recommendation had posted the matter for re-hearing vide order dated 20-10-1993. However, pending hearing of the said suit a "Samajota", an amicable settlement, took place amongst the parties concerned in the presence of the respective people of the society concerned contending, *inter alia*,

"সালিশীতে মৃত দুগ্য মগের প্রকৃত ওয়ারিশ এবং তাহার নামীয় মৌজায় ১০৯ নং খতিয়ানের ২৪.৩০ একর রেকর্ডীয় জমি ভাগ বাটোয়ারা বিষয়ে বিস্তারিতভাবে আলোচনা করা হয়। সালিশীতে মারমা সম্প্রদায়ের ওয়ারিশ বিষয়ে বিভিন্ন প্রশ্ন উঠানো হয়। মারমা বৌদ্ধ ধর্মাবলম্বীদের জন্য আমাদের বাংলাদেশে কোন উত্তরাধিকার প্রবর্তন বা প্রচলন না থাকিলেও ন্যায়ের স্বার্থে ইচ্ছামাফিক উত্তরাধিকার নির্ণয় করা সমীচীন বা যুক্তিযুক্ত নহে। গত ২৬-২-৯৫ ইং তারিখের সালিশী বৈঠকে অত্র জেলার মারমা সংসদের ধর্মীয় সভাপতি এবং মারমা সম্প্রদায়ের প্রবীণ ব্যক্তি জনাব মথু চৌধুরী জানান যে, তৎকালীন ব্রিটিশ আমল হইতে অত্র এলাকার মারমা সম্প্রদায়গণের মধ্যে সাধারণত কোন মৃত ব্যক্তি/ব্যক্তিনীর পুত্র-সন্তানগণ ওয়ারিশ হিসাবে ত্যাজ্য সম্পত্তির অংশীদার হন। কিন্তু কোন ছেলে সন্তান না থাকিলে মেয়েরা ওয়ারিশ হন বটে। গঞ্জপাড়ার রামকমল কাবরী বাবু এবং গঞ্জপাড়ার সামাজিক কার্যকরী কমিটির সভাপতি বাবু চাইলাপ্রু মারমা একবাক্যে ইহা স্বীকার করেন। তৎকালীন ব্রিটিশ আমল হইতে অত্র এলাকার বৌদ্ধ মারমা সম্প্রদায়গনের একই নিয়মে আইন আদালতে ওয়ারিশ নির্ণয় ক্ষেত্রে বিচার কার্য পরিচালিত হইয়া আসিতেছে। ধর্ম ত্যাগের ধর্ম। তাই, বৌদ্ধ ধর্মমতে ওয়ারিশ ক্ষেত্রে কোন দিক নির্দেশনা নাই। অত্র এলাকার মং রাজার এক প্রতিবেদণ ক্ষেত্রে সালিশীতে পর্যালোচনায় দেখা যায় যে, মারমা সম্প্রদায়ের ওয়ারিশ নির্ণয় ক্ষেত্রে জেষ্ঠ্যপুত্র আংশিক বেশি পায়। বাদবাকী সম্পত্তি সব পুত্রগণ সমান অংশে ভাগ পায়। স্ত্রী এবং মেয়েরা স্বামী বা পিতার জীবিতাস্থায় যদি কিছু অংশ সম্পত্তি দিয়া যায় তাহাই পাইবে। অন্যথায় ভাইয়েরা সন্তষ্টচিত্তে যাহাই দেয় তাহাই পাইবে।" (Annexure-E).

19. It has been alleged however, that the Deputy Commissioner, Khagrachari and the *ex-officio* Civil Judge without appreciating the customary rules of inheritance of the Marma community and without inviting any report and opinion from the Headman to that effect passed the impugned judgment and order dated 22-9-1996(Annexure-C) applying Hindu Dayabhaga Law relying on the decision of the case of *Karatala and Bihar vs HR Chowdhury*, reported in *40 DLR(AD) 137.*

20. Challenging the said judgment and order dated 22-9-1996 the respondent No. 6 Chailaprue Marma, the petitioner of Writ Petition No. 2829 of 2006 preferred Civil Appeal (Khagrachari) Case No. 84 of 1997 before the Divisional Commissioner, Chittagong Division, Chittagong and the *ex-officio* Appellate Judge of Chittagong Hill Districts, which was ultimately dismissed vide judgment and order dated 12-3-200 1 (Annexure-F),

21. Being aggrieved the said respondent filed Case No, 4-27 of 2001 Appeal (Khagrachari) before the Land Appeal Board, Dhaka which was also dismissed on 12-4-2003 (Annexure-F)

22. Being dissatisfied the said respondent filed Review Petition Case No. 4-56/2003 Review (Khagrachari) before the Land Appeal Board, Dhaka which was also dismissed vide order dated 7-2-2006 (Annexure-F-2).

23. Challenging the order dated 12-3 -2001 (Annexure-F) passed by the Divisional Commissioner, Chittagong Division, Chittagong in Civil Appeal (Khagrachari) Case No. 84 of 97 the respondent No. 6, (defendant No . 8) as petitioner filed Writ Petition No. 2829 of 2006 before this Hon'ble Court wherein a Rule Nisi

had been issued; however, vide the *ad-interim* order dated 24-4-2006 the respective contending parties had been directed to maintain *status-quo* with regard to position and possession of the case property till disposal of the Rule (Annexure-G).

24. Meanwhile, pursuant to the impugned judgment and order dated 12-9-1996 (Annexure-A) the respondent Nos. 9-13 filed Namjari Case No. 167 of 1997 before the Deputy Commissioner, Khagrachari (respondent No. 2) through the Assistant Commissioner (Land) wherein vide order No.3 dated 30-7-1997 record of right over 15.18 acres of land out of 24.30 acres of land were directed to be corrected in their names.

25. Being aggrieved by and dissatisfied with the petitioners they have filed the instant writ petitions and obtained the present Rules Nisi.

26. Respondent Nos. 9-13 entered appearance by filing affidavit- in-opposition contending, *inter-alia*, that the Marma community of Bangladesh follows Buddhist religion and as Buddhists they are regulated by the Hindu-Dayabhaga Law. However, according to the Hindu Dayabhaga Law of inheritance the sisters are excluded from the property in the presence of their brothers. It has further been stated that in the society of Marma community of Chittagong Hill Tracts the daughters are always excluded by the sons over the father's and mother's property.

27. So far the instant case is concerned it has been contended that Pusuma Mogini had 5(five) sons and 2(two) daughters; Kraynori Mogini had l(one) son and 3(three) daughters and Aongkra Mogini had 2(two) Sons; as such, according to Hindu Dayabhaga Law of inheritance eight (8) sons of three (3) daughters of late Abetu Mogini inherited the case property so left behind by late Dugyo Mog and that the respondent Nos. 9-13 named Mongsajai Mog, Shujai Mog, Hola thoai Mog, Aungprue Mog and Apaise Mog got 3.04 acres of land each according to the said law, which has been mandated as lawful by both the courts below vide the impugned judgment and orders.

28. Again, it has been contended that the report dated 22-2-1993 as submitted by the Thana Nirbahi Officer, Khagrachari Sadar and the report dated 12-9-93 submitted by the Additional Deputy Commissioner (Rev) to the respondent No. 2 were not approved by him. Rather, by fixing 20-12-93 he had directed both the contending parties to remain present for hearing of those reports. Ultimately, considering all the documents the respondent No. 2 had disposed of the suits applying the ratio as decided in *40 DLR (AD) 137* vide the impugned judgment and order dated 22-9-1996.

29. Further, it has been stated that the "Samajota" dated 28-2-95 was not prepared correctly and lawfully before the Court, for all the parties concerned did not agree to the contention so made therein.

30. Moreover, pursuant to the impugned judgment and order dated 22-9-1996 Mongshajai Mog and 4 others submitted Namjari Case No. 165 of 1997 with a prayer to open separate khatian over 15.18 acres of case land. However, upon due consideration of all the relevant records the respondent No.2 had approved the said case and ordered respondent No. 5 to allow the case over 15.18 acres of land under Khatian No. 159. Ultimately, said mutation case was allowed vide order dated 11-3 -2006.

31. It has been stated further that the social and cultural dispute of the Marma community can only be resolved exercising administrative power by the Karbari, Headmen, Circle Chief or Divisional Commissioner, Chittagong. However, in the eye of law, inheritance and land dispute may be heard and disposed of by

the Civil Judge Court under the existing civil law. As such, the Deputy Commissioner and the *ex-officio* Civil Judge, the respondent No. 2 had rightly passed the impugned judgment and order dated 22-9-2006 considering the respective rules and regulations under the jurisdiction of the Civil Court.

32. Mr Ekramul Islam, the learned Advocate appearing for the petitioners in Writ Petition No. 3285 of 2009 and Mr Sheikh Reajul Hoque, the learned Advocate appearing for the petitioner in Writ Petition 2829 of 2006 co-jointly submit that since the issue in question involves inheritance of the Marma community thus, it was liable to have decided only according to their "social custom" in view of section 66 of the Khagrachari Parbotyo Zila Parishad Ain, 1989 (Act XIX of 1989) and or section 4 of the Chittagong Hill Tracts Regulations (Amendment) Act, 2003 (Act No. XXXVIII of 2003). The respondent No.2 having decided the matter applying Hindu Dayabhaga Law wrongly relying on the decision reported in *40 DLR (AD) 137* hence, the impugned judgment and order dated 22-9-1996 is liable to be declared to have been passed without lawful authority, and is of no legal effect.

33. In this regard referring to section 66 of the Khagrachari Parbotyo Zila Parishad Ain, 1989 (Act XIX of 1989) he submits that in view of the said provision tribal dispute like the matter in question is required to be decided by the mouza Headman; challenging which may prefer appeal to the Circle Chief, if is aggrieved and then to the Divisional Commissioner, Chittagong Division. The said provision also provides for both the Circle Chief and the Commissioner to consult at least 3(three) experts from the concerned tribe before resolving the dispute, which has not been done in the instant case and as such, the fundamental right of the petitioners to be treated in accordance with law as guaranteed under Article 31 of the Constitution has been violated.

34. He further submits that the respondent No. 2 has applied Hindu Dayabhaga Law amongst the parties to this case by misconstruing the decision reported in *40 DLR (AD) 137* along with *32 DLR 187* inasmuch as those decisions did not provide that the Buddhists of Marma community are governed by the Hindu Dayabhaga Law, for the decision reported in *32 DLR 187* provides that the Buddhists are governed by the principles of justice, equity and good conscience. In this regard he further submits that the Appellate Division was not inclined to review the said view in *40 DLR (AD) 137* since both the parties to that case agreed to apply the principles of Hindu Dayabhaga Law.

35. He further goes to ague that the Deputy Commissioner and the *ex-officio* Civil Judge vide the impugned judgment and order has directed a defective partition even in the eye of Hindu Dayabhaga Law inasmuch as in this case after the death of Dogyo Mog the entire case property (24.30 acres) devolved upon Abetu Mogini, then to her 3 (three) daughters named Kraynori Mogini and Pusuma Mogini, Aungkra Mogini; admittedly, Kraynori Mogini took $^1/_3$ share (8.10 acres), Pusuma Mogini 10.00 acres and Aungkra Mogini 6.20 acres. However, he submits that the core dispute in question is whether the excess land (10.00 – 8.10=1.90 acres), being enjoyed by the successors of Pusuma Mogini (respondent Nos. 9.14), will go to Aungkra Mogini's successors (respondent Nos. 7 and 8). Accordingly, he goes to argue that even if it is accepted for argument's sake that the females are excluded by the males then the whole $^1/_3$ share of Kraynori Mogini (8.10 acres) will go to her only male successor i.e. Chailaprue Mog (respondent No. 6); Pusuma Mogini's $^1/_3$ share (8.10 acres) will be divided amongst her 5 (five) male successors (respondent Nos. 9-13) each getting 1.60 acres; Aungkra Mogini's s $^1/_3$ share (8.10 acres) will be divided amongst her 2 (two) male successors (respondent Nos. 7 and 8) each getting 4.05

acres (and if the excess 2.00 acres land is not returned from Pusuma Mogini's successors (respondent Nos. 9-13) they will get 2.00 acres each and Aungkra Mogini's successsors (respondent Nos. 7 and 8) will get 3.00 acres each; whereas, in the present case the respondent No. 2 has directed to divide Dogyo Mog's total 24.30 acres of land to his grand daughters' sons giving each 3.04 acres of land, which is misconceived and defective.

36. He again goes to contend that the respondent No. 2 has erroneously come to a wrong decision that the females of Marma community do not get property in view of Hindu Dayabhaga Law without appreciating the fact that the property in question itself came through the maternal line. In this regard he submits that after the death of Dogyo Mog the property went to Abetu Mogini, one of his daughters and then to her 3(three) daughters named Kraynori Mogini, Pusuma Mogini, Aungkra Mogini and then to their respective successors (the petitioners and the respondent Nos. 6-14) according to their social customary law of inheritance without any discrimination between males and females. Thus, the "Samojota" dated 28-2-1995 (Annexure-E), which provides shares for the females (although proportionately less than the males) dividing Kraynori Mogini's 1/3 share (8.10) amongst her successors (petitioners and respondent No.6) Pusuma Mogini's share (10.00 or 8.10 whatever may be) amongst her successors (respondent Nos.9-14) and Aungkra Mogini's share (6.20 or 8.10 acres) amongst her successors (respondent Nos. 7-8) considering practical condition, and the social and customary demand of the parties, ought to have been considered by the said respondent.

37. Mr Munsurul Haq Chowdhury the learned Senior Advocate appearing with Mr. Quamrul Hoque Siddiquee, the learned Advocate with Mr SM Rezaul Karim, the learned Advocate and Mr Abdul Mannan Bhuiyan, the learned Advocate on behalf of the respondent Nos. 9-13 of writ petition No. 3285 of 2009 and respondent No. 8 in writ petition No. 2829 of 2006 submits that the Marma community of Bangladesh being Buddhists are regulated by the Hindu Dayabhaga Law as such, the respondent No. 2 while disposing of the issue has rightly applied the principles of the said school referring to the ratio as decided in *40 DLR (AD) 137*, for the Appellate Division has categorically observed that for the Buddists of Bangladesh Hindu Dayabhaga Law of succession is applicable. He further submits that Abrechai Mog was the "ঘর জামাই" of Kraynori Mog and as such, he has no *locus standi* to file writ petition No. 3285 of 2009; moreover, Kraynori Mog had only 1(one) son named Chaila Prue Mog who inherited the property as left by his mother and that his sisters are excluded by him according to the Hindu Dayabhaga Law of inheritance. More so, he submits that the Deputy Commissioner and the *ex-officio* Civil Judge, Khagrachori has also observed, *inter-alia*, "আব্রেচাই মারমা বিরোধীয় জমির কোন অংশ পাইবে না বলিয়া সিদ্ধান্ত দেওয়া হইল" "in Civil Suit No. 20 of 1992. As such, he submits that both the Rules being not maintainable are liable to be discharged.

38. The Bangladesh Legal Aid and Services Trust (in short, BLAST) has been added as an Intervenor vide order dated 12-6-2011 in order to assist the Court with information and materials regarding the application of law in the Chittagong Hill Tracts and other related facts for effective hearing and disposal of both the Rules.

39. Mr Raja Debashish Roy Chowdhury, the learned Advocate, who is also the Chakma Raja and Chief of the Chakma Circle, appearing with Ms Sara Hussain, the learned Advocate appearing on behalf of the Intervenor submits that the law of succession applicable to persons of Buddhist affiliation will differ depending upon their ethnicity (whether Bengali or Non-

Bengali) and if the latter, depending upon the tribe to which they belong and the district (place of residence) where they are located. He further submits that in some cases Hindu Law may apply, in others Burmese Buddhist law and in some other cases social customs of the tribe concerned may apply. In this regard he goes to argue that the application of Hindu Law (whether Dayabhaga or Mitakshara or otherwise) to Buddhists of Bangladesh is limited to the members of Barua community, who are Buddhists by affiliation, who generally regard themselves as ethnically Bengali and are quite distinct from the non-Bengali Buddhists coming from different ethnic groups such as, Chakma, Marma, Tanchangya and Rakhine, who reside in the Chittagong Hill Tracts and in several plains districts of the country. In this regard referring to Article 152 of the Constitution of the People's Republic of Bangladesh, the supreme law of the land, he submits that the Constitution of Bangladesh recognizes "social custom" as a source of law. Therefore, he goes to contend that in the matter requiring application of personal laws of the different tribes and other ethnic groups, the application of social customary law is totally consistent with the Constitution, as has also been upheld by the Supreme Court of Bangladesh in several cases.

40. He further submits that the Chittagong Hill Tracts Regulations, 1900 (in short, the Regulations) including the Rules so made thereunder, and the respective laws are made to apply to regulate the civil, revenue, land, judicial and other aspects of administration of the region. Like, the District Council Acts for the three (3) hill districts define the powers, functions and responsibilities of the respective Hill District Councils. The Regional Council Act defines the powers, functions and responsibilities of the Chittagong Hill Tracts Regional Council. The Land Commission Act provides for the expeditious resolution of land-related disputes in the Chittagong Hill Tracts (in short, CHT) by a specially constituted Commission. However, all those statutes duly take into cognizance the "customs" of the circle/district region and of its tribes. He also goes to argue that the Chittagong Hill Tracts Regulations, 1900, which is one of the major legal instruments for the administration of the hill region, has expressly recognized the prevalence of the customary laws of the Chittagong Hill Tracts. Referring to section 66 of the 3(three) Hill District Councils Acts of 1989 i.e., Act Nos. XIX, XX and XXI of 1989 he submits that vide the said statutes the disputes between the members of the tribes of the concerned district are to be tried and disposed of as per the "প্রচলিত রীতি-নীতি অনুযায়ী" by the local Karbaries, Headmen and Chiefs of the respective mouza and circle concerned, with provision for appeal before the Divisional Commissioner, who is obliged to consult 3(three) experts from the tribe concerned while hearing appeals. Similarly, section 6(l)(Kha) of the Chittagong Hill Tracts Land Disputes Resolution Commission Act, 2001 provides that the Commission will resolve land related disputes in accordance with the "পার্বত্য চট্টগ্রামের প্রচলিত রীতি-নীতি অনুযায়ী"।

41. However, while defining the jurisdiction of the civil courts in the region, he goes to argue that section 8(4) of the Regulations 1900 has explicitly excluded tribal customary matters of the 3(three) districts from the jurisdiction of the civil courts. Thus, he leaves the administration of the tribal justice including the personal laws of the tribes to the Chiefs and Headmen and excludes it from the jurisdiction of the district civil court.

42. So far the question of consultation with the Mouza Headmen is concerned he submits that regulation 39 of the Regulations, 1900 also reiterates the consultative prerogatives of the Circle Chiefs, obliging the Deputy Commissioner to consult the Chiefs on important matters affecting the administration of the CHT. However, before the introduction of civil courts

in the hill districts in 2008, tribal matters, including inheritance and other customary law matters, were left to be resolved by the Circle Chiefs and Mouza Headmen. In this regard, he goes to argue that prior to issuance of succession certificates, the Deputy Commissioner of each hill district, directly or through the Upazilla Nirbahi Officers and Assistant Commissioner (Land) used to consult the concerned Mouza Headmen on the identities of the heirs and successors of any landed estate situated within the district concern, which indicates the prevalence of customary law of different tribes of the CHT recognizing the role of the traditional institutions, regarding matters of succession.

43. He further submits that application of Hindu-Dayabhaga Law by the respondent No. 2 referring to the ratio as decided in *Karatala L Bihar vs HR Chowdhury, 40 DLR (AD) (1988)137,* on the court that the Appellate Division has held that said principles would apply to the Buddhists of Bangladesh, is a misconceived one, for the said case involved a suit for declaration of title and confirmation or alternatively, recovery of possession, and also for a declaration on the illegality of a "Nirupannama", devolving an estate of the Chief Priest of Lakshmi Bihar, who was a member of Barua Buddhist (Bengali) community of Chittagong district and not members of any non-Bengali ethnic groups, including the Marma, Rakhine, Chakma, Tanchangya, etc.; as were the other contenders; however, in the said case the respective contending parties did not contest the application of Hindu Dayabhaga Law to them. As such, he submits that ratio of *40 DLR (AD) 137* cannot be regarded as a yardstick to establish that Hindu Dayabhaga Law would apply to each and every case of inheritance concerning Buddhists of Bangladesh, and certainly not to Buddhists who are ethnically different from the Buddists (Bengali) Barua community such as, the petitioners Nos. 1-8 and respondent Nos. 9-13 in the present case.

44. He also submits that in a number of cases the Appellate Division has categorically upheld the application of tribal customary law, rather than Hindu law; like in *AS Prue Chowdhury vs KS Prue Chowdhury, 6 BLT (AD) (1998) 109 = 50 DLR (AD) 73,* the Appellate Division while resolving the issue held that the office of the Bohmong Chief is a customary office and both the government and the Court have to recognize the custom and not to introduce any other criterion or factor which will add to the customary requirements of that office. Also, in *Rajkumari Unika Devi vs Bangladesh, 12 BLT (AD) (2004), 141 = 9 BLC (AD) 181* the Appellate Division observed, *inter-alia*, that the appointment was valid, since it followed the "custom, usage and tradition of the Mong Circle."

45. In the case of Chakmas and Tripuras too, he goes to argue that it is customary law that applies, and the religious affiliation of the Chakmas or Tripuras is not considered, as supported in Chakma Byaktigoto Paribarik Am pp 84-85, and Trzura Byaktigoto Paribarik Am, pp 67). Referring to another publication on Chakma Inheritance Law by Bankim Krishna Dewan (Chakma Jatiyo Bichar Poddhoti O Chakma Uttoradhikar Protha, Rangamati, 1985) he goes to contend that it contains several summaries of case laws from the Courts of the Chakma Chief, the Deputy Commissioner, the Divisional Commissioner, the Board of Appeal and the Provincial Governor, in which customary law, and not any law of religious affiliation, including Hindu Law, were applied.

46. Accordingly, he submits that the laws and practices prevailing in Bangladesh clearly indicate that inheritance and other personal law matters of the different ethno-linguistic-cultural groups that are not ethno-linguistically "Bengali are governed by the laws of the tribe/people concerned, irrespective of their

religious affiliation. In the stated circumstances, he submits that the observations of the Appellate Division in *Karatala L Bihar vs HR Chowdhury, 40 DLR (AD) (1988) 137* must be confined to the circumstances of the case, involving Bengali Buddhists (Baruas) and involving litigants, whose views on the application of Hindu Dayabhaga Law cannot be impugned to apply to other Buddhists, and definitely not to the non-Bengali Buddhist communities. Consequently, he submits that the respondent No. 2 ought to have referred the matter in dispute to the concerned Circle Chief and/or Mouza Headman, or at least should have consulted them prior to deciding upon the matter.

47. The cardinal issue which requires determination in the present Rules Nisi is whether dispute over succession within Marma community, who are ethnically non-Bengali Buddhists, should be resolved in accordance with Hindu Dayabhaga Law or with the "social customs" of the said community of the Chittagong Hill Tracts (in short, CHT).

48. The property in question i.e., 24.30 acres of land is situated within Khagrachari Hill District, one of the 3(three) Hill Districts of the Chittagong Hill Tracts. It is, however, the emphatic contention of the Intervenor as well the petitioners of writ petition No.3285 of 2009 that the applicability of law regarding succession differs depending upon the religious affiliation, ethnicity and place of residence. Thus, the law applicable to persons of Buddhist affiliation will go to differ depending upon their ethnicity (whether Bengali or Non-Bengali), and that if the latter, depending upon the tribe to which they belong and the district where they are located.

49. It has also been contended that the application of Hindu Law (whether Dayabhaga or Mitakshara of otherwise) to Buddhists of Bangladesh is limited to members of the Barua community, who are Buddhists by affiliation, who generally regard themselves as ethnically Bengali and quite distinct from the non-Bengali Buddhists from different ethnic groups such as, the Chakma, Marma, Tanchangya and Rakhine who reside in the Chittagong Hill Tracts and in several plains districts of the country.

50. Further, it has been contended that "social custom" has been recognised by the Constitution of the country having the force of law and that the Regulations, 1900 has duly recognised its applicability in the matters of personal law of the respective tribes of all the 3(three) districts of the Chittagong Hill Tracts where consultation with the local Headmen and Circle Chiefs of the respective Mouza has been made obligatory. In the said backdrop, when both the contending parties of the case pleaded to resolve the dispute applying "প্রচলিত নিয়মে", as such, disposing of the suits by the respondent No. 2 applying Hindu Dayabhaga Law on the plea that the Appellate Division in the case reported in *40 DLR (AD) 137* has made the principles of the said school applicable in matters of succession of Buddhists belonging to Marma Community, cannot be tenable in the eye of law.

51. The word "law" has been defined in our Constitution vide Article 152, which provides as under:

> "Law" means any Act, ordinance, order rule regulation, bye-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh; "

52. The Chittagong Hill Tracts Regulations, 1900 (in short, the Regulations) recognizes "social customs" in the area concern along with the authority of the 3(three) traditional Circle Chiefs and about 380 mouza Headmen. In this regard the relevant provisions of law may be looked into, which are quoted herein below:

"Section 8

(1) .....

(2) .....

(3) .....

(4) The Joint District Judge as a court of original jurisdiction, shall try all civil cases in accordance with the existing laws, customs and usages of the districts concerned except the cases arising out of the family laws and other customary laws of the tribes of the districts of Rangamati, Khagrachari and Bandarban respectively which shall be triable by the Mauza Headmen and Circle Chiefs."

(Emphasis given)

53. However, vide regulation 35 of the Regulations, 1900 the districts of Chittagong Hill Tracts comprises the Circles of the three Chiefs, viz the Chakma Chief, the Bohmong Chief and Mong Chief.

54. In this regard, regulation 38 provides as under:

"38. The Circle-Chiefs shall form an Advisory Council to the Deputy Commissioner, and shall assist him with information and advise on all matters which concerned the administration of their respective circles, and shall exercise their authority as Chiefs in the prompt enforcement in the mauzas of their circles of all orders of the Deputy Commissioner".

55. Regulation 39 enumerates the prerogatives of the Circle Chief to be consulted with on matters affecting the administration of the CHT, which runs as follows:

"39. The Deputy Commissioner shall consult the Chiefs on important matters affecting the administration of the CHT. For this purpose a conference shall be held, at least twice a year, under the presidency of the Deputy Commissioner, to which the Chiefs or their representatives shall be invited."

56. Moreover, section 66 of the "খাগড়াছড়ি পার্বত্য জেলা পরিষদ আইন" (Act No. XX of 1989)" also provides as under:

৬৬।(১) খাগড়াছড়ি পার্বত্য জেলার বাসিন্দা এমন উপজাতীয়গণের মধ্যে কোন সামাজিক,সাংস্কৃতিক বা উপজাতীয় বিষয়ে বিরোধ দেখা দিলে বিরোধটি নিষ্পত্তির জন্য স্থানীয় কাবারী বা হেডম্যানের নিকট উত্থাপন করিতে হইবে এবং তিনি সংশ্লিষ্ট উপজাতীয়গণের মধ্যে রীতি-নীতি অনুযায়ী বিরোধের নিষ্পত্তি করিবেন।

(২)

(৩)

(৪)

(৫)

57. From the above quoted provisions of law it is rather evident that considering the role of "social customs" being played in all spheres of the respective tribes of the 3(three) districts of CHT the legislature has duly given recognition to it having the force of law.

58. However, in a number of cases the Appellate Division as well has categorically upheld the applications of triable customary law, as referred and relied upon by the Intervenor.

59. In *AS Prue Chowdhury vs KS Prue Chowdhury, 6 BLT (AD) (1998) 109 = 50 DLR (AD) 73,* the appellant who was a member of the Marma community of Bandarban hill district had challenged the decision of the Government in appointing and recognizing another member of his family as the Chief of the Bohmong Circle of the CHT (thereby not appointing and recognizing him to the office) on the ground, *inter-alia*. that this appointment was made in violation of the age-old usage, traditions and customs of the Bobmong Chiefs family.

60. The Appellate Division while declaring the appointment of the government of the respondent as Bohmong Chief to be *ultra vires* observed, *inter-alia*, that, "The court will only inquire whether the selection has been made following the tradition, custom and usage which govern such selection Government will also not deny that the susceptibilities of the people should not be ignored. "

61. In *Rajkumari Unika Devi vs Bangladesh, 12 BLT (AD) (2004), 141 = 9 BLC (AD) 181*, the appellant had challenged the decision of the Government in appointing and recognizing another member of her family as the Chief of the Mong Circle of the CHT (thereby not appointing and recognizing her to the office) alleging, *inter-alia*, that this was done in violation of the age-old usage, traditions and customs of the Mong Circle. In the said case the Appellate Division observed, *inter-alia*,"

> "Customs play a predominant part in the matter of succession in the absence of any heir to the late Mong Chief Customs in this case is the social customs of the Mong Chief which constitutes a source of law for the Mong Circle in the absence of any law as regards succession. The customs is something that has the effect of local law."

62.. From the above, it is apparent that the statute as well as the dictum as settled by the Appellate Division in a number of cases have duly recognized applicability of the "social customary law" in the case of succession together with the cancellation of the Circle Chief for the respective community of the Chittagong Hill Tracts.

63. As for the instant case, the respondent Nos. 7 and 8, 2(two) sons of Akra Mogini, who was one of the 3(three) daughters of Abetu Mogini, one of the daughters of late Dugya Mog, (the owner of 24.30 acres of land) instituted Civil Suit No.20 of 1992 impleading the respective defendants who were the daughters and sons of Krayari Mogini and Pusuma Mogini, before the Deputy Commissioner, Khagrachari and *ex-officio* Civil Judge, the respondent No. 2 , on 9-6-1991(Annexure-C) contending, *inter alia*,

> "প্রচলিত বিধির নিয়মে আওয়া মগিনী ওয়ারিশান সনদপত্র মূলে কোন সম্পত্তি অংশীদার বা দাবীদার হিসাবে যোগ্য বা প্রযোজ্য নহে বলিয়া মনে করি। তাই অনিয়মিত ওয়ারিশানের মামলার নথি তলব করিয়া বিজ্ঞ আদালতে পর্যালোচনা ক্রমে প্রচলিত নিয়মে এবং স্থানীয় হেডম্যানের পুনঃতদন্ত প্রতিবেদন তলবে সাক্ষীর শুনানী গ্রহনপূর্বক অনিয়মিত ইস্যুকৃত একক উত্তারাধিকারী সনদপত্র বাতিল করিয়া অধীনগণের প্রকৃত ওয়ারিশান হিসাবে ইস্যুকৃত উত্তারিধারী সনদপত্র বহাল রাখার আকুল আবেদন করিতেছি"। *(Emphasis given)*

and prayed for—

> "মৃত দুগ্য মগের প্রকৃত ওয়ারিশান সত্ত্বে প্রচলিত নিয়মে বিজ্ঞ আদালত কর্তৃক নির্ধারণ করিয়া পূর্বে অনিয়মিত ওয়ারিশান পত্র বাতিল পূর্বক নিম্ন তফশীলভূক্ত জমি ছক মতে ভাগবন্টন করিয়া পৃথকখতিয়ানে এর ডিক্রি প্রদানে মহোদয়ের চির আজ্ঞা হয়"। *(Emphasis given)*

64. The defendant Nos. 1-10 entered appearance by filing written statement on 14-10-1992 contending *inter alia*, that the dispute in question involved the inheritance of Marma community of Khagrachari Hill District (legally termed as tribal dispute) and thus, made a prayer for:—

> "অতএব হুজুব আদালত দয়া পরবশ হয়ে সরেজমিনে বিচার বিভাগীয় তদন্তক্রমে নালিশী ভূমি ওয়ারিশানের মধ্যে মগ সম্প্রদায়ের ক্ষেত্রে প্রযোজ্য আইন অনুযায়ী ভাগ বন্টনের ডিক্রি দানের বিহিত অজ্ঞা হয়।"

65. Hence, it is apparent that the pleadings of both the contending parties was to resolve the issue applying "প্রচলিত নিয়মে", social customs, as is applicable for Marma community.

66. However, after filing of the said suit, pursuant to Memo dated 21-3-1992 issued earlier by the respondent No. 2 the concerned

Headmen of the respective Mouza had made a request to the said respondent to keep further proceedings suspended for proper inquiry contending, *inter alia*—

".....নিম্নস্বাক্ষরকারী এবং উপস্থিত মারমা সম্প্রদায়ী গণমান্য ব্যক্তিবর্গগণ বুঝিতে পারিতেছেন না। কারণ সকলে উপস্থিত সুষ্ঠু তদন্ত করা না হইলে পূর্বের মত ভুল হইয়া বিভিন্ন জটিলতার সৃষ্টি হইবে বা হইতে পারে বিধায় প্রচলিত কাষ্টমারী বা সামাজিক বিধি মতে মৃত দগ্য মগের প্রকৃত ওয়ারিশান পুনঃ তদন্ত মোতাবেক সর্বশেষ সুষ্ঠু তদন্তের সাপেক্ষে মারমা সম্প্রদায়ী বহু গন্যমান্য ব্যক্তির উপস্থিতে সমন্বয়ে নিধারণের জন্য মহোদয়ের নিকট পুনঃ এক মাসের সময়ের প্রার্থনা করিতেছি। অনুরূপভাবে পূর্বের সকল বিবিধ মামলা মূলে মৃত ব্যক্তির দুগ্য মগের ওয়ারিশান হিসাবে ইস্যুকৃত সকল উত্তরাধিকার সনদপত্রের কার্যক্রম কিংবা সংশ্লিষ্ট সম্পত্তি বিষয়ে যে কোন কার্যক্রম মহোদয়ের পরবর্তী আদেশ না হওয়া স্থগিত রাখার একান্ত আবেদন"।

67. However in the inquiry report dated 22-2-1993 the Thana Nirbahi Officer, Khagrachari, Police-Khagrachari pursuant to Memo dated 6-12-2009 (Annexure-D) stated, inter alia—,

"মূল মালিক মৃত দুগ্য মগের দুই মেয়ের মধ্যে এক মেয়ে আওয়া মগিনী নিঃসন্তান হলেও দুগ্য মগের লালন-পালনকারী হিসাবে এবং সর্বোপরি কন্যা হিসাবে পিতার মোট সম্পত্তির অংশ সম্পত্তি তার পাওয়ার কথা। কিন্তু তার কোন সন্তান না থাকায় তার মৃত্যুর পর পরোক্ষভাবে তার অপর বোন আবেন মগিনীর উত্তরাধিকারীরাই তার সম্পত্তির অংশীদারিত্ব লাভ করবে। সেহেতু দুগ্য মগের সমুদয় সম্পত্তির অংশীদার আবেতু মগিনীর উত্তরাধিকারীগণ। তবে বর্তমানে আওয়া মগিনীর লালন-পালনকারীরা তার সম্পত্তিক্রমে কিছু সম্পত্তির পেতে।

.....

তার সদয় জ্ঞাতার্থে ও প্রয়োজনীয় ব্যবস্থা গ্রহণার্থে এ তদন্ত প্রতিবেদন তার আগে প্রেরণ করা হলো।"

68. Subsequently, the Additional Deputy Commissioner (Rev) Khagrachari passed an order on 11-9-1993 in the form of recommendation for consideration by the respondent No. 2. ultimately, the Deputy Commissioner and the *ex-officio* Civil Judge, the respondent No. 2 vide the impugned judgment and order dated 22-9-1996(Annexure-A) has disposed of the suit observing, inter alia

"সম্পত্তি বিতরণের আইন সম্পর্কে ২ পক্ষের ভিন্ন দাবীঃ বিবাদীপক্ষ দাবী করিয়াছে যে, আমাদের উত্তরাধিকারের কোন লিখিত আইন না থাকায় স্থানীয় প্রথা মতে মৃত দুগ্য মগের সম্পত্তি তাহার ওয়ারিশদের মধ্যে ভাগ করিতে হইবে। বাদী পক্ষ অবশ্য এই দাবী অস্বীকার করিয়া হিন্দু দয়াভাগা আইন অনুসারে সম্পত্তিভাগের দাবী জানাইয়াছি। সেই বিষয়ে ভিন্ন ভিন্ন লেখকের লেখা হইতে ইহা জানা যায় যে, উত্তরাধিকারের ক্ষেত্রে হিন্দু দয়াভাগা আইন বৌদ্ধ ধর্মাবলম্বীদের ক্ষেত্রে প্রযোজ্য। ৪০ ডিএলআর এ রিপোর্টকৃত অমৃত নন্দ মহাথেরো বনাম হৃদয় রন চৌধুরীর মামলার রায় হইতে ইহা প্রতীয়মান হয় যে, বাংলাদেশের বৌদ্ধদের উত্তরাধিকারের ক্ষেত্রে হিন্দু দায়ভাগা প্রযোজ্য। মামলার অবশ্য উভয় পক্ষ উত্তরাধিকারের ক্ষেত্রে হিন্দু দায়ভাগা আইন প্রযোজ্য কিনা সে বিষয়ের বিস্তারিত আলোচনা করেন নাই। বৌদ্ধ ধর্মাবলম্বীদের ক্ষেত্রে হিন্দু দায়ভাগা আইন প্রযোজ্য বলিয়া উল্লিখিত মামলার উভয়পক্ষ এবং মানীয় বিচারপতিগণ কর্তৃক মানিয়া নেওয়ার ঘটনা ও সংশ্লিষ্ট বিষয়ে বিশেষজ্ঞদের লেখা পুস্তকে প্রদত্ত মতামত হইতে ইহা ধরিয়া নেয়া যায় যে, হিন্দু দায়ভাগা আইনই বৌদ্ধ ধর্মাবলম্বীদের জন্য প্রযোজ্য হইবে। ৩২ ডিএলআর এ রিপোর্টকৃত অজিতা ভিক্ষু বনাম অগ্র বংশ মহাথেরো মামলায় বৌদ্ধ ধর্মাবলম্বীদের ক্ষেত্রে হিন্দু আইন প্রযোজ্য নয় বলিয়া মাননীয় বিচারপতিগণ যে মতামত দিয়াছেন ৪০ ডিএলআর এ রিপোর্টকৃত উল্লিখিত মামলার বিচারকারী মাননীয় বিচারপতিগণ উহাকে সুইপিং বলিয়া আখ্যায়িত করার বিষয়টি উপরোক্ত মতামতকে আরও দৃঢ় করিয়াছে। সুতরাং সিদ্ধান্ত নেওয়া যায় যে, মারমাদের উত্তরাধিকার নির্ণয়ের ক্ষেত্রে হিন্দু দায়াভাগা আইন প্রযোজ্য হইবে।"

69. In other words, the concerned Court applied the principles of Hindu Dayabhaga Law to the Buddhists of the Marma community firstly, on the alleged claim of the plaintiffs, (the respondent Nos.7 and 8) and secondly, applying the ratio of the case reported in *40 DLR (AD) 137* and thereby had cancelled the 3(three) Miscellaneous Cases bearing Nos.110, 65 and 98 all of 1990. Vide the said order he further cancelled the claim of the respondent No.6 to get 8.10 acres of land upon dismissing his suit and also observed that his brother in law, Abrechai Marma, who is the petitioner No.1 in writ peti-

tion No. 3285 of 2009, not being an heir would not get any portion of the property in question and accordingly, had directed the concerned Upazilla Nirbahi Officer for recovery of possession from the petitioner No.l and others who were not the successive heirs, within 60 (sixty) days.

70. The findings of the respondent No. 2 has also been mandated as lawful by the appellate authority in Civil Appeal (Khagrachari) Case No. 84 of 1992, so preferred by the defendant No.8, the petitioner of writ petition No.2829 of 2006, the only son of Kraynori Mogini, who also filed separate application claiming to get entire share of his mother in total 8.10 acres and that both the applications of respondent Nos. 6, 7 and 8 were disposed of vide the impugned judgment and order passed by the Land Appeal Board (Khagrachari) Case No. 4-27 of 2001 (Appeal), upholding the findings of the respondent No. 2.

71. As has been observed earlier, the impugned judgment and order dated 22-9-1996 has been passed by the respondent No. 2 applying the principles of Hindu Dayabhaga Law for succession of Buddhists, (the petitioners and respondent Nos. 9-13) who belong to Marma community relying on the claim of the plaintiffs (the respondent Nos.7 and 8); whereas from the plaint it is rather evident that they had claimed to apply "social customs" to resolve the dispute in question. Hence, the said findings of the respondent No.2 have no leg stand, for having been passed beyond the pleadings.

72. Secondly, the said respondent has applied the rationale of the case reported in *40 DLR (AD) 137* for application of the principles Hindu Dayabhaga Law. It is fact that the Appellate Division in the said case has applied the principles of the said school where the contending parties belonged to the Buddhist (Bengali) Barua community (who are not the members of any non-Bengali ethnic groups including Marma, Takhaine, Chakma, Tanchangya, etc.) over the issue of declaration of title and confirmation, alternatively for recovery of possession; but the fact remains that they are the respective parties who did not dispute application of Hindu Dayabhaga Law; as such, the findings of the Appellant Division should be confined to the facts of the said case and cannot be the *ratio decidendi* in the instant ease where both the parties had pleaded to apply "social customs", not Hindu Dayabhaga Law. Moreover, in a number of cases the Appellate-Division has duly upheld the application of tribal customary law in the matter of succession of Buddhists by religious affiliation. In addition, the categorical assertion of the petitioners as well as the Intervenor is that customary law applies in the case of succession of Marma community of CHT, which has not been refuted by the respondents concerned in their affidavit in opposition with supporting documents.

73. Moreover, before passing the impugned judgment and order dated 22-9-1996 by the respondent No.2, from Annexure-C (the prayer of the local Headman to re-inquire) it appears that the opinion was sought from the concerned Headman of the respective Mouza in compliance of the requirement as prescribed under the Regulations, 1900, but while passing the impugned judgment and order by the said respondent it does not reflect that the opinion of the concern Headman was actually considered.

74. Lastly, before parting with the judgment it is pertinent to remember one important fact that the property in question has devolved upon the respective contending parties through the maternal line.

75. In view of the above facts, circumstances, observations and findings we have no manner of doubt to final that disposing of the respective suits by the respondent No. 2 apply-

ing Hindu Dayabhaga Law in the case of succession of Marma community of the Chittagong Hill Tracts basing on the alleged claim of the respondent Nos. 7 and 8 and the ratio as decided in *40 DLR (AD) 137*, is without any lawful authority having no mandate of law.

76. In the result, both the Rules in connection with Writ Petition Nos. 3285 of 2009 and 2829 of 2006 are made absolute.

77. The impugned judgment and order dated 22-9-1996 (Annexure-A) passed by the respondent No. 2, the Deputy Commissioner Khagrachari and the *ex-officio* Civil Judge in connection with Civil Suit No. 20 of 1992 as well as the judgment and order dated 12-3-2001 passed by the Additional Divisional Commissioner, Chittagong Division, Chittagong, respondent No. 4 in Civil Appeal (Khagrachari) Case No. 84 of 1997 (Annexure-C), as has been upheld up to the Land Appeal Board, Dhaka directing vide order dated 12-3-2006 to make portion of 24.30 acres of land and opening a separate Khatian in Volume 6, page 81 by the respondent No. 5 in favour of the respondent Nos. 9-13 pursuant to Namjari Case No. 165 of 1997 (Annexure-B) are hereby declared to have been passed without any lawful authority and hence, are of no legal effect.

78. Since admittedly there is no written law of succession of Marma community hence, the respondent No. 2 is hereby directed to resolve the issue in question afresh on the basis of the pleadings of both the contending parties and other relevant documents and in particular upon consultation with the respective Circle Chief and Headman, as has been envisaged in the Chittagong Hill Tracts Regulations, 1900 preferably within a period of 4(four) months from the date of receipt of the copy of this judgment and order.

There will be no order as to costs.

Ed.

High Court Division
(Criminal Miscellaneous Jurisdiction)

Md Rezaul Haque J
Gobinda Chandra Tagore J

Judgment
April 22nd, 2014.

Shahjahan (Md) and others.....
.....Accused petitioners

vs

State...Opposite Party*

Code of Criminal Procedure (V of 1898)
Section 498

Anticipatory Bail—As the record of the case in hand is unusually lying with the Court of the Chief Judicial Magistrate, the accused-petitioners had no scope to surrender to the concerned Tribunal with a prayer for bail and, as such, the application for anticipatory bail is maintainable in the prevailing factual as well as procedural aspects of the case. .....(41)

Code of Criminal Procedure (V of 1898)
Sections 156(3), 157(1), 173(1)(a) and 190

Court of Magistrate empowered to take cognizance of the offences has jurisdiction to exercise its power in relation to any or all of the situations or stages of the proceedings of a case during or after the investigation in the case. .....(27)

Nari-o-Shishu Nirjatan Daman Ain (8 of 2000)
Sections 18

The Ain provides that the Tribunal established under the Ain can order an investigation into any offence under the Ain and the investigating officer is accountable only to the Tribunal ordering the investigation or to his controlling officer as to properly and diligent-

*Criminal Miscellaneous Case No. 18030 of 2014

ly completing the investigation within the stipulated time. .....(28)

Nari-o-Shishu Nirjatan Daman Ain (8 of 2000) **Sections 19(1)(2)(3)(4), 22(2)(1), 27(1)**

Court of Judicial Magistrate being not empowered to take cognizance of any offence under the Ain it has no jurisdiction of the Court of original jurisdiction to do anything in connection with any case under the Ain as it does into performing its functions in relation to any or all of the situations or stages of the proceedings of a case under the Code.

.....(35)

ACC vs Khandaker Mosharaf Hossain, 66 DLR (AD) 92 and Fazlur Rahman vs State, 2009 (XVII) BLT (HCD) 192 ref.

ASM Abdul Mobin with Sayem M Murad, Advocates—For the Petitioners.

ASM Nazmul Haque, DAG—For the State.

Judgment

Having surrendered to this Court the accused-petitioners filed this application under section 498 of the Code of Criminal Procedure for anticipatory bail in GR No. 40 of 2014 arisen out of Jokiganj Police Station Case No. 7 dated 10-3-2014 under section 7/30 of the Nari-o-Shishu Nirjatan Daman Ain, 2000, now pending in the Court of the learned Chief Judicial Magistrate, Sylhet.

2. Mr ASM Abdul Mobin along with Mr Sayem M Murad learned Advocate having placed the application submits that under section 19 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 the bail granting authority has been given to the Tribunal, but the record of the case is lying with the learned Chief Judicial Magistrate, Sylhet and consequently, there is no scope for the petitioners to surrender to or appear before the Tribunal and in the event of their arrest, they would be produced before the learned Chief Judicial Magistrate, who under the Ain has got no jurisdiction to grant them bail and in that eventuality, the learned Chief Judicial Magistrate upon refusing them bail would send them to the custody, which would cause irreparable loss and injury to them and, as such, they may be kindly granted anticipatory bail.

3. The learned Advocate for the petitioners then having referred to the case of *Durniti Daman Commission vs Khandaker Mosharaf Hossain*, reported in *66 DLR (AD) 92*, submits that at least the purpose of implicating petitioners No. 2-5 in the case is not what it purports to be, but to achieve a collateral purpose by using the process of law, such as harassment, humiliation etc. of the accused, which cannot be permitted by law and, as such, they should be granted anticipatory bail.

4. On the other hand, Mr ASM Nazmul Haque, learned Deputy Attorney-General along with Md Abdul Khaleque, learned Assistant Attorney General having referred to the case of *Fazlur Rahman vs State*, reported in *2009 (XVII) BLT (HCD) 192*. Submits that so long any case under the Ain is treated as a GR case before the Court of Judicial Magistrate, the concerned Judicial Magistrate can consider the matter of bail in such a case and, as such, anticipatory bail cannot be granted under the Ain only on the plea that the case is still under investigation and the case record is lying with the Judicial Magistrate.

5. The learned Deputy Attorney General further submits that since there is specific allegation against accused-petitioner Nos. 2-5 to abet accused-petitioner No. 1 in committing the offence of kidnapping, there is no scope to say

that the allegation brought against them are *malafide* and, as such, as per the law enunciated by the Appellate Division in the case of *Durniti Daman Commission vs Khandaker Mosharaf Hossain,* reported in *66 DLR (AD) 92*, it is not a fit case for anticipatory bail.

6. We have perused the application and heard the learned Advocate for the petitioners and the learned Deputy-Attorney-General along with the learned Assistant-Attorney-General for the State.

7. The case before us has been filed under sections 7/30 of the Nari-o-Shishu Nirjatan Daman Ain, 2000. The case is still under investigation and the record of the case is lying with the learned Chief Judicial Magistrate, Sylhet.

8. At this stage, the pertinent question has been arisen whether the Chief Judicial Magistrate or any Judicial Magistrate or any other Court, except, the Tribunal established under the Ain has been conferred to any jurisdiction by or under the Ain to deal with any case filed upon a police report under the Ain including the matter of bail, even before such a case is ready for trial.

9. Section 3 of the Ain declares that notwithstanding anything contained in any other law for the time being in force, the provisions of this Ain shall be effective.

10. But, section 25(1) of the Ain provides that, except as otherwise provided in this Ain, the provisions of the Code of Criminal Procedure, hereinafter referred to as the Code, shall be applicable to the lodging, investigation into, trial and disposal of the allegations under the Ain and the Tribunal shall be deemed to be a Court of Sessions and the Tribunal may exercise all the powers of a Court of Sessions in the trial of the offences under the Ain or in the trial of any other offences in accordance therewith.

11. Section 5(2) of the Code provides that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provision, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Therefore, only the provisions of the Code which are not provided by the Ain shall be applicable to regulating the manner or place of investigating, inquiring into trying or otherwise dealing with the offences under the Ain.

12. Section 60 of the Code provides that a Police Officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions therein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case or before the Officer-in-Charge of a Police Station.

13. Section 61 of the Code stipulates that a person arrested without warrant shall not be detained more than twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

14. Section 62 of the Code dictates that the concerned Officer-in-Charge of the Police Station shall report, in a Metropolitan Area, to the Chief Metropolitan Magistrate and in other areas to the District Magistrate and also to the Chief Judicial Magistrate, the cases of all persons arrested without warrant, whether such persons have been admitted to bail or otherwise.

15. Therefore, the Officer-in-Charge of the Police Station or the Police Officer making the arrest without warrant is required by sections 60, 61 and 62 of the Code to produce immediately the persons arrested without warrant before a Magistrate having jurisdiction to deal with the bail in the particular case.

16. Section 81 of the Code provides that the Police Officer or other person executing a warrant of arrest shall, without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person,

17. Section 156(3) of the Code clarifies that any Magistrate empowered under section 190 i.e. the Judicial Magistrate empowered to take cognizance of the offences may order an investigation into any cognizable case.

18. Section 157(1) of the Code stipulates that if the Officer-in-Charge of a Police Station has reason to suspect the commission of a cognizable offence, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report.

19. Section 167(1) of the Code provides that if the investigation cannot be completed within the period of twenty-four hours fixed by section 61 and there are grounds for believing that the accusation or information is well founded, the Officer-in-Charge or the Police Officer making the investigation shall forthwith transmit a copy of the entries in the diary relating to the case and forward the accused to the nearest Judicial Magistrate.

20. Section 167(5) (a) of the Code signifies that if the investigation is not concluded within one hundred and twenty days from the date of receipt of the information relating to the commission of the offence or the order of the Magistrate for investigation, the Magistrate empowered to take cognizance of such offence or making the order for investigation may, release the accused on bail if the offences is not punishable with death, imprisonment for life or imprisonment exceeding ten years and under section 167(5)(b), the Court of Sessions may release the accused on bail if the offence is punishable with death, imprisonment for life or imprisonment exceeding ten years.

21. Section 170(1) of the Code clarifies that when evidence is sufficient, the case to be sent to the Magistrate empowered to take cognizance of the offences upon a police report and to try the accused or send him for trial.

22. Section I73(l)(a) of the Code provides that the investigation report is to be forwarded to a Magistrate empowered to take cognizance of the offences on a police report.

23. Section 193 of the Code mandates that, except as otherwise expressly provided by the Code or by any other law for the time being in force, no Court of Sessions as a Court of original jurisdiction shall take cognizance of an offence unless the accused has been sent to it by a Magistrate duly empowered in that behalf. Therefore, as per the provision of section 193 of the Code, the Court of Sessions as a Court of original jurisdiction cannot take cognizance of the offences though the same may be triable by such Court.

24. Section 205C of the Code provides that if the offence is triable exclusively by the Court of Sessions, the Magistrate shall send the case to the Court of Sessions subject to the provision of this Code relating to bail, remand the accused to custody during and until the conclusion of the trial.

25. With regard to trial in absentia section 339B of the Code stipulates that only the Court taking cognizance of the offence complained of is empowered to, by order published in at least two national daily Bengali Newspapers having wide circulation, direct the accused person, who has absconded or concealed himself to appear before it within a specified period.

26. From a thorough examination of the above provisions of the Code it transpires as

follows—

(i) Any person arrested without any warrant or in the execution of any warrant is to be produced before a Judicial Magistrate empowered to take cognizance of the offences and to deal with the matter of bail;

(ii) Any information relating to any cognizable offence or the suspicion of the commission of any cognizable offence is to be forwarded to the Magistrate empowered to take cognizance;

(iii) Only the Magistrate empowered under section 190 of the Code to take cognizance of the offence may order an investigation in any cognizable case;

(iv) Only the Magistrate empowered to take cognizance of the offences can deal with the bail matters if the offences are punishable with imprisonment not exceeding ten years;

(v) The Court of Sessions even being the Trial Court of the offences, it cannot take cognizance thereof as a Court of original jurisdiction;

(vi) The concerned Magistrate shall send the case to the Court of Sessions if the offence is exclusively triable by the Court of Sessions subject to the provision of the Code relating to bail and remand the accused to the custody.

(vii) Only the Court taking cognizance of the offence complained of is empowered to, by order published in at least two national daily Bengali Newspapers having wide circulation, direct the absconded accused to appear before it within a specified period.

27. Therefore, only the Court of Magistrate empowered to take cognizance of the offences has jurisdiction to exercise its power in relation to any or all of the situations or stages of the proceedings of a case during or after the investigation in the case, as it may be enumerated above.

28. On the other hand, section 18 of the Ain provides that the Tribunal established under the Ain can order an investigation into any offence under the Ain and the Investigating Officer is accountable only to the Tribunal ordering the investigation or to his controlling officer as to properly and diligently completing the investigation within the stipulated time. In case of failure to complete the investigation in time, the Tribunal may trust another officer with the investigation and even may direct the concerned authority to appoint any other Investigating Officer in place of the present one. Even, after the submission of the investigation report, upon scrutinizing it if the Tribunal is satisfied as to that any person mentioned in the investigation report as an accused is required to be made a witness in the interest of justice, it can direct the Investigating Officer to treat the person as a witness instead of an accused. Nevertheless, if after closing the examination of the witnesses it appears to the Tribunal that in an intention to save any person from the liability of the offences or due to negligence in the investigation, the investigating Officer submitted the investigation report without seizing or taking into consideration any article required to be used as evidence or without any necessity for proving the case made a person witness instead of an accused or without examining any vital witness, the Tribunal, upon identifying the act or negligence of the officer as inefficiency or misconduct, as it may be, may direct the controlling authority of that officer to take appropriate legal action against him. Thus, the Tribunal comes in seisin of the case and plays a

significant role in the investigating process from the very initiation of any case under the Ain.

29. With regard to trial in absentia section 21 of the Ain empowers only the Tribunal to pass an order as contemplated under section 339B of the Code.

30. Section 22(2) stipulates that the statement of a witness recorded by a Magistrate under section 22(1) shall be directly sent to the Investigating Officer or person in order to submit the same along with the investigating report to the Tribunal.

31. Section 19(1) declares that all the offences punishable under the Ain are cognizable.

32. Section 19(2), (3) and (4) empower only the Tribunal to deal with the ball under the Ain.

33. Section 27(1) stipulates that only the Tribunal can take cognizance of the offences under the Ain.

34. Section 20 read with section 25 and 26 of the Ain stipulates that the offences under the Ain are exclusively triable by the Tribunal established under section 25.

35. Therefore, the Court of Judicial Magistrate being not empowered to take cognizance of any offence under the Ain it has no jurisdiction of the Court of original jurisdiction to do anything in connection with any case under the Ain as it does into performing its functions in relation to any or all of the situations or stages of the proceedings of a case under the Code enumerated above.

36. However, the Magistrate may exercise the ordinary powers under section 36 conferred upon the Magistrate and specified in the third schedule to the Code and the additional powers conferrable on the Magistrate under section 37 and specified in the schedule-IV to the Code, which are not required by the Code to be exercised by the Magistrate empowered to take cognizance of any offence and are not inconsistent with and redundant to any provisions of the Ain, such as, to record the statements and confession under section 164, to hold the inquest examination under section 174 of the Code and so on.

37. On the contrary, the Tribunal being exclusively empowered to take cognizance of the offences under the Ain and the other offences, if any, committed in connection with such offences, only the Tribunal is competent to perform the functions in relation to any or all of the situations or stages of the proceedings of a case under the Ain corresponding to that or those of a case under the Code enumerated above, which are not inconsistent with and redundant to any provisions of the Ain.

38. Accordingly, the Tribunal being empowered to take cognizance of the offences under the Ain along with the other offences, if any, committed in connection with such offences, and to try those offences, it is empowered to exercise its jurisdiction as the Court of original jurisdiction until the case is ready for trial and then as the Trial Court.

39. Consequently, the Officer-in-Charge of a Police Station, any other Police Officer making the arrest of an accused, the Investigating Officer or any other Officer empowered to investigate into the offences under the Ain is required by the Ain to forward the person arrested without any warrant or in execution of any warrant, or to send the information relating to the commission or suspicion of the commission of any offence under the Ain or to submit the investigation report, whatever it may be, through the GRO directly to the concerned Tribunal and not to any other Court.

40. Since, the Tribunal has been bestowed upon the jurisdiction of the Court of original

jurisdiction under the Ain, it is also empowered to deal with bail even before the case is ready for trial inasmuch as sections 19(2), (3) and (4) exclusively empower the Tribunal to deal with the bail under the Ain, which does not differentiate the bail as to the bail during the investigation into or the bail during the trial of the case.

41. As the record of the case in hand is unusually lying with the Court of the Chief Judicial Magistrate, Sylhet, the accused-petitioners had no scope to surrender to the concerned Tribunal at Sylhet with a prayer for bail and, as such, the application for anticipatory bail filed in this Court is maintainable in the prevailing factual as well as procedural aspects of the case.

42. The FIR discloses that the victim is a minor girl of 14 years only, but accused-petitioner No.1, Md Shahjahan, son of Abdul Mannan @ Monoi Miah of village-Shirajpara, Police Station-Jokigonj, District-Sylhet has allegedly kidnapped and married her. In such a situation, the learned Advocate for the petitioner feels difficulties to press the prayer of accused-petitioner No.1 for bail. Accordingly, the prayer of accused-petitioner No.1 for bail is rejected being not pressed.

43. However, it appears that the motive for implicating accused-petitioner Nos. 2-5 in the case was to create pressure on the accused-persons so that they would give the victim to the custody of the informant-party.

44. In such view of the matter, let accused-petitioner Nos. 2, Ali Amzad son of Abdul Mannan @ Monoi Miah of village Shirajpara 3, Md Nazim Uddin, son of late Ibrahim Ali of village Rarai; 4, Abdul Mannan, 5, Moinul Islam both are sons of late Junab Ali of No. 6, Sultanpur Union, all of Police Station-Jokigonj, District-Sylhet be enlarged on anticipatory bail for a period of 4 (four) weeks from the date in GR No. 40 of 2014 arisen out of Jokigonj Police Station Case No. 7 dated 10-3-2014 under section 7/30 of the Nari-o-Shishu Nirjatan Daman Ain, 2000, now pending in the Court of the learned Chief Judicial Magistrate, Sylhet with the satisfaction of the concerned Nari-o-Shishu Nirjatan Daman Tribunal, Sylhet.

45. However, accused-petitioner Nos. 2-5 shall produce the minor victim, namely, Tajkera Jannat Sumi, daughter of Kutub Uddin and Mst. Afifa Khanam of village-Shirajpara, Police Station-Jokigonj, District-Sylhet before the Tribunal at the time of furnishing the bail bond, in default their bail shall stand cancelled.

46. After the expiry of the period of anticipatory bail, the Tribunal shall have the liberty to consider their bail on merit of the case in accordance with law.

47. The learned Chief Judicial Magistrate, Sylhet is directed to transmit the record of the case to the concerned Tribunal immediately after receipt of this order.

48. The office is directed to send a copy of this order to each of (1) The Registrar of this Court, (2) The Secretary, Ministry of Law, Justice and Parliamentary Affairs, (3) The Secretary, Ministry of Home Affairs and (4) The Inspector-General of Police for doing the needful in accordance with the findings and observations made in the body of this order, particularly with regard to forwarding the person arrested without any warrant or in execution of any warrant, sending the information relating to the commission or suspicion of the commission of any offence under the Ain and submitting the investigation report etc. through the concerned GRO directly to the concerned Tribunal and not to any other Court.

Accordingly, the application is disposed of.

Ed.

High Court Division
(Special Original Jurisdiction)

Syed Refaat Ahmed J
Mahmudul Hoque J

Judgment
February 20th, 2014.

Nazrul Islam Mollah (Md) & others.....
.....Petitioners
vs
Chairman, 1st Court of Settlement & another..... Respondents*

Bangladesh Abandoned Property (Control, Management & Disposal) Order (PO No. 16 of 1972)

Preamble—The purpose of PO 16 of 1972 is not to declare as abandoned the property of citizens who are very much present in Bangladesh and who have been occupying, supervising and managing their property at all times. .....(19)

Abandonment

Mere temporary or occasional absence of physical possession shall not of itself suffice to treat the property as abandoned. .....(22)

Constitution of Bangladesh, 1972
Article 44 and 102

The right to enforce a fundamental right under Article 44 is another fundamental right which gives the petitioners right to move even though their application was rejected by the Settlement Court on the ground of limitation. .....(30)

Nahar vs Bangladesh, 49 DLR 108; Bangladesh vs Chand Sultana, 1 MLR 310 = 48 DLR 547; Government of Bangladesh, represented by Ministry of Works and another vs Syed Chand Sultana, 51 DLR (AD) 24; Sarwari Begum vs Bangladesh, 45 DLR 571; Bangladesh vs Md Jalil, 48 DLR (AD) 10; Secretary Ministry of Works vs Rowshan Ara Begum, 57 DLR (AD) 167 and Md Feroz Mia vs Bangladesh in Writ Petition No, 4971 of 2001 ref.

ZI Khan Panna, Advocate with Md Sagir Hossain—For the Petitioners.

Shahidul Islam, DAG with Sukumar Biswas, AAG—For Respondent No. 2.

*Writ Petition No. 827 of 2004.

Judgment

Mahmudul Hoque J: In this application under Article 102 of the Constitution of Bangladesh a Rule Nisi has been issued at the instance of the petitioner calling upon the respondents to show cause as to why the inclusion of premises being House No. 19/7 Pallabi, Mirpur, Dhaka in the "Kha" list of abandoned building as appearing in the Bangladesh Gazette Extra-ordinary on 23-9-1986 at page 9764 (25) in serial No. 35 should not be declared to be 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.

2. Facts relevant for disposal of this Rule, in short, are that the petitioners are the citizen and permanent residents of Bangladesh. The properties in question was originally belonged to one Idu Mollah who got the same by a deed of Heba-bil-Ewaz dated 18-12-1946. While he was in possession and enjoyment of the same, he sold the properties to 1) Sultan Ahmed Mollah, 2) Nur Islam Mollah, 3) Nur Mohammad Mollah and (4) Del Mohammad Mollah by a registered deed of sale being No. 10801 dated 20-8-1960. Since then the petitioners have been possessing the property in question peacefully without any disturbances and on payment of all taxes to the Government. They mutated their names in the relevant khatian, got WASA and gas connection in their names.

3. The petitioners are the heirs of Nur Islam Mollah. Said Nur Islam Mollah while in possession of the property in question died in Bangladesh on 4-4-1986 and was buried in Mirpur Graveyard. Local Ward Commissioner issued a certificate to that effect on 3-1-2001.

4. Further case of the petitioners is that the owner of the property Nur Islam Mollah is a national of Bangladesh by birth and he never left the country at the time of Liberation period and he was a permanent resident and inhabitant in Mirpur area, Dhaka. He was a voter in Mirpur area and his name appears in the voter list prepared on 7-12-1976 at serial No. 254 (Annexure-J). It is to be noted that the name of the petitioner No. 5 is also to be found listed at serial No. 191 (Annexure-K).

5. It so transpired that one Shamima Rahman, through her constituted attorney M/s Eastern Housing Ltd, as plaintiff instituted Title Suit No. 3 of 2003 in the Court of Joint District Judge, 6th Court, Dhaka for declaration of title, recovery of possession and permanent injunction in respect of the suit land against the petitioners along with others. After contested hearing the learned court dismissed the suit vide judgment and decree dated 3-11-2011 (decree signed on 22-11-2011) (Annexure L and L-I to the Supplementary Affidavit).

6. After the death of said Nur Islam Mollah the present petitioners as heirs got their names mutated in the Khatian (annexure-G to the supplementary affidavit) and the latest City Record of Right Stands recorded in the names of the petitioners (Annexure-H). They paid taxes to the Government and City Corporation as well and constructed building thereon upon obtaining sanction and approval of the plan from RAJUK (Annexure-B series) and took loan from House Building Finance Corporation for construction of the building.

7. The petitioners' predecessor died in Bangladesh and was buried at Mirpur Graveyard at a time when the petitioner Nos. 1-4 were minors and the petitioner No.5 was merely a housewife and was not aware of the worldly affairs and it was not possible to know about the affairs of the property in question on their part and it was also not known to them that the property has been enlisted as abandoned property in the Gazette published on 23-9-1986. For the first time on 15-9-2003 they came to know that their property has been enlisted as abandoned property in the abandoned buildings list. The petitioners on coming to know the fact of enlistment of the property as abandoned collected relevant papers and documents and filed an application before the Court of Settlement praying for release of the property from the abandoned list.

8. The said case was heard by the Court of Settlement and after hearing was dismissed by its judgment and order dated 15-10-2003 on the ground of limitation without entering into the merit of the case.

9. The petitioners assert that they as well as their predecessor-in-interest are nationals of Bangladesh by birth and have been in possession of the property in question, supervising and managing the property in person and the property in question was never abandoned. Accordingly, question of petitioners or their predecessor's whereabouts being unknown does not arise and, therefore, the very inclusion of the property in the 'Kha' list shows that the petitioners are in possession and, as such, the inclusion of the property in question in the 'Kha' list is *ex facie* illegal and violative of Article 42 of the Constitution. It is also claimed that no notice for surrendering or taking over possession of the property in question as abandoned property was ever issued or served under Section 7 of the Abandoned Buildings (Supplementary Provisions) Ordinance, 1985 (Ordinance No. LIV of 1985 ("Ordinance")

upon the petitioners. It is contended further that the property in question is not an abandoned property as the same does not come within the definition of abandoned property given in the Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972 being President's Order No. 16 of 1972 (P.O. No. 16 of 1972) and thus inclusion of the same in the list of the abandoned buildings is illegal and without lawful authority. The Court of Settlement having rejected the application for being barred by limitation the petitioners moved this Court by filing this Application under Article 102 of the Constitution challenging the enlistment of the case property in the 'Kha" list and the judgment and order of the Court of Settlement and obtained the present Rule and Order of *status quo.*

10. The respondents contested the Rule by filing Affidavit-in-opposition alleging that since the whereabouts of the original owner was not known to the Government after the commencement of PO No. 16 of 1972, the Government has rightly declared the said property as abandoned property. Furthermore, it is asserted that from 'House to House' survey report of survey team dated 5-11-1984 it is found in the remark column that "the present occupant failed to produce any paper". Thereafter, the authority concerned issued a notice to the occupant Nur Islam Mollah on 1-6-1985 asking him to appear before the office of the respondent No.2 within 7 days along with original lease deed and other documents placing the addressee further on notice that any failure to so comply would entail the risk of the said house being treated as an abandoned property as per provision of Article 2(1) of the PO No. 16 of 1972. Admittedly, Nur Islam Mollah did not appear before the authority. Again on 19-7-1986 another notice was issued to Nur Islam Mollah fixing 26-7-1986 to appear before the authority but he failed to appear notwithstanding ostensible due service upon him. It is submitted, therefore, that the petitioners' plea of non-service of notice and lack of knowledge is not sustainable in the eye of law and that also the Court of Settlement has rightly rejected the application on the ground of limitation. The core argument put forward in this regard for and on behalf of the respondents is that the listing of the property as abandoned property without service of notice as per provision of Ordinance is not material because the Ordinance has encumbered the claimants to establish that the property in question is not an abandoned property i.e., whether the claimant had ceased to occupy, supervise or managed the case property in person at the very point of date at first.

11. It is also stated that the question of service of notice is a question of fact and this can only be determined upon taking evidence. Since no rebuttable evidence has been adduced to show that the original owner was present in Bangladesh and he occupied, managed or supervised the disputed house when PO No. 16 of 1972 came into operation i.e., 28-2-1972 and, as such, listing of the property as abandoned property in the "Kha" list is lawful and conclusive proof of facts.

12. Mr. ZI Khan Panna with Mr Md Sagir Hossain the learned Advocates appearing for the petitioners submit that the property in question was under the possession of Nur Islam Mollah bona fide citizen and permanent resident of Bangladesh by birth on the basis of a purchase deed dated 20-8-1960 till 4-4-86, the date of his death and thereafter the present petitioners as Bangladeshi nationales by birth till to date and that not for a single day it was abandoned or held by any other person or persons for which there was no scope to find it without effective control and supervision of the original owner and subsequently the present petitioners. It is submitted that, therefore, it was quite illegal to include the said property in the abandoned property list being in violation of the

rules and regulations in this regard.

13. Mr. Khan referring to the Preamble of the Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972 further submits that since the case property was constantly under effective occupation, control and supervision of the original owner and, thereafter, the petitioners themselves having never ever deserted the property with the positive intent to give up their rights vested in the property, the inclusion of the property in the list of abandoned buildings was done by abuse of authority and arbitrarily and, as such, it is unjust, improper, illegal and bad in law.

14. It is also argued that pursuant to section 5(l)(b) of the Ordinance No. 54 of 185, no notice was served upon the petitioners and in that view of the matter the enlistment of the case property in the 'Kha" list of the abandoned buildings is *ex facie* illegal and without any lawful authority. Mr Khan further submits that the case has become time-barred for no fault of the petitioners as they were minors when the property got included in the 'Kha' list and immediately on coming to know that the case property has been enlisted in the 'Kha' list the petitioners had filed a case but at that time the remedy available before the Settlement Court had become time-barred and there was no competent court to go to and no alternative effective remedy for the petitioners to avail of. In this situation the petitioners can indeed invoke writ jurisdiction under Article 102 of the Constitution to enforce their fundamental rights inclusive of the right to property even though they availed the alternative remedy, but failed on a technical ground of limitation. He also submits that the title of the petitioners in respect of the disputed house has been decided in favour of the petitioners by a competent court in Title Suit No.3 of 2003 filed by one Shamima Rahman. In this view of the matter also the case property cannot be an abandoned property. In support of his submission he referred to the cases of *Jebon Nahar and others vs Bangladesh* reported in *49 DLR 108, Bangladesh vs Chand Sultana* reported in *1 MLR (HC) 310 = 48 DLR 547 & 51 DLR (AD) 24* and *Sarwari Begum vs. Bangladesh* reported in *45 DLR 571.*

15. Mr. Shahidul Islam, the learned Deputy Attorney-General with Mr Sukumar Biswas, the learned Assistant Attorney-General appearing for the respondents submits that under section 7 of the Ordinance any person disputing the enlistment of a property as abandoned property may make an application to the Settlement Court within 180 days. The petitioners having filed the case long after the period as prescribed by the Ordinance, the Settlement Court rightly rejected the said settlement case for being time barred.

16. It is also argued by the respondents that the case property was duly listed in the 'Kha' list after issuance of a notice under section 5(1)(b) of the Ordinance to the predecessor of the petitioners which the petitioners deny to have received. By the said notices Nurul Islam Mollah was asked to appear before the office of the respondent No. 2 along with necessary papers pertaining thereto and it was duly served upon him. The learned Deputy Attorney-General further submits that the burden of proof squarely lies on the petitioners to prove that Nur Islam Mollah occupied, managed or supervised the case property on the relevant date, i.e., 28-2-1972 to establish that the said property is not an abandoned property. But the petitioners having failed to prove the same, the inclusion of a building in the 'Kha' list is proof of its being an abandoned property and the Government has nothing to prove or deny. In the present case the petitioners could not show that Nur Islam Mollah was present in Bangladesh on material dates or that he occupied, managed or supervised the case property when PO No. 16 of 1972 came into operation, as

such the listing of the property in the 'Kha' list as abandoned property is lawful and conclusive proof of facts. In support of his submission he referred to the cases of *Bangladesh & others vs Md Jalil and others* reported in *48 DLR (AD) 10, Secretary Ministry of Works vs Rowshan Ara Begum* reported in *57 DLR (AD) 167* and an unreported judgment dated 29-10-2009 passed in the case of *Md Feroz Mia vs Bangladesh* in Writ Petition No. 4971 of 2001.

17. Heard the learned Advocates for the parties, perused the petition, supplementary affidavits, Affidavits-in-opposition and the annexure annexed thereto.

18. Before entering into the merit of the case the provisions of law in this respect may be looked into. The purpose of PO No. 16 of 1972 is to make provisions for the control, management and disposal of certain property abandoned by certain persons who are not present in Bangladesh or whose whereabouts are not known or who have ceased to occupy or supervise or manage in person their property, or who are enemy aliens.

19. From the language as used in the Preamble it appears that the purpose of PO 16 of 1972 is not to declare as abandoned the property of citizens who are very much present in Bangladesh and who have been occupying, supervising and managing their property at all times. The petitioners have made clear averment in the writ petition about themselves and their predecessor's Bangladeshi nationality, their continuous residence in Bangladesh and their possession over the case property all along. In support of their claim they have annexed to the writ petition and supplementary affidavits the title deed dated 20-8-1960 (Annexure-A), rent receipts, municipal tax receipts, duplicate carbon receipt, sanction letter issued by RAJUK granting permission to construct building on the case property, present city record of right, voter list of the year 1976 evidencing that the predecessor of the petitioners was a voter, death certificate of Nur Islam Mollah issued by the ward Commissioner, Mirpur and judgment and decree of the court of Subordinate Judge, Dhaka passed in Title Suit No. 03 of 2003. All these papers and documents show that the predecessor of the petitioner and the present petitioners are all Bangladeshis and they have always been in possession of the case property, supervising and managing the same. There is nothing on record to suggest that at any point of time they have ceased to occupy, supervise and manage the case property in person and the property was ever resultantly abandoned. These documents further attest to the fact that their whereabouts cannot possibly have remained unknown to the Government. Moreover, the respondent No. 2 also do not claim that the predecessor of the petitioners and the present petitioners are not Bangladeshi or that they are nationals of any other country which at any time after 25-3-1971 was at war with Bangladesh or that they are not in possession of the said property. Rather given these facts and circumstances, the very fact of inclusion of the property in the "Kha" list itself proves that the petitioners have been in possession all along. This Court finds, accordingly, that the case property in no way answers to description of the abandoned property as defined in Article 2 of 16 of 1972 and, as such, the inclusion of the case property in the 'Kha' list violates the petitioners, fundamental right under Article 42 of the Constitution of Bangladesh to own and hold property. Such right this court finds cannot be taken away without the backing of law.

20. Furthermore, the voter list dating back to as early as 1976, manifests to this Court and by reference to Article 122 of the Constitution, in the very minimum the status of the voter as a citizen and resident of Bangladesh and of one having at least attained the age of 18 on the material date of preparation of such voter list.

The inclusion of the names of Nur Islam Mollah and his wife, the petitioner No. 5 must, therefore, in the absence of any conclusive evidence to the contrary, be assumed to manifest the same.

21. Furthermore, it is always to be borne in mind that in any case as this it must be accepted as a truism that the act of abandonment implies two fundamental factors:

(i) Desertion of the property and

(ii) Giving up one's right to the property.

22. The word "abandonment" connotes in this sense the idea of the owner not merely temporarily vacating but deserting the property with the intention of never returning to it. Such absolute desertion must be concomitant with the positive intention to give up the right vested in the property. It follows, therefore, that (mere temporary or occasional absence of physical possession shall not of itself suffice to treat the property as abandoned. These two determinants of the notion of "abandonment" appear not to have been established in this case.

23. This Court, accordingly, finds that the case property does not in any way answer to the description of abandoned property as mentioned above and defined particularly under Article 2 of the PO 16 of 1972 as there was no desertion of the property accompanied by giving up of the right to the property by the owner.

24. It is also argued by the respondents that notice contemplated under the Ordinance was duly served upon the predecessor of the petitioners. Provisions in section 5(l)(b) of the Ordinance may be looked into in this regard:

"Section 5(i) The Government shall, after the commencement of the Ordinance and before the 31st day of December, 1988, publish, from time to time, in the official Gazette... (b) Lists of buildings in respect of which notices for surrendering or taking possession as abandoned property under the said Order have been issued. "

25. A perusal of the Government file pertaining to the case property indicates that a notice being Memo No. AP-8M-898 dated 1-6-1985 was claimed to be served upon the petitioner's predecessor Nur Islam Mollah. It is prudent to produce the notice, the contents of whcih are reproduced below:—

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
পূর্তমন্ত্রনালয়
শাখা-৮।

তাং-১-৬-১৯৮৫ ইং

স্মারক নং এপি-৮ম-৮৯৮
প্রেরক-টি,সি,চাকমা,
উদ্ধর্তন শাখা প্রধান।

প্রতিঃ জনাব নূরুল ইসলাম মোল্লা,
১৯/৭, পল্লবী, মিরপুর, ঢাকা।

বিষয় ঃ ১৯/৭, পল্লবী, মিরপুর, ঢাকা প্রসংগে।

মিরপুরস্থ ১৯/৭, পল্লবী, মিরপুর, ঢাকা-নং বাড়ীটিতে বসবাসের স্বপক্ষে মূল দলিল/কাগজপত্র, এক প্রস্থ ফটোকপি সহ অত্র পত্র প্রাপ্তির ৭(সাত) দিনের মধ্যে অত্র মন্ত্রনালয়ে হাজির হওয়ার জন্য নির্দেশক্রমে আপনাকে অনুরোধ করিতেছি। অন্যথায় পি,ও, ১৬ এর ১৯৭২ আইন মোতাবেক উল্লিখিত বাড়ীটি পরিত্যক্ত সম্পত্তি হিসাবে ঘোষণা করার প্রয়োজনীয় ব্যবস্থা গ্রহণ করা হইবে।

(টি,সি, চাকমা)
উদ্ধর্তন শাখা প্রধান।

26. There is nothing found on record to show when and how it was issued and how it was served upon the petitioners predecessor by the respondent No.2. Another notice dated 19-7-1986 alleged to have been issued and served upon the petitioners' predecessor Nur Islam but facts remain said Nurul Islam Mollah died on 4-4-1986 i.e. before the issuance of said notice as evident from death certificate dated 3-1-2001.

27. Article 7 of the PO 16 of 1972 also provides for giving notice in certain cases which runs as thus:—

> 7. (1) Where any abandoned property is not in possession of any person, the Deputy Commissioner or the Sub-divisional Magistrate [or the authorised officer] shall take possession of the property in such manner as may be prescribed.
>
> (2) Where any abandoned property is in possession of any person, such person shall, within seven days of the commencement of this Order, surrender such property to the Deputy Commissioner or the Sub-divisional Magistrate [or the authorised officer.]
>
> (3) Where the person in possession of any abandoned property fails to surrender such property as he is required to do under clause (2), the Deputy Commissioner or the Sub-divisional Magistrate for the authorised officer shall serve a notice on him in the prescribed manner requiring him to surrender possession of the property, within seven days of the service of the notice, to the person mentioned in the notice or to show cause against such surrender within the said period and if he fails to do so, the Deputy Commissioner or the Sub-divisional Magistrate [or the authorised officer] shall take possession of the property in such manner as may be prescribed.
>
> 4).....

28. Therefore, after the issuance of the notice leaving the matter hanging without pursuing it further or taking possession of the property as required under Article 7 of PO 16 of 1972 proves *mala fide.*

29. The petitioners claimed that no notice under section 5(l)(b) of the Ordinance, was issued and served upon the predecessor of the petitioners or the petitioners, as a result they were not aware of inclusion of the case property in the 'Kha' list. By the time they came to know about the inclusion of the case property in the 'Kha' list after long lapse of time and they failed to file application before the Court of Settlement for exclusion of the case property within the period as provided in section 7 of the Ordinance. Consequently, their application was rejected and they are now without any relief unless this court invokes its writ jurisdiction and interferes with the inclusion of the case property in the 'Kha' list. In this situation in our view this court in its writ jurisdiction has every reason to react to the manifest injustice and try to remedy it.

30. It appears from the annexure '2' to the affidavit-in-opposition that a survey was held by the respondent No.2 to find the position of the case property which proves that the owner Nur Islam Mollah was in possession on material dates. Later enlistment of the case property by the respondent No.2 in the 'Kha" list shows bad faith, dishonesty and improper motive on their part. The petitioners, therefore, do have an entitlement under Article 42 read with Article 27 and 31 that should now be protected under due process of law. The right to enforce a fundamental right under Article 44 is another fundamental right which gives the petitioners right to move this court even though their application was rejected by the Settlement Court on the ground of limitation.

31. It is also noted that there is nothing on record to show that the petitioners or their predecessor was ever asked to show cause about inclusion of the property or to surrender the same which has definitely denied the right of natural justice to the petitioners.

32. In the case of *Syeda Chand Sultana vs Bangladesh* reported in *1 MLR (HC) 310* which was affirmed by the Appellate Division and reported in *51 DLR (AD) 24*, it has been held that,

'Where the owners as Bangladeshi nationals having lawful title have been in possession of the property all through and never having ceased to manage or supervise the same and not having left the country and when there was no proper service of notice upon the petitioners as required under Article 7 of the PO No. 16 of 1972, the inclusion of the said building in the "Kha list" of abandoned properties being violative of the fundamental rights as contained in Article 42 of the Constitution is illegal, without jurisdiction and of no legal effect and, as such, the petitioners are entitled to invoke the writ jurisdiction for enforcement of fundamental rights.

33. In the facts and circumstances, this Court finds itself fully subscribing to the ratio above and finding on its applicability to the case at hand is now inclined to make the rule absolute.

34. In the result, the Rule is made absolute, without any order as to costs.

35. It is hereby declared that the inclusion of House No. 19/7, Pallabi, Mirpur, Dhaka in the "Kha" list of abandoned buildings, published in the Bangladesh Gazette Extra Ordinary on 23-9-1986 under serial No. 35 at page 9764 (25) is without lawful authority and is of no legal effect and the respondent No. 2 are, hereby, directed to exclude the petitioners building from the 'Kha' list of the Abandoned Buildings within 30 (thirty) days from the date of receipt of the certified copy of this Judgment and Order.

36. There is no Order as to costs.

Communicate a copy of this Judgment and Order to the Court of Settlement concerned at once.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

SM Ziaul Karim J
ANM Bashirullah J

Judgment
February 8th & 9th, 2012.

State.....
.....Respondent

vs

Md Wazed Ali and others.....Condemned-Prisoners*

Evidence Act (I of 1872)
Section 30

Confession of a co-accused is not substantive evidence in the sense that conviction on that alone must stand and section 30 has merely given the Court a discretion to call it an aid inappropriate case. It can be used only for lending assurance and is to be merely an element in considering the evidence in the case. If there is no other evidence or if the other evidence in the case is insufficient to establish the case against the accused, the confession cannot be taken into consideration against the co-accused. .....(64)

Hasmat Ali vs State, 53 DLR 170; State vs Azim Sarder, 6 MLR (AD) 103; Mofazzal Hossain alias Mofa vs State , 58 DLR 524; State vs Rafiqullah Khan, 7 BLC 480; Ustar Ali vs State, 3 BLC (AD) 53; Lutfur Nahar vs State, 27 DLR (AD) 29; Babor Ali Molla vs State, 44 DLR (AD) 10; State vs Lalu Mia, 39 DLR (AD) 117; Amir Hossain vs State, 37 DLR (AD) 179; Joygun Bibi vs State, 12 DLR (SC) 156; Bhuboni Sahu vs The King, LR 76 Indian Appeals 147; Kashmira Singh vs State of Madhya Pradesh, 1952 SCR (India) 526; Emperor vs Lalit Mohan Chakraborty, (1911) ILR 38 Calcutta, 559 at 588; Periyaswami Moopan (1931) ILR 54 Madras, 75 at 77; Joygun Bibi vs State, (I960) 12 DLR (SC) 156; Maqbool Hussain vs State, (1960) 12

*Death Reference No. 55 of 2006.

DLR (SC) 217; Monsur Ali vs State, 13 BLC 196; State vs Badsha Molla, 41 DLR 11, State vs Mofijuddin, 4 BLD 481 = 10 BLC 93, State vs Lalu Mia, 39 DLR (AD) 117, State vs Sree Ranjit Kumer Promanik, 45 DLR 660, Ali vs Crown 6 DLR (WP) 52, Rahman vs State of UP AIR 1972 (SC) 110, Shajahan vs State 46 DLR 575 and Mojibur Rahman vs State 13 MLR 88 ref.

M A Mannan Mohan, DAG with Md Mahbub-ul-Alam and Md Osman Goni, AAG—For the State.

Habib Hamza Chowdhury, Advocate—For the informant.

Judgment

Syed Ziaul Karim J: This reference under section 374 of the Code of Criminal Procedure (briefly as the Code) has been made by learned Additional Sessions Judge, first Court, Naogaon, for confirmation of death sentences of condemned-prisoners.

2. By the above appeals the appellants have challenged the legality and propriety of the judgment and order of conviction and sentence dated 26-6-2006 passed by learned Additional Sessions Judge, Naogaon, in Session Case No. 167 of 2002 convicting the appellants namely 1. Md Wazed Ali alias Mithu, 2. Md Harun-or-Rashid alias Harun, 3. Md Majed alias Pintu to death by hanging and also to pay a fine of Taka 10,000 each and convict-appellants namely (l) Mizanur Rahman, (2) under section 302, 34 of the Penal Code and sentencing each of them to death by hanging and also to pay a fine of Taka 1,00,000 each in default to suffer rigorous imprisonment for one year more, however acquitted accused Md A Karim.

3. This death reference and all these appeals having arisen out of a common judgment, these have been heard together and are being disposed of by this judgment.

4. Facts in brief are that Nurul Islam Mondal (since deceased) was the head-master of Dayaher non-Government registered Primary School of PS Porsha. On 11-2-2002 at 8-00 AM he went out for official meeting at Education Office at Posha, after visiting different places, he offered magrib prayer at Samnagar mosque wherein he had a talk with Tajuddin (PW 10), Abdur Rashid (PW 9) and Md Idris Ali (PW 7). Later, on the way to home by bi-cycle he was kidnapped by his full sister's sons i.e. suspected accused Wazed Ali, Md Mazed Ali and Md Harun. Reportedly there was a land dispute between them. Subse-quently accused Wazed Ali being nabbed by the Police admitted that all the accused murdered him by beating and interred the dead-body beside the Nalkata pond. His wife and other host of relatives searched him but to no avail. With these allegations Most. Salma, wife of deceased, as informant (PW l) lodged a first information report (briefly as FIR) which was recorded as Porsha PS Case No.4 dated 16-2-2002 corresponding to GR No. 13 of 2002 (Porsha).

5. During investigation accused Wazed Ali was arrested by the Police on 28-2-2002 and according to his admission body of deceased was exhumed and Dr Md Mahbub Alam Siddique (PW 12) held autopsy upon the cadaver and found multiple injuries and opined that death was due to combined effect of asphyxia and head injuries which was ante-mortem and homicidal in nature.

6. The Police after investigation submitted charge-sheet under section 364, 302, 34 of the Penal Code accusing the condemned-prisoners and three others.

7. Eventually the accused were called upon to answer the charge under section 364, 302, 34 of the Penal Code to which they pleaded not guilty and claimed to be tried.

8. In course of trial the prosecution in all examined thirteen witnesses out of twenty five charge sheeted witnesses.

9. The defence case as it transpires from the trend of cross-examination of prosecution witnesses are that of innocence and false implication. It was divulged in defence that due to internal feud and conflict between the parties the accused were falsely implicated in this case at the instance of local rivals.

10. After trial the accused were convicted as aforesaid.

11. The learned Deputy Attorney-General assisted by learned Advocate for the informant supports the reference and submits that accused Wazed Ali being arrested by Police confessed his guilt before the locals and according to the admission some incriminating articles like dead body, bi-cycle and one wrench were recovered. He adds that the evidence regarding inflicting wrench blow by Harun was corroborated by other evidence, particularly the doctor who held autopsy upon the cadaver and found multiple injuries upon the body. He adds that the FIR was lodged within normal gap of time. In support of his contentions he refers the case of *Hasmat Ali vs State 53 DLR 170* held:

> "The recovery of the blood-stained axe and lungi belonging to the convict constituted a strong circumstantial evidence, conclusive enough so as not to admit any hypothesis of his innocence."

He next refers the case of *State vs Giasuddin and others 51 DLR (AD)* held:

> "Motive is not a necessary ingredient of an offence under section 302 of the Code. The Court will see if sufficient direct evidence is there or not. If not, motive may be a matter for consideration, specially when the case is based on circumstantial evidence."

12. He submits that at the time of examination under section 342 of the Code the accused did not explain their position in respect of commission of offence. He candidly submits that there is no evidence against accused Mizanur Rahman and Abdur Rashid. He lastly submits that the judgment and order of conviction and sentence based on evidence on record which calls for no interference by this Court.

13. The learned Advocate appearing for the convict-appellants submits that the occurrence took place on 11-2-2002 and the dead-body was exhumed on 1-3-2002 and for the first time deceased's wife Most. Salma alias Rahinur Bibi (PW 1) identified the dead-body. He adds that the FIR was lodged after long lapse of four days from the date of occurrence without any proper explanation of delay which casts a serious doubt upon the prosecution case. He adds that it is absolutely a case of no evidence inasmuch as all the prosecution witnesses categorically narrated the extra-judicial exculpatory admission of accused Wazed Ali. So their evidences are not admissible. He adds that Magistrate and local Chairman were very important witnesses but they were not examined by the prosecution without any explanation which casts a serious doubt upon the prosecution case. He adds that the judgment and order of conviction and sentence based on misreading and non-consideration of evidence on record. In support of his contentions he refers the case of *State vs Azim Sarder land another 6 MLR (AD) 103* held:

> "Section 302/34 Charge of murder or section 396-dacoity with murder-applicability-Nature of proof.
>
> In order to sustain conviction and sentence for the charge against the accused, it must be proved by cogent and consistent evidence. When there is no legal evidence on record as to proof to the hilt connecting the accused with the commission of offence and when evidence are not satisfactory in the assessment of the court beyond all reasonable doubt, the accused cannot be convicted on any other hypothesis. The High

Court Division having found no reliable and consistent evidence against the convict-respondents set-aside the conviction and sentenced and acquitted the accused-respondents. As the impugned judgment of the High Court Division does not suffer from any legal infirmity, the leave petition is dismissed.

We have gone through the judgment of the High Court Division and it appears that there is absolutely no evidence from the side of the prosecution to implicate these two respondents in the commission of dacoity and murder. No one identified these two respondents as assailants or persons responsible for the commission of dacoity and murder. There is no confession by these two respondents. We have gone through the judgment and other available materials and it appears to us that there is no evidence against these two respondents. The learned Deputy Attorney-General failed to point out any legal infirmity in the judgment of the High Court Division which may call for our interference."

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

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

16. PW 1, Salma alias Rahinur Bibi wife of deceased and informant of the case. She deposed that her deceased husband was a headmaster of non-governmental primary school. On 11-2-2002 at 8-00 AM he came out for official work. Then after visiting different places he offered magrib prayer at Samnagar Jam-e-mosque wherein he had a talk with the locals at 7-00 PM. On the way to home he was kidnapped by accused Wazed Ali, Mazed All and Harun-or-Rashid and others. The accused admitted that they murdered her husband and interred the dead-body. She lodged the FIR. She proved the same as Exhibit. 1 and her signature on it as Exhibit. 1/1.

17. In cross-examination she stated that witness Mujaffar Hossain, was a local Chairman and she did not mention the name of accused Karim in FIR. She suspected accused Mizanur Rahman and Abdur Rashid and the primary school is about $1^1/_2$ mile away from her home and she was not with her husband. She was residing in her home. She heard about visiting different places from another teacher Fazlu. Witnesses Tajuddin, Idris Ali and Abdur Rashid told her about offering prayer by deceased. She could not see who kidnapped her husband. There was a land dispute between the accused and her husband. She denied the suggestion that the accused were falsely implicated in this case and no bi-cycle was recovered and deposing falsely.

18. PW 2 Md Sattar Shah alias Dhukha a local seizure list witness. He deposed that on 28-2-2002 at 6-00 PM SI Habib reached in the village Hargram with accused Wazed Ali alias Mithu. He along with other locals were present there. In their presence accused Wazed Ali told that on 11-2-2002 at 7-19 PM while the deceased reached beside the Jex pond from Samnagar by bi-cycle, then accused Mazed, Harun assaulted him and he succumbed to the injuries. They strangulated him. The accused Mazed and Harun threw bi-cycle into the pond and the accused admitted that they interred the dead-body beside the Nalkata pond. Later, bi-cycle was recovered from there. On the same night accused Harun was arrested who also admitted his guilt. The accused assaulted the deceased by wrench. The wrench belonged to Harun. He signed in the seizure list (Exhibit.2) and his signature on it Exhibit. 2/1. He also proved the bi-cycle as Mat. Exhibit. i.

19. In cross-examination he stated that accused Wazed Ali was in the Police Van, who

confessed that accused Harun assaulted the deceased. He denied the suggestion that no bi-cycle was recovered at his instance. He was present before the Magistrate, wrench was not brought out by accused Harun. The Police did not assault Wazed and he had no knowledge about the occurrence. He denied the suggestion that he was deposing falsely.

20. PW3 Mudasser Hossain, a local witness. He deposed that he heard that since 11-2-2002 master was missing. Later, he happened to be at the home of deceased Nurul Islam, he asked about the occurrence to accused Wazed Ali who denied the same. Subsequently on Friday he went to their home wherein accused Karim admitted and he was with accused Wazed. After lodging FIR the accused on dock fled away. Police arrested Wazed alias Mithu who admitted that he along with other accused murdered his maternal uncle Nurul Islam and interred him. Subsequently, accused Wazed Ali pointed out the dead-body and the same was exhumed in presence of Magistrate and other locals. Later, Magistrate sent the dead-body to the morgue. On 1-3-2002 he signed in seizure list (Exhibit. 2(ক) and his signature on it Exhibit. 2 (খ)/1. On recalled by prosecution, he stated that on 12-6-2002 Police seized two deeds (Exhibits. 2(খ) his signature on it 2(খ)/1. He also signed in inquest report (Exhibits. 3) and his signature on it 3/1.

21. In cross-examination he stated that he did not see the occurrence however heard it from Van puller Abdul. He was not examined by the IO. He arrested accused Wazed Ali alias Mithu with the help of Police. He was present at Hargram Bazar when Police came with accused Wazed wherein 200/400 locals were thronged. He was present when the accused got down from the Police Van. He denied the suggestion that the accused did not murder the deceased deposing falsely.

22. PW 4 Hafizur Rahman alias Hafizul Haq a local witness. He deposed that on 28-2-2002 Police arrested accused Wazed Ali and at his showing dead-body of Nurul Islam was brought out. On the following day Magistrate and Police came. The locals and wife of deceased identified the dead-body. Later, it was sent to the morgue for autopsy. He was examined by the Police.

23. In cross-examination he stated that at the time of recovery hands of Wazed Ali were tied up. Accused Wazed Ali remained in northern side and dead-body was found at the southern part. He, Azhar and Harun were present there but accused Wazed was not allowed to go where the dead body was found. Such statement was also stated to the Police. He denied the suggestion that he was deposing falsely.

24. PW 5, Md Khalilur Rahman, a local witness. He deposed that deceased Nurul Islam was the headmaster of a primary school. On 11-2-2002 he went out for official duty but did not return in time. They searched him but to no avail. On 16-2-2002 a case was filed. The accused Wazed Ali fled away to Naogaon. Police arrested him and according to his admission the dead-body and bi-cycle were recovered. The accused interred the dead-body. At the time of recovery locals and Chairman and other police personnel were present. Accused Wazed Ali disclosed the names of others and admitted that they murdered the deceased master. Accused Harun inflicted a wrench blow of shallow machine on the head of deceased and other accused inconsistently assaulted him. Deceased master instantaneously died at the spot. One spade and a bag were brought from the house of Mizanur Rahman. Then, bi-cycle was thrown into the pond and the dead-body was interred. At that time he was examined by the Police. On being re-called he stated that he was examined by the Police on 12-5-2002. On 16-2-2002 and 20-2-2002 Police seized some deeds and took it in his jimma.

25. In cross-examination he stated that he did not see the occurrence and there was a dispute between the deceased and accused. The hands of accused Wazed was tied up and he was standing at the northern side of Khari. He could not remember when accused Wazed talk with the Police and denied the suggestion that he did not make admission to the Magistrate and Police and no dead-body was recovered at his instance and deposing falsely.

26. PW 6 Md Azhar a local witness. He deposed that on 28-2-2002 at 7-00 PM he was called out by Sattar member and Police wherein he found accused Wazed Ali and according to his showing dead-body was recovered. The accused Wazed told that three including him assaulted the deceased and the dead-body was interred. He proved inquest report as Exhibit. 3 and his signature on it as Exhibit. 3/1.

27. In cross-examination he stated that he had no knowledge about murder of deceased. He signed on a plain paper, at that time Wazed Ali was tied up. On 28-2-2002 he was examined by the Police. He denied the suggestion that no dead-body was recovered at the instance of accused Wazed who did not disclose the names of Harun and Mazed and deposing falsely.

28. PW 7 Idris Ali a local witness. He deposed that the deceased Nurul Islam offered magrib prayer at Samnagar Jam-e-mosque. He heard that accused Harun and Wazed alias Mithu were arrested and at their instance the dead-body and bi-cycle were recovered.

29. In cross-examination he stated that he could not remember from whom he heard the occurrence.

30. PW 8 Shamsun Nahar daughter of deceased. She deposed that on 11-2-2002 her father went out for official duty but did not return in time. She heard from witnesses Idris and Tajuddin that her father offered prayer in Samnagar Jam-e-mosque. They searched him, then case was filed. The Police arrested accused Wazed Ali and Harun and on their admission the dead-body was recovered but one sweeper exhumed the dead-body. She identified her father's body. Accused Mithu, Harun and Mazed are her cousins and for the cause of land dispute they murdered her father.

31. In cross-examination she stated that accused Mithu was arrested from Samnagar by Police. He denied the suggestion that accused murdered her father and deposing falsely.

32. PW 9 Abdur Rashid, a local witness. He deposed that he also offered prayer with deceased. After 18/19 days dead-body of deceased master was exhumed and they identified it. They found accused Mithu and Harun were tied up and locals were whispering that they murdered the deceased. Police did not examine him.

33. In cross-examination he stated that he could not say by which the accused murdered the deceased.

34. PW 10 Tajuddin, a local witness. He offered prayer with deceased. After 18 days dead-body of deceased was found and they also identified it. Later, he heard that accused murdered the deceased and at their showing dead-body was recovered.

35. In cross-examination he stated that he has no knowledge who murdered the deceased master. At that time the hands of the accused were tied up. He denied the suggestion that he was deposing falsely.

36. PW 11 SI Sheikh Shahin Kamal deposed that on 16-2-2002 Salma alias Rahinur Begum lodged FIR recorded by OC Md Mofizuddin and filled up its form. The case was entrusted to him for investigation. He visited the place of occurrence, prepared sketch mp and index (Exhibits. 4 and 5) and his signatures on it (Exhibits. 4/1 and 5/1). He recorded the statement of witness Birajuddin. On 22-2-2002 the

case was handed over to SI Habibur Rahman for investigating as he went on leave.

37. In cross-examination he stated he examined witnesses Birajuddin at the PO

38. PW 12 Dr Md Mahbub Alam. He deposed that on 1-3-2002 he was attached with Naogaon sadar hospital as medical officer. He held autopsy upon the cadaver of slain Nurul Islam and found the following injuries:

"1. One oblique lacerated wound on the forehead measuring about 3" x $^{1}/_{8}$" muscle depth.

2. One hamatoma on right parietal region of he scalp measuring about 2"x $1^{1}/_{2}$".

3. One hamatoma on the occipital region of the scalp measuring about 2" x 2".

39. On dissection of neck—a linear congestion on the anterolateral aspect of neck just below the level or thyroid-cartilage affecting the subcutaneous tissues e.g. muscles, blood vessels, Nerves and larynx.

40. O/D of injury Nos. 1, 2 and 3 show congestion of under ling soft tissues with ante-mortem clotted blood in the same.

মৃতের ঝিল্লি ঃ Partially decomposed.

ফুসফুস ঃ Congested.

ক্ষুদ্রান্ত্র, বৃহদান্ত্র ঃ Partially decomposed.

41. In our opinion- the cause of death of the deceased was due to the combined effect of asphyxia and head injuries as a result of the injuries stated above which was ante-mortem and homicidal in nature".

42. PW 13 SI Md Habibur Rahman. He deposed that on 22-2-2002 he was attached with Porsha Police Station. The case was entrusted to him for investigation. He visited the place of occurrence and recorded the statements of the witnesses under section 161 of the Code and arrested accused Wazed and Harun and according to their showing wrench and dead-body of deceased were recovered which was identified by the nephew of deceased. According to pre-plan accused murdered the deceased. Later, interred him by spade and a bag brought from the house of accused Mizanur Rahman. After investigation he submitted charge-sheet against accused. He held inquest and prepared sketch map and index (Exhibits. 7 and 8). He seized wrench and prepared list.

43. In cross-examination he stated that he did not produce the accused for recording confession under section 164 of the Code. He denied the suggestion that without proper investigation he submitted a fictitious charge-sheet.

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

45. It is indisputable that slain Nurul Islam was lynched.

46. On going to the materials on record it transpires that prosecution in all examined thirteen witnesses out of twenty five charge sheeted witnesses. Of them PW 1 is the wife of the deceased and informant of this case. PWs 2-10 are the local witnesses and heard the occurrence. PWs 11 and 13 investigated the case, of whom PW 13 submitted charge-sheet accusing the accused. PW 12 is a doctor held autopsy upon the cadaver of Nurul Islam.

47. We should bear in mind, credibility of testimony oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. When dealing with the serious question of guilt or innocence of persons charged with crime, the following principles should be taken into consideration:—

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

cutor.

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

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

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

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

48. Inspite of the presumption of truth attached to oral evidence under oath if the Court is not satisfied, the evidence inspite of oath is of no avail.

49. It is true that there was no eye witness of the occurrence. The prosecution case absolutely rest upon the extra judicial statement of accused Wazed.

50. It appears to us that there is absolutely no evidence against other four accused namely Helal, Aslam, Musaddek, and Mannan alias A. Mannan, save and except their names were disclosed by other two co-accused, viz Milon and Rabiul alias Hubul. We also find that there is no substantive corroboration with the Judicial and extra-Judicial confessions of co-accused Milon and Rabiul alias Hubul. So such confessions should not be used against them.

51. It is well settled that the confession of an accused is not a substantive piece of evidence against co-accused who did not confess and such evidence alone without any substantive corroborative evidence cannot form basis of conviction of co-accused. With this regard reliance is being placed in this case of *Mofazzal Hossain alias Mofa vs State 58 DLR 524.* This view receives support in the cases of *State vs Rafiqullah Khan 7 BLC 480, Ustar Ali vs State 3 BLC (AD) 53, Lutfur Nahar vs State 27 DLR (AD) 29, Babor Ali Molla vs State 44 DLR (AD) 10, State vs Lalu Mia 39 DLR (AD) 117, Amir Hossain vs State 37 DLR(AD)179, Joygun Bibi vs State 12 DLR (SC) 156.*

52. Therefore we hold that the Tribunal without considering the settled principle of law and the materials and evidence on record most erroneously convicted them which cannot be sustained.

53. The explanation given under the section includes within the term "offence" used in the section, the abetment or attempt to commit the offence. The language of the section does not render the confession of a co-accused as evidence within the definition of section 3 of the Evidence Act. It simply says that the court may "take into consideration such confession". In the case of *Bhuboni Sahu vs The King,* reported in *LR 76 Indian Appeals page 147,* the Privy Council stated as follows:

> "But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence."

54. In view of the observation above, the questions arose in what way can a confession be used in support of other evidence and whether it can be used to fill in missing gaps.

The questions were considered by the Supreme Court of India in the case of *Kashmira Singh vs State of Madhya Pradesh,* reported in *1952 SCR (India) 526.* After referring approvingly to the observations made by Sir Lawrence Jenkins in the case of *Emperor vs Lalit Mohan Chakrabarty,* reported in *(1911) ILR 38 Calcutta, 559 at 588* where it was said that such a confession can only be used to "led assurance to other evidence against a co-accused" and to the observation of Reilly, J. in re *Periyaswami Moopan* reported in *(1931) ILR 54 Madras, 75 at 77* that "where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in section 30 may be thrown into the scale as an additional reason for believing that evidence", the Supreme Court of India held as follows:

> "The proper way to approach a case of this kind is first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise when the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

55. We may as well refer to the views expressed by the Supreme Court of Pakistan is two cases. In the case of *Joygun Bibi vs State, (I960) 12 DLR (SC) 156* it was held that the High Court was not justified in discarding the confession of co-accused Abdul Majid, in connection with the question of the guilt of the appellant Joygun Bibi. It was found that confession of Abdul Majid was by no means the only material against Joygun Bibi but that there was other evidence which, along with the confession of Abdul Majid, pointed to her guilt.

56. In the case of *Maqbool Hussain vs State,* reported in *(1960) 12 DLR (SC) 217* the Supreme Court of Pakistan made the following observations regarding the use of a confession under section 30 of the Evidence Act-

> " The language of the section is very guarded and lends no warrant to the inference that such a statement made by a co-accused could be treated as substantive evidence against the other person sufficient to sustain his conviction. It is well settled that there ought to be other evidence, whether direct or circumstantial, linking such a person with the crime. Before a confession made by a co-accused could be adverted to, in adjudging the guilt of that person."

57. The upshot of the discussions above is that confession of an accused cannot be treated as substantive evidence against another accused but that it can only be used "to lend assurance to other evidence."

58. In the instant case, there is no doubt that the above four appellants have been implicated in the murder in the confessional statement of two accused, but the said confessional statements cannot be taken into consideration unless there exists independent evidence, direct or circumstantial, to connect the appellants with the murder. There is no direct evidence in this case against them. So such confessions should not be used against them.

59. In Indian Jurisdiction we find that while dealing with a case as regards the confession of co-accused affecting himself and some other persons who were being tried jointly with him for the same offence, their Lordships of the Supreme Court of India have laid down the law as follows:

" In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the Court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the Court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right, *AIR 1964 SC 1184.*

60. In a case it has been observed as follows:

"In dealing with a case against an accused person, the Court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in section 30, *AIR 1949 PC 257+ AIR 1952 SC 159.*

61. Under section 30, Evidence Act, confession of a co-accused can only be taken into consideration but is not in itself substantive evidence. *AIR 1957 SC 381+AIR 1964 AP 548.*

62. Where such statement is exculpatory it cannot be used against another accused in support of his conviction. It would be dangerous to do so. *AIR 1967 Goa 31 at p.25.*

63. It has been laid down that confessions of co-accused are not evidence as defined in section 3 and no conviction can be founded thereon. But, if there was other evidence on which a conviction be based, they can be referred to as lending assurance to that conclusion and for fortifying it. *AIR 1956 SC 56.*

64. The law is well-settled that the confession of a co-accused is not substantive evidence in the sense that conviction on that alone must stand and section 30 has merely given the Court a discretion to call it in an inappropriate case. It can be used only for lending assurance and is to be merely an element in considering the evidence in the case. If there is no other evidence or if the other evidence in the case is insufficient to establish the case against the accused, the confession cannot be taken into consideration against the co-accused. It cannot be called in aid to supplement evidence otherwise insufficient and in no case can it be used to fill up gaps in the prosecution evidence. *AIR 1957 AP 758 + AIR 1952 SC 139 + AIR 1956 SC 56+AIR 1957 Orissa 172.*

65. The confession of a co-accused person can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. *AIR 1952 SC 159 +AIR 1964 SC 1184 + AIR1965 Orissa 170.*

66. A confession can only be used to "lend assurance to other evidence against a co-accused *AIR 1966 Pat. 448.*

67. Their Lordships held that one of the conditions in section 30 of the Evidence Act is that the confession must implicate the maker substantially to the same extent as the other accused against whom it is sought to be taken into consideration. Where he was really trying to throw the main blame on the other accused and make out that he was an unwilling spectator to the crime committed by the other accused, the confession cannot be used at all against the other accused. But because there was differences between his confession and the confessional statement of the other accused, the confessional statement cannot be condemned in

limini. *AIR 1957 SC 216+(1966) 142 Cut LT 1140.*

68. The confessional statement made by one accused could only be taken into consideration against other co-accused if there is other acceptable evidence against the other co-accused for the purpose of lending further assurance which the Court may need. Hence in the absence of any other evidence in this case the confessional statement made by any one of the appellants cannot be used against the other appellants. *AIR 1964 SC 1184 + 1977 Crl LJ 1309.*

69. The confessions of co-accused are not evidence but if there is other evidence on which a conviction can be based, they can be referred to as lending some assurance to the verdict. *AIR 1956 SC 56 + AIR 1968 SC 832.*

70. The Tribunal convicted those accused considering their absconsion for certain period of time, and the prosecution also tried to make nexus between the absconsion and the crime of murder.

71. According to the submissions from prosecution and observations made by the Tribunal, it indicates that some accused remained absconding from the place of occurrence for certain period, which is a circumstances leading to the inference of guilt. In our view it is mere submissions and observation of the Court below. The prosecution measurably failed to establish by evidence that soon after the occurrence, the accused had any responsibilities to discharge their duties towards the occurrence. It is well settled that mere abscondence cannot always be circumstances leading to the inference of guilt of the accused. In this case, there is no evidence against the accused. Hence their subsequent abscondence cannot be treated as a circumstances leading to the inference of involvement in the crime. Mere abscondence cannot always be a circumstances which should lead to an inference of guilt of the accused. Sometimes out of fear and self respect and to avoid unnecessary harassment even an innocent person remain absconding for sometime.

72. With this regard reliance are being placed in the cases of *Monsur Ali vs State 13 BLC 196.* Similar views were taken in the cases of *State vs Badsha Molla, 41 DLR 11, State vs Mofijuddin 4 BLD 481 = 10 BLC 93, State vs Lalu Mia, 39 DLR (AD) 117, State vs Sree Ranjit Kumer Promanik, 45 DLR 660, Ali vs Crown 6 DLR (WP) 52, Rahman vs State of UP AIR 1972 (SC) 110, Shajahan vs State 46 DLR 575, Mojibur Rahman vs State 13 MLR 88.*

73. In the light of discussions made above and the preponderant judicial views emerging out of the authorities referred to above, we are of the view that the prosecution successfully proved the charge against accused Milon and Rabiul alias Hubul beyond all reasonable doubt but failed to prove the charge against accused Aslam, Musaddek, Helal, Mannan alias A Mannan.

74. In the result:—

(A) Death reference No. 43 of 2006 is accepted in part.

(B) The impugned Judgment and order of conviction and sentence dated 18-5-2006 passed by learned Judge of Nari-o-Shishu Nirjatan Daman Tribunal No.2, Bogra in Nari-o-Shishu case No. 288 of 2004, so far as it relates to the accused Milon and Rabiul alias Hubul is maintained. Sentences imposed upon them stand confirmed. Sentence of death shall be executed in terms of the Judgment recorded in Nari-o-Shishu case No. 288 of 2004.

(C) The impugned judgment and order of conviction and sentence dated 18-5-2006 so far as it relates to accused Aslam, Musaddek, Helal and Mannan alias A. Mannan is set-aside, they are acquitted from the charge. They be set at liberty if not detained

in any other case.

D) Accordingly Criminal appeal No. 2185 of 2006 is allowed in part.

E) Jail appeal Nos. 407 of 2006 and 409 of 2006 are dismissed.

F) Jail appeal Nos. 408 of 2006, 410 of 2006, 411 of 2006, and 412 of 2006 are allowed.

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

Ed.

High Court Division
(Special Original Jurisdiction)

Zinat Ara J
SH Md Nurul Huda
Jaigirdar J

Judgment
April 6th, 2014.

Shahidul Islam (Md)...
.....Petitioner

vs

Assistant Commissioner of Taxes, and others....Respondents*

Income Tax Ordinance (XXXVI of 1984)
Sections 83A(5) and 93

There was scope for re-opening of a case by the DCT/the ACT under section 93 of the Ordinance for the relevant assessment year. However, re-opening must be on definite information regarding concealment. The ACT ought to have given an information to the assessee about the concealment of income as required under section 83A(5) of the Ordinance so as to enable the assessee to controvert such allegations of concealment. .....(7)

Mustafa Kamal Mansoor—For the Petitioner.

Mahfuza Begum, AAG—For the Respondents

*Writ Petition No. 2426 of 2014

Judgment

In this application under article 102 of the Constitution, the assessee-petitioner has challenged the legality of the notice dated 6-6-2013 issued by the Assistant Commissioner of Taxes, Circle-26, Taxes Zone-2, Chittagong under section 93 of the Income Tax Ordinance, 1984 (shortly, the Ordinance) with reference to TIN No. 349-100-2919 for the assessment year 2006-2007 relating to re-opening of the self- assessment case of the assessee-petitioner submitted under section 83A(1) of the Ordinance.

2. It has been stated that the assessee-petitioner submitted his income tax return under section 83A of tne Ordinance under self-assessment scheme for the assessment year 2006-2007 before the Assistant Commissioner of Taxes, Circle-11 (now Circle-26), Chittagong (shortly, the ACT) and the assessment was completed accordingly. Subsequently, the ACT issued notice under section 93 of the Ordinance for re-opening of the case. Hence, this application.

3. Mr Mustafa Kamal Mansoor, the learned Advocate for the assessee-petitioner, submits that there is no scope to re-open the case under section 93 of the Ordinance. He further submits that from the letter issued by the assessee (Annexure-D to the application), it appears that the information relating to concealment of income was not supplied to the assessee and so, a rule nisi may be issued in the matter.

4. In reply, Ms Mahfuza Begum, the learned Assistant Attorney-General, takes us through the provisions of section 83A(5) of the Ordinance and submits that sub-section (5) of section 83A of the Ordinance was inserted by the Finance Act, 2003 and therefore, in the assessment year 2006-2007 there was legal scope for re-opening of the case under section 93 of the Ordinance by the taxes authority.

5. We have examined the application and the materials on record and considered the provisions of section 83A of the Ordinance.

6. It transpires that by the Finance Act, 2003, sub-section (5) was added to section 83A of the Ordinance which reads as follows:-

"Notwithstanding anything contained in this section the Deputy Commissioner of Taxes may initiate proceedings under section 93 if definite information regarding concealment of income comes to his possession."

7. Therefore, there was scope for re-opening of a case by the DCT/the ACT under section 93 of the Ordinance for the relevant assessment year. However, re-opening must be on definite information regarding concealment. Therefore, the ACT ought to have given an information to the assessee about the concealment of income as required under section 83A(5) of the Ordinance so as to enable the assessee to controvert such allegations of concealment.

8. In view of the above, we are not inclined to issue any Rule in the matter.

9. However, the ACT (Respondent No. 1) is directed to give information to the assessee-petitioner about his concealment of income within one month from the date of receipt of this order as prayed for by the assessee through annexure-D to the writ petition.

10. With the above observations and directions, the application is disposed of.

No cost.

Communicate this order to respondent No. 1 at once.

Ed.

High Court Division
(Criminal Revisional Jurisdiction)

Borhanuddin J
KM Kamrul Kader J } Begum Khaleda Zia.....
.....Accused Petitioner

vs

Judgment
April 23rd, 2014. } State and another.....
.....Opposite-Parties*

Code of Criminal Procedure (V of 1898)
Sections 221, 222 and 342

Framing of charge is beginning of a case, the accused-petitioner will get ample opportunity to prove her innocence at the trial by adducing evidence and also under section 342 of the Code. .....(23)

State vs Jobaida Rashid, 49 DLR 119; Abdul Hashem vs State, 27 DLR 242; State vs Md Shafiq-ul-Islam, 40 DLR 310; M Ershad vs State, 45 DLR 533; Abdur Razzaque @ Geda vs State, 48 DLR 457; Moslem Ali Mollah vs State, 48 DLR 427; Abul Kaslam Azad vs State, 48 DLR 294; MA Motalib vs State, 13 DLR 80; Hachi Meah and another vs State, 17 DLR 692; Bashir Kha vs State, 50 DLR 199; W. Stanley vs State, AIR 1956 SC 116; Bireehh Bhuiyan and others vs State of Bihar, AIR 1963 SC 1120; Makkhan vs Emperor, AIR 1945A 181; Syeda Sajeda Chowdhury vs State (Criminal Miscellaneous Case No.45295 of 2012); Taher Hossain Rushdi vs State, 6 MLR 83 = 6 BLC 282 and Taher Hossain Rushdi vs State, 7 MLR (AD) 116 = 7 BLC (AD) 45;

Khandker Mahbub Hossain, Senior Advocate, with Moudud Ahamed, Rafiqul Islam Miah, AJ Md Ali, AM Mahbub Uddin, Advocates—For the accused-Petitioner. (In both applications)

Mahbubey Alam, Attorney-General, with Murad Reza., Additional Attorney-General Momtazuddin Fakir, Additional Attorney-General Md Selim, DAG Aminur

*Criminal Revision Case No. 484 of 2014.

Rahman Chowdhury, AAG ABM Mahbub AAG MA Kamrul Hasan Khan, AAG—For the State.

Md Khurshid Alam Khan, Advocate—For the Anti-Corruption Commission.

Judgment

Since both the applications filed by the same accused petitioner against order of framing charge dated 19-3-2014 and facts of two cases are related to one another, points of law involved are also same, we are disposing of the applications by a single order.

2. Facts of Special Case No. 3 of 2010 corresponding to Metropolitan Special Case No. 177 of 2009 arising out of Tejgaon Police Station Case No. 8 dated 3-7-2008 corresponding to ACC GR Case No.102 of 2008, in short, are that one Harun-ur-Rashid, Sub-Assistant Director, Anti-corruption Commission, Head Office, Dhaka, lodged an FIR with Ramna Police Station under sections 409/109 of the Penal Code read with section 5(2) of the prevention of Corruption Act, 1947, and Rule 15 of the Emergency Power Rules 2007, implicating 7 persons including the accused petitioner Begum Khaleda Zia alleging that when she was Prime Minister of the country during 1991-1996, opened a current account being No. 5416 in Sonali Bank, Ramna Branch, under the name and style "প্রধানমন্ত্রীর এতিম তহবিল". In the said account a donation of US Dollar 12,55,000 equivalent to Bangladeshi Taka 4,44,81,216 was deposited on 9-6-1991 but it was not disbursed amongst any of the orphanage till 5-9-1993, no rule or policy was made to distribute the amount deposited in the account. She formed "Zia Orphanage Trust" with her two sons and with the son of her sister-in-law. On 13-11-1993, a cheque of Taka 2,33,33,500 from the account of 'Prime Minister Orphanage Fund' was issued in favour of 'Zia Orphanage Trust' to establish an orphanage at Bogra and the cheque was deposited to the said Trust account in Sonali Bank, Gulshan Branch. On 4-2-1993 Taka four lakhs was withdrawn from the account and 2.79 acres land was purchased at the cost of Taka 2,77,000 in the name of Zia Orphanage Trust, rest of the money lying unutilized without establishing any orphanage or spending for welfare of any orphans. Consequently, the said money has grown up to Taka 3,37,09,757.32 as on 12-4-2006. Thereafter, the accused petitioner as Prime Minister arranged withdrawal of Taka 3 crore 30 lakhs from the account by 6 cheques dated 12-4-2006, 15-6-2006 and 4-7-2006 respectively through her sons and relatives. On 12-4-2006, Taka 50 lakhs was encashed and kept in fixed deposit in the name of Kazi Salim-ul-Huq. On 16-7-2006 said FDR was encashed and opened a new FDR in the name of Zia Orphanage Trust. Apart from that, two other FDR accounts were opened in the name of Zia Orphanage Trust on 9-7-2006 and 27-6-2006, by the remaining one crore another FDR account was opened in the name of Kazi Salim-ul-Huq. Money of the orphanage fund also kept in the personal accounts of Syed Ahamed, Giasuddin and others. Thus, the accused-petitioner in collusion with other accused persons misappropriated or helped others to misappropriate about Taka 2,10,71,643 using the name of Zia Orphanage Trust and committed the offence under the aforesaid sections.

3. The case was investigated by one Harun-ur-Rashid, Assistant Director of Anti-Corruption Commission (Anu-o-Tadanta-1) and after holding investigation, he submitted charge-sheet on 5-8-2009. However, the accused-petitioner was enlarged on bail by this Division. The case was transferred in the Court of Metropolitan Senior Special Judge, Dhaka, and numbered as Metropolitan Special Case No. 177 of 2009 and the learned Metropolitan Senior Special Judge, Dhaka, took cognizance of offence against the accused-petitioner along-

with other accuseds. Against that an application under section 561A of the Code of Criminal Procedure has been moved before this Division for quashing the proceeding of the case. A Division Bench of this court issued rule on 15-10-2009. After hearing the rule, a Division Bench of this Court has been pleased to discharge the rule vide judgment dated 12-12-2011.

4. Being aggrieved, the accused petitioner preferred Criminal Petition for Leave to Appeal No.134 of 2012 before the Appellate Division of the Hon'ble Supreme Court.

5. In the meantime, the case has been transferred to the learned Special Judge, Court No. 3, Dhaka, and numbered as Special Case No. 3 of 2013. On 19-3-2014 charge was framed.

6. Facts of the Special Case No. 5 of 2013 corresponding to Metropolitan Special Case No. 30 of 2012 arising out of Tejgaon Police Station Case No. 15 dated 8-8-2011 corresponding to ACC GR Case No.84 of 2001, in brief, are that one Harun-ur-Rashid. Assistant Director (Special inquiry and investigation-1) Anti-Corruption Commission, Head Office, Dhaka, lodged an FIR with Tejgaon Police Station against four accused persons including the accused-petitioner alleging *inter alia* that an inquiry team was formed on 5-10-2009 and after inquiry a report was submitted. From the report, it reveals that the accused-petitioner as Prime Minister of the country during the tenure of 2001 to 2007, formed 'Shahid Ziaur Rahman Charitable Trust' and the Trust was registered vide deed No.IV-33 dated 26-10-2004 with Gulshan Sub-registry Office. The accused- petitioner is the first trustee and her two sons are members of the said trust. The accused-petitioner as first managing trustee opened an account on 9-1-2005 in the Sonali Bank, Prime Minister's Office Branch. Money was deposited in the account from illegal sources. On 16-1-2005 Taka 26,00,000 through pay order No. 039440; Taka 26,00,000 through pay order No.039438; Taka 31,00,000 through pay order No. 039446; Taka 26,00,000 through pay order No.039439; Taka 26,00,000 through pay order No. 039437; in total Taka 1,35,00,000 was deposited in the said account. Those cheques were issued in the name of Metro Makers and Developers Ltd. The Managing Director of Metro Makers and Developers Ltd. informed that he never paid or gifted any amount to Ziaur Rahman Charitable Trust. He further informed that Monirul Islam Khan, the then Assistant Private Secretary of the Mayor of Dhaka City Corporation managed to deposit the said amount using the name of Metro Makers and Developers Ltd. He also informed that Haris Chowdhury, the then Political Secretary of Prime Minister was given the amount him to deposit the same in the account of said Trust. On 18-1-2005 Taka 27,00,000 was deposited in the account, another amount of Taka 6,18,89,529 was deposited from various accounts of BNP to the said account of Trust. Several notices were issued upon the accused petitioner to make statement regarding the matter on 15-2-2010, 16-3-2010, 28-3-2010 and 20-4-2010 but she did not make any statement. A piece of land measuring 42 kathas was purchased in consideration of Taka 6,52,07,000 paying excess amount of Taka 1,24,93,000 to the owner of land Suria Khan. But mutation khatian was not opened in the name of Trust till date and no rents or taxes paid relating to the land. Thus the accused-petitioner in collusion with other accused persons committed the offence under the aforesaid sections.

7. After holding investigation Assistant Director of Anti-Corruption Commission (Anu-0-Tadanla-l), submitted charge-sheet before the learned Chief Metropolitan Magistrate, Dhaka, on 16-1-2012. However, the accused petitioner was enlarged on bail. Being ready, the case has

been transferred in the court of Metropolitan Senior Special Judge, Dhaka, and numbered as Metropolitan Special Case No. 30 of 2012 and the learned Metropolitan Special Judge has been pleased to take cognizance of offence against the accused-petitioner alongwith other accuseds. Thereafter, the case has been transferred in the court of learned Special Judge, Court No.3 Dhaka, and numbered as Special Case No. 5 of 2013. Charge was framed on 19-3-2014.

8. In both the cases, learned Special Judge framed charge against the accused-petitioner alongwith other accused persons on 19-3-2014. Having aggrieved, the accused-petitioner preferred two separate applications under section 10(1A) of the Criminal law Amendment Act, 1958.

9. Mr Khandker Mahbub Hossain. Mr Moudud Ahamed, Mr Rafiq-ul-Islam Miah, Mr AJ Mohammad Ali and Mr AM Mahbubuddin, learned Advocates have appeared before us and made submissions separately on behalf of the accused-petitioners.

10. Mr Khandker Mahbub Hossain, learned Advocate submitted that though the accused-petitioner was present in the Court but the Court below while framing charge did not ask the accused-petitioner whether she admits that she has committed the offence with which she is charged and thus violated the mandatory provisions of section 242 of the Code of Criminal Procedure and, as such, the impugned order liable to be set-aside. By referring sections 23 and 30 of the Trust Act, he submitted that since the Trust is a private one, charge under section 5(2) of the prevention of corruption Act, is not applicable in the instant case and, as such, the instant proceeding is *malafide* and *ex-facie* illegal.

11. Mr Moudud Ahamed, learned Advocate submitted that it appears from the impugned order passed in Special Case No. 3 of 2013 that the Court below heard the learned Advocates of both the parties, considered record of the case and documents submitted therewith but rejected the application under section 241 A of the Code of Criminal Procedure with a finding that: "পর্যালোচনায় দেখা যায় আসামী বেগম খালেদা জিয়ার পক্ষে গত ২-৪-২০১৩ ইং তারিখে ফৌজদারী কার্যবিধির ২৪১এ ধারামতে দরখাস্ত দাখিল করা হলে ও আসামীপক্ষ হতে উক্ত দরখাস্ত শুনানী না করায় নামঞ্জুর করা হয়।" According to Mr Ahamed, such finding is contradictory and not conceivable, as such, the impugned order is not tenable in the eye of law and liable to be set-aside.

12. Mr AJ Md Ali, learned Advocate mainly submitted that before framing charge under section 242 of the Code of Criminal Procedure, the Court below did not exercise its jurisdiction under section 241A of the Code of Criminal Procedure and thus failed to comply with judicial function of examination of all issues involved and required for framing charge and, as such, the impugned orders are liable to be set-aside. He also submitted that Court below failed to go through the process of scrutiny and examination records/documents of the case and framed charge without adherence to requirement of law which resulted in an error and illegality, as such, orders of framing charge are liable to be set-aside. He next submitted that the Anti-Corruption Commission acted in breach of Rule 7(1)(5) of the Anti-Corruption Commission Rules, 2007 relating to inquiry, no inquiry report was submitted to the Anti-Corruption Commission within the time stipulated in Rule 7(1) of the Rules, the ACC also acted in breach of Rule 10 of ACC Rules relating to investigation.

13. Mr AM Mahbubuddin, learned Advocate by adopting submissions of Mr Khandkar Mahbub Hossain, Mr Moudud

Ahamed and Mr AJ Md Ali, further submitted that the original file of "Prime Minister Orphanage Fund" is not available which is apparent from the charge-sheet wherein it is stated that former director of the office of Chief Advisor admitted that: "তৎকালীন সময়ের প্রধানমন্ত্রীর অনুমোদন থাকার কথা উক্ত মূল নথি অফিসে ব্যাপকভাবে তল্লাশী করেও পাওয়া যায়নি।" which proves that the accused-petitioner has no link with the alleged offence. He also submitted that in a criminal case no one can be prosecuted without conclusive *prima-facie* case, as such, instant proceedings are *malafide* and liable to be set-aside.

14. In support of their submissions, learned Advocates referred to the case of *State vs Jobaida Rashid,* reported in *49 DLR 119;* the case of *Abdul Hashem vs State,* reported in *27 DLR 242;* the case of *State vs Md Shafiq-ul-Islam,* reported in *40 DLR 310;* the case of *HM Ershad vs State,* reported in *45 DLR 533;* the case of *Abdur Razzaque @ Geda vs State,* reported in *48 DLR 457;* the case of *Moslem Ali Mollah vs State,* reported in *48 DLR 427;* the case of *Abul Kaslam Azad vs State,* reported in *48 DLR 294;* the case of *MA Motalib vs State,* reported in *13 DLR 80;* the case of *Hachi Meah vs State,* reported in *17 DLR 692;* the case of *Bashir Kha vs State,* reported in *50 DLR 199;* the case of *W. Stanley vs State,* reported in *AIR 1956 SC 116;* the case of *Bireehh Bhuiyan and others vs State of Bihar,* reported in *AIR 1963 SC 1120;* the case of *Makkhan and others vs Emperor,* reported in *AIR I945A 181* and an unreported case of *Syeda Sajeda Chowdhury vs State (Criminal Miscellaneous Case No.45295 of 2012).*

15. On the oilier hand, Mr Mahbubey Alam, learned Attorney-General appearing for the State and Mr Khurshid Alam Khan, appearing for the Anti-Corruption Commission made their submissions separately.

16. Learned Attorney-General submitted that though the amount was donated one but the amount was kept by opening an account under the name and style "প্রধানমন্ত্রীর এতিম তহবিল" and from the said fund the money was transferred to "Zia Orphanage Trust" while the accused-petitioner was Prime Minister of the country and, as such, the accused-petitioner cannot avoid her responsibility and the charge framed by the Special Judge is in accordance with law. He also submitted that challenging the proceedings of Metropolitan Special Case No. 177 of 2009, the accused petitioner preferred an application under section 561A of the Code of Criminal Procedure before this Division and after hearing the parties, the Rule was discharged by a Division Bench of this Court holding that there is *prima-facie* allegation against the accused petitioner and directed the trial court to proceed with the Special Case in accordance with law, against the said judgment, the accused-petitioner preferred Criminal Petition for Leave to Appeal No. 134 of 2012 before the Appellate Division of Bangladesh Supreme Court but till today the accused-petitioner did not take any step for hearing of the leave petition which proves dilatory tactics on behalf of the accused petitioner. He drew our attention to the impugned orders wherein it is stated that the accused-petitioner took 34 adjournments in Special Case No.3 of 2013 and 11 adjournments in Special Case No.5 of 2013, and submitted that by such dilly-dallying tactics the accused-petitioner is trying to stay proceedings of the cases. He further submitted that from the impugned orders it is clear that the Court below by complying the provisions of sections 241A and 242 of the Code of Criminal Procedure passed the orders and there are no illegality.

17. Mr Md Khurshid Alam Khan, learned advocate appearing on behalf of the opposite party No. 2 Anti-Corruption Commission, submitted that in a revision, this court can only look into the correctness, legality or propriety

of any kind of finding or sentence or order recorded or passed by the court below. By adopting the submissions of learned Attorney-General, Mr Khan submitted that the accused-petitioner is trying to stay proceedings of the cases. He also submitted that though the FIR was lodged on 3-7-2008 in Special Case No. 3 of 2013 and on 8-8-11 in Special Case No. 5 of 2013, but charge could not be framed against the accused-petitioner because of such dilatory tactics of the accused-petitioner. He next submitted that the Court below after complying the provisions of section 241A of the Code of criminal procedure formed his opinion in accordance with law and the reasons assigned by the Court below are plausible one. In support of his submissions, Mr Khan referred to the case of *Taher Hossain Rushdi vs the State*, reported in *6 MLR 83 = 6 BLC 282*, and the case of *Taher Hossain Rushdi vs State*, reported in *7 MLR (AD) 116 = 7 BLC (AD) 45*, by which the Appellate Division affirmed the case reported in *6 MLR 83 = 6 BLC 282*.

18. Perused the applications, impugned orders and other annexures appended with the applications. Heard the learned advocates for the accused-petitioner, learned Attorney-General and the learned advocate for the Anti-Corruption Commission.

19. From impugned orders of both the cases, it appears that the orders started with the word "মামলা অদ্য চার্জ গঠন বিষয়ে শুনানীর জন্য ধার্য আছে". It also appears from the orders that the court below heard the learned advocates of the parties and considered the records of the cases, the documents submitted therewith and thereafter framed charge against the accused-petitioner and others. By filing supplementary affidavit, the accused-petitioner stated that she was not asked by the Court below whether she admits that she has committed the offence with which she is charged, a mandatory provision of law. But impugned orders show that the Court below recorded its findings that the charge was read over to the accused-petitioner and explained to her and she claimed herself innocent and demanded trial. Since there is a finding of the court below, we cannot disbelieve a court and go beyond the findings of a court. It also appears from the order sheets of Special Case No. 3 of 2013 and Special Case No. 5 of 2013 that the accused-petitioner took adjournment for 34 times and 11 times respectively in the cases. It was submitted by the learned advocate for the accused-petitioner that though there was an application under section 241A of the Code of Criminal Procedure but that was not considered and the learned Judge rejected the same on the ground that the learned advocate for the accused-petitioner did not move the application. In Special Case No. 5 of 2013 there was no application under section 241A of the Code of Criminal Procedure rather from the order sheet it is found that after framing charge, learned advocate for the accused-petitioner filed an application under section 241A of the Code of Criminal Procedure. It is true that exercise of sections 241A and 242 of the Code are independent of any application, but on perusal of the impugned orders, it cannot be said that the Court below did not comply with the provisions of scetions 241A and 242 of the Code of Criminal Procedure. Both sections 241 A and 242 of the Code should be read together.

20. Apart from that, the accused-petitioner earlier preferred an application under section 561A of the Code of criminal procedure challenging proceedings of Metropolitan Special Case No. 177 of 2009 (Special Case No. 3 of 2013) wherein Rule was issued by this Division and the Rule was discharged upon hearing the parties, thoroughly discussing the facts of the case and points of law involved in the case by a Division Bench of this Court vide judgment dated 12-12-2012 holding that: "considering all

aspects placed before us, we are led to hold that the impugned criminal proceedings cannot be quashed in view of existence of *prima-facie* allegations against the accused petitioner" and directed "the trial Court shall proceed with the impugned Special Case in accordance with law"*(64 DLR 1).* Against the said judgment, accused-petitioner preferred petition for leave to Appeal No. 134 of the 2012 before the Appellate Division of the Bangladesh Supreme Court but till today they did not take any step for hearing of the petition. In such view of the matter, we cannot go beyond the findings recorded in judgment passed by this Division, reported in *64 DLR 1.* It also appears from the order sheet of Special Case No.5 of 2013 that the accused-petitioner took 11 adjournments in the case on the plea that an application under section 561A of the Code of Criminal Procedure is pending before this Division. But said application was also not moved before any Bench of this Division till today.

21. Regarding formation 'opinion' under section 242 of the Code of Criminal Procedure, we have perused the case of *Taher Hossain Rushdi vs State,* reported in *6 MLR 83 = 6 BLC 282.* In that case the accused-petitioner challenged the legality of framing charge wherein the learned Special Judge formed his opinion in the following manner: "উভয় পক্ষের বিজ্ঞ কৌশুলীগনের বক্তব্য শ্রবনান্তে এবং নথি পর্যালোচনান্তে আমি মনে করি যে, ফৌঃ কাঃ বিঃ ২৬৫ সি. ধারা অনুযায়ী আসামীগনকে অত্র মামলা হইতে অব্যহতি দেওয়া সমীচীন হইবে না, কেননা আসামীদের বিরুদ্ধে অভিযোগ গঠন করা আবশ্যক"। Referring sections 265C and 265D(1) of the Code of Criminal Procedure keeping side by side sections 241A and 242 of the Code, this Division held in the aforementioned case:

> "On perusal of the aforementioned provisions of law it appears that while discharging an accused the trial court is obliged to record the reasons for so doing. But under sections 265D and 242 of the Code, there is no obligation shouldered upon the Court to record the reasons for so doing."

When the judgment was challenged before the Appellate Division, their lordships affirmed the judgment passed by the High Court Division holding that:

> "the learned Judge special as seen from the orders impugned upon assigning cogent reason has rejected the petitioner's application filed under section 265 CrPC" [reported in 7 MLR (AD) 116 = 7 BLC (AD) 45].

22. In such view of the matter, we cannot hold that the Court below did not assign cogent reason in framing charge against the accused-petitioner and others after hearing the learned Advocates of the parties, upon consideration of record of the same and the documents submitted therewith and after making such examination formed 'Opinion' "পর্যালোচনায় আসামীদের বিরুদ্ধে আনীত অভিযোগের সমর্থনে অভিযোগ গঠন করার পর্যাপ্ত উপাদান বিদ্যমান থাকায় আসামী.....বিরুদ্ধে দন্ডবিধির ৪০৯-১০৯ এবং ১৯৪৭ সনের দুর্নীতি প্রতিরোধ আইনের ধারা ৫(২) ধারায় শাস্তিযোগ্য অপরাধে গঠন করা হলো।"

23. Furthermore, framing of charge is beginning of a case, the accused-petitioner will get ample opportunity to prove her innocence at the trial by adducing evidence and also under section 342 of the Code of Criminal Procedure.

24. Facts and circumstances of the cases cited by the learned Advocates for the accused-petitioner are quite distinguishable from the fact and circumstances of the cases in hand.

In such view of the matter and for the reasons stated above, we do not find any merit in these applications and accordingly both the applications are rejected summarily.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Md Moinul Islam Chowdhury J } Sultan Mahmud Hasan and others.....Petitioners

vs

Judgment
June 5th, 2013. } Roksana Manir and others.....Opposite Parties*

Code of Civil Procedure (V of 1908)
Section 115(1)

In order to enforce the contractual right either of the parties has legal remedy by seeking enforcement of the contract by way of specific performance of contract under the provision of the existing law. .....(26)

AJ Mohammad Ali with Md Ahsan Habib, Advocates—For the Petitioners.

Abdul Quayum with Md Ali Reza, Advocates—Opposite Parties.

Judgment

Due to some unavoidable circumstances the judgment of this Rule could not be delivered on 3-6-2013, therefore, the judgment is delivered today ie 5-6-2013.

2. At the instance of the Defendant-Petitioners, Sultan Mahmud Hasan and others, this Rule has been issued calling upon the opposite party No.1 to show cause as to why the judgment and decree complained of in the petition moved in court today should not be set-aside and or pass such other or further order or orders as to this court may seem may seem fit and proper.

3. The Rule is directed against the judgment and decree dated 29-10-2009 passed by the learned District Judge, Rangpur in Other Class Appeal No. 184 of 2007 affirming those dated 26-9-2007 passed by the learned Joint District Judge, 2nd Court, Rangpur, in Other Class Suit No. 23 of 2005 (earlier No. 37 of 1999).

4. The relevant facts for disposal of the Rule are that the present opposite party No.1, Mrs Roksana Manir as the plaintiff filed the Other Class Suit No. 37 of 1999 in the court of learned Subordinate Judge, First Court, Rangpur for specific performance of contract.

5. The plaint case is that the suit land originally belonged to one Hedatullah and after his death among his three sons Hasinur got the suit land by an amicable settlement and Hasinur died leaving behind wife, one son and one daughter who got the suit land by inheritance. On their offer for sale, plaintiff agreed to purchase the suit land measuring area of 18 decimals, at a consideration money of Taka 3,65,000 and advanced Taka 20,000. Accordingly an unregistered deed of agreement for sale was executed on 1-3-1993 by the parties on condition that the sale deed would be executed and registered within 3-5-1993 on payment of the rest consideration money otherwise the advance so paid should be forfeited. The defendants began to reside at Pahartali, Chittagong far away from the suit land and as a result they could not execute the registered sale deed. The defendant No.1 again on 16-5-1993 executed another agreement for sale receiving further Taka 50,000 wherein it was a condition that the sale deed would be registered within 15-7-1993 otherwise the advance would be forfeited. Having failed to do so the defendant No. 1 again executed an agreement for sale on 17-7-1993 receiving further Taka 40,000 on condition that sale deed would be registered within 30-11-1996. Having failed yet again on 12-3-1998 the defendant No.1 executed another agreement for sale receiving Taka 1,55,000 on condition that the sale deed would be registered within

*Civil Revision No. 1202 of 2010.

12-9-1998, thus the defendants received total Taka 2,65,000 but failed to register a sale deed but told that sale deed would be registered in the first week of July, 1999. On their failure the plaintiff on 10-8-1999 sent her brother-in-law to the residence of the defendants at Dhaka and being refused by the defendants to register the sale deed she instituted the suit.

6. The present petitioners as the defendant Nos.1 to 3 contested the suit by filing a written statement denying the allegations made in the plaint and contending, *inter alia*, that the suit land of CS Khatian No. 185 corresponding to SA Khatian No. 216, Plot No. 70 originally belonged to one Hedaetullah who died leaving behind 4(four) sons among them Hasinur Rahman got $^{1}/_{5}^{th}$ share of his father Hasinur Rahman died leaving behind the defendant Nos.1-3 as his heirs and they entered into an agreement for sale with the plaintiff on 1-3-1993 in respect of 18 decimals land out of 62 decimals as mentioned in the said agreement at a consideration money of Taka 3,65,000 and on 1-3-1993 they received 20,000 as advance. Both the parties agreed that the plaintiff would pay the rest of consideration money within 3-5-1993 and the defendants would execute sale deed and if the plaintiffs fail to do so the advance so paid would be forfeited. The agreement for sale as produced by the plaintiff before the learned Court, wherein plot number mentioned as 71 instead of 70, was not the real agreement for sale. The land of Plot No. 70 is the suit property of the agreement and the Plot No. 71 was recorded in separate CS Khatian No. 184 and SA Khatian No. 215 which is not suit property of agreement. The plaintiff failed to comply with the condition of the agreement dated 1-3-1993 to pay the rest of the consideration amount and that on 16-5-1993 plaintiff paid Taka 50,000 to the defendant No.1, and requested to extend time upto 15-7-1993 for executing sale deed and accordingly on 16-5-1993 an agreement for sale was executed on condition that if plaintiff fails to pay rest of the consideration amount the advance would be forfeited. On 15-7-1993 because of illness of the defendant No.1 sale deed having not been executed, with both side's consent time for executing sale deed was extended upto 15-11-2993 by writing the same on the over page of agreement dated 16-5-1993.

7. It was also agreed that if the plaintiff fails to pay the rest of the amount within the extended period the advance of Taka 70,000 would be forfeited and the plaintiff requested defendant No.1 to extend the period for executing sale deed upto 30-11-1993 and paid Taka 40,000 more as advance and accordingly on 17-7-1993 by an undertaking time for sale deed was extended upto 30-11-1993 and that thus defendants received total Taka 1,10,000 as advance and that photocopy of the undertaking dated 17-7-1993 by an undertaking time for sale deed was extended upto 30-11-1993 and that thus defendants received Taka 1,10,000 as advance and that photocopy of the undertaking dated 17-7-1993 was given to the defendant No.1 and original was kept with the plaintiffs custody and that the undertaking dated 17-7-1993 had been manipulated by over writing the date 30-11-1993 as 30-11-1996 and also tempered inserting last two lines at the marginal note of the document. The deed of agreement for sale dated 12-3-1998 was never executed by the defendant No.1 and he never received the advance of Taka 1,55,000 as mentioned in the said deed. The same was forged, fabricated, falsified and created and period had not been extended upto 30-11-1996 for execution of sale deed and that plaintiff could not get any relief on the basis of the said false document.

8. After hearing both the parties the learned Joint District Judge decreed the suit by its judgment and decree dated 26-9-2007. Being aggrieved the present petitioners filed Other Class Appeal No. 184 of 2007 in the Court of learned District Judge, Rangpur who by its

judgment and decree dated 29-10-2009 dismissed the appeal and thereby affirmed the judgment and decree passed by the trial court.

9. Mr AJ Mohammad Ali, the learned Advocate appearing with the learned Advocate Mr Md Ahsan Habib, for the petitioners submits that the plaintiffs specific case was on the basis of agreement for sale dated 1-3-1993, 16-5-1993, 17-7-1993 and ultimately those were finalized by agreement dated 12-3-1998. But the said agreement dated 12-3-1998 having been found forged, the learned Courts below misconceived the facts as well as on law in decreeing the suit for specific performance of contract and thus committed error of law resulting in an error in passing the decree which occasioned failure of justice.

10. The learned Advocate further submits that the learned courts below misread the Exhibit-3 (agreement dated 17-7-1993) and its photocopy produced by the defendant-petitioner as Exhibit- "Ka" inasmuch as the manipulation of Exhibit-3 by over writing and tempering does not appear in the Exhibit "Ka" which was kept with the petitioners. In view of the facts the learned Courts below committed error of law resulting in an error in passing the impugned judgment which occasioned failure of justice.

11. The learned Advocate further submits that forgery and manipulation having been found the learned courts below misconceived the law granting equitable relief by way of decree for specific performance of contract and thus committed error of law resulting in an error in passing the impugned judgment occasioning failure of justice.

12. He also submits that because of commission of fraud in the 4th bainanama dated 12-3-1998(12-9-1998) (Exhibit-4) as well as the baina dated 17-7-1993 (Exhibit-3) the evidential value of the other bainanamas have been vitiated that there is no contract thus the question of equitable relief of specific performance of contract is not sustainable of the amount deposited pursuant to the bainanama which has been forfeited. Thus under section 22 of the Specific Relief Act no decree can be passed by the courts below, as such, the judgment and decree is liable to be set-aside and the Rule should be made absolute.

13. The Rule has been opposed by the opposite party No. 1 by filing a Counter Affidavit contending, *inter alia*, that both the courts below found the Exhibit-3 as genuine as the defendant No.1 did not deny his signature in the said instrument. The only allegation made was that there had been overwriting in the year 96 in place of 93. On deep perusal, it appears that the date 31-11-1996 had appeared in two places and in the last one, there was no overwriting. The slight overwriting in the first one and for that an explanation had been given in the footnote in the same page. The defendant tried to frustrate the transaction on raising a technical ground which is not sustainable in law.

14. It is also contended that court rightly ignored the agreement dated 12-3-1998 (Exhibit No. 4) as it was not the subject matter for disposing the suit. The photocopy of the said agreement dated 12-3-1998 was also exhibited by the defendant No.1 as Exhibit-Ka and it is the Defendant No.1 who manipulated the date of the agreement and purposely exhibited the same with the intention to place the suit under limitation. The photocopy of the agreement dated 17-7-1993 is not acceptable as an evidence.

15. Mr Abdul Quayum, the learned Senior Advocate, appearing with the learned Advocate Mr Ali Reza, submits that after considering the evidence both documentary and deposition made by the witnesses as well as the

submissions made by the respective parties before the trial court the suit filed by the present opposite party No.1 was decreed which was affirmed by the learned appellate court below by dismissing the appeal and thereby the courts below committed no error of law and there is no misconstruing or non- consideration of the evidence produced and adduced by the parties. Thus the Rule is liable to be discharged.

16. The learned Advocate further submits that the Title Appeal No. 184 of 2007 was dismissed by the judgment and decree dated 29-10-2009 and the said decree was put for execution by filing an Execution Case No.1 of 2010. The learned trial court executed a registered deed No. 2823 of 2010 dated 14-2-2010 in favour of the present opposite party pursuant to the bainanama executed between the parties in order to sell 18 decimals of land situated at Mouza Ragunathgonj, Dag Nos. 70-71 under Rangpur Pourashava and there was no suit pending at that point of time, as such this revisional application became infructuous by operation of the courts order, as such, the Rule is liable to be discharged.

17. The learned Advocate further submits that the petitioners alleged that the bainanama dated 17-7-1993 contains some overwriting which is not applicable in the alleged bainanama dated 12-3-1998 (12-9-1998) that it has been created by practicing fraud or through forgery. In this regard the learned Advocate appearing for the opposite party submits that overwriting cannot be considered as a forgery as bainanama dated 17-7-1993 contains sufficient explanations as to the correction or amendment of the said bainanama, as such, the learned courts below after examining the documents came to a conclusion that there was a contract between the parties in order to sale and purchase the suit land thereby passing the impugned judgment and decree the appellate court below committed no error of law and no interference from this court is called for.

18. After considering the above submissions made by the learned Advocates for both the parties and also considering the application under section 115(1) of the Code of Civil Procedure including the Annexures therein, in particular, the impugned judgment and decree and perusing the materials in the lower court record and also perusing the counter affidavit filed by the present opposite parties, it appears to me that the present opposite party No.1 as the plaintiff has filed the Other Class Suit for seeking decree for specific performance of contract for sale of a land owned by the present petitioners. The present opposite parties expressed there intention to purchase the land measuring 18 decimals by fixing total consideration of Taka 3,65,000. For that purpose the parties have entered into several bainanamas including bainas dated 1-3-1993, 16-5-1993, 17-7-1993 and finally on 12-3-1998. It further appears through out these bainas that the present petitioners received total amount of Taka 1,10,000 towards the purchase money and remaining to be paid on execution of a registered sale deed.

19. Now the question is whether there was a contract between the parties for sale and purchase of the suit land at the fixed consideration money. For an answer to that question, I have examined these bainanamas as mentioned above which have been exhibited as exhibits 1, 2, 3 and 4. The present petitioners as the defendant in the original suit also filed bainanamas dated 17-7-1993 as exhibit-Ka. I consider that even a single baina is admitted by the parties that constitutes a contract between the parties. The subsequent baina or other bainanamas can be considered as an amendment or supplementary to the original contract with free consent by and between the parties. It is a settled principle of law that a contract or an agreement is meeting of minds by undertaking obligations to perform the respective parts of the parties. In the

instant case it is admitted by the parties that the present defendant-petitioners proposed to sell the land measuring 18 decimals by making an offer which was accepted by the present opposite party No.1 to purchase the land and there was an agreement between the parties in the name of bainanama originally on 1-3-1993 and subsequently on 16-5-1993. The submissions made by the learned Advocates for the respective parties those two bainas have not been disputed or contradicted or even denied by the either of the parties, as such, the said bainanama can be enforced as valid contract by obliging each party to comply and perform their respective obligations arose therefrom.

20. Regarding the subsequent baina dated 17-7-1993 (exhibit-3) and 12-3-1998 (19-9-1998) (exhibit- 4) there are some conflicting statements from the parties alleging that these documents were not made with full consent by both the parties.

21. I have perused the documents dated 17-7-1993 and could find some overwriting but those overwriting have been sufficiently explained in the same documents in the proper form thus it cannot be said these bainanamas cannot be accepted as a valid documents. The said bainanamas made it obligatory on the part of the present petitioners to execute a registered document in favour of the present opposite party within 13-11-1996.

22. Regarding the baina dated 12-3-1998 an expert opinion was obtained by way of report dated 22-4-2002 which clearly found that the said bainanama was not executed by the present-petitioner, as such, this document does not carry any legal eventual value. However, the present opposite party contended that the exhibit-4 was not a subject matter of the suit as it was not contended that opposite party was claiming execution of a contract on the basis of the said documents, as such, even if such document is disregarded as a void document the contractual obligation arose between the parties by the earlier document cannot be ignored. As I have already stated that even a single contract or agreement between the parties makes contractually binding to perform their respective obligations within a contract. In fact, the said obligation has been executed by the trial court through the Execution Case No.1 of 2010 by executing a registered deed No. 2823/2010 dated 14-12-2010.

23. Regarding the submission of the learned Advocate appearing for petitioners that if there is a fraud no equitable remedy can be sought by way of specific performance of contract. In this regard I consider that the 4th bainanama alleged to have been created by practicing fraud but it is not a part of the claim of the present opposite party by way of equitable relief of specific performance of contract because a contract was made prior to this execution of 4th baina as it is not a part of the specific performance of contract in the instant case.

24. The learned trial court after considering the evidence adduced and produced by the parties came to conclusion on the basis of the following manner:

"সার্বিক পর্যালোচনা ও বিশ্লেষনে প্রতীয়মান হয় যে, বাদী ও বিবাদীপক্ষের মধ্যে গত ৩০-১১-১৯৯৬ তারিখ পর্যন্ত চুক্তি বহাল ছিল। প্রঃদঃ ৩ বায়নাপত্র হইতে দেখা যায় যে, বায়নাপত্রে উল্লেখ আছে যে, উক্ত সময়ের মধ্যে বিক্রিটাকা পরিশোধ করিতে না পারিলে সম্পূর্ণ টাকা বাজেয়াপ্ত বলিয়া গন্য হইবে। প্রকৃতপক্ষে বায়নাপত্রে এইরুপ শর্ত উল্লেখ থাকিলেও মোকদ্দমার ঘটনাপ্রবাহ বাদী ও বিবাদীগনের কার্যক্রম ১নং বিবাদীর মায়ের অসুস্থতা এবং সেই মর্মে প্রদঃ ২ বায়নাপত্রের অপর পৃষ্ঠায় ১নং বিবাদীর লিখিত বিবরণ পর্যালোচনা করিলে প্রতিয়মান হয় যে, বাদীপক্ষের গাফিলতির কারণে দলিল রেজিঃ না হওয়ার দাবী বিশ্বাসযোগ্য নয়। বরং ১নং বিবাদীর মায়ের অসুস্থতার কারণে একেরপর এক তারিখ পরিবর্তন করিয়া দলিল রেজিঃ করা সম্ভব হয় নাই। কাজেই আদালত মনে করেন যে, বায়নাপত্রে বায়নাকৃত টাকা বাজেয়াপ্ত

হইয়া শর্ত উল্লেখ থাকিলেও বিবাদীর গাফিলতির কারণে দলিল রেজিঃ করা সম্ভব না হওয়ায় বিবাদী বায়নাপত্রের উক্ত শর্তের কোন সুবিধা পাইবেন না। উক্ত শর্তটি কার্য্যকরী হইবে না।"

25. The learned appellate court below concurrently found that the trial court committed no error of law by decreeing the suit and came to a conclusion on the basis of the following terms: —

"It appears from the written statements and evidences adduced by defendant-appellant No.1 that there is no allegation of non-compliance of any terms and conditions of the Bainapatra on the part of the plaintiff-respondent. The defendant appellants did not raise any objection of unwillingness and non-cooperation on the part of the plaintiff-respondent to get the job done by both the parties but it is evident that the plaintiff-respondent left no stone unturned to get the kabala deed from defendant-appellants in pursuance of the agreement for sale. Thus the learned Joint District Judge found the plaintiff-respondent always vigilant to get the kabala deed register on payment to balance consideration money. The learned Joint District Judge found no failure on the part of the plaintiff-respondent and found the case instituted well in time, i.e. within the period of limitation of 3 years from the admitted date embodied in the deed of acknowledgement and money receipt dated 17-7-1993. The defendant-appellants submitted the photocopy of the money receipt and acknowledgement dated 17-7-1993 which was marked as Exhibit No. 'Kha'. The contesting defendants-appellants stated in the written statements that the photocopy was handed over to the defendant-appellant No.1 and the original was kept by plaintiff-respondent. But the defendant-appellants did not submit other 2 photocopies of bainapatra dated 1-3-1993 Ext. No.1 and acknowledgement and money receipt and 16-7-1993 Ext. No. 2. The learned Joint District Judge discussed the evidence on record, considered the facts and circumstances of the case, conduct of the parties and decreed the suit. Thus it appears that the findings recorded by the learned Joint District Judge are based on sound reasoning and I do not find any cogent ground for interference in such findings. The appeal has no merit and is liable to be dismissed."

26. From the two concurrent findings in favour of the present opposite parties the judgment and decree passed by the lower court below and after perusal of the documents, in particular, exhibits 1 and 2. I have considered that there was a contract between the parties by executing said deeds for sale and purchase of the land measuring 18 decimals by and between the present petitioner and the opposite party. In order to enforce the said contractual right either of the parties has legal remedy by seeking enforcement of the contract by way of specific performance of contract under the provision of the existing law of the country, as such, the appellate court below committed no error of law by dismissing the appeal and thereby affirming the judgment of the trial court, therefore, I am not inclined to interfere into the judgment and decree.

27. Accordingly I do not find merit in the Rule.

28. In the result, the Rule is discharged without any order as to costs.

29. The interim order of stay granted at the time of issuance of the Rule and extended subsequently upon the operation of the judgment and decree of the trial court is hereby recalled and vacated.

The office is directed to communicate the judgment and order to the court concerned and send down the lower court record immediately.

Ed.

High Court Division
(Special Original Jurisdiction)

Mirza Hussain Haider J
Sheikh Hassan Arif J

Judgment
December 14th, 2010.

Badar Box Industries Limited.....Petitioner

vs

Commissioner of Customs (Bond), Customs Bond and others...Respondents*

Constitution of Bangladesh, 1972
Article 102(2)

A licensee is now entitled to a show cause notice and a reasonable opportunity of being heard before suspension. The order of suspension has been vitiated by both the defects, namely lack of show-cause notice followed by reasonable opportunity of being heard and non-mentioning of any period for suspension. .....(8)

Customs Act (IV of 1969)
Section 13

The authority, suspended petitioner's license without mentioning any period of suspension. The authority imposing punishment is required to give the person a reasonable opportunity of being heard before a punishment is imposed even though no such provision is provided by statute-unless such opportunity is expressly excluded by the statute in clear terms. .....(8)

AKM Nazrul Islam, Advocate—For the Petitioner.

Israt Jahan, Advocate—For the Respondent No.1.

Judgment

Sheikh Hassan Arif J: Rule was issued calling in question the legality of the order as contained in Letter No. S4-5/Bond/92-93 (Part-l) 1079 dated 21-1-2004 (Annexure-L) issued by the Assistant Commissioner, Customs Bond Commissionerate, Chittagong (respondent No.3) suspending the petitioner's Bond Licence No. S4-5/Bond/92-93 dated 24-1-1994 under section 13(3) of the Customs Act, 1969.

*Writ Petition No. 572 of 2004.

2. Short facts, relevant for disposal of the rule, are that the petitioner company is engaged in the business of manufacturing Board, Paper and Package etc., and it is a 100% export oriented industry. In the course of business, it imported different qualities of White Liner (C) and released the same through different bills of entry. Subsequently, it was discovered by chemical examination and enquiry that the imported goods were not White Liner but they were Duplex Board and that the petitioner removed raw-materials illegally from the bonded warehouse. Accordingly, the Customs Authority concerned initiated two proceedings against the petitioner for false declaration and illegal removal of raw-materials from the bonded warehouse leading to the issuance of show-cause notices, reply, hearing and two adjudication orders against the petitioner being Order No. 25/05 dated 14-7-2005 and Order No. 101/04 dated 9-10-2004 (Annexures 2 & 3 to the Supplementary Affidavit-in-opposition). Against these adjudication Orders, the petitioner moved Writ Petition No. 7464 of 2005 and Writ Petition No. 7463 of 2003 before the High Court Division, which are still pending. Apart from above, the Customs authority issued the impugned order suspending petitioner's bonded warehouse licence in exercise of power under section 13(3) of the Customs Act, 1969 (the said Act") on the allegation that the petitioner abused 4(four) utility permissions (UP)-as against this the petitioner moved this court and obtained the Rule and order of stay.

3. The rule is contested by respondent No.2 the Commissioner of Customs (Bond),

Customs Bond Commisionerate, Chittagong by filing affidavit-in-opposition and supplementary affidavit-in-opposition contending, *inter-alia,* that a proper enquiry was done by the Authority by constituting an enquiry committee and the enquiry committee upon extensive investigation found that the petitioner misused/ abused the aforesaid 4 (four) utility permissions and, as such, the authority passed the impugned order as per recommendation of the said enquiry Committee.

4. Mr AKM Nazrul Islam, the learned advocate for the petitioner, submits that the impugned order of suspension is a non-speaking order and there is no mention of any specific allegations against the petitioner. He further submits that since this suspension of license amounts to a punishment upon the petitioner, he was entitled to have a prior show cause notice and proper hearing. Referring to the very impugned order, he argues that the suspension is imposed for an indefinite period which is not reasonable and sustainable in law. As against this, Ms. Israt Jahan, the learned Assistant Attorney-General, submits that section 13 of the Customs Act, 1969 is very much clear on this point and it does not require the authority to issue show cause notice and give any opportunity of hearing to the petitioner. She submits that only in case of order of cancellation of licence, the petitioner is entitled to a 30 days show cause notice and hearing -as per proviso to section 13. Referring to the inquiry report (Annexure-I to the affidavit-in-opposition), she argues that the authority has lawfully passed the impugned order on the basis of enquiry conducted by the enquiry committee which recommended suspension of petitioner's bonded warehouse license as it was found that the petitioner misused/abused 4(four) UPs.

5. Perused the writ petition, affidavit-in-opposition, supplementary affidavit-in-opposition and heard the submissions of the learned advocates.

6. It appears that through an amendment entire section 13 of the Customs Act, 1969 has been substituted vide section 5(4) of the Act 17 of 2003. For ready reference, both the unamended and amended provisions of section 13 are quoted below:

Unamended section 13:

> **"13. Licensing of private warehouses** —(1) At any warehousing station, the [Commissioner of Customs (Bond) or any other Commissioner of Customs authorized by the Board] may license private warehouses.....
>
> (2) The [Commissioner of Customs (Bond) or any other Commissioner of Customs authorized by the Board] may cancel a licence granted under sub-section (1)-
>
> (a) by giving one month's notice in writing to the licensee; or
>
> (b) if the licensee has contravened any provision of this Act or the rules made thereunder or committed breach of any of the conditions of the licence:
>
> Provided that before any licence is cancelled under clause (b), the licensee shall be given a reasonable opportunity of being heard.
>
> (3) pending an enquiry whether a licence granted under sub-section(1) should be cancelled under clause (b) of sub-section (2), the [Commissioner of Customs (Bond) or any other Commissioner of Customs authorized by the Board] may suspend the licence."

After Amendment:

> **"13. Licensing of private warehouses:** (1) Subject to sub-section (2), at any warehousing station, the Commissioner of Customs (Bond) or any other Commissioner of Customs authorized by the Board may, license private warehouses.....
>
> (2) .....
>
> (3) The Commissioner of Customs (Bond) or any other Commissioner of Customs authorized by the Board may, suspend or cancel a licence granted under sub-section (1)—
>
> (a) if the licensee contravenes any provision of this Act or the rules made thereunder or commits breach of any of the conditions of the licence; or
>
> (b) in the case where, he deems fit, a licence to be suspended or cancelled in the public interest:
>
> Provided that in case of cancellation of any licence, the licensee shall be served with a show cause notice of thirty days, and be given a reasonable opportunity of being heard."
>
> *(Emphasis given)*

7. It appears from the unamended section-13 that the Commissioner of Customs (Bond) or any other Commissioner of Customs was empowered to cancel a bonded warehouse license if the licensee was found to have contravened any provisions of the said Act or the rules made thereunder or committed breach of any of the conditions of the licence. However, before cancellation, the licensee was entitled to a show cause notice and hearing, and the authority was empowered to suspend the license pending any inquiry before such cancellation. However, the substituted/amended section 13 under sub-section (3) empowered the concerned authority either to suspend or cancel the license on the same allegations, and proviso to amended/substituted section 13 provides that in case of cancellation, the licensee is entitled to a show cause notice and reasonable opportunity of being heard. Thus, the amended/substituted provisions of section 13 does not provide for suspension of license pending inquiry before cancellation as provided in the unamended section 13 of the said Act. Further, the unamended section 13 provided for one punishment, namely cancellation-whereas the amended section-13 provides for two types of independent punishments, namely suspension and cancellation of license.

8. In the present case, the authority suspended the license of the petitioner on the basis, as it appears now, of recommendations made by the inquiry committee which found that the petitioner abused/misused four UPs. However, the authority, by the impugned order, suspended petitioner's license without mentioning any period of such suspension. Since we have already found that the amended/substituted provision of section 13 provides for suspension as an independent punishment and not as an interim measure pending enquiry, we are of the view that a licensee is now entitled to a show cause notice and a reasonable opportunity of being heard before such suspension. Although the amended provision of section 13 has not specified such opportunity, yet it is now an age old established principle of law that such provision of natural justice has to be read in a statute. In other words, the authority imposing punishment is required to give the person a reasonable opportunity of being heard before a punishment is imposed even though no such provision is provided by concerned statute unless such opportunity is expressly excluded by the concerned statute in clear terms. Since the amended/substituted section

13 has not excluded such opportunity in clear terms, we are of the view that, in reading the amended section 13, the authority will have to read such provisions therein. Thus, the authority concerned must issue a prior show cause notice upon the licensee allowing him to give reply to the allegations brought against him and also give him an opportunity of being heard. The authority may impose the punishment of suspension only after proper adjudication of the allegations after such show-cause notice and hearing. Further, the punishment of suspension cannot be for an indefinite period-as in that case, it will amount to an order of cancellation of license. In the present case, the impugned order of suspension has been vitiated by both the defects, namely lack of show-cause notice followed by reasonable opportunity of being heard and non-mentioning of any period for suspension.

9. Nevertheless, having regard to the above observations and discussions of law involved in this matter and upon reading the said enquiry report, we are of the view that since the allegations are of serious nature, we should not go into the merit of the same. Rather, we are inclined to give the concerned authority a fair chance to proceed with the allegations upon giving the petitioner a reasonable opportunity of being heard preceded by a show-cause notice.

10. In the facts and circumstances of the case and for the reasons stated above, we are not inclined to make the rule absolute in the present case. Rather, we are of the view that the rule should be disposed of allowing both the parties a fair chance afresh.

In the result, the Rule is disposed of without any order as to cost. The concerned Customs authority is at liberty to proceed with the allegations afresh in the light of the above observations.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Syed Md Ziaul Karim J
Ashish Ranjan Das J

Judgment
March 12th, 2014.

Mohammad Ali Khan..
...Informant-Appellant
vs
Masud Khan and another.....
Accused-Respondents*

Children Act (XXXIX of 1974)
Section 66(1)

In absence of any findings as to the age of the accused of determination of age by holding on inquiry, the Adalat failed to comply with the section 66(1) of the Act. .....(17)

Children Act (XXXIX of 1974)
Section 2(f)

After the lapse of time, the controversy as to the age of the accused regarding minority have been deleted. They should be tried by the Adalat in accordance with.

Moreover, it appears to us that the alleged date of occurrence was on 9-2-1996, the First Information Report was lodged on 18-2-1996, the impugned orders were passed on 17-6-1996 and 29-6-1996, and the appeal has been filed in 1996. So, by now, after the lapse of time, the controversy as to the age of the accused regarding minority have been deleted. In our view they should be tried by the Adalat in accordance with law. .....(20)

Baktiar Hossain vs State 14 BLD 381 = 47 DLR 542 and Bimal Das vs State, 14 BLD (AD) 218 ref.

No one Appears—For the Informant-Appellant.

No one Appears—For the Accused-Respondent Nos. 1-2.

*Criminal Appeal No. 898 of 1996.

Sakila Rowshan, DAG with Sharmina Haque, AAG and Md Sarwardhi, AAG—For the State-Respondent No. 3.

Judgment

Syed Md Ziaul Karim J: By this appeal the informant-appellant has challenged the legality and propriety of the orders dated 17-6-1996 and 29-6-1996 passed by learned Judge of Nari-o-Shishu Nirjatan Daman Bishesh Adalat, Barisal, (briefly as Adalat), in Nari-o-Shishu Nirjatan Case No. 15 of 1996 ordering to try the case in Juvenile Court and framing charge against the accused respondents under section 6(3) of the Nari-o-Shishu Nirjatan (Bishesh Bidhan), Ain 1995 (briefly as Ain 1995) respectively.

2. Facts in brief are that, the informant-appellant lodged FIR with Kotwali Police Station under District Barisal on 10-2-1996 alleging that on 9-2-1996 at about 19-30 hours while his daughter Moni Begum aged about 13 years 6 months went out of their dwelling house to answer call of nature accused (1) Masud Khan, (2) Liton Akan and two others kidnapped his daughter and forcibly took her towards south on the bank of a river and raped her one after another; as a result of gang rape she lost her sense; thereafter the accused left her at a little distant of her home; the informant and others went out in search of her and found her in senseless condition, then brought her to her house and gave first hand treatment by local doctors; after regaining her sense she narrated the occurrence to her father and other witnesses; since her condition was deteriorating she was taken to Sher-e-Bangla Medical College Hospital on the following evening, thereafter the victim's father i.e. the informant-appellant lodged the FIR with Kotwali PS Police.

3. The police after investigation submitted charge-sheet under sections 9(Ga) and 6(3) of the Ain, 1995 accusing the accused respondents as accused.

4. Eventually the case was taken up for trial by the Adalat, wherein, the accused filed an application for discharge stating that they are minors. The learned judge after hearing directed for trial of the case by Juvenile Court and subsequently on 29-6-1996 framed charge against the accused under section 6(3) of the Ain, 1995.

5. Feeling aggrieved the informant as appellant filed the instant appeal.

6. No one appears to support the appeal. In view of the facts this is an old appeal of 1996. We are inclined to take it up for disposal on merit considering the materials on record.

7. No one appears on behalf of the accused-respondent Nos. 1-2 to oppose the appeal.

8. The learned Deputy Attorney-General appearing for the State respondent No. 3 opposes the appeal and submits that the learned Judge of the Court below after considering the materials on record rightly passed the impugned order, which calls for no interference by this Court.

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

10. The moot point before us is whether the accused respondents will come under the Children Act, 1974. The term Child has been defined in section 2(f) of the Children Act, 1974 which reads as hereunder :—

> "Child means a person under the age of sixteen years, and when used with reference to a child sent to a certified institute or approved home or committed by a Court to the custody of a relative or other fit person means that child during the whole period of his detention notwithstanding that he may have attained the age of sixteen years during that period."

11. But in the instant case before us the

accused respondents were not sent in any institute of approved home or committed to anyone's custody to stop the passage of time for the purpose of computing his age.

12. The question which now survives is how does the age of accused respondents affect the trial for the offence they have allegedly committed. Section 6 of the Children Act, 1974 conceives that the accused should be less than 16 years when he is charged with or tried for an offence to come within the ambit of the Children Act, 1974 section 6 runs as follows:—

> "6(1) Notwithstanding anything contained in section 239 of the Code or any other law for the time being in force, no child shall be charged with, or tried for, any offence together with an adult."
>
> (2) If a child is accused of an offence for which under section 239 of the Code or any other law for the time being in force such child but for the provision of sub-section (1) could have been tried together with an adult, the Court taking cognizance of the offence shall direct separate trials of the Child and the adult."

13. A close scrutiny of the aforesaid provisions it appears that the age referred to in the section relates to the age of the accused when he is 'charged with or tried for.....' and not to the age when the offence was committed. Therefore, once a child offender attained the age of 16 years and then charged with an offence or tried for the same the statutory requirement of the child being tried by a Juvenile Court comes to an end.

14. Juvenile Courts are created in recognition of Special needs of the young offenders so that a child appearing before the court does not come into contact with adult offenders, or come out of the trial with unnecessary and avoidable stigma to his name or does not pass through the trauma and exposure of a public trial. But this benefits is available to an offender when 16 years of age and not to anyone else.

15. In the instant we also find that accused respondents were charge-sheeted. So the first task before the court is to determine the age of the accused under section 66 of the Children Act, 1974 which is to the effect:—

> "66 presumption and determination of age.
>
> (1) Whenever a person, whether charged with an offence or not, is brought before any criminal court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child, the Court shall make an inquiry as to the age of that person, and for that purpose, shall take such evidence as may be forthcoming at the hearing of the cases, and shall record a finding thereon, stating his age as nearly as may be".

16. On going to the materials on record it transpires that, on 9-2-1996 the accused committed rape upon Moni Begum daughter of the informant, thereby committed offence prescribed in sections 9(Ga) and 6(3) of the Ain, 1995. The police after investigation submitted charge-sheet accusing them as accused. It is pertinent to point out that, in the trial court the accused produced two certificates showing them as minors and the learned judge relied on such documents without holding any inquiry or taking any evidence to that effect. There are separate procedure for presumption and determination of the age of the accused as laid down in section 66 of the children act 1974.

17. From the impugned order dated 17-6-1996 we find that no such inquiry has been ordered by the Court to find out the correct age of the accused. In fact the impugned order seems to be a non-speaking one in this respect. In absence of any findings as to the age of the accused of determination of age by holding on inquiry, we are of the opinion that the learned Judge of the Adalat failed to comply with the

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

Anti-Corruption Commission Act (V of 2004)

Section 27(2)—The accused-petitioner is under the obligation to clear his position and account for in respect of the possession of the property allegedly disproportionate to his known sources of income to the satisfaction of the Court. *Sabira Sultana vs State (Criminal)* 349

Artha Rin Adalat Ain (VIII of 2010)

Sections 22 and 24—Adalat should remember that after amendment of section 22 in the year 2010 mediation has been made mandatory on the part of the Adalat itself. When amended section 22 be read together with section 24 of the Ain it makes the proposition more clear. Now the law stands that right after filing of the written statement, the duty is incumbent upon the Court to initiate mediation. *Mohammad Ali vs Judge, Artha Rin Adalat (Spl Original)* 356

Chittagong Hill Tracts Regulations, 1900

Regulations 38 and 39—Law of Succession—Since admittedly there is no written law of Marma community hence, the respondent No. 2 is hereby directed to resolve the issue question afresh on the basis of the pleadings of both the contending parties and other relevant documents and in particular upon consultation with the respective Circle Chief and Headman, as has been envisaged in the Chittagong Hill Tracts Regulations,1900. *Abrechai Mog vs District Judge, Khagrachari (Spl Original)* 358

Children Act (XXXIX of 1974)

Sections 2(f) and 66—When the children are being used in various manners by different culprits including using them as carriers of the arms, drug, narcotics and the petitioner being a child should not have been dealt with in the manner as he has been dealt with in this case. *Kalimuddin vs State (Criminal)* ... 338

Code of Civil Procedure (V of 1908)

Section 115(1)—In order to enforce the contractual right either of the parties has legal remedy by seeking enforcement of the contract by way of specific performance of contract under the provision of the existing law. *Sultan Mahmud Hasan vs Roksana Manir (Civil)* 405

Code of Criminal Procedure (V of 1898)

Sections 221, 222 and 342—Framing of charge is beginning of a case, the accused-petitioner will get ample opportunity to prove her innocence at the trial by adducing evidence and also under section 342 of the Code. *Begum Khaleda Zia vs State (Criminal)* 398

Section 498—Anticipatory Bail—As the record of the case in hand is unusually lying with the Court of the Chief Judicial Magistrate, the accused-petitioners had no scope to surrender to the concerned Tribunal with a prayer for bail and, as such, the application for anticipatory bail is maintainable in the prevailing factual as well as procedural aspects of the case. *Shahjahan (Md) vs State (Criminal)* 372

Section 561A—The petitioner being a child ought to have been dealt with in accordance with the Act. Having not done so we hold that the trial, conviction and sentence passed therein which has been challenged in this Rule, without jurisdiction. *Kalimuddin alias Karimuddin (Md) vs State (Criminal)* 338

Constitution of Bangladesh, 1972

Articles 44 and 102—The right to enforce a fundamental right under Article 44 is another fundamental right which gives the petitioners right to move even though their application was rejected by the Settlement Court on the ground of limitation. *Nazrul Islam Mollah (Md) vs Chairman, 1st Court of Settlement (Spl Original)* 379

Article 102(2)—A licensee is now entitled to a show cause notice and a reasonable opportunity of being heard before suspension. The order of suspension has been vitiated by both the defects, namely lack of show-cause notice followed by reasonable opportunity of being heard and non-mentioning of any period for suspension. *Badar Box Industries Limited vs Commissioner of Customs (Bond) (Spl Original)* 411

Customs Act (IV of 1969)

Section 13—The authority, suspended petitioner's license without mentioning any period of suspension. The authority imposing punishment is required to give the person a reasonable opportunity of being heard before a punishment is imposed even though no such provision is provided by statute-unless such opportunity is expressly excluded by the statute in clear terms. *Badar Box Industries Limited vs Commissioner of Customs (Bond) (Spl Original)* 411

Section 156(1), Clause 24(II)—International Trade and Practice—The carrier is entitled to 1% ocean allowance as inevitable loss while carrying bulk cargo like oil/tallow and, as such, the shortage of 5.984 is well covered by 1% ocean allowance allowed as per international trade and practice. *Novorossiysk Shipping Company USSR vs Lever Brothers Bangladesh Ltd (Civil)* 344

Evidence Act (I of 1872)

Section 30—Confession of a co-accused is not substantive evidence in the sense that conviction on that alone must stand and section 30 has merely given the Court a discretion to call it an aid inappropriate case. It can be used only for lending assurance and is to be merely an element in considering the evidence in the case. If there is no other evidence or if the other evidence in the case is insufficient to establish the case against the accused, the confession cannot be taken into consideration against the co-accused. *State vs Md Wazed Ali (Criminal)* 386

Income Tax Ordinance (XXXVI of 1984)

Sections 83A(5) and 93—There was scope for re-opening of a case by the DCT/the ACT under section 93 of the Ordinance for the relevant assessment year. However, re-opening must be on definite information regarding concealment. The ACT ought to have given an information to the assessee about the concealment of income as required under section 83A(5) of the Ordinance so as to enable the assessee to controvert such allegations of concealment. *Shahidul Islam (Md) vs Assistant Commissioner of Taxes (Spl Original)* ... 397

Ullage Survey Report—In the event of conflict between 2 reports one by ullage survey report and the other by shore tank survey report the ullage survey report must prevail over the shore tank survey report. *Novorossiysk Shipping Company USSR vs Lever Brothers Bangladesh Ltd (Civil)* 344

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