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Appellate Division

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Sections 13 and 138(1)—Cross-cheque/account payee cheque is a cheque as contemplated in section 138(1) of the Act but only changes its normal character by ceasing its negotiable character but it does not lose its character as negotiable instrument as defined in section 13 of the Act. *Dr Abdullahel Bari vs Md Rahat Chowdhury and another (Criminal)* 167

Section 138(1)—"Any cheque"—Since the "account payee cheque" mentioned in the complaint-petition has not lost its character as negotiable instrument, the same can be easily brought within the mischief of "any cheque" employed in section 138(1) of the Act because cheque includes "account payee cheque" also. *Dr Abdullahel Bari vs Md Rahat Chowdhury and another (Criminal)* 167

Interpretation of Statute—The intention of the legislature must be sought from the statute taken as a whole. In arriving at the true meaning of any particular phrase or words employed in the statute it must not viewed in an isolated manner from the context, it must be viewed in its whole context, the title, the preamble and all other related parts of the statute. *Dr Abdullahel Bari vs Md Rahat Chowdhury and another (Criminal)* ... 167

Miscellaneous Case No. 11155 of 2008 making the Rule absolute.

2. Facts leading to the filing of this petition are that respondent No.1 as petitioner (hereinafter referred to as the accused) filed an application before the High Court Division under section 561A of the Code of Criminal Procedure (the Code) for quashing the proceedings of Special Case No.1(ka) of 2008 of the Court of Divisional Special Judge, Rajshahi Division, Rajshahi. The said special case arose out of a First Information Report (FIR) lodged by Dr Md Zahirul Islam, Deputy Civil Surgeon, Rajshahi on 29-5-2007 with Tanore Police Station implicating the accused along with 3(three) others alleging, *inter alia*, that as a part of operation "Alor Sondhaney," the Joint force found some medicine; some of those are expired, from outside the store room and from the kitchen of storekeeper, Azizul Haque in presence of the Civil Surgeon, Rajshahi, Upazila Nirbahi Officer (in charge), Rajshahi and the Officer-in-Charge, Tanore Police Station. The recovered articles were stored for misappropriation. On the basis of the said FIR, Tanore Police Station Case No.12 dated 29-5-2007 under sections 409/411/34 of the Penal Code was started against the accused and 3(three) others. The corresponding GR number of the case is 66 of 2007.

3. Initially the investigation of the case was taken up by the then Officer-in-Charge of Tanore Police Station and then the case was investigated by the Commission and eventually, two charge-sheets were submitted on 6-3-2008 being Nos. 30 and 30(ka) under sections 409/273/109 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947. Eventually, the case was sent to the Divisional Special Judge, Rajshahi where it was numbered as Special Case No.1 of 2008. Then on the prayer of the Public Prosecutor, the cases were split up and another case being Special Case No. 1(ka) of 2008 was registered. Special Case No.1 of 2008 was for the defalcation of money to the tune of Taka 7,43,977.15 for the period 17-8-2005 to 16-8-2006 and Special Case No.1(ka) of 2008 was for the defalcation of money to the tune of Taka 6,86,343.97 during the period 17-8-2006 to 29-5-2007. It further appears that charge was framed in the instant special case against the accused including the petitioner on 8-7-2008 under sections 409/273/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 to which the accused pleaded not guilty and claimed to be tried. It further appears that prosecution witness No.1 (PW 1) was examined on the 26th day of August, 2008 and thereafter as many as 17(seventeen) other witnesses, i.e. in total 18(eighteen) witnesses were examined out of 37(thirty seven) charge-sheet witnesses. The last witness was examined on 16-9-2008 and at that stage of the proceedings, the application for quashing the proceedings of the special case in question was filed.

4. From the application under section 561A of the Code, it appears that the fact of examination of 18(eighteen) prosecution witnesses was not stated therein. However, the certified copies of the depositions of the prosecution witnesses were filed subsequently, by filing supplementary affidavit. In the application under section 561A, the following points were taken: (i) that the investigation report was not submitted within 60(sixty) working days from the date of lodgment of the FIR as provided in rule 15Ga of the Emergency Rules, 2007 and also bidhi 10 of the Durnity Daman Commission Bidhimala, 2007, (ii) that no approval was given by the Commission to lodge the FIR against the accused and no sanction was also given under section 32 of the Durnity Daman Commission Ain, 2004 (the Ain, 2004) to submit the charge-sheet and (iii) the accused was innocent, he neither committed any offence nor had he any knowledge about the allegations made in the FIR, the impugned proceeding was nothing, but an abuse of the process of the Court.

5. Before this Court, it has been specifically stated in the leave petition that in the meantime, 18(eighteen) prosecution witnesses have already been examined. Therefore, the application for quashing the impugned proceedings filed before the High Court Division was not maintainable. In the leave petition, it has also been specifically stated that after the submission of the Memo of evidence, the Commission accorded sanction under section 32 of the Ain, 2004 and after obtaining sanction, the Investigation Officer submitted charge-sheet, but the High Court Division wrongly held that sanction under section 32 of the Ain was not complied with before submission of the charge-sheet.

6. The High Court Division by the impugned judgment and order made the Rule absolute mainly on the ground that no sanction was granted in respect to the submission of the charge-sheet. In the context, the High Court Division further observed that "sanction is a *sine quo non* for the reception of a charge-sheet, without which the Court concerned cannot take cognizance." The High Court Division further observed that "the language as figured in Rule 10 is such that investigation should be concluded in time." The High Court Division concluded that it was abundantly clear that "the mandatory provisions in section 32 had been ignored wherefore the proceeding must be taken to have been commenced as an abortive one." The High Court Division also observed that a Civil Surgeon should not be implicated for alleged theft committed at a store which remains under the control of a storekeeper, not under the direct control of a Civil Surgeon, in the view, this was an appropriate case where an initial inquiry should have been undertaken.

7. Mr Md Khurshid Alam Khan, learned Advocate, appearing for the Commission, petitioner herein, has drawn our attention to the depositions of the witnesses examined in the case and has submitted that while examination of half of the prosecution witnesses was completed (total witnesses cited in the charge-sheet is 37), the accused-respondent filed the application before the High Court Division for quashing the impugned proceeding with *mala fide* motive just to delay the disposal of the case. He has submitted that although, in the application filed under section 561A of the Code, the fact of examination of 18(eighteen) prosecution witnesses was not stated, by filing a supplementary affidavit the accused-petitioner annexed the certified copies of the depositions of the witnesses, but the High Court Division did not at all consider the said fact. He has further submitted that the High Court Division was wrong in holding that no sanction was granted by the Commission. Mr Khan has drawn our attention to the relevant portion of the charge-sheet to show that sanction was accorded by the Commission for submission of the charge-sheet. He has lastly submitted that the High Court Division exceeded its jurisdiction in making observation as to the merit of the case which, in fact, is the domain of the trial Court.

8. Mr KM Saifuddin Ahamed, learned Advocate, entering caveat on behalf of the accused-respondent, on the other hand, has supported the impugned judgment and order by submitting that although the prosecution in the meantime examined 18(eighteen) witnesses in the case, a perusal of the depositions would show that the petitioner had no complicity with the commission of the offence for which he was being tried and as such, the High Court Division rightly quashed the impugned proceedings.

9. From the facts stated in the leave petition and also the deposition of the prosecution witnesses which have been filed before this Court, it is apparent that trial had already commenced before the filing of the application for quashing the impugned proceedings and 18(eighteen) witnesses were already examined. Therefore, the filing of the application before

the High Court Division for quashing the impugned proceedings does not appear to us *bonafide*. 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 impugned proceedings. In that view of the matter, the High Court Division ought not to have entered into the merit of the application. The High Court Division was also not correct in coming to the finding that no sanction was granted by the Commission to submit the charge-sheet as in the last paragraph of the charge-sheet, it has been clearly stated that "দুর্নীতি দমন কমিশন, প্রধান কার্যালয়, ঢাকার স্মারক নং-২৬৯০, তাং ২৮-২-০৮ ইং মাধ্যমে চার্জসীট দাখিলের নিমিত্তে প্রাপ্ত মঞ্জুরী পত্র অত্র সাথে সংযুক্ত করা গেল।" However, 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.

10. 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. In the instant case, 18(eighteen) witnesses having already been examined, the trial Court should have been allowed to conclude the trial and dispose of the same in accordance with law. The 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.

11. In view of the above, the impugned judgment and order cannot be sustained. But, we are not inclined to give leave, as that would delay the disposal of the impugned proceedings. Moreso, we have heard the learned Advocate for the accused. The impugned judgment and order is set-aside. The trial Court is directed to proceed with the trial in accordance with law and conclude the same as expeditiously as possible.

This leave petition is disposed of accordingly.

Ed.

Appellate Division
(Civil)

Md Muzammel Hossain CJ
Surendra Kumar Sinha J
Md Abdul Wahhab Miah J
Hasan Foez Siddique J

Government of Bangladesh and others.....
.....Petitioners

vs

Md Gazi Shafiqul and others.....
.....Respondents*

Judgment
April 24th, 2013.

Constitution of Bangladesh, 1972
Article 102(2)

When no affidavit-in-opposition was filed before the High Court Division denying or controverting the case of the writ-petitioners, the High Court Division had no option but to accept the case of the writ-petitioners. .....(10)

Rajik-al-Jalil, Deputy Attorney-General instructed by Madhu Malati Chowdhury Barua, Advocate-on-Record—For the Petitioners.

Abdul Baset Majumder, Senior Advocate with Pankaj Kumar Kunda, Advocate instructed by Giasuddin Ahmed, Advocate-on-Record—For the Respondents.

*Civil Petition for Leave to Appeal No.2689 of 2012.

(From the judgment and order dated the 12th day of February, 2012 passed by the High Court Division in Writ Petition No.6406 of 2010)

Judgment

Md Abdul Wahhab Miah J: This petition for leave to appeal has been filed by the writ-respondents calling in question the judgment and order dated the 12th day of February, 2012 passed by the High Court Division in Writ Petition No.6406 of 2010 making the Rule absolute.

2. The respondents, 7(seven) in number, filed the above mentioned writ petition before the High Court Division challenging the appointment orders dated 22-6-2010 issued by the Director General, Directorate of Food (writ-respondent No.3) for the posts Food Inspector, Sub-Inspector of Food and Assistant Sub-Inspector of Food to have been issued without lawful authority and were of no legal effect and accordingly, the Rule was issued.

3. The case of the writ-petitioners as made out in the writ petition, in short, was that in 2004, writ-respondent No.4, the Director (Administration), made an advertisement vide Memo No. প্রশা/সংস্থা/১নিয়োগ-০১/২০০২(অংশ-১)/২১২৫ dated 2-9-2004 for appointment in different posts including Food Inspector, Sub-Inspector of Food and Assistant Sub-Inspector of Food under the Directorate of Food. The said advertisement was published in 'The Daily Observer" dated 9-9-2004, but no examination was held within the next two years. Then another similar advertisement was made under Memo. প্রশা/সংস্থা/১নিয়োগ-০৩/২০০৫-৬২৯ dated 26-4-2006 and this time, no examination was also held within the next two years. Finally, writ-respondent No.4 made another advertisement vide Memo. প্রশা/সংস্থা/১নিয়োগ-১/২০০৮-৭১৪ dated 2-6-2008 which was published in "The Daily Jugantor" of 8th June, 2008. In the last advertisement, it was mentioned that the candidates, who already applied earlier, need not apply afresh. Writ-petitioner No.l, Gazi Md Shafiqul; writ-petitioner No.2, Md Anisuzzaman Talukder; writ-petitioner No.3, Nurani Sultana Afrose and writ-petitioner No.5, Md Abul Kalam Azad applied for the post of Food Inspector in 2004; writ-petitioner No.4, Md Jalal Uddin Sarder applied for the same post in 2006; writ-petitioner No.6, Md Ferdous Alam applied for the post of Sub-Inspector of Food in 2004 and 2006 respectively; writ-petitioner No.7, Md Atiqul Islam applied for the post of Assistant Sub-Inspector of Food in 2008. The respective writ-petitioner had requisite qualifications for the appointment in the respective post during submission of the respective application and all of them applied for the respective post in the quota 'Children of the Freedom Fighters'. The writ-petitioners submitted relevant papers including the freedom fighters' certificate of their respective fathers. All the writ-petitioners sat in the written tests against their respective post held on 24-4-2009 and came out successful in the tests. Accordingly, they got admit cards for their viva voice. The viva voice of the writ-petitioners took place on different dates between 11-11-2009 to 2-10-2010. According to the assumption of the writ-petitioners, they did well in the quota of children of the Freedom Fighters and they were expecting to be selected for appointment and posting. After holding a so-called viva voice, writ-respondent No.3 declared the result and subsequently gave appointment to 965 candidates in the post of Food Inspector, Sub-Inspector of Food and Assistant Sub-Inspector of Food (Inspector = 350, Sub-Inspector =196 and Assistant Sub-Inspector = 419) by the order dated 22-6-2010. The Ministry of Establishment issued an order vide Memo No.05.170.022.07.01.020. 2010-59 dated 16-2-2010 in respect of Freedom Fighter quota. In that order, it has been mentioned that if the quota of the Freedom Fighters' children cannot be filled up, the concerned posts would remain vacant. The whole process of the impugned appointments was questionable. There were various allegations of corruptions

and unfair means against the writ-respondents in holding the examinations and declaring the results. The news of irregularities of the writ-respondents was widely reported in many national dailies. Despite that, the writ-respondents did not stop the process of appointment rather they made the impugned appointments most arbitrarily, unfairly and *malafidely*. Age of the Government service of all the writ-petitioners except writ-petitioner No.7 has already expired. Since the writ-petitioners successfully completed the written examinations and the viva voice, they had legitimate expectations that they would be selected for their respective post in the quota for 'Children of Freedom Fighters'. But due to illegality, arbitrariness and 'pick and choose policy' of the writ-respondents in the appointment process, the writ-petitioners have been dropped out and they have no possibility of getting any Government job since their Government stipulated service age is already over. The writ-respondents did not follow the guideline of the Government vide Memo No.05.170.022.07.01.020.2010-59 dated 16-2-2010 issued from the Ministry of Establishment in respect of the quota of the Freedom Fighters' children and, as such, the impugned appointment orders were liable to be declared to have been made without lawful authority and were of no legal effect. According to the Government guideline, the concerned post would remain vacant, if the quota for the Freedom Fighters' children is not filled up. The impugned appointment orders do not reveal as to whether the said quota has been maintained and, as such, the same were liable to be declared to have been made without lawful authority and were of no legal effect. The orders were also violative of the fundamental rights of the writ-petitioners guaranteed in Articles 27, 31 and 40 of the Constitution.

4. No affidavit-in-opposition was filed by the writ-respondents controverting the statements made in the writ petition. However, as it appears from the impugned judgment and order that at the time of hearing the Rule, the learned Deputy Attorney-General appeared on behalf of the writ-respondents, but he could not make any effective submission as the High Court Division noted that "the learned DAG, could not assist much as being without instruction."

5. By the impugned judgment and order, the High Court Division made the Rule absolute in the following terms:

> "The respondents are directed to accommodate the petitioners, seven in number, either in addition to those people already appointed or by excluding, seven person from the bottom of the list forthwith."

6. Mr. Rajik-al-Jalil, learned Deputy Attorney-General, appearing for the writ-respondent-petitioners submits that the writ-petitioners did not furnish any detail about the number of appointments made from the category of Freedom Fighters' children; therefore, in the absence of such detail, the High Court Division erred in law in directing the Government to appoint them from the quota of the children of the Freedom Fighters. He submits that the High Court Division erred in law in giving the direction upon the Government to appoint the writ-petitioners inasmuch as before giving such direction, it should have ascertained whether there were vacant posts or not, and that there might be other better candidates in the category of children of the Freedom Fighters than the writ-petitioners. He further submits that the High Court Division failed to consider that it is not practically possible to cancel the appointment of persons who were previously appointed. He further submits that the High Court Division failed to consider that the appointments of Food Inspector, Sub-

Inspector of Food and Assistant Sub-Inspector of Food, were made after observing all the legal formalities following 30% quota for the children of the Freedom Fighters and as such, the writ-petitioners had no cause of action to file the writ petition and the Rule was liable to be discharged for want of cause of action. He lastly submits that the writ-petition was based on disputed question of fact which could not be decided in a summary manner under the writ jurisdiction; therefore, the Rule was liable to be discharged on the ground of maintainability and, as such, the impugned judgment and order calls for interference by this Court.

7. Mr Abdul Baset Majumder, learned Counsel, entering caveat on behalf of the writ-petitioner-respondents, has supported the impugned judgment and order.

8. From the statements made in the writ petition as summarized hereinbefore, it appears that the whole grievance of the writ-petitioners was that they are the children of the Freedom Fighters and they have applied for the appointment in the respective post of Food Inspector, Sub-Inspector of Food and Assistant Sub-Inspector of Food having requisite qualifications and they having duly qualified for the respective post both in the written and the viva voice examination, were entitled to be appointed to the respective post they applied for. The writ-respondents gave the impugned appointments without following 30% quota reserved for the children of the Freedom Fighters and in the process, the writ-petitioners were not appointed illegally and in the meantime, except writ-petitioner No.7, all other writ-petitioners crossed the age of the Government job.

9. As already stated hereinbefore, no affidavit-in-opposition was filed by the writ-respondents controverting the assertions made in the writ petition that the writ-petitioners were the children of the Freedom Fighters, that they filed the relevant papers in support of their claim, that they were the children of Freedom Fighters and that they qualified for the respective post in both the examinations: written and viva voice and that the writ-respondents made the appointment by the impugned orders without fulfilling the 30% quota reserved for the children of the Freedom Fighters.

10. In the leave petition, though it has been submitted that the High Court Division failed to appreciate that at the time of appointment of Food Inspector, Sub-Inspector of Food and Assistant Sub-Inspector of Food "30% (thirty percent) quota of children of Freedom Fighters was followed", no paper or document has been filed to substantiate the said submission. When in the writ petition, the writ-petitioners categorically asserted that in giving the appointments by the orders impugned in the writ petition, 30% quota reserved for the children of the Freedom Fighters was not followed and the High Court Division found that "In this case as the documents shows(sic), this policy has not been followed", the leave petitioners (the writ-respondents) were under legal obligation to produce documents/papers to show that in appointing the Food Inspector, the Sub-Inspector of Food and the Assistant Sub-Inspector of Food, 30% quota of the children of the Freedom Fighters was followed, but they have not produced any such papers. Admittedly, when no affidavit-in-opposition was filed before the High Court Division denying or controverting the case of the writ-petitioners that 30% quota for the children of the Freedom Fighters was not followed, the High Court Division had no option but to accept the case of the writ-petitioners; therefore, we find no substance in the submissions of the learned Deputy Attorney-General. In this regard, it may further be stated that the statements made in the writ petition that except writ-petitioner No.7, the other writ-petitioners have already

crossed the age of getting the Government job, has also remained un-assailed.

11. In view of the above, we find nothing wrong with the High Court Division in holding that "As a result of the Respondents' failure to come up with any affidavit in opposition, we have no choice but to accept as true the averments and the claims that has been laid by the petitioners. The petitioners claims(sic) that the 30% quota system has not been followed in the recruitment process. There is no doubt that there is a policy being followed by the government that in every appointment 30% quota must be kept for the freedom fighters or there(sic) off springs. In this case as the documents show, this policy has not been followed. The impugned decision, can, hence not be termed as lawful." Therefore, no interference is called for with the impugned judgment and order.

12. However, considering the facts and circumstances of the case and the submissions of the learned Deputy Attorney-General, we direct the writ-respondents to implement the direction of the High Court Division immediately, if 30% quota for the children of the Freedom Fighters has not been filled up in making the appointments in the posts of Food Inspector, Sub-Inspector of Food and Assistant Sub-Inspector of Food.

13. We make it very clear that the writ-respondents shall not take any other excuse or plea to avoid the appointment of the writ-petitioners pursuant to the direction of the High Court Division in the respective posts they applied for in case 30% quota reserved for the children of the Freedom Fighters was not maintained in making the appointments.

This petition is disposed of accordingly.

Ed.

Appellate Division
(Criminal)

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

Judgment
November 14th, 2013.

Dr Abdullahel Bari .....Petitioner

vs

Md Rahat Chowdhury and another .....Respondents*

Negotiable Instruments Act (XXVI of 1881) **Sections 13 and 138(1)**

Cross-cheque/account payee cheque is a cheque as contemplated in section 138(1) of the Act but only changes its normal character by ceasing its negotiable character but it does not lose its character as negotiable instrument as defined in section 13 of the Act. .....(9)

Negotiable Instruments Act (XXVI of 1881) **Sections 13 and 123A(2)(a)**

Clause (a) of section 123A(2) is absolutely dependent on clause (b) when the cheque is an "account payee" one; since in clause (a) only word "negotiable" has been used not the words "negotiable instruments" as defined in section 13 of the Act. .....(12)

Negotiable Instruments Act (XXVI of 1881) **Section 138(1)**

***"Any cheque"*—Since the "account payee cheque" mentioned in the complaint-petition has not lost its character as negotiable instrument, the same can be easily brought within the mischief of "any cheque"**

*Criminal Petition for Leave to Appeal No. 148 of 2010.

(From the judgment and order dated 1-3-2010 passed by the High Court Division in Criminal Misc. Case No.l 1907 of 2008)

employed in section 138(1) of the Act because cheque includes "account payee cheque" also. .....(13)

Interpretation of Statute

The intention of the legislature must be sought from the statute taken as a whole. In arriving at the true meaning of any particular phrase or words employed in the statute it must not viewed in an isolated manner from the context, it must be viewed in its whole context, the title, the preamble and all other related parts of the statute. .....(11)

Abdul Matin Khasru, Senior Advocate, instructed by Zainul Abedin, Advocate-on-record—For the Petitioner.

Fida M Kamal, Senior Advocate, Instructed by Md Nawab Ali, Advocate-on-record—For the Respondent No.l.

None represented—For the Respondent No.2.

Judgment

Md Anwarul Haque J: This Petition for Leave to Appeal, is directed against the judgment and order dated 1-3-2010 in discharging the Rule passed by the High Court Division in Criminal Misc. Case No.l1907 of 2008 under section 561A of the Code of Criminal Procedure arising out of Metro Sessions Case No.2642 of 2007 corresponding to CR Case No.2488 of 2007 pending before the learned Joint Metropolitan Sessions Judge, 5th Court, Dhaka.

2. In short, the relevant facts for disposal of the petition are follows:

One Rahat Chowdhury, present respondent, filed a petition of complaint against the petitioner for committing the offence punishable under section 138 of the Negotiable Instruments Act, 1881 since the cheque issued by the accused-petitioner in favour of the Complainant-respondent to the tune of Taka 1,00,00,000 (one crore) has bounced for insufficient money in the account. On receipt of such complaint the learned magistrate in pursuance of the provision laid down in section 141 of the said Act, 1881 took cognizance of the offence punishable under section 138 of Act and sent the CR case No. 1488 of 2007 to the court of Sessions for trial.

3. During the course of trial the present-petitioner filed a petition for discharging the accused-petitioner under section 265C of the Code of Criminal Procedure which was rejected and accused filed this Criminal Misc. Case under section 561A of the Code of Criminal Procedure for quashment of entire proceeding of the above Metro. Sessions Case No.2642 of 2007 alleging that since it was an "account payee/cross cheque" it does not come within the mischief of section 138 of the Negotiable Instruments Act, 1881 but the learned Joint Sessions Judge rejected such prayer and proceeded with the trial where the High Court Division also endorsed the same view with the observation in detail that the provision laid down in section 123A(2)(a) has been wrongly interpreted in order to keep it within the ambit of section 138 of the Negotiable Instruments Act, 1881.

4. Mr Abdul Matin Khasru the learned Senior Advocate appearing on behalf of the petitioner submits that "cross-cheque" or "account payee" cheque as has been mentioned in the compliant-petition does not come within the scope of section 138 of the Negotiable instruments Act,1881 because as soon as a cheque is made crossed it shall cease its negotiability. Mr Khashru has drawn our attention to the provision laid down in section 123A of the Negotiable Instruments Act, 1881 which has been placed in Chapter XIV of the said Act in the name and style "Special Provisions Relating

to Cheques" and accordingly when a cheque is crossed or made account-payee cheque it shall cease to be a Negotiable Instrument in the language employed in section 123A,(2)(a) of the Negotiable Instrument Act, 1881; as such the same cannot be brought within the mischief of section 138 of the Negotiable Instruments Act, 1881. In the instant case since it was a "cross-cheque" it cannot be a Negotiable Instrument; as such it does not come within the scope of section 138 of the Negotiable Instruments Act, 1881.

5. Mr Fida M Kamal the learned Senior Advocate appearing on behalf of the opposite-party submits that subject matter of a criminal proceeding under section 138 of the Negotiable Instrument Act, 1881 is "any cheque" which has been defined in section 6 of the Negotiable Instrument Act. Moreover, since "account payee cheque" is also a cheque within the meaning of section 6 and it does not change its character as negotiable instrument to keep it out of the clutch of section 138 of the Negotiable Instruments Act. In fact, section 123A(2)(b) of the Negotiable Instruments Act only put restriction in order to encash the amount mentioned in the cross-cheque because such cheque will simply make it not negotiable but does not lose its character of Negotiable Instrument.

6. In support of his contention the learned advocate has brought to our notice in the provisions laid down in section 13, 123A(2)(b) and section 126 of the Negotiable Instruments Act. Moreover, the words "any cheque" as has been employed in section 138 of the Negotiable Instruments Act, 1881 clearly bring the cheque whether it is a "bearer" or "account payee" within the mischief of section 138 of the Act, 1881. In no way, it can be regulated by only the provisions laid down in section 123A(2)(a) rather, such "account payee" cheque is to be regulated by both sub-section (2)(a) and (b) of section 123A of the Negotiable Instruments Act. The provision laid down in section 123(2)(a) cannot be read or taken into consideration in an isolated manner rather the provision laid down in clause (b) is to be taken into consideration for the purpose of collection of money mentioned in the cheque.

7. On the face of these submissions we have gone through the respective provision laid down in section 123A of the Negotiable Instrument Act which is quoted below:

> **123A. Cheque crossed "account payee**—"(1) Where a cheque crossed generally bears across its face an addition of the words "account payee" between the two parallel transverse lines constituting the general crossing, the cheque, besides being crossed generally, is said to be crossed "account payee."
>
> (2) when a cheque is crossed "account payee"—
>
> (a) it shall cease to be negotiable; and
>
> (b) it shall be the duty of the banker collecting payment of the cheque to credit the proceeds thereof only to the account of the payee named in the cheque.
>
> This section is also to be read with section 126 placed in same Chapter XIV of the Negotiable Instruments Act, 1881.

8. The above provision laid down in section 123A must be read with section 126 of the Negotiable Instruments Act which is also quoted below:

> **"Section 126. Payment of cheque crossed generally**—Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker."

9. On meticulous examination of these provisions laid down in sections 123A & 126 read with the definition of the "cheque" given in section 6 it has become clear to us that cross-

cheque/Account Payee cheque is also a cheque as contemplated in section 138(1) of the Negotiable Instruments Act but only changes its normal character by ceasing its negotiable character but it does not lose its character as Negotiable Instrument as defined in section 13 of the Act.

10. In fact, section 123A(l)(a) is to be read with clause (b) of the same section which have already been quoted. The provisions laid clown in clause (b) of section 123A(2) clearly gives the way how to encash the amount mentioned in the "account payee" cheque. In addition to that provision we are also to follow the provision of section 126 of the said Act.

11. We are to remember that the principal object of interpretation of the statutory law is not only to find out a particular meaning of a word or words but to find out the intention of the legislature which has been expressed through the medium of words. To interpret is not to restrict or to expand the meaning of the statute which, in truth, it intends to convey. So every effort is necessary to make a statute workable and not to render it ineffective by giving a meaningless interpretation. It is an elementary rule of construction that the intention of the legislature must be sought from the statute taken as a whole. In arriving at the true meaning of any particular phrase or words employed in the statute it must not be viewed in an isolated manner from the context, it must be viewed in its whole context, the title, the preamble and all other related parts of the statute.

12. Keeping the above view in mind we are of opinion that the clause (a) of section 123A(2) is absolutely dependent on clause (b) when the cheque is an "account payee" one; since in clause (a) only word "negotiable" has been used not the words "Negotiable Instruments" as defined in section 13 of the Act, 1881.

13. In the light of the above discussion we are of the opinion that since the "account payee cheque" mentioned in the complaint-petition has not lost its character as Negotiable Instrument, the same can be easily brought within the mischief of "any cheque" employed in section 138(1) of the Negotiable Instruments Act because cheque includes "account payee cheque" also. So we find no substance in the contention of the learned Advocate for the petitioner and accordingly the petition for leave to appeal is dismissed.

Ed.

Appellate Division
(Civil)

Md Muzammel Hossain CJ
Surendra Kumar Sinha J
Md Abdul Wahhab Miah J
Hasan Foez Siddique J
AHM Shamsuddin Chowdhury J

Judgment
November 14th, 2013.

Aman Ullah Chowdhury and another.....
.....Petitioners

vs

Bulbul Lalitkala Academy (Bulbul Academy of Fine Arts BAFA).....
.....Respondent*

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

Summary disposal of a revision application giving full relief to the petitioner without issuing Rule and thus giving no opportunity to the other side(s) of being heard is not permissible. .....(10)

Danish Ali vs Sakina, 4 BLC (AD) 68; Moslema Khatun vs Ishaque, 42 DLR (AD) 72; Abu Ahmed vs

*Civil Petition for Leave to Appeal No.1253 of 2011.

(From the Judgment and Order dated the 6th day of June, 2011 passed by the High Court Division in Writ Petition No.2315 of 2011)

MA Haque, 1983 BLD (AD)193; Faruk vs Nurul Azim, 1983 BLD (AD) 196; AH Chowdhury vs M Hossain, 1984 BCR (AD) 532; Abdul Wahab vs Ali Ahmed, 1992 BLD (AD) 64 = 44 DLR (AD) 55; Fazlur Rahman vs Rajab Ali, 30 DLR (AD) 30; Dijendra Lal vs Abu Zafar, 30 DLR (AD) 74; Shamsul Arefin vs Kazal Mia, 49 DLR (AD) 175; Jabbar Jute Mills vs Abul Kashem, 10 MLR (AD) 301; Sukumar Sen vs Gouranga, 1989 BLD (AD) 162; Karnaphuli Cotton Mills vs UCBL, 49 DLR (AD) 130 and Md Hossain vs Dildar Begum, 9 MLR (AD) 361 ref.

Garib Newaz, Advocate instructed by Nurul Islam Bhuiyan, Advocate-on-Record—For the Petitioners.

Zainul Abedin, Advocate-on-Record—For the Respondent.

Judgment

Md Abdul Wahhab Miah J: This civil petition for leave to appeal is from the order dated 6-6-2011 passed by the High Court Division summarily disposing of an application filed by the plaintiff-respondent under section 115(1) of the Code of Civil Procedure (the Code) vide Civil Order No.2315 of 2011.

2. Facts giving rise to this petition are that respondent, Bulbul Lalitkala Academy, represented by its vice-president as plaintiff filed Title Suit No.219 of 2007 in the Court of Assistant Judge, third Court, Dhaka for declaration that the circular published on 22-11-2007 shown to have been signed by the defendants on 17-11-2007 is illegal, collusive and is not binding upon it.

3. The defendants, petitioners herein, appeared in the suit and filed an application under Order VII, rule 11 of the Code for rejection of the plaint on the ground that the vice-president does not represent the plaintiff's institution, so he could not file the suit. More so the duration of the so-called Executive Committee already expired on 10-3-2010. The learned Assistant Judge by his order dated 6-3-2001 allowed the application and rejected the plaint accepting the grounds taken by the defendants.

4. Being aggrieved by and dissatisfied with the order rejecting the plaint, the plaintiff filed Title Appeal No.104 of 2011 before the District Judge, Dhaka. The appeal was admitted for hearing on 5-4-2011, notices were issued upon the defendant-respondents fixing 15-5-2011 for service return and acknowledgement due. The defendants appeared in the appeal by filing vokalatnama on 10-4-2011. On 27-4-2011, the plaintiff-appellant filed an application under Order XXXIX, rules 1 and 2 of the Code praying for an order of injunction restraining the defendant-respondents from "making disturbance or making obstacle to the day to day administration of the appellant applicant institution itself and from destroying the congenial environment of the institution in the field of education." The appellant also made a prayer for *ad-interim* injunction. The copy of the application was not served upon the learned Advocate for the defendant-respondents. The learned District Judge fixed the application for hearing on the date fixed ie on 15-5-2011 subject to the service of the copy of the application upon the learned Advocate for the defendant-respondents. Thereafter, on 3-5-2011, the plaintiff-appellant filed an application for hearing the application for injunction dated 27-4-2011. The defendants prayed for time for filing written objection against the application and the prayer was allowed fixing the next date on the date already fixed and also for hearing the application for injunction. On 15-5-2011, the appellant filed an application under section 151 of the Code with the prayer for an order of *ad-interim* injunction till the hearing of the application for injunction; the learned District Judge fixed the next date on 6-7-2011 for filing written

objection and also for hearing the application. Then again, on 24-5-2011, the plaintiff-appellant filed an application praying for hearing the application filed on 15-5-2011 under section 151 of the Code and the learned District Judge by his order of the same date issued notices upon the defendant-respondents to show cause within 20(twenty) days from the date of receipt of the notices as to why an order of temporary injunction shall not be passed against them as prayed for till disposal of the appeal. Then the plaintiff filed the revision application before the High Court Division. The Cause title of the revision application was formulated as follows:

> "Failure of the learned District Judge, Dhaka to consider the petitioner's prayer for *ad-interim* injunction since 27-4-2011 and lastly on 24-5-2011 keeping this application on record in Title Appeal No. 104 of 2011 and refusal to grant interim injunction."

and the prayer was also couched in terms of the cause title with the prayer for interim injunction. A learned Judge of the Single Bench hearing the revision application summarily disposed of the same by the impugned order directing the District Judge, Dhaka to dispose of the injunction matter within 3(three) months from the date of receipt of the order and at the same time, restrained the defendant-opposite parties (the petitioners), by an order of injunction from disturbing the peaceful functioning of the plaintiff's institution and also restrained the defendants from taking any initiative by which the atmosphere of the institution might not be hampered.

5. Heard Mr Garib Newaz, learned Advocate for the defendant-petitioners and Mr. Zainul Abedin, learned Advocate-on-Record entering caveat for the plaintiff-respondent.

6. In the back ground of the case as stated hereinbefore, the only question to be decided in this leave petition is as to whether the High Court Division was correct in its approach in disposing of the revision application under section 115(1) of the Code summarily in the manner as indicated hereinbefore without issuing any Rule and thus giving no chance of hearing to the other side, namely, the defendant-petitioners herein to place their version of the case on the prayer for injunction made in the appeal and the show cause notice issued by the learned District Judge thereon.

7. The question is not a new one and was raised earlier many a times before this Division and each time, this Division disapproved the disposal of revision application summarily by the High Court Division giving full relief to the petitioner without issuing any Rule upon the other side(s). This Division in unequivocal language held that though section 115 of the Code does not speak about service of notice on the opposite party, the revisional Court cannot interfere with the decision of the Court below without giving to the other side(s) an opportunity of being heard. It has also been held by this Division that Rule must be issued against all parties who would be affected in case of interference; more so, to pass an order of restrainment ex-parte as in the instant case. This is so even when the High Court Division acts *suo motu*. The cases are *Danish Ali vs Sakina, 4 BLC (AD) 68; Moslema Khatun vs Ishaque, 42 DLR (AD) 72; Abu Ahmed vs MA Haque, 1983 BLD (AD)193; Faruk vs Nurul Azim, 1983 BLD (AD) 196; AH Chowdhury vs M Hossain, 1984 BCR (AD) 532; Abdul Wahab vs Ali Ahmed, 1992 BLD (AD) 64 = 44 DLR (AD) 55; Fazlur Rahman vs Rajab Ali, 30 DLR (AD) 30; Dijendra Lal vs Abu Zafar, 30 DLR (AD)74; Shamsul Arefin vs Kazal Mia, 49 DLR (AD) 175; Jabbar Jute Mills vs Abul Kashem, 10 MLR (AD) 301; Sukumar Sen vs Gouranga, 1989 BLD (AD) 162; Karnaphuli Cotton Mills vs UCBL, 49 DLR (AD) 130 and Md Hossain vs Dildar Begum, 9 MLR (AD) 361.* But unfortunately, we are coming across number of cases

including the instant one where the learned Judges of the High Court Division have been disposing of revision applications summarily giving full relief to the petitioner without issuing any Rule completely ignoring the said principles of law declared by this Division. It seems that the concerned learned Judges are oblivious of Article 111 of the Constitution of the People's Republic of Bangladesh which has mandated that the law declared by this Division shall be binding on the High Court Division.

8. If the facts and circumstances of the case called for interference by the High Court Division, it could do so by issuing a Rule upon the defendant-opposite parties giving a short returnable date and passing an interim order as well, but, in no case, it could dispose of the revision application summarily by giving full relief to the plaintiff-petitioner in the absence of the defendant-opposite parties. This tendency of giving relief in a summary manner without hearing the other side(s) is clearly violative of the law declared by this Division and the principles of natural justice. We further state that no final/absolute order of restrainment or injunction-in whatever form or nature, can be passed against a party(s) without affording him/it any chance of showing cause.

9. Mr AF Hasan Arif, learned Advocate, who appeared before the High Court Division for the plaintiff-petitioner, also owed a duty as an officer of the Court to bring to the notice of the learned Judge about the law declared by this Division on the question, but the impugned order does not show that he discharged his said duty, rather he made submission contrary to the law declared by this Division. This is clear from the following:

> "learned Advocate further submits that he did not want a rule but prayed that till disposal of the appeal the atmosphere of the institution may not be disturbed"

as noted in the impugned order by the High Court Division.

10. In view of the above, the order passed by the High Court Division complained of in this petition cannot be sustained and must be set-aside. But since we have heard the learned Advocates of both parties and the question involved in this leave petition, is already settled by this Division, we do not consider it necessary to grant leave, because that would cause delay of the disposal of the application for injunction and the appeal pending before the District Judge. However, we reiterate the statement of law that summary disposal of a revision application filed under section 115 of the Code giving full relief to the petitioner without issuing Rule and thus giving no opportunity to the other side(s) of being heard is not permissible. We strongly disapprove and deprecate such kind of disposal by the High Court Division.

11. In the above backdrop, we consider it proper to direct the District Judge, Dhaka to dispose of the appeal itself now pending before him within 3(three) months from the date of receipt of this judgment, if not disposed of in the meantime.

This petition is disposed of in the following terms:

(a) The impugned order dated the 6th day of June, 2011 passed by the High Court Division in Civil Order No.2315 of 2011 is set-aside.

(b) The District Judge, Dhaka is directed to dispose of Title Appeal No.104 of 2011 within 3(three) months from the date of receipt of this judgment, if the appeal has not been disposed of in the meantime.

Ed.

Appellate Division
(Civil)

Nazmun Ara Sultana J
Syed Mahmud Hossain J

Judgment
April 9th, 2014.

Abdul Gaffar (Md) and others.....
.....Appellant
(In both the appeals)

vs

Kuti Miah.....
.....Respondents.
(In both the appeals)

Code of Civil Procedure (V of 1908)
Order XXXIX, rule 2(3)

High Court Division corrected the mistake committed by the trial Court and imposed punishment as provided in Order XXXIX, rule 2(3) of the Code.

What is important to note here is that the learned Assistant Judge should have disposed of the suit for permanent injunction and the case for violation of the order of *status quo* independently as a proceeding for punishment in respect of violation of an order of *status quo* partakes more of the characteristics of a criminal proceeding or, at any rate, is a quasi-criminal proceeding. But here the suit for permanent injunction and the violation case were heard analogously.

The defendant-leave-petitioners were not prejudiced in any way by the disposal of the suit for injunction and the violation case analogously. The grounds on which, the appellate Court remanded the suit for permanent injunction and the case for violation of the order of status quo were not in accordance with law. .....(22, 23 & 26)

*Civil Appeal Nos.91-92 of 2009.

(From the judgment and order dated 24-4-2006 passed by the High Court Division in Civil Revision Nos.1209 & 1206 of 1997).

Civil Imprisonment

Civil imprisonment of 4 (four) days will be proper and accordingly, the defendants are sentenced to suffer civil imprisonment for 4 (four) days.

For violating the order of *status quo*, the High Court Division punished the defendants to suffer civil imprisonment for 1 (one) month modifying the punishment of payment of Taka 1000 and also directed to restore possession of the suit land to the plaintiff as per direction of the trial Court. .....(28 & 27)

Mamtaz Meah vs Mosammat Amirunnessa (1957) 9 DLR 444 and Sultan Ahmed Howlader vs Habibur Rahman Munshi, 39 DLR 260;

AJ Mohammad Ali, Senior Advocate, instructed by Haridas Paul, Advocate-on-Record—For the Appellants. (In both the appeals)

Awlad Ali, Senior Advocate, instructed by Syed Mahbubur Rahman, Advocate-on-Record—For Respondent Nos.1 (In both the appeals)

None represented—For Respondent No.2-6. (In both the appeals)

Judgment

Syed Mahmud Hossain J: These two appeals, by leave by the defendants-appellants are directed against the judgment and order dated 24-4-2006 passed by the High Court Division in Civil Revision Nos.1209 and 1206 of 1997 making the Rules absolute.

2. Both the appeals have been heard together and are being disposed of by this common judgment as they do involve common questions of laws and facts.

3. The facts, leading to the filing of these two appeals, in brief, are that respondent No.1 as the plaintiff instituted Title Suit No.48 of

1992 in the Court of Assistant Judge, Kulaura, Moulavibazar for a decree of permanent injunction restraining the defendants from making any interference with his peaceful possession in the suit land claiming that he purchased suit plot No. 699 comprising an area of 0.53 acre from defendant Nos.2-4 by two registered deeds of sale dated 28-1-1962 and he has since been enjoying and possessing the suit land by constructing huts, digging pond and installing tubewell thereon. The suit land has been properly demarcated and separated by putting bamboo fencing on its boundaries and he has also mutated the suit land in his name, vide Mutation Case No. 524 of 1981-1982 and has since been paying rents and taxes. The defendants threatened the plaintiff to dispossess him from the suit land and hence he was constrained to file the suit.

4. Defendant Nos.1-9, appellants herein, contested the suit by filing joint written statement denying all the material statements made in the plaint. Their case, in short, is that the plaintiff purchased about 0.32 acre of land from the eastern part of the suit plot No. 699 by a registered deed of sale dated 28-1-1962 and the remaining 0.23 acre of land from the western part was never sold to him. The plaintiff's registered deed No.597 dated 28-1-1962 is a forged document and defendant Nos. 2-4 never executed such deed nor did they sell 0.23 acre of land from the western part of the suit plot No.699 to him and the plaintiff got his name mutated in respect of the suit land without any notice to them and they have been possessing the said 0.23 acre of land in ejmali by erecting kutcha hut thereon. The plaintiff, therefore, did not acquire any right, title and possession over 0.23 acre of land and, as such, the suit was liable to be dismissed.

5. After hearing the parties, the trial Court by its judgment and order dated 20-2-1995 decreed the suit. Against the judgment and decree of the trial Court, the defendants preferred an appeal before the learned District Judge, Moulavibazar and on transfer, the appeal was heard and disposed of by the then learned Subordinate Judge, who by his judgment and order dated 30-10-1996 allowed the appeal and remanded the suit to the trial Court for fresh trial.

6. Being aggrieved by and dissatisfied with the judgment and decree dated 30-10-1996 passed by the appellate Court, the plaintiff, Kuti Miah moved to the High Court Division by filing a revisional application and obtained Rule in Civil Revision No.1209 of 1997.

7. During the pendency of the said suit, the plaintiff prayed for an order of temporary injunction and the trial Court by an order dated 27-5-1993 directed both parties to maintain *status quo* in respect of the possession of the suit land, but the defendants allegedly violated the order of *status quo* and evicted the plaintiff from the western portion of the suit land. After that, the plaintiff filed Miscellaneous Case (Violation) No.55 of 1994 against the defendants, which was allowed on 20-2-1995 and the defendants were directed to restore and deliver possession of the western part of the suit land in favour of the plaintiff within 30 days from the date of that judgment and for violating the Court's order, they were punished with a fine of Taka 1,000.

8. Against the order dated 20-2-1995, the defendants preferred Miscellaneous Appeal No.16 of 1995 before the learned District Judge, Moulavibazar and the plaintiff filed cross objection No.8 of 1995. On transfer, both the appeal and cross objection were heard analogously by the then learned Subordinate Judge, Moulavibazar, who by his judgment and order dated 30-10-1996 allowed the miscellaneous appeal setting-aside the judgment and order passed by the trial Court and also sent back the violation case to the trial Court for fresh trial.

9. Being aggrieved by and dissatisfied

with the judgment passed in the appeal and the cross objection arising out of violation proceeding, the plaintiff moved to the High Court Division by filing revisional application and obtained Rule in Civil Revision Nos. 1206 of 1997. The learned Single Judge of the High Court Division upon hearing both the civil revision cases by his judgment and order dated 24-4-2006 made the Rules absolute.

10. Feeling aggrieved by and dissatisfied with judgment and order passed by the High Court Division, the leave petitioners have filed Civil Petitions for Leave to Appeal Nos.834-835 of 2007 before this Division and obtained leave in both the civil petitions on 13-1-2009 resulting in Civil Appeal Nos.91-92 of 2009.

11. Mr AJ Mohammad Ali, learned Senior Advocate appearing on behalf of the appellants in both the appeals, submits that the appellate Court remanded both the suit for permanent injunction and the violation case to the trial Court directing to dispose of the suit and the miscellaneous case for violation independently and that against the order of remand, the High Court Division made the Rules absolute setting-aside the order of remand passed by the appellate Court without at all adverting to the findings arrived at by the appellate Court and, as such, the impugned judgment should be set-aside. He further submits that a case for violation of order of *status quo* cannot be disposed of with the suit for permanent injunction because a violation case is quasi criminal proceeding and, as such, cannot be disposed of with suit for permanent injunction and that the High Court Division without looking into this broad legal aspect of the case made the Rules absolute and, as such, the impugned judgment should be set-aside.

12. Mr Awlad Ali, learned Senior Advocate appearing on behalf of the respondents in both the appeals, on the other hand, supports the impugned judgment delivered by the High Court Division.

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

14. To begin with, it is necessary to go through the grounds, on which, leave was granted, which are as under:

> "The appellate Court acted in accordance with law in remanding the suit and the miscellaneous violation case with some findings inasmuch as the violation case being quasi criminal in nature cannot be heard and disposed of along with the suit by the same judgment and the Court ought to have disposed of them separately by framing separate issue and the failure to do so has caused a failure of justice. Since the allegations for violation of an injunction order passed by the trial Court under Order XXXIX, rule 2(3) of the Code of Civil Procedure partake quasi judicial in nature, the court in such a proceeding was required to frame issues disclosing materials constituting the offence so that the person at fault could be put on his guard as to his defence but both the trial Court as well as the High Court Division failed to appreciate and consider this vital aspect of the case and as a result there has been a miscarriage of justice."

15. Having considered the exhihit-1 and exhibit-1ka, the deeds of sale dated 28-1-1962, the trial Court came to a finding that those deeds of sale were more than 30 years old and that exhibit-1ka was not cancelled by any competent court and, as such, the plaintiff could prove his *prima facie* title to the suit land. The trial Court also found that pursuant to the exhibit-3 series, the plaintiff paid rent of the suit land and these exhibits proved possession of the plaintiff in the suit land.

16. Exhibit-Ga, the report of the Advocate Commissioner, submitted by Advocate Ali

Ahmed, revealed that as many as ten huts were on the suit land and that a building was under construction. The trial Court took into consideration the Advocate Commissioner's report dated 4-10-1993 (exhibit-5) submitted by Advocate Solim Ahmed Chowdhury, and found that adjacent to the under construction building a fence having the height of 4 yards was erected and that the structure was about 3/4 months old. The Advocate Commissioner also found that a house measuring 65 yards long and $4^1/_2$ yards breath was erected 3/4 months back. Having considered the evidence on record and exhibit-5, the trial Court came to a finding that the plaintiff had been in possession of the suit land exclusively and that during pendency of the suit, he was dispossessed from a portion thereof by the defendants. The trial Court also considered the evidence of the witnesses in extenso and came to a finding that the plaintiff was dispossessed from a portion of the suit land by the defendants during pendency of the suit in violation of the order of *status quo* passed by the Court.

17. On the other hand, the appellate Court without adverting to the material findings of the trial Court set-aside the judgment and decree passed by the trial Court and sent the suit and the violation case to the trial Court for disposing of them separately.

18. Having considered exhibits-1 and 1(ka), the appellate Court came to a finding that on 28-1-1962, the defendant sold the suit land to the plaintiff by registered deeds of sale Nos.496 and 497. The appellate Court further found that the defendants admitted selling of 0.32 acre of the suit land to the plaintiff by exhibit-ka and that they denied selling of 0.23 acre of land by exhibit-l(ka) to the plaintiff. The appellate Court, however, came to a finding that exhibit-1(ka) was a genuine deed. When the appellate Court found that the plaintiff, in fact, purchased the suit land by exhibits-1 and l(ka), it should have affirmed the judgment and decree of the trail Court which decreed the suit for permanent injunction.

19. While considering the case for violation, the appellate Court found that there was no scope for disposing of the suit for permanent injunction and the violation case analogously and in support of such finding, the appellate Court relied upon the cases of *Mamtaz Meah vs Mosammat Amirunnessa 9 DLR 444 and Sultan Ahmed Howlader and others vs Habibur Rahman Munshi 39 DLR 260.* In the case of Mamtaz Meah (ibid), the High Court Division held that a proceeding for punishment in respect of violation takes the form of a criminal proceeding and proof of violation by production of evidence is necessary and the person proceeded against should also be given an opportunity to prove the contrary.

20. Almost similar view has also been taken in the case of Sultan Ahmed Howlader and others (ibid). The principle laid down in the cases referred to above is not disputed.

21. In the case in hand, the learned Assistant Judge afforded the defendants with all opportunities to defend them in the violation case. The appellate Court, however, was correct in holding that the trial Court was not justified in imposing a punishment of payment of Taka 1000 upon the defendant under Order XXXIX, rule 2(3) of the Code of Civil Procedure.

22. Having gone through the impugned judgment, we find that the High Court Division corrected the mistake committed by the trial Court and imposed punishment as provided in Order XXXIX, rule 2(3) of the Code of Civil Procedure.

23. What is important to note here is that the learned Assistant Judge should have disposed of the suit for permanent injunction and the case for violation of the order of *status quo* independently as a proceeding for punishment in respect of violation of an order of *status quo*

partakes more of the characteristics of a criminal proceeding or, at any rate, is a quasi-criminal proceeding. But here the suit for permanent injunction and the violation case were heard analogously.

24. The trial Court framed issue No. 4 and 5 in respect of the violation of the order of *status quo*, which are quoted below:

(৫) বাদী কি বিবাদীপক্ষ কর্তৃক বিগত ২৮-৬-১৯৯৩ইং তারিখ নালিশী ভূমি হইতে বেদখল হইয়াছে?

(৬) বিবাদীপক্ষ কি আদৌ আদালতে স্থিতিঅবস্থার আদেশ অমান্য করিয়াছে?

25. The trial Court extensively considered both the issues with reference to the evidence on record and found that the defendants had violated the order of *status quo*.

26. Having gone through the judgments of the trial Court and the High Court Division, we are of the view that the defendant-leave-petitioners were not prejudiced in any way by the disposal of the suit for injunction and the violation case analogously. The grounds on which, the appellate Court remanded the suit for permanent injunction and the case for violation of the order of *status quo* were not in accordance with law.

27. For violating the order of *status quo*, the High Court Division punished the defendants to suffer civil imprisonment for 1(one) month modifying the punishment of payment of Taka 1000 and also directed to restore possession of the suit land to the plaintiff as per direction of the trial Court.

28. On the facts and in the circumstances of the case, we are of the view that a civil imprisonment of 4 (four) days will be proper and accordingly, the defendants are sentenced to suffer civil imprisonment for 4(four) days.

In view of the findings made above, both the appeals are dismissed with the modification of sentence. The direction regarding restoration of possession by the defendants to the plaintiff is affirmed.

Ed.

Appellate Division
(Criminal)

Code of Criminal Procedure (V of 1898)

Md Muzammel Hossain CJ
Surendra Kumar Sinha J
Md Abdul Wahhab Miah J
Hasan Foez Siddique J
} State...Appellant
vs
} Tajel Sheikh @ Md Tajul Sheikh and others.....
} .....Respondents*

Judgment
January 8th, 2014.

Section 509A

Post-Mortem Report—Post-mortem report is just like any other corroborative evidence and it cannot be accepted as a conclusive proof as to the cause of death of a deceased and a Court can discard the opinion of the doctors if it contradicts the ocular evidence adduced in the case which appears to be credible, cogent and trustworthy and the doctors concerned failed to hold the autopsy properly and gave fanciful opinion. .....(17)

Code of Criminal Procedure (V of 1898)
Section 35A

The period during which he suffered in jail hajat before the order of conviction and sentence passed by the Sessions Judge shall be deducted from his sentence of imprisonment. .....(20)

*Criminal Appeal N0.26 of 2011.

(From the judgment and order dated the 22nd day of February, 2010 passed by the High Court Division in Criminal Appeal No.2005 of 2000)

Abdul Mannan vs State, 44 DLR (AD) 60 and State vs Abdul Kader alias Kada, 19 BLT (AD) 38 ref.

Rajik-al-Jalil, Deputy Attorney-General instructed by Sufia Khatun, Advocate-on-Record—For the Appellant.

Harun-or-Rashid, Advocate instructed by Nahid Sultana, Advocate-on-Record—For the Respondents.

Judgment

Md Abdul Wahhab Miah J: This appeal, by leave, has arisen out of the judgment and order dated the 22nd day of February, 2010 passed by a Division Bench of the High Court Division in Criminal Appeal No.2005 of 2000 dismissing the same.

2. Facts necessary for disposal of the appeal are that the respondents, four in number, namely: Md Tajul Sheikh, Rezaul Hoque, Rokeya Begum and Dr Nurul Haque, were put on trial before the Sessions Judge, Rajbari in Sessions Case No.24 of 1999 and were charged under sections 302/34 and 302/201 of the Penal Code to which they pleaded not guilty and claimed to be tried.

3. The case of the prosecution as stated by PW 1, the informant (hereinafter referred to as the PW), is that his daughter-Sufia Khatun had love affairs with respondent No.l, Md Tajel Sheikh (hereinafter all the respondents shall be referred to as the accused, in the petition of appeal, Tajel Sheikh has been described as Tajul Sheikh @ Md Tajul Sheikh) and as a result, she became pregnant and as per decision of a local salish, Sufia Khatun was given in marriage with Tajel Sheikh; subsequently, the marriage was registered. The accused could not accept the marriage, so they used to torture Sufia Khatun and they did not call in any doctor when labour pain of Sufia Khatun started. The PW took Sufia to Faridpur Hospital where she gave birth to a female child named Buri. After $1^1/_2$ one and half) months, the accused took Sufia Khatun and her baby (daughter) in their house. On 9-10-1998, at about 11-30, in the night, accused-Dr Nurul Haque (in the petition of appeal he has been described as Nurul Haque) went to the house of the PW and informed that Sufia Khatun was found missing. Then, on search, the PW found the dead body of Sufia Khatun in a low land behind the house of one Rahman and on the following day, he found the dead body of his grand daughter, wrapped in a kantha, on the western bank of the pond of accused-Dr Nurul Hoque. The accused killed the daughter and the grand daughter of the PW. Thereafter, the PW lodged the First Information Report with Goalanda Police Station. The Investigating Officer prepared the inquest report of the dead bodies and seized the wearing clothes of Sufia Khatun.

4. The prosecution in all examined 11 (eleven) witnesses to substantiate the charges levelled against the accused. The defence cross-examined all the prosecution witnesses and did not examine any defence witness. The case of the defence, as it appears from the trend of cross-examination of the prosecution witnesses, was that the accused were innocent and they were implicated in the case falsely. Deceased-Sufia Khatun was not the wife of accused-Tajel Sheikh and she and her daughter-Buri were not in his house. The further defence case was that accused-Dr Nurul Haque being a man of different area, they were implicated in the case falsely with the sole motive to evict him from his house in the occurrence village.

5. On conclusion of trial, the learned Sessions Judge by his judgment and order dated 14-8-2000 found accused-Tajel Sheikh guilty under section 302 of the Penal Code and accordingly, sentenced him to suffer imprisonment for life with a fine of Taka 10,000 in default to suffer rigorous imprisonment for l(one) year more. The learned Sessions Judge also found the other accused, namely: Dr Nurul Hoque, Rezaul Haque and Rokeya Begum

guilty of the charges under sections 302/201 of the Penal Code and accordingly, convicted them and sentenced each of them to suffer rigorous imprisonment for 5(five) years with a fine of Taka 5000 each in default to suffer rigorous imprisonment for 6(six) months more.

6. Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence, the accused filed Criminal Appeal No.2005 of 2000 before the High Court Division and a Division Bench of the High Court Division by the impugned judgment and order allowed the appeal and set-aside the judgment and order of conviction and sentence passed by the learned Sessions Judge and acquitted all the accused of the charges brought against them. Against the said judgment and order of acquittal, the State preferred Criminal Petition for Leave to Appeal No.215 of 2010 before this Division and leave was granted on the 28th day of September, 2010 to consider:

I. Whether the High Court Division was justified in acquitting the accused of the charges on proper sifting of the evidence on record, inasmuch as, the learned Sessions Judge on proper appreciation of the evidence found that victim Sufia Khatun was the legally married wife of Tajel Sheikh and that through the said marriage they were blessed with a daughter and that while the victims were staying with accused Tajel Sheikh, their dead bodies were found on a low lying area nearer to the house of Tajel Sheikh with injuries.

II. Whether the reasonings of the High Court Division that the prosecution had failed to prove beyond doubt that the victims were living in the house of the accused at the time of occurrence are sufficient grounds to acquit them of the charges brought against them in view of the fact that the accused failed to dislodge the prosecution case that the victim Sufia Khatun was the wife of the respondent No. 1 who was done to death.

7. Mr Rajik-al-Jalil, learned Deputy Attorney-General, appearing for the State, has made his submissions in the light of the leave granting order by referring to the evidence of PWs. 1, 4, 5, 6 and 8 and has submitted that the testimonies of these PWs proved beyond reasonable doubt that accused-Tajel Sheikh was compelled to marry deceased-Sufia Khatun as per verdict of a salish as she became pregnant by him while she used to work as a maid at the house of his father. He has further submitted that the testimonies of these witnesses also proved the fact that on the fateful night, deceased-Sufia Khatun alone with her two and half months old female baby was at the house of the accused and Sufia Khatun slept in the same bed with accused-Tajel Sheikh as spermatozoa were found in the swab of Sufia Khatun as clearly mentioned in the post-mortem report, but the High Court Division by ignoring the evidence of the PWs and the post-mortem report came to the abrupt finding that the prosecution failed to prove that deceased-Sufia Khatun was the wife of accused-Tajel Sheikh and thus erred in law in acquitting the accused of the charges brought against them setting-aside those of the learned Sessions Judge.

8. Mr Harun-or-Rashid, learned Advocate, appearing on behalf of the accused, on the other hand, has submitted that the High Court Division rightly acquitted the accused as the prosecution failed to prove the fact that deceased-Sufia Khatun was the legally married wife of Tajel Sheikh and through their wedlock, a female baby named Buri was born and that they used to reside in the house of accused-Tajel Sheikh and that on the fateful night (9-10-1998), deceased Sufia along with her daughter was in the house of the accused.

9. From the judgment of the learned Sessions Judge, it appears that it came to the specific findings:

(i) that deceased Buri was done to death due to suffocation and her death was un-natural,

(ii) that Sufia Khatun was done to death and she did not meet a natural death, though in the post mortem report, it was opined that she died a natural death,

(iii) that deceased-Sufia Khatun was the married wife of accused-Tajel Sheikh and their marriage was solemnized in a salish as due to the love which developed between her and accused-Tajel Sheikh, she became pregnant,

(iv) that Sufia Khatun and her $2^1/_2$ months old daughter were staying at the house of the accused till death and that on the night of occurrence, ie on 9-10-1998, Sufia Khatun stayed in the house of the accused with her husband "in the same bed." Sufia Khatun and her baby daughter were done to death on the night following 9-10-1998 and on the following morning, their dead bodies were taken to the morgue for autopsy,

(v) that though there is no eye witness in the case, ie none saw the accused to kill Sufia and her baby daughter in the night of the occurrence, "the prosecution has successfully been able to a good circumstancial*(sic)* evidence of any convicting character."

(vi) that it has also been well proved that the accused used to torture Sufia Khatun and prior to marriage, she used to work in the house of the accused as servant,

(vii) that it has also been well proved that after the death, "the dead bodies of both deceased were left outside of the house of accused persons to disappear the evidence of murder with the intention of screening themselves from legal punishment" and consequently accused Dr Nurul Hoque gave a fake information to the informant that Sufia had been missing,

(viii) that accused Dr Nurul Hoque, Rezaul Haque and Rokeya took leading part in the occurrence of disappearance of evidence of the offence of murder caused by accused-Tajel by leaving the dead body of Sufia "in the low land behind the house of husband" and the dead of Buri in a bush situated on the western bank of the tank of accused-Dr Nurul Hoque and by giving "fake information" that Sufia Khatun had been missing and they were also guilty for the offence punishable under sections 302/34 of the Penal Code.

10. In coming to the above findings, the learned Sessions Judge considered the testimonies of PWs 1, 4, 5, 6 and 8, the inquest report and the two post-mortem reports which were proved and marked as exhibits-'1', '4' and '5' respectively. The learned Sessions Judge discarded the opinion of the doctors given in the post-mortem report of Sufia that she met a natural death. The reasons assigned by the learned Sessions Judge in holding so are:

(a) though the doctors who held the autopsy found no external injury on the body of deceased-Sufia, they found diffused sign of "ecchymosed on the buttocks of deceased Sufia", they did not give any comment about the mark of injury which was seen on the buttock,

(b) the doctors concerned did not also pass any opinion as to how and for what disease the deceased (Sufia)

met a natural death,

(c) PW1, (the informant), PWs 2, 4, 5, 6 and 8 in a chorus have stated that Sufia Khatun and her daughter were murdered,

(d) On scrutiny of exhibits-'1'(the inquest report) and '4' (the post mortem report), it appeared that Sufia Khatun was also done to death and she did not meet a natural death.

11. The learned Sessions Judge observed that "it is not understandable if Sufia met a natural death, why her dead body was found lying in a low land" near the house of one Rahman instead of her husband's house. The further reason assigned by the learned Sessions Judge in discarding the opinion of the doctors that Sufia Khatun met a natural death is that from the post-mortem report it appears that she was 20(twenty) years old, so if she met a natural death, she would have suffered from serious disease, but from the statements of the PWs as well as from the suggestion of the defence, it was found that before death Sufia Khatun had not been suffering from any such disease. The learned Sessions Judge further observed that the doctors concerned did not hold the autopsy over the dead body of deceased Sufia properly and "they made a fanciful opinion that Sufia Khatun met a natural death."

12. From the impugned judgment, it appears that the High Court Division came to the finding that the alleged marriage between accused-Tajel Sheikh and deceased- Sufia Khatun was not proved just by referring to the cross-examination of PW1 to the effect "তাজলের সঙ্গে আমার মেয়ের কবে বিয়ে হয় তা বলতে পারব না। কে কে উকিল ছিলো, কত টাকা দেনমোহর ধার্য হয় তা মনে নাই। বিয়ে মজলিসে কে কে উপস্থিত ছিল তা মনে নাই। কাবিন কয় তারিখে রেজিস্ট্রি হয় তা স্মরণ নাই। কাবিন খানা দারোগা নেননি আমিও দেইনি। কয় মাসের গর্ভ অবস্থায় মেয়ের বিয়ে হয় তা খেয়াল নাই। মেয়েকে ভর্তি করিবার কাগজপত্র দারোগাকে দেইনি।" The High Court Division did not at all consider the assertions made by PW1 in his Examination-in-Chief that there was love affairs between the accused and his daughter, Sufia for which she became pregnant, a salish was held over the matter and marriage was solemnized in the salish; a child was born out of the wedlock of his daughter, Sufia and the accused; after marriage, Tajel Sheikh fled away, then the villagers got the kabinnama executed. The High Court Division also failed to consider that in cross-examination, PW1 emphatically denied the defence suggestion that it was not a fact that accused-Tajel did not marry his daughter and that his daughter never went to the house of Nurul Haque. In cross-examination, PW1 asserted the fact of marriage of Sufia by the villagers. The fact of marriage between Tajel Sheikh and Sufia was further asserted by PW4, an independent witness, who categorically stated that Tajel Sheikh married Sufia as a sequel to love. PW5 categorically stated in his Examination-in-Chief that accused-Tajel Sheikh and Sufia got married out of their love and during marriage, a salish was held (in the deposition sheet, in Bangla, it has been recorded as ("তাহাদের বিয়ের সময় সালিশ হয়") and marriage was solemnized in the salish. PW 5 further asserted that after marriage, kabinnama was executed. PW6 stated in her Examination-in-Chief that accused-Tajel married Sufia out of love affairs. There were salish on several times over the marriage of Sufia and the marriage of Sufia was solemnized by Moulavi Mohammad. In the salish, Jalil Chairman was present who died in the meantime. PW 8 also categorically stated in his Examination-in-Chief that Sufia was married to accused-Tajel and their marriage was the culmination of their love for each other (in the deposition sheet, in Bangla, it has been recorded as ("প্রেম করে তারা বিয়ে করে"). Before marriage, a salish was held and in the salish, Tajel and Sufia admitted the fact of love. He further stated that in the salish, decision was taken to solemnize their marriage, but subsequently the father of accused-Tajel did not accept the decision of the salish. Afterwards, Jalil Chairman held a salish

and got the marriage solemnized. Jalil Chairman died in the meantime. The Moulavi solemnized the marriage and kabinnama was also executed later. Of these PWs, PW 1 is the informant, PWs 5 and 8 are the full brothers of the informant, PW6 is the wife of the informant, but merely because PWs 5, 6 and 8 are closely related to the informant, in other words, they are related to each other, their evidence cannot be disbelieved if it is found that they are natural and trustworthy witnesses. The test of acceptance of a closely related witness is whether he could withstand the test of cross-examination. We have gone through the testimonies of these PWs (PWs. 5, 6 and 8). From their cross-examination, it does not appear that their assertions made in their Examination-in-Chief that there was love affairs between deceased-Sufia and accused-Tajel and salish was held as she became pregnant and that eventually marriage was solemnized in the salish could be in any way shaken. Besides, as already stated hereinbefore, PW4, an independent witness also corroborated the fact of marriage between the accused and Sufia. But, as it appears from the impugned judgment, the High Court Division did not at all consider the positive assertions of those PWs in their Examination-in-Chief as to the marriage between accused-Tajel Sheikh and deceased-Sufia. The High Court Division disbelieved the fact of marriage between accused-Tajel Sheikh and deceased-Sufia Khatun on the ground that PW1 could not say the exact date of marriage of his daughter, who was the 'Ukil of the marriage, the amount of 'Denmohar', who were present in the wedding ceremony and the date of kabinnama completely forgetting the prosecution case and the evidence of the PWs as referred to above that the marriage between the accused and the deceased was not held in a normal way, but was solemnized in a salish because of the fact that due to love affairs developed between the two, the deceased became pregnant. The High Court Division also failed to consider that the failure on the part of PW 1 in cross-examination in telling the exact date of marriage, the name of 'Ukil' of the marriage, the amount of 'Denmohar', the name of the persons who were present in the marriage ceremony and the date of kabinnama, could not nullify the evidence of the other witnesses as discussed above regarding the fact of marriage of Sufia with Tajel Sheikh. In the facts and circumstances of the instant case, PWs. 1, 4, 5, 6 and 8 were the most natural witnesses to depose on the fact and we see no reason to disbelieve them. The finding of the High Court Division as to the marriage between accused-Tajel and Sufia is based on total non-consideration of the material evidence of PWs 1, 4, 5, 6 and 8. Therefore, the same cannot be sustained.

13. Now the next pertinent question comes for consideration is whether, after marriage, Sufia was taken in the house of the accused, in other words, whether, after marriage, Sufia lived with her husband, accused-Tajel in his house.

14. The informant as PW 1 in his Examination-in-Chief categorically stated that after the marriage of Sufia had been solemnized with accused-Tajel in the salish, he fled away; then the villagers got the kabinnama executed. Thereafter, the parents of Tajel took Sufia to their house; sometime thereafter when Sufia was staying at the house of the accused, her labour pain started, the accused told him to see a doctor (in the deposition sheet, in Bangla, it has been recorded as ("কিছু দিন পরে আসামীদের বাড়িতে থাকাবস্থায় প্রসব বেদনা উঠে। আসামীরা আমাকে ডাক্তার দেখাতে বলেন") and he took his daughter to Faridpur Hospital where a female child was born. And then he brought his daughter to his house, after $1^1/_2$ months, the accused took his daughter and grand daughter to their house. On 9-10-1998 at about 11-30 o'clock in the night, accused-Dr Nurul Haque informed him that Sufia was not traceable. PW 5 stated in his Examination-in-Chief that after marriage, kabinnama was exe-

cuted. And Sufia was taken to the house of her husband by giving her due honour as wife. At the time of execution of the kabinnama and also at the time of giving birth of the child, there were problems. At that time, Sufia was at the house of the accused, they wanted to call a doctor, but accused-Dr Nurul Hoque told that they would not be allowed to bring any doctor. In those circumstances, they took Sufia to Faridpur Hospital from the house of the accused where she gave birth to a female child named Buri. After two months of the birth of the child, Sufia went to the house of the accused along with her two months old daughter. The PW stated that the accused used to misbehave with her niece. PW6 stated that Sufia was killed at the house of her husband. She further stated that after marriage, the accused used to torture her daughter. PW8 in his Examination-in-Chief stated that after the kabinnama, the accused took Sufia to their house and they used to assault her oft and often. The evidence of these PWs clearly show that after marriage, deceased-Sufia was taken to the house of the accused and she used to stay with her husband, accused-Tajel. After giving birth to the child although Sufia stayed for above $1^1/_2$ months at the house of her father, she went to the house of the accused along with her 2(two) months old baby. But the High Court Division without considering the evidence of the PWs in an abrupt manner came to the finding that although the prosecution examined 11 witnesses including the informant, none of them deposed in the Court that deceased-Sufia and her daughter was ever found in the house of the accused at or about the time of occurrence. So, this finding of the High Court Division cannot also be sustained.

15. Another fact has to be considered is whether, on the date of occurrence, deceased-Sufia Khatun along with her baby daughter was in the house of accused-Tajel. From the evidence of the PWs discussed above, we have already found that after marriage with accused-Tajel Sheikh, Sufia started living with her husband at his house. She stayed at the house of her father for about $1^1/_2$ months after giving birth to the child and then went to the house of her husband with the baby. Sufia was with her husband on the fateful night along with her daughter is evident from the evidence of PWs 1, 4 and 6 and the post-mortem report as well. PW 1 in his Examination-in-Chief categorically stated that on 9-10-1998, at about 11-30 hours, in the night, accused-Dr Nurul Hoque informed him that Sufia was found missing. PW 4 in his Examination-in-Chief stated that on the date of occurrence, he had gone to the house of Ashraf situated on the southern side of his house to watch television. Dr Nurul Hoque went there and took out his two sons from there. Sometime thereafter, the PW started for his house and when he reached near the house of Dr Nurul Hoque, he saw accused-Tajel Sheikh sitting on the road and Dr Nurul Hoque going towards the north. Immediately, thereafter, Dr Nurul Hoque came back and informed that the wife of Tajel was not traceable (in the deposition sheet, in Bangla, it has been recorded as ("তাজেলের স্ত্রীকে পাওয়া যাইতেছে না") then he went to his house and sometime thereafter, at about 11-00 o'clock, in the night, the dead body of Sufia was found and on the next morning, at 6-00 AM, the dead body of Buri, daughter of Sufia, was found. PW 6 also asserted that her daughter was killed at the house of her husband. Had Sufia not been in the house of the accused than accused-Dr Nurul Hoque would not have gone to the house of the informant (PW 1) to tell him that Sufia was not traceable or found missing; for similar reason, accused-Dr Nurul Hoque would not have also said the same fact to PW 4. From the post-mortem report, it appears that on microscopic examination, spermatozoa were found in the vaginal swab of Sufia. Admittedly Sufia was a young woman of 20(twenty) years and she was at the house of her husband. It was not the defence case that Sufia was a girl of loose moral character or a woman of bad character

section 66(1) of the Children Act, 1974. Therefore we hold that the impugned order suffers for legal infirmities.

18. With this regard reliance can be placed in the case of *Baktiar Hossain vs State 14 BLD 381 = 47 DLR 542* held—

"Section 66(1)

It provides that when an accused is brought before any criminal court for facing trial and it appears that he is a child, the Court shall make an enquiry as to his age by taking such evidence as may be forthcoming and shall record a finding thereon stating his age as nearly as possible. When such a plea is taken by the accused, a duty is cast upon a court to determine the age of the accused by holding an enquiry."

19. On the identical issue it is held in the case of *Bimal Das vs State, 14 BLD (AD) 218.*

"Section 66(1)

It provides that when it appears to the Court that a person charged with an offence is a child, the Court is required to direct an enquiry to ascertain the age of the accused. When an accused is above 16 years of age at the time of framing of the charge he is not entitled to get the benefit of the Children Act".

20. 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. Thus the appeal having merit succeeds.

21. In view of foregoing narrative the appeal is allowed. The impugned orders dated 17-6-1996 and 29-6-1996 are hereby set-aside. The order of stay granted earlier stands vacated.

22. The learned judge of the Adalat is directed to frame charge afresh after hearing both the parties and to dispose of the case expeditiously.

Office is directed to communicate the order at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Md Ashfaqul Islam J } Eastern Money Changer.. .....Petitioner

Md Ashraful Kamal J } vs

Judgment March 6th, 2014. } Bangladesh Bank and others.....Respondents*

Constitution of Bangladesh, 1972
Article 40

To do lawful business or trade subject to restriction of law is one of those provisions which cannot be curtailed or throttled in any manner by any authority. .....(16)

Bangladesh vs Tajul Islam, 49 DLR (AD) 177; Bangladesh Telecom (Pvt.) Ltd. vs T&T, 48 DLR (AD) 20; Chairman REB vs Abdul Jalil, 3 BLC (AD) 79; Abdul Jalil vs REB 45 DLR 24 and R. vs Metropolitan Police Commissioner (1968) 2 All ER 139 ref.

Masood Reza Sobhan with Fatema S Chowdhury, AFM Saiful Karim, Advocates—For the Petitioner.

*Writ Petition No. 2515 of 2012.

Md Abdun Nur with Md Hafizur Rahman, Advocates—For the Respondents.

Judgment

Md Ashfaqul Islam J: Eastern Money Changer, a partnership concern challenging the cancellation of licence issued by the respondent No.l Bangladesh Bank moved this Writ Petition and obtained the present Rule under the following terms:—

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why the impugned Memo No. EEPD (LDA) 144/538/2012-168, 169 dated 5-3-2012 issued by the respondent No.l under the signature of the respondent No. 3 Deputy General Manager, Bangladesh Bank cancelling the Money Changer Licence No. বৈমুনী (অবা) ১৪৪/৯৮-২৫০৫ dated 19-10-1998 (Annexure- "B") shall not be declared to have been issued without lawful authority and is of no legal effect."

2. Facts relevant for disposal of the Rule, *inter alia*, are that the petitioner is a partnership firm and has been running its business as Money Changer since 1998 after obtaining Licence No. বৈমুনী (অবা) ১৪৪/৯৮-২৫০৫ dated 19-10-1998. His Licence has been renewed time to time. Respondent No. 1 Bangladesh Bank on 5-3-2012 issued Memo No. EEPD (LDA) 144/538/2012-168, 169 dated 5-3-2012 under the signature of the respondent No. 3 Deputy General Manager Foreign Exchange Policy Department Bangladesh Bank cancelling the petitioner's said licence (Annexure- "B").

3. In the petition it has been stated that in strict compliance of all the provisions of Foreign Exchange Regulation Act, 1947 the petitioner had been running its business. On 5-12-2011 a team led by the Joint-Director of the respondent No. 1 inspected the petitioner firm's premises and found that out of many only three separate transactions or separate dates were not recorded in the register of books of accounts from 1st to 5th of December, 2011. It has also been stated that the register of books of accounts were updated at once by recording the three transactions as mentioned above in respect of endorsements for travel purpose. By Annexure-"C" the petitioner explained books of accounts.

4. All on a sudden on 2-1-2012 the petitioner firm received a notice alleging irregularities found in inspection on 5-12-2011 and called for explanation from the petitioner on the same within seven days further asking him as to why his licence would not be cancelled (Annexure-"D"). The petitioner firm accordingly on 11-1-2012 submitted its explanation to the respondents stating that the allegations made in the notice were not true and there were no latches whatsoever on the part of the firm (Annexure-"E"). It has been also stated that the licence which was issued in the year 1998 to the petitioner allowed him to deal with all foreign currencies. The petitioner's long standing business extending over a period of 15 years remained unblemished except an occurrence at the behest of the petitioner's employees which was also handled by him with promptitude. That being the situation the petitioner impugns the Memo in question that has cancelled his licence to do business as a Money Changer on the ground that the same has the curtailing effect on the fundamental rights of the petitioner as enshrined in Article 40 and 31 of the Constitution in particular and, as such, the same should be declared to have been issued with lawful authority and is of no legal effect.

5. Mr Masood Reza Sobhan, the learned Counsel appearing with Mrs Fatema S Chowdhury, the learned Advocate for the petitioner after placing the petition and the relevant

Annexures with it pressed into serving several grounds. Their bone of contention is that the impugned notice has been issued without assigning any lawful reason and even without referring to any of the terms of the licence or any of the provisions of Foreign Exchange Regulation Act 1947 which is arbitrary and *malafide* action of the respondents having curtailing effect upon the fundamental right of the petitioner guaranteed under the Constitution. Mr Sobhan also argues that the licence can be cancelled under section 3(2) (iii) of the Foreign Exchange Regulation Act 1947 (hereinafter referred to as Act) if Bangladesh Bank seems it fit to be done in a given situation. But this unfettered right, as he submits, should be exercised sparingly with due caution.

6. Mr Sobhan placed reliance on the decision of *Bangladesh vs Tajul Islam* reported in *49 DLR (AD) 177* in support of his contention. Highlighting the observations made in the said decision that the licence is a legal privilege guaranteed under law and not a charity on a technical requirement or an ideal ceremony rather a mandate, he submits that a wrong has been committed *exfacie* by cancelling the licence of the petitioner. Mr Sobhan concludes by submitting that the act of the respondent by which the licence of the petitioner has been cancelled certainly is an act tainted with unbridled and capricious decision of the respondents which certainly had indulged in excess. Therefore, he submits that in all fairness this Rule should be made absolute declaring the order impugned against to be illegal and without any lawful authority.

7. Mr Md Abdun Nur, the learned counsel appearing on behalf of the respondent Bangladesh Bank by filing affidavit-in-opposite and Supplementary affidavit-in-opposition, on the other hand, opposes the Rule submits that Eastern Money Changer is not a legal person and, as such, writ petition is not maintainable on that score. It has been stated in affidavit-in-opposition that the licence was issued to the petitioner with condition that it will follow the instructions of the Bangladesh Bank. He also placed reliance on FE Circular No.2 dated 14-1-1997 in this context wherein it has been stated in Clause 6 as under:

> "ক্রয় বিক্রয়ের বিস্তারিত বিবরণ সঠিক এবং সম্পূর্ণ ভাবে হিসাব বহিতে সংরক্ষণ করিতে হইবে। সকল রেকর্ডপত্র ও হিসাব বহি সমুহ নির্দেশিত হওয়া মাত্র বাংলাদেশ ব্যাংকের পরিদর্শকগনের নিকট উপস্থাপনের জন্য প্রস্তুত রাখিতে হইবে।"

8. He submits that in utter disregard the petitioner has defaulted to comply with the said Circular. Consequently he was served with the show cause notice calling for explanation on 5-10-2011. There was also a repetition of such act. Lastly he contends that the petitioner was not up-to date in maintaining its register books wherefrom false interpolation etc was detected. The enquiry team found that the petitioner manipulated Encashment Certificate No. 1420 dated 1-12-2011 where there was a insertion of US$ 4,000 manipulating of US$ 2,000. But corresponding payment in Bangladeshi taka remained unchanged for Taka 1,55,000 which *prima facie* proves their true manipulation from the side of the petitioner. It has been also alleged that manipulation of this kind has also been done in other certificate No. 10733 dated 3-12-2011 (Annexures-4, 4-A and 4-B). He submits that though the petitioner gave explanation to the notice of the respondent Bangladesh Bank but it does not hold good being bereft of any legal support or sanction. The petitioner was given ample opportunity to reply the show cause notice and, as such, no question of violation of his fundamental right as submitted by the learned counsel of the petitioner can be resorted to in the instant petition for which the Rule is liable to be discharged outright.

9. That being the position the only question that needs to be addressed in this petition is whether under the facts and circumstances and the relevant laws on the subject the cancellation of the licence of the petitioner has been justified.

10. We have heard the learned counsel of both sides at length and considered their submissions. We have also perused the papers and documents submitted by the parties carefully.

11. On the question of maintainability of the instant Writ Petition the law is well settled. Writ petition can be well founded against the partnership concern. This proposition of law is no longer a *resintegra* and needs no elaboration. *Further in Bangladesh Telecom (Pvt.) Ltd. vs T & T 48 DLR (AD) 20* it was held that a Writ petition cannot be resisted when a licence granted in exercise of statutory power.

12. In order to appreciate the central issue before us it would be worthwhile to quote the pertinent law by which the licence of the petitioner has been cancelled. Section 3(2)(III) of the Foreign Exchange Regulation Act 1947 states:

"3. Authorized dealers in foreign exchange-

(l) The Bangladesh Bank may, on application made to it in this behalf, authorize any person to deal in foreign exchange.

(2) As authorization under this section.

(i) May authorize dealing in all foreign currencies or may be restricted to authorizing dealings in specified foreign currencies only.

(ii) May authorize transactions of all descriptions in foreign currencies or may be restricted to authorizing specified transactions only.

iii) May be granted to be effective for a specified period of within specified amounts, and may in all cases be revoked for reasons appearing to if sufficient by the Bangladesh Bank."

13. On a plain reading of section it reveals that in a fit case Bangladesh Bank certainly can take any decision for revoking licence of any person which has been issued for a fixed period. The right reserved under law unquestionably is unfettered and absolute right. But when we glean the entire scenario of the case a question pertinently comes to our mind whether the manner by which the licence of the petitioner had been cancelled was well justified in exercising its jurisdiction under the quoted law. The answer would be clarified upon the discussion of another vital aspect which has been unveiled by my brother Justice Md Ashraful Kamal. He pointed out that there are some remedial provisions in the Act itself viz, section 23 read with section 22 and section 19 which the respondents under the situation could have resorted to and could very well proceed against the petitioner instead of cancelling his licence. I also endorse my brother's view.

14. The Constitution of ours which is the supreme law of the land has protected and guaranteed some fundamental rights of the citizen. The provisions of the Constitution are self executing. Article 40 of the constitution in particular have a positive bearing on the issue which states:

"Subject to any restrictions imposed by law, every citizen possessing such qualifications, if any, as may be prescribed by law in relation to his profession, occupation, trade or business shall have the right to enter upon any lawful profession or occu-

pation, and to conduct any lawful"

Further Article 31 says:

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

15. In the decision referred to above our Appellate Division while upholding the decision of this Division declaring cancellation of a licence under section 14(1) of the Immigrant Ordinance, 1982 to be illegal observed:

"A licence in a commercial sense is not a charity done to a person but a privilege accorded generally on payment of a fee. Under section 10 of the Ordinance a licencee is required to pay "such security and fee as may be prescribed". The respondent paid Taka 5 lakh as security which was liable to be forfeited upon cancellation of the licence. So, the cancellation of a licence is a serious matter adversely touching a person's pecuniary interest, more than that, it affects a fundamental right of a citizen to conduct any lawful trade or business subject to certain restrictions imposed by law. The Court would always insist that an authority exercising such a drastic power of cancellation acts strictly according to law and always with fairness,"

16. In the case in hand cancellation of licence was indeed an unbridled arbitrary outcome of executive feat which certainly had indulged in excess. The act has a curtailing effect upon Article 40 of the Constitution in particular. It has flouted Article 40 of the Constitution directly. The Constitution being the supreme law of the land the framers of the same in their wisdom have made some provisions protecting the right of the citizen. To do lawful business or trade subject to restriction of law is one of those provisions which cannot be curtailed or throttled in any manner by any authority. In the case of *Chairman REB vs Abdul Jalil 3 B LC (AD) 79* upholding the decision of the High Court Division reported in *Abdul Jalil vs REB 45 DLR 24*, the Appellate Division maintained that the decision taken by Rural Electrification Board (REB) barring all ex-employees of the Board from participating in any tender is unreasonable as offended to Article 40 of the Constitution.

17. Inevitably this mandate of the Constitution deserves protection by our interference in the context of the case. Lord Denning also preached the same ideal when he said "Silence in not an option when things are ill-done". [*R. vs Metropolitan Police Commissioner (1968) 2 All ER 139*] we are not oblivious but alive to that saying.

18. Fortified with the decisions of the Appellate Division as referred to above, in particular *49 DLR (AD) 177* all of which are binding on us and conjunct with the observations of our own we are of the view that the act of the respondents cancelling the licence of the petitioner has been done without lawful authority having no legal effect.

19. In the result, the Rule is made absolute. The order impugned against is declared to have been issued without lawful authority and is of no legal effect and, as such, set-aside.

Communicate this order at once.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

ANM Bashir Ullah J

Judgment
November 19th, 2013.

Mina Begum and others...Plaintiff-Petitioners

vs

Joj Miah.....Defendant-Opposite Party*

Limitation Act (IX of 1908)
First Schedule, Article 144

Adverse Possession—Whenever the plaintiff claims title by adverse possession he is duty bound to prove that his possession was adverse and hostile against the real owner for more that 12 years within the knowledge of the real owner and others.

In my consideration, the plaint of the plaintiff is sufficient to hold that his possession was never hostile from 1981 to 2006 as within this period he was requesting the defendant to execute and register a kabala admitting his title. The hostile and adverse possession of the plaintiff was started in fact from 30-8-2006 when the defendant denied to execute and register a kabala and within one year of 2006 the suit was filed. So the said one year is not sufficient to consider the claim of adverse possession of the plaintiff.

.....(23 & 22)

Sheikh Farid (Md) vs Abdul Wadud Sikdar, 58 DLR (AD) 248 ref.

Mohammad Mobarak Hossain—For the Petitioners.

Mohammad Abul Kashem Bhuiyan—For the Opposite Party.

Judgment

This Rule, on an application under section 1 15(1) of the Code of Civil Procedure (in short, the CPC) at the instance of the plaintiff-petitioners was issued calling upon the opposite party No. 1 to show cause as to why the impugned judgment and decree dated 29-5-2012 and 4-6-2012 respectively passed by the learned Joint District Judge, 1st Court, Brahmanbaria, in Title Appeal No. 62 of 2009 affirming the judgment and decree dated 14-7-2009 and 20-7-2009 respectively passed by the learned Assistant Judge (in-charge) Akhaura, Brahmanbaria in Title Suit No. 69 of 2007 dismissing the suit should not be set-aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The facts leading to the issuance of the Rule, in short, is that the late plaintiff Mohammad Ali, now being dead, instituted the above suit for declaration of his title into the suit land by adverse possession averring, *inter-alia*, that 0.15 acres of land appertains to settlement plot No. 209 corresponding to BS plot No. 575 of settlement khatian No. 60 of Noorpur mouza under Akhaura Police Station of Brahamanbaria district originally belonged to the defendant No. 1 who purchased the same from others on 25-6-1975.

3. The defendant No.l while in possession of the said land sold the same at a consideration of Taka 20,000 in presence of the common relations of both the parties to the plaintiff in 1981 and from then the plaintiff has been possessing the suit land. The defendant No.l had been serving in the Bangladesh Army at the relevant time. He had made commitment to the plaintiff that at his convenient time he would execute and register a kabala deed for the suit land in favour of the plaintiff.

4. The plaintiff demanded kabala from the defendant No.l on many occasions but he taking the plea of his service in the Army was dragging the same. On 1-1-1990 the plaintiff requested the defendant for execution and reg-

*Civil Revision No. 1857 of 2012.

istration of the kabala deed but the defendant No.l promising to register the kabala had requested the plaintiff to get the land recorded in his (defendant No.l) name in the on going record of right and accordingly the plaintiff in order to maintain the tranquility among them got the land recorded in the name of defendant No.l. Since the defendant denied to execute and register the kabala deed in favour of the plaintiff on 30-8-2006 he (plaintiff) made an allegation on 31-8-2006 before the Chairman of No. 3, Akhaura (south) Union Parishad which was registered as case No. 14 of 2006 in the office of the Union Parishad and pursuant to the said petition filed by the plaintiff, a meeting to resolve the dispute between the parties took place on 28-11-2006 and the meeting took a decision but the defendant ultimately denied to execute the decision of the said compromise meeting and the local Chairman gave a certificate to that effect on 12-2-2007.

5. The defendant filed a petition to the Deputy Commissioner, Brahmanbaria on 3-9-2007 for eviction of the plaintiff alleging, *inter-alia,* that the plaintiff has been possessing the suit land forcibly and the said petition was sent to the Akhaura Police Station wherein it was registered as GD entry No. 1564 dated 3-9-2007. In the said petition, the defendant No.l categorically admitted the forcible possession of the plaintiff into the suit land. The plaintiff ultimately denied the sale of the suit land to the plaintiff on 12-10-2007. Hence the plaintiff has been constrained to file the suit.

6. The suit was contested by the defendant No.l filing written statement wherein he denied the material allegations made in the plaint. The case of the defendant No.l, in short, is that the plaintiff is his step brother and he is the elder brother of the plaintiff, their father died in 1968 and from then, they have been living jointly with their mother. In the war of liberation, the defendant had participated actively whereupon after the war of liberation he joined in the Bangladesh Army and ultimately the plaintiff used to look after the common ancestral properties of the plaintiff and the defendant at their native village.

7. The further case of the defendant is that he had purchased the suit land from his uncle Ali Akbar by a registered deed on 25-6-1975. At the time of preparation of the recent record of right, the defendant handed over the original deed of the suit land to the plaintiff to get his (defendant) name recorded and accordingly the hal record of right has been prepared in the name of the defendant. The plaintiff taking the advantage of his possession into the suit land on behalf of the defendant and also using the original deed have been claiming the suit land on some false plea. The claim of title of the plaintiff into the suit land is false and frivolous. The defendant did never sell the suit land to the plaintiff a consideration of Taka 20,000. So, the suit is liable to be dismissed with costs.

8. Upon the above pleadings, the trial Court framed as many as 4 issues to dispose of the suit. The plaintiff examined 6 witnesses and submitted some papers which were duly marked as exhibits in the suit while the defendant examined 4 witnesses but did not adduce any documentary evidence. The trial Court on consideration of the evidence on record dismissed the suit and as against the said judgment of the trial Court, the plaintiff preferred Title Appeal No. 62 of 2009 in the Court of District Judge, Brahmanbaria and the appeal was ultimately heard by the Joint District Judge, 1st Court, Brahmanbaria who by his impugned judgment and decree affirmed the judgment of the trial Court. The petitioners being the substituted heirs of late original

plaintiff moved this Court and obtained the present Rule. The Rule is resisted by the sole defendant-opposite party.

9. Mr Mohammad Mobarak Hossain, the learned Advocate appearing for the petitioners supports the Rule. He submits that though the petitioners have come in this Court against the judgment and decree of affirmance but if the very basis of the concurrent findings of the two Courts below appears to be as misconception or based on no evidence, such concurrent findings cannot claim any immunity from this Court. He also submits that the plaintiff filed the original suit for declaration of his title by way of adverse possession asserting his uninterrupted and continuous possession in to the suit land from 1981 till filing of the suit in 2007. But the Courts below did not at all consider the possession of the plaintiff into the suit land.

10. He further submits that the plaintiff very successfully proved his possession into the suit land and since the suit was for declaration of title by way of adverse possession, the Courts below should have considered the continuous possession of the plaintiff. He taking me through exhibit-3 submits that the defendant filing a petition before the Upazilla Nirbahi Officer, Akhaura, Brahmanbaria had admitted the forcible possession of the plaintiff into the suit land and this admission of the defendant is very much consistent with the case of the plaintiff that the plaintiff has been possessing the suit land forcibly denying the title of the defendant into the suit land. But both the Courts below overlooking the exhibit-3 dismissed the suit and this kind of non-consideration of material evidence by the Courts below is an error of law and when there is error of law in taking decision by the Appellate Court below this Court can interfere into the decision of the appellate Court below.

11. He also submits that both the Courts below took notice of the conciliation meeting held under the leadership of the Chairman of Akhaura Union Parishad (PW 6), but both the Courts below failed to conceive and consider the inherent meaning of the resolution taken by the mediator. The local Chairman under whose leadership the compromise meeting has taken place on 28-11-2006 gave a certificate to the plaintiff on 12-2-2007 which has been marked in the suit as exhibit-2 will go to show that the defendant had admitted the sale of the land to the plaintiff but both the Courts below seriously overlooked the averment of the exhibit-2.

12. The learned Advocate also submits that since the suit was for declaration of title by way of adverse possession the prime consideration of the Courts below should have been whether the plaintiff has been possessing the suit land adversely from 1981 till filing of the suit and though the plaintiff had proved the said facts successfully by the local witnesses but even then the Courts below without considering such evidence very arbitrarily and capriciously dismissed the suit. So, the impugned judgment and decree of the Appellate Court below is liable to be set-aside decreeing the suit in favour of the plaintiff.

13. On the other hand, Mr Mohammad Abul Kashem Bhuiyan the learned Advocate appearing for the sole defendant-opposite party opposing the Rule very strenuously contends that the plaintiff filed the suit for declaration of his title by way of adverse possession but the plaint itself discloses that he was admitting the title of the defendant into the suit land till 13-8-2006 and 28-11-2006. In order to succeed in a suit like this, the plaintiff is to prove his adverse possession into the suit land for more than 12 years but if the adverse possession of the plaintiff is counted in this particular

suit from 13-8-2006 of 28-11-2006 his such possession appears to be hostile for one year only as against the defendant as the suit was filed in 2007.

14. He very categorically submits that there is no date of any sale and also as to when the plaintiff was inducted into the possession pursuant to his alleged purchase from the defendant. Then the plaint shows that the plaintiff admitting the title of the defendant till 2006 demanded the kabala from him (defendant). So, if it is conceded for a moment that the plaintiff had purchased the suit land in 1981 from the defendant but his (plaintiff) possession from 1981 to 2006 was never a hostile possession against the real owner, the defendant as he had admitted the ownership of the defendant during those period of time.

15. He also submits that it is admitted that the plaintiff and the defendant are step brothers of each other and after the death of their father they were in the same mess and since the defendant has been serving in the Bangladesh Army and since the plaintiff has been living in the native village at Nurpur, all the ancestral properties and the properties owned by the defendant were under the control and management of the plaintiff but the plaintiff taking the said managerial activities claimed his adverse possession into the suit land for some illegal gain.

16. He also submits that in 1990, the field survey for the recent record of right was going on in the locality, as such the defendant handed over the original kabala of the suit land to the plaintiff in the normal course of family business to get his name recorded and accordingly the plaintiff did the same. Had there been any fact of sale in 1981, the plaintiff must not have allowed the defendant to record his name in 1990. So, all these facts reveal that in fact before 1990 there was no any event of sale between the parties. But whenever the plaintiff got the original kabala from his brother for the preparation of the record of right he being misguided unethically claimed his ownership using the said original deed into the suit kind.

17. He also submits that in the plaint it has been averred that in presence of the common relations, the suit land was sold to the plaintiff by the defendant. But the plaintiff though examined 6 witnesses in the suit but could not examine any common relation of the plaintiff and the defendant in order to prove the alleged sale. The Courts below scanning the evidence of both the parties have concurrently found that the plaintiff case is based on surmise and conjecture and they taking into consideration the evidence and other connecter materials on record rightly dismissed the suit. They did not commit any error of law and they did not bypass any evidence in the record. So, the judgment of the Courts below do not call for interference from this Court. So, the Rule is liable to be discharged with costs.

18. I have considered the above submissions and the arguments of the learned Advocates of both the parties with profound attention and have gone through the materials on record including the plaint, written statement, judgment of the Courts below and the evidence both oral and documentary adduced by the parties.

19. In this Rule, it is admitted that the defendant was the owner of the suit land in question and he had purchased it from his uncle on 25-6-1975. The case of the plaintiff is that he had purchased the suit land from his step brother, the defendant and pursuant to the said purchase he has been possessing the suit land from 1981. But interestingly it is important to note here that neither in the plaint nor in the evidence of the plaintiff there is any definite date as to when he (plaintiff) was inducted into the possession of the suit land. In the plaint it

was averred among other that in presence of the common relations and the witnesses, the plaintiff had purchased the suit land. The plaintiff examined as many as 6 witnesses in the suit but none of them is the witness of the sale in question and both the Courts below considered this fact of the suit in a very right way. In this regard, the learned Advocate for the petitioner argued that since the plaintiff claims title by way of adverse possession, the evidence in order to prove the purchase of the land and the date of possession thereof is immaterial. But I find it difficult to have any substance in this argument. The defendant denied the adverse possession of the plaintiff into the suit land. So, there should have been a definite date from when the plaintiff started to possess the suit land. In the case of *Sheikh Farid (Md) and others vs Abdul Wadud Sikdar and others* reported in *58 DLR (AD) 248* the appellate division did not rely upon the plea of adverse possession simply for the want of any date of starting time of possession. The Appellate Division observed the said fact in the following manner:

> "The plaintiff was required to establish from what particular point of time he started to possess the land in assertion of his title upon denying the title of the real owner i.e. Karuna Moyee Dasi. The evidence from plaintiff's side is totally lacking for establishing the fact that from a particular point of time he started to possess the land asserting his title upon denying the title of the real owner to his knowledge as well as to the knowledge of the others and since that date he was possessing the land for more than 12 years. In our view, there is no evidence that at any particular point of time the plaintiff claimed title in the land in suit on the basis of adverse possession or, - in other words, claimed his title in the land upon denying the title of the real owner." (para 10 of the judgment)

20. The observation made in the reported case has a full manner of application with the case in my hands and it is difficult for me to take any different view from than that of the reported ease.

21. Adverse possession means possession of a person in hostility and adversely against the real owner with the knowledge of the real owner and others and same must be very open and notorious against the real owner also. But surprisingly in the suit I find that the plaintiff had requested the defendant althrough till 2006 for having a kabala from him and it is in the admission of the plaintiff that on 30-8-2006 on his request the defendant denied to execute and register a kabala in his favour. This fact means and includes that the plaintiff has been possessing the suit land admitting the right and title of the defendant till 30-8-2006. So, if it is conceded for a moment that the plaintiff was in possession of the suit land from 1981 to 2006 how this sort of possession can be considered as adverse possession against the real owner. The possession of the plaintiff can be at best hostile and adverse after 30-8-2006 only when the defendant denied to execute the kabala in favour of the plaintiff. The trial Court and the appellate Court below considering all these facts and circumstances came to a sound conclusion that the possession of the plaintiff was never a hostile and adverse into the suit land against the defendant . The Courts below also found that since he was living in the native village of the defendant, he used to look after the joint property of the plaintiff and the defendant including the suit land. I find no illegality in the finding and decisions of the Court below based on proper appreciation of the evidence and other materials on record.

22. In my consideration, the plaint of the plaintiff is sufficient to hold that his possession was never hostile from 1981 to 2006 as within

this period he was requesting the defendant to execute and register a kabala admitting his title. The hostile and adverse possession of the plaintiff was started in fact from 30-8-2006 when the defendant denied to execute and register a kabala and within one year of 2006 the suit was filed. So the said one year is not sufficient to consider the claim adverse possession of the plaintiff.

23. Whenever the plaintiff claims title by adverse possession he is under duty bound to prove that his possession was adverse and hostile against the real owner for more that 12 years within the knowledge of the real owner and others. But in this particular case, the plaintiff could not prove that his possession was hostile for more than 12 years against the defendant.

24. The Courts below on proper scrutiny of the evidence on record rightly dismissed the suit. There appears no misreading or non-reading or non-consideration or misconstruction of evidence by the Courts below. In exercising the revisional jurisdiction, this Court can interfere in the concurrent findings of the Courts below when there appears non-consideration of evidence in arriving the decision by the Courts below. But I find that the Courts below have properly scanned the evidence of both the parties and the facts related thereto and thereafter came to a sound conclusion that the possession of the plaintiff was never hostile and adverse possession against the defendant. Thus I find no merit in the Rule.

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

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

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Moyeenul Islam Chowdhury J

Judgment
January 21st, 2014

Chandu Sheikh (Md).....
.....Petitioner

vs

Aynal Sheikh and others....Opposite-Parties*

State Acquisition & Tenancy Act (XXVIII of 1951) **Section 96**

Pre-emption—A year-to-year lessee under the Government cannot defeat the right of pre-emption of the contiguous land-holders. .....(16)

Pre-emption

The statutory right of pre-emption of the pre-emptor cannot be thwarted by mere verbal assurance unless other facts and circumstances clearly make out a case of estoppel, waiver and acquiescence. The right of pre-emption of the pre-emptor cannot be skirted round by mere invocation of their verbal assurance as above. .....(18)

Fazaruddin vs Maijuddin 44 DLR (AD) 62; Abdur Rahman Bepari vs Areshed Ali, 12 MLR (AD) 120; Iqbal Hossain Talukder (Md) vs Md Joynal Abedin Talukder , 55 DLR 604; Mohar Ali Bhuiyan vs Michir Ali Bhuiyan, 15 MLR (AD) 500 and Fazaruddin vs Maijuddin, 44 DLR (AD) 62 ref.

Shasti Sarker, Advocate—For the Petitioner.

Zakir Hossain Bhuiyan, Advocate—For the Opposite-Party Nos. 1-5.

Judgment

Moyeenul Islam Chowdhury J: On an application under section 115 of the Code of

*Civil Revision No. 446 of 2010.

Civil Procedure, 1908, a Rule was issued calling upon the opposite-party Nos. 1-5 to show cause as to why the judgment and order dated 2-11-2009 passed by the Joint District Judge, 2nd Court, Rajbari in Miscellaneous Appeal No. 10 of 2009 affirming the judgment and order dated 8-2-2000 passed by the Assistant Judge, Rajbari Sadar, Rajbari in Miscellaneous Case No.31 of 2005 allowing the Miscellaneous Case should not be set- aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The pre-emptor-opposite-party Nos.1-5 filed Miscellaneous (Pre-emption) Case No.31 of 2005 against the pre emptee-petitioner and others in the Court of Assistant Judge, Rajbari Sadar, Rajbari for pre-emption of the case property measuring an area of 34 decimals out of SA plot No. 339, now plot No. 240 appertaining to S A Khatian No. 367 (DP Khatian No. 560) of Mouza Bilnoyabad under Police Station and District-Rajbari. Their case, in short, is that one Komala Krishna Guha was the owner-in-possession of plot No.240 and on his death, it devolved upon his daughter Boiashakhi alias Owisharjya Guha. The pre-emptor-opposite-party No.1 along with others was the owner-in-possession of plot No. 338 appertaining to SA Khatian No. 239 of the self-same Mouza Bilnoyabad. Anyway, one Shanti Rani Guha was the owner-in-possession of previous plot No. 362 at Bilnoyabad Mouza. At one stage, Shanti Rani Guha transferred the plot No. 362 to one Md Hekmat Ali Munshi by a registered deed dated 2-12-1986. After the death of Md Hekmat Ali Munshi, his heirs transferred the said plot No. 362 in favour of the pre-emptor-opposite-party Nos. 2-5 by a registered deed dated 7-5-1997. The previous plot No. 362 was converted into plot No. 241 and accordingly the relevant Khatian was published. The previous plot No. 338 of the pre-emptor-opposite-party No.1 was converted into plot No. 238 and he has been in possession thereof for about 50 (fifty) years. In this way, the pre-emptor-opposite-party Nos.1-5 have been the contiguous landholders of the case plot No. 240. However, the pre-emptee-petitioner purchased the case property from Boishakhi by a registered kabala dated 9-5-2004. The pre-emptor-opposite-party Nos. 1-5 came to know about the Kabala dated 9-5-2004 on 11-12-2004 for the first time and thereafter they obtained the certified copy of the said kabala on 11-5-2005. They are entitled to get the case property by way of pre-emption as contiguous landholders under section 96 of the State Acquisition and Act, 1950.

3. The pre-emptee-petitioner contested the case by filing a written objection. His case, in short, is that the pre-emptor-opposite-party Nos.1-5 have no cause of action and the case is bad for defect of party. It is true that the pre-emptor-opposite-party Nos.1-5 are the contiguous landholders of the case property. But the pre-emptee-petitioner along with others has been in possession of plot Nos. 1853, 1737, 1728, 1623 and 1613 as a year-to-year lessee of the Government. When the seller opposite-party No.6 disclosed that she would sell out the case property, the pre-emptor-opposite-parties expressed their inability to purchase the same and assured that they would not lay any claim thereto by way of pre-emption. Anyway, the pre-emptee-petitioner purchased the case property in due course and made improvement thereof to the tune of Taka 60,000/70,000. The case is evidently barred by the principles of estoppel, waiver and acquiescence. It was filed on some false and frivolous allegations with a view to harassing the pre-emptee-petitioner.

4. After hearing the parties concerned and on an assessment of the evidence and materials on record and in the facts and circumstances of the case, the trial Court allowed the Pre-emption Miscellaneous case on the findings, *inter*

alia, that the pre-emptor-opposite-parties are contiguous landholders and that the case is not bad for defect of party and that the same is not barred by the principles of estoppel, waiver and acquiescence.

5. On appeal, the Appellate Court below concurred with the findings of the trial Court and consequently the learned Judge of the Appellate Court dismissed the Miscellaneous Appeal and upheld the judgment and order of the Court of first instance.

6. Being aggrieved at and dissatisfied with the impugned judgment and order dated 2-11-2009 passed by the joint District Judge, 2nd Court, Rajbari in Miscellaneous Appeal No.10 of 2009, the pre-emptee-petitioner has preferred the revisional application and obtained the instant Rule.

7. The only point for determination in this Rule is whether the Court of Appeal below committed any error of law resulting in an error in its decision occasioning a failure of justice.

8. Mr Shasti Sarker, learned Advocate appearing on behalf of the pre-emptee-petitioner, submits that the petitioner did not have a square deal either before the trial Court or before the Appellate Court and both the Courts below came to the erroneous findings that the pre-emption case is not bad for defect of party and that the same is not barred by the principles of estoppel, waiver and acquiescence and by that reason, the impugned judgment passed by the Court of Appeal below is liable to be reversed.

9. On the other hand, Mr Zakir Hossain Bhuiyan, learned Advocate appearing on behalf of the pre-emptor-opposite-party Nos.1-5, submits that it is an admitted fact that they are contiguous landholders of the case property and the pre-emptee-petitioner has allegedly been a year-to-year lessee in certain plots of the DP Khatian No. 560 of Mouza Bilnoyabad, Police Station and District- Rajbari and a year-to-year lessee being the purchaser of the case property cannot stifle the claim of the pre-emption of the case property made by the pre-emptor-opposite-parties.

10. Mr Zakir Hossain Bhuiyan further submits that the trial Court, on an appraisal of the evidence and materials on record, came to the findings that the pre-emption case is not bad for defect of party and that the same is not barred by the principles of estoppel, waiver and acquiescence and as the contiguous landholders, the pre-emptor-opposite-parties might claim the case property by way of pre-emption and the Appellate Court below concurred with the findings of the trial Court on a fresh assessment of the evidence and materials on record and rightly dismissed the Miscellaneous Appeal and affirmed the judgment and order of the trial Court.

11. Mr Zakir Hossain Bhuiyan also submits that the right of pre-emption is a statutory right under section 96 of the State Acquisition and Tenancy Act, 1950 and this statutory right of pre-emption cannot be defeated by mere verbal assurance of the person having such right, unless other facts and circumstances clearly make out a case of acquiescence or waiver. In this connection, he has drawn my attention to the decision in the case of *Fazaruddin vs Maijuddin* reported in *44 DLR (AD) 62.*

12. Mr Zakir Hossain Bhuiyan further submits that the pre-emption case is not bad for defect of party in view of the fact that the pre-emptor-opposite-parties served interrogatories upon the pre-emptee-petitioner on 16-10-2005 and the pre-emptee-petitioner replied to the interrogatories on 14-11-2005 and on the basis of the replies thereto, the pre-emptor-opposite-parties took steps and brought the necessary party on record on 14-2-2006 and given this sce-

nario, it does not lie in the mouth of Mr Shasti Sarker to say that the case is bad for defect of party.

13. Mr Zakir Hossain Bhuiyan next submits that it is the definite claim of the pre-emptee-petitioner that he made improvement of the case property to the extent of Taka 60,000/70,000 and some general evidence in that regard was adduced in a sweeping manner on behalf of the pre-emptee-petitioner during the trial of the case, but the fact remains that the claim for improvement of the case property could not be substantiated by, furnishing particulars thereof and what is more, no commission was taken out at the instance of the pre-emptee-petitioner to support the claim of improvement of the case property and in this perspective, the claim for improvement of the case property is not credible at all and the learned Judge of the Appellate Court rightly agreed with the trial Court on this point. In this context, Mr Zakir Hossain Bhuiyan relies upon the decision in the case of *Abdur Rahman Bepari vs Areshed Ali* reported in *12 MLR (AD) 120.*

14. Mr Zakir Hossain Bhuiyan lastly submits that Mr Shasti Sarker has failed to point out misreading or non-reading of any vital piece of evidence affecting the case on merit and as there is no perverse finding in the judgments of both the Courts below, the concurrent findings of the trial Court as well as the Appellate Court are binding upon the Revisional Court, that is to say, the High Court Division. On this point, Mr Zakir Hossain Bhuiyan adverts to the decisions in the cases of *Iqbal Hossain Talukder (Md) vs Md Joinal Abedin Talukder, 55 DLR 604* and *Mohar Ali Bhuiyan vs Michir Ali Bhuiyan, I5 MLR (AD) 500.*

15. I have heard the submission of Mr Shasti Sarker and the counter-submissions of Mr Zakir Hossain Bhuiyan and perused the impugned judgment and other relevant materials on record.

16. It has been specifically stated in paragraph-5 of the written objection filed by the pre-emptee-petitioner that the pre-emptor-opposite-parties are contiguous landholders of the case property. In other words, the claim of the pre-emptor-opposite-parties that they are contiguous landholders is very much admitted. By the way, it may be mentioned that the pre-emptee-petitioner filed a supplementary affidavit in this Revisional Court claiming to be a year-to-year lessee along with others in certain plots of DP Khatian No. 560. Now a pertinent question arises, can a year-to-year lessee defeat the right of pre-emption of the pre-emptor-opposite-parties? The answer is obviously in the negative. A year-to-year lessee under the Government cannot defeat the right of pre-emption of the contiguous landholders, namely, the pre-emptor-opposite-parties.

17. A reference to the judgments of the trial Court and the Appellate Court shows that the pre-emptor-opposite-parties served interrogatories upon the pre-emptee-petitioner on 16-10-2005 and the pre-emptee-petitioner replied to the interrogatories about the addition of necessary party on 14-11-2005 and accordingly the pre-emptor-opposite-parties took steps for addition of party on 14-2-2006. This being the position, it cannot be said by any stretch of imagination that the case is bad for defect of party. It appears that the Court of Appeal below rightly concurred with the trial Court on this question.

18. It is the assertion on behalf of the pre-emptee-petitioner that at the time of his purchase of the case property, the pre-emptor-opposite-parties expressed their inability to purchase the same and assured that they would not lay any claim of pre-emption thereto; but giving a go-by to their earlier assurance, they filed the pre-emption Miscellaneous Case and

that being so, the case is barred by the principles of estoppel, waiver and acquiescence. If I, for the sake of argument, accept this assertion of the pre-emptee-petitioner as gospel truth, even then the statutory right of pre-emption of the pre-emptor- opposite-parties cannot be thwarted by their mere verbal assurance unless other facts and circumstances clearly make out a case of estoppel, waiver and acquiescence. It transpires that both the Courts below rightly discussed this issue and Mr Zakir Hossain Bhuiyan has also rightly relied upon the decision in the case of *Fazaruddin vs Maijuddin and others* reported in *44 DLR (AD) 62* in this respect. Precisely speaking, the right of pre-emption of the pre-emptor-opposite-parties cannot be skirted round by mere invocation of their verbal assurance as above. In the facts and circumstances of the case and regard being had to the evidence and materials on record, I am of the opinion that both the Courts below correctly found that the case is not barred by the principles of estoppel, waiver and acquiescence.

19. No plea has been raised on behalf of the pre-emptee-petitioner that the case is barred by limitation. The record shows that the case is well within time.

20. It has been claimed by the pre-emptee-petitioner that he made improvement of the case property to the tune of Taka 60,000/70,000. But the evidence adduced on his side indicates that no break-up of the expenditure was given by any of the witnesses. This claim is an omnibus claim of expenditure of Taka 60,000/70,000 for improvement of the case property. Besides, no money receipts or vouchers were filed and admitted in evidence on behalf of the pre-emptee-petitioner in order to prove the expenditure of the aforesaid amount of money. On top of that, indisputably no commission was taken out in order to prove the alleged factum of improvement of the case property after purchase by the pre-emptee-petitioner. In such a landscape, I am at one with the learned Judge of the Appellate Court on this question. In the decision in the case of *Abdur Rahman Bepari vs Areshed Ali* reported in *12 MLR (AD) 120* relied on by Mr Zakir Hossain Bhuiyan, it has been held therein that the pre-emptee failed to mention the particulars of his alleged cost of improvement of the case property and the claim for cost of improvement must be substantiated by furnishing particulars thereof. Keeping the 'ratio' of the above decision in view, the Appellate Court, as I see it, rightly turned down the claim for the alleged cost of improvement of the case property.

21. The scope of a Civil Revision as contemplated by section 115 of the Code of Civil Procedure is very limited. Mr Shasti Sarker has signally failed to point out any gross misreading or non-reading or non-consideration of any material piece of evidence affection the merit of the case. So the concurrent findings of the trial Court as well as the Appellate Court are binding upon the Revisional Court. In a word, there does not appear to be any perverse finding recorded by the Appellate Court below in the judgment under challenge. In this context, it seems that Mr Zakir Hossain Bhuiyan has rightly adverted to the decisions reported in *55 DLR 604 and 15 MLR (AD) 500 (supra).*

22. In view of the foregoing discussions and in the facts and circumstances of the case, I find no merit in the Rule. The Rule, therefore, fails.

23. Accordingly, the Rule is discharged without any order as to costs.

Let the lower Court records along with a copy of this judgment be sent down at once.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Syed Refaat Ahmed J
ANM Bashir Ullah J

Ataur Rahman Manik (Md).....Election Respondent-Petitioner

vs

Judgment
February 26th, 2013.

Pir Md Mojnu Miah and others.....Election Petitioner-Opposite Parties*

Code of Civil Procedure (V of 1908)
Order XVIII, rule 19(2)
Local Government (Union Parishad) Election Rules, 2010
Rule 61(4)
Local Government (UP) Act (XLI of 2009)
Section 22(3)

The requirement of the 180 day disposal period is indeed of strict application and that the requirement of such disposal demands that this be unqualifiedly adhered to. It also becomes incumbent upon tribunal to keep strictly within that prescription and to secure the public interest by so disposing of duly within the prescribed period the question whether the election has been affected materially in any adverse manner with any or either of the parties contributing to such state of affairs. .....(20 & 21)

Kohinoor Chemical vs Eastern Shippers, 41 DLR 387; Bangladesh German Food (Pvt. Ltd vs Bangladesh, 14 BLC 266, Khurshid Alam vs Artha Rin Adalat, 12 BLC 592, AHM Mustafa Kamal vs Bangladesh, 28 BLD 367 and Sujit Kumar Mondal vs Bangladesh, 13 BLC 391; Paradise Metallurgical Complex Ltd. vs Superintendent Customs, 32 BLD 151; Lord Campbell LC in Liverpool Borough Bank vs Turner (1860) 2 De GF & J. 502; Bhikraj Jaipuria vs Union of India, AIR 1962 Supreme Court 113; Lord Penzance in Howard vs Odington, (1877) 2 PD 203; State of Haryana vs PC Wadhwa, AIR 1987 (SC) 1201; OxK Atta Md Qureshi vs Settlement Commissioner, Lahore Division, Lahore PLD 1971 ref.

Khijir Ahmed with Dider Alam Kollol, Advocates—For the Election Respondent-Petitioner.

Ragib Rouf Chowdhury, Khandakar Ahsan Habib, Advocates—For the Election Petitioner-Opposite Party No. 1.

*Civil Revision No. 3111 of 2012.

Judgment

Syed Refaat Ahmed J: In this Application under section 151(1) of the Code of Civil Procedure ("Code") a Rule was issued calling upon the Opposite Party No. 1 to show cause as to why the impugned judgment and order dated 7-8-2012 passed by the learned District Judge, Sylhet in Civil Revision No. 15 of 2012 rejecting the same by affirming the order dated 28-2-2012 passed by the learned Senior Assistant Judge and Election Tribunal Sadar, Sylhet in Election Case No. 10 of 2011 rejecting the application tiled against the Election Petition shall not be set-aside and/or such other or further Order or Orders as to this Court may seem fit and proper.

2. This case stems from the fact of the Opposite Party No. 1 as Election Petitioner having filed Election Petition No. 10 of 2011 on 8-8-2011 impleading the Petitioner herein amongst others for nullifying the Petitioner's election as Chairman of No. 7 Goalabazar Union Parishad. In responding to that Election Petition the present Petitioner as Election Respondent generally contended that the Election of 25-6-2011 was held peaceably upon adherence to all relevant rules and regulations and he was declared the duly elected Chairman of the Union Parishad as evident in a further Gazette notification to

that effect. It is further contended that the Election Respondent-Petitioner is presently discharging responsibility upon taking oath of office as Chairman.

3. The Election Petition as above having been filed on 8-8-2011 the present Petitioner on 19-2-2012 filed an application for rejecting that Petition on the ground on the same having not been disposed of within a 180-day period prescribed specifically under Rule 61(4) of the স্থানীয় সরকার ইউনিয়ন পরিষদ নির্বাচন বিধিমালা, ২০১০ ("বিধিমালা" or "Rules"). It is submitted that the Election Tribunal eventually rejected the Petitioner's Petition on 28-2-2012 holding that drawing on the provisions of section 22(3) of the স্থানীয় সরকার ইউনিয়ন পরিষদ আইন, ২০০৯ ("Act") read with Rule 61(4) of the Rules and Order XVIII, Rule 19(1) of the Code, no specific consequence attaches upon non-compliance of the provisions therein for disposal of cases within the otherwise specifically prescribed period. The Election Tribunal deduced that the Act read with the Rules and the Code had consequentially not enunciated the procedure to reject an Election Petition should it not be disposed of within the period specified therein. It was also reasoned that it is indeed a common phenomenon that most cases cannot duly be disposed of within the prescribed period "for inevitable and unwilling reasons" and that such cases are commonly conducted beyond the otherwise statutory prescribed period. Predicated on that rationale the Election Tribunal, accordingly, held the provisions of Rule 61(4) to be directory "but which the Tribunal must try to comply with". Accordingly, the Tribunal found no impediment as would hinder the Election Petition of 8-8-2011 to be continued to be heard and to be eventually disposed of notwithstanding that the prescribed 180-day period under Rule 61(4) "has already been elapsed". Aggrieved by this Order of the Election Tribunal the present Petitioner preferred Civil Revision No. 15 of 2012 before the learned District Judge, Sylhet which eventually came to be rejected by that Court's impugned Judgment and Order dated 7-8-2012 concurring with the findings of the Election Tribunal. Finding no merit in the present Petitioner's submission that Rule 61(4) reflecting a specific period for disposal of an Election Tribunal case is, thereby, to be deemed to make an imperative or mandatory prescription as opposed to being merely directory or permissive in nature, the learned District Judge held upon an ostensible perusal of the relevant provisions of law that since no consequence is prescribed for conclusion of trial within the 180-day prescribed period under Rule 61(4) such time limit is readily to be deemed to be merely directory and not mandatory in nature. In so concurring with the findings and decisions of the Election Tribunal the learned District Judge also noted that the present Election Respondent-Petitioner had failed to cite any relevant decisions of the Superior Court as would otherwise establish the mandatory nature of the prescription in Rule 61(4).

4. It is against this backdrop that the Election Respondent-Petitioner aided by a two-pronged argument seeks to substantiate both the merit in this Application and the substance in the Rule issued. First, it is submitted that both the Courts below erred in law by disregarding the fact that the language in Rule 61(4) is mandatory in nature as particularly emphasizes the duly imposed therein to definitely dispose of a case within a 180-day period.

5. Rule 61(4) reads thus:

> ৬১। নির্বাচনী দরখাস্ত এবং নির্বাচনী আপীল নিষ্পত্তি। .....(৪) নির্বাচনী ট্রাইব্যুনাল কর্তৃক কোন নির্বাচনী দরখাস্ত দাখিলের একশত আশি (১৮০) দিনের মধ্যে এবং নির্বাচনী আপীল ট্রাইব্যুনাল কর্তৃক নির্বাচনী আপীল দায়েরের একশত বিশ (১২০) দিনের মধ্যে নিষ্পত্তি করিতে হইবে।
>
> *(emphasize add ed)*

নিষ্পত্তি করিতে হইবে" emphatically assert the mandatory nature of the provisions in Rule 61(4). It is consequentially submitted that these words by that rational construction exclude any possibility for any extension of time to be allowed once the prescribed period has elapsed. The Election Respondent-Petitioner at this juncture highlights both the legislative history stressing on the provenance and evolution of the provisions of Rule 61(4) and at the same time submits on the necessity for this Revision Court to deduce the true legislative intent that is so fundamental to understanding the mandatory provisions of Rule 61(4). It is explained that under the local Government (Union Parishad) Election Rules, 1983 there was no specific time prescribed for disposal of election Petitions. Instead, the prescription under Rule 47 of the 1983 Rules was for adherence to the relevant provisions of the Code as nearly as possible. Rule 61(4) of the Rules make a departure in that regard in that it prescribes a specific period and given that it features in a piece of special legislation read with subordinate legislation it is to be strictly complied with to avoid the objective and intent behind such legislation being set at naught otherwise. The present Petitioner submits that such reading of the law clearly escaped the attention of both the Courts below. The resultant miscarriage of justice caused, it is further submitted, is compounded by the Courts' lack of appreciation of such prescription deterring the "sword of Damocles", as submitted by the learned Advocate for the Election Respondent-Petitioner Mr Khijir Ahmed, hovering menacingly and indefinitely over the head of an elected representative and, thereby, preventing him from discharging his public duty in the best interest of his constituents. The rationale here, it is submitted, is that an Election Petition cannot be part of a protracted process of determination dragging on inconclusively thereby, preventing a holder of public office from duly discharging his/her mandated duties within the limited time at disposal in this regard.

6. The second aspect to the Petitioner's case is that provisions in the Rules reflecting the specific time fixed for disposal of election cases as well as Election Appeals must necessarily be read as excluding the application of any provision of the Code regarding time for disposal of the same. It is asserted that both the Election Tribunal as well as the lower revision Court further erred herein overlooking this aspect of the case.

7. The Election Petitioner-Opposite Party No. 1 in responding to this Rule categorically endorses the concurrent Orders of the two Courts below as being legally sound and reemphasizes that the Rule 61(4) provisions are not mandatory in the absence of any declared consequential result in the event of failure to dispose of cases in time. The Opposite Party No. 1 highlights further that the Election Respondent-Petitioner filed us application for rejection against the backdrop of numerous adjournments sought and secured and accounting for 33 days expended in this regard with a view to filing his written objection. Submitting that the number of days mentioned in various provisions of the Act and the Rules means "working days" which exclude all Government and weekly holidays, the Election Petitioner-Opposite Partly No.l states that there were effectively only 111 "working days" out of a total of 195 days in gross between 8-8-2011 and 10-2-2012. The implication here being that the Tribunal was in effect still keeping within the bounds of the statutory prescribed period when the Election Respondent-Petitioner lodged his rejection application.

8. Responding to the Election Respondent-Petitioner's contention that the Code has no manner of application in the general scheme of the বিধিমালা or the Rules upon a proper con-

struction of the mechanism of calculation of time under Rule 61(4), the Election Petitioner-Opposite Party No. 1 asserts that the absence in the Rules of a mechanism in that regard does not, however, automatically preclude resort to the relevant provisions of the Code. Reference is had here to Rule 60 of the Rules the relevant portion of which reads thus:

> ৬০। নির্বাচনী ট্রাইব্যুনাল এবং নির্বাচনী আপীল ট্রাইব্যুনাল কর্তৃক অনুসরণীয় পদ্ধতি।–আইন ও এই বিধিমালার বিধানাবলী সাপেক্ষে, নির্বাচনী ট্রাইব্যুনাল বা, ক্ষেত্রমত, নির্বাচনী আপীল ট্রাইব্যুনাল প্রতিটি নির্বাচনী দরখাস্ত, Code of Civil Procedure, 1908 (Act V of 1908) এর অধীন যে পদ্ধতিতে মোকদ্দমা বিচার করা হয়, যতদূর সম্ভব, অনুরূপ পদ্ধতি অনুসারে বিচার করিবে।

9. It is submitted that Rule 60 providing for reliance on the Code on matters not covered by the Rules, it would stand to reason to rely upon Order XVIII, Rule 19(2) of the Code as allows for computation of time on the basis of "working days". In that regard, leaving aside the 33 days that the Election Tribunal's proceedings stood adjourned as above, in fact only 111 working days had elapsed between 8-8-201 1 and 19-2-2012. Such method of calculation meriting due legal interpretation is now submitted to be a matter properly falling within the terms of consideration and disposal of this Rule.

10. The Election Respondent-Petitioner by filing an Affidavit-in-Reply questions the agitation before this forum of the issue of calculation of time by reference to the Code given the failure of prior agitation in the two forums below. In doing so, the Petitioner reemphasizes that there is no scope to induct the notion of "working days" in the understanding and operation of the time prescription in Rule 61(4).

11. Heard the learned Advocates for the Petitioner and the Opposite Party No.l and perused the application and the judgments of the Courts below.

12. The core argument adopted by the Election Respondent-Petitioner is that Election cases need to be determined within a specified period, for the simple reason that this best serves and enures to the public interest and good. If that was not the case, the learned Advocate for the Election Respondent-Petitioner Mr Khijir Ahmed argues, a public representative like the Election Respondent-Petitioner risks in all probability bearing a stigma indefinitely of illegitimacy and, thereby, failing to effectively carry out the mandate given to him/her by this constituents. That, Mr. Ahmed further argues, should be the true rationale behind this Court's exercise of constructing the true purport and intent behind the time prescription found in Rule 61(4).

13. As noted earlier, the Election Petitioner-Opposite Party No.l sees in the silence in Rule 61(4) of the consequences of failure to conclusively determine within the prescribed period a reflection of the legislative intent of equipping these provisions with a mere directory or permissive force and not otherwise. Indeed, the learned Advocate for this party Mr Ragib Rouf Chowdhury has relied on the *ratio decidendi* in *Kohinoor Chemical vs Eastern Shippers* reported in *41 DLR (1989) 387* in which this Court emphasized on that point of view. Mr Chowdhury has further sought to substantiate his argument by reference to the Judgments of this Court in *Bangladesh German Food (Pvt) Ltd vs Bangladesh* reported in *14 BLC 266, Khurshid Alam vs Artha Rin Adalat* reported in *12 BLC 592, AHM Mustafa Kamal vs Bangladesh* reported in *28 BLD 367* and *Sujit Kumar Mondal vs Bangladesh* reported in *13 BLC 391.*

14. For his part Mr Khijir Ahmed has relied extensively on the ratio of yet another judgment of this Court adopting the same as the core basis of his submissions in the present case. Relying, accordingly, on this Court's Judgment, in *Paradise Metallurgical Complex Ltd.*

vs Superintendent Customs and others reported in *32 BLD (HCD) 2012, 151,* Mr Ahmed highlights the ratio of the Judgment in this case as appears thus in Paragraph 10 at page 155:

> "Rules of construction or interpretation of statute do not intrinsically incorporate any overriding or entrenched formula for determining whether a provision of law is directory or imperative. Rather, the long-established judicial view is that common law prescriptions have instead been brought forth laying standards against which the courts themselves are left to construe the real intention of the legislature against the context of the scheme of any given statute. "

15. It is noted that the judgment in the *Paradise Metallurgical Complex* case was informed by the test as thus enunciated by *Lord Campbell LC in Liverpool Borough Bank vs Turner* reported in *(1860) 2 De GF & J. 502, at pp. 507and 508:*

> "...No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed." *(emphasis added)*

16. Mr Ahmed has in this regard has further relied on the Indian Supreme Court Judgment in *Bhikraj Jaipuria vs Union of India* reported in *AIR 1962 Supreme Court 113 (V 49 C 21)* in which the Indian Supreme Court also upon relying on Lord Campbell's "whole scope " test found thus:

> "Where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of non-compliance, the question whether the provision was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the statue. "

17. It is noted that a break down of the essential components of Lord Campbell's "whole scope" test ,to a consideration further of certain guidelines provided thus by *Lord Penzance in Howard vs Odington, (1877) 2 PD 203, at p.211:*

> "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

18. These components, therefore, appear to be the subject matter of a case as juxtaposed against the relevant importance of any given provision in the scheme of a particular statute and its relation to the general object of the said statute.

19. A further test is also to be derived from the judgment in *Atta Muhammad Qureshi vs The Settlement Commissioner, Lahore Division, Lahore and others* reported in *PLD 1971* Supreme Court, 61 in that if a certain statute enacts that a certain action shall be done in a certain manner then it has to be deduced therefrom that such requirement is absolute in nature from which there may be no derogation. This is similar to the test of substantial compliance as adopted by the *State of Haryana vs PC Wadhwa* reported in *AIR 1987(SC), 1201 at paragraph 14, page 1207.*

20. The cumulative effect of all these tests, as indeed found upon in the *Paradise Metallurgical Complex* case, is that notwithstand-

ing Rule 61(4) not expressly declaring the consequence of non-compliance of the time prescribed therein for disposal of Election cases, the requirement of the 180-day disposal period is indeed of strict application and that the requirement of such disposal demands that this be unqualifiedly adhered to. It is noted further that Rule 61(4) in imposing a duty to dispose of Election Petitions or cases within a defined period bears no reference to an Election Tribunal's ability to undertake or discharge the same and, accordingly, phraseology like, e.g., "reasonably practicable steps" or "to the best of one's ability" to qualify the manner in which the Tribunal is mandated to discharge its obligations has been avoided therein. That being the case, this Court is further satisfied that Rule 61(4) imposes an obligation that is absolute.

21. Upon a consideration of the above, we are inclined to hold that the prescription in Rule 61(4) has always remained, therefore, for a disposal of Election Petitions, as in the present Case, within the 180-day period specified therein. This Court finds that this specific requirement in the scheme of the Rules in general and Rule 61(4) in particular is in evidence of an absolute and categoric requirement and, thereby, against any party to an Election Petition being made to wait indefinitely to ponder over his or her electoral fate. It also becomes incumbent upon such Tribunal to keep strictly within that prescription and to secure the public interest by so disposing of duly within the prescribed period the question whether the election has been affected materially in any adverse manner with any or either of the parties contributing to such state of affairs.

22. Having so found as above, we have only but dealt with the first aspect of by the Election Respondent-Petitioner's arguments to substantiate his case for issuance of the Rule. As noted above, however, there is the other significant aspect of the manner in which the time prescription in Rule 61(4) has actually to be computed or counted given the legislative intent and the scheme of the particular enactment under consideration. It is here that we revisit Rule 60 of the Rules that allows for application of the relevant-provisions of the Code subject, however, as Mr Khijir Ahmed has pointed out, to the provisions of the Act and the বিধিমালা or the Rules. Contrary to the stance taken as earlier noted in this regard by the Election Petitioner-Opposite Party No. 1, Mr Ahmed has vigorously argued against any scope left in the specific law represented by the Act and the Rules to rely on Rule 60 as an avenue for application of the Code given that the very specific and categoric prescription as to the running of time under Rule 61(4).

23. It is here that Mr Ragib Rouf Chowdhury has submitted that any scope left in Rule 61(4) for a transportation of the standards of the Code in giving effect to the legislative intent of limiting the time for disposal of Election cases can still be availed of to the fullest upon a proper juxtaposition of the provisions of Rule 60 *vis-a-vis* Rule 61(4). Here Mr Chowdhury argues that the provisions of Order XVIII, Rule 19(2) serve as a bridge for a proper understanding and construction of the computation of limitation period in Rule 61(4) given that one is here dealing with a Tribunal that necessarily can only be seized of and actively conduct proceedings during working days. The test here is to give a reasonable construction to the mechanism of computation of time in Rule 61(4) given the reality of the workings and administration of cases by an Election Tribunal. Mr Chowdhury here highlights Order XVIII, Rule 19(2) as simply reads thus:

> "In this rule, in determining the time, only the working days shall be counted. "

24. We find merit in that construction to be

given to Rule 61(4) by reference to Order XVIII, Rule 19(2) of the Code given that it is only working days that can reasonably and practicably be relevant for proceedings to be conducted under the aegis of an Election Tribunal or indeed an Election Appeal Tribunal and that any other construction would lead to consequences unreasonable, unfair and arbitrary. Our findings in this regard are further substantiated by the fact of our reading of Rule 61(4) as not incorporating a non-obstante provision. In other words there is nothing in Rule 61(4) that inherently prevents a construction to be given as submitted on by Mr Chowdhury preventing reliance on the provisions of the Code as otherwise prescribed in Rule 60. Rule 60 and 61(4), we find, are meant to supplement each other to the fullest extent possible to achieve a workable solution to the dispute that is now before us.

25. Based on the above, it is this Court's finding that the provisions of Rule 61(4) are indeed mandatory in nature subject, however, to the qualification that Order XVIII, Rule 19(2) by the scheme of the very Rules applies for computation of the time of the 180 day period for disposal of cases by an Election Tribunal on the basis of counting working days as opposed to regular days. In other words, Rule 61(4) does not prescribe a continuous running of time as otherwise emphasized upon by Mr Khijir Ahmed.

26. While therefore, the Election Respondent-Petitioner's stance on the first issue of whether Rule 61(4) is of mandatory effect stands in law, the argument placed on the second issue of computation of time is found not acceptable to this Court. This effectively, therefore, cumulatively translates into the Election Petition No.10 of 2011 staying alive and current and the application of 8-8-2011 before the Tribunal by the Election Respondent-Petitioner for rejection for that Petition to be misconceived and ineffectual in that regard.

27. It is further found that both the Election Tribunal and the lower revision Court got the points of law wrong with regard to disregarding that Rule 61(4) is of mandatory effect as well as in disregarding the important issue of the manner of computation of time by reference to the Code itself. This has had the effect of the two Courts below keeping the Election Petition of 8-8-2011. That is, the Tribunal and lower revision Court's orders have had the right effect but based on wrong and/or insufficient reasons or rationale shown. We note in this regard that as a revision Court, while we cannot necessarily engage in a probe into questions or errors of fact our revision exercise has to take into account not only mere errors of law but of such errors of law as result in erroneous decisions occasioning failure of justice. For reasons above cited, given the manner in which the Courts below misdirected themselves it is also within this Court's authority in revision to do justice in a case and to that end exercise a wide power vested in it. That entails the making of any consequential orders necessitated by the facts of a given case where a disregard or misapplication of any provision of law is so blatantly apparent as is indeed true of the instant case.

28. It is with that larger perspective in view and given further that curiously the concurrent findings of the Courts below have had the effect of keeping the Election Petition alive but strictly not for the right reasons in law, we are on the whole now inclined to discharge the Rule issued. It will now consequentially be incumbent upon the Election Tribunal to dispose of the Election Petition within the 180-working day period prescribed in Rule 61(4) allowing, however, for the time already expended for reasons of weekly holiday, government holiday and court vacation to be taken into account. In so being seized of the Election Petition No. 10 of

2011, the Election Tribunal shall take due care to dispose of the same within the prescribed time now left in harmony with our findings above. In particular, the Tribunal, shall also be mindful of the fact that it remains under a statutory duty to so dispose of the Petition within the prescribed period, such duty being unqualified as above found.

29. In the result, the Rule is discharged. The *ad interim* Order of Stay as initially granted is necessarily, hereby, recalled and vacated.

There is no Order as to costs.

Ed.

High Court Division
(Special Statutory Jurisdiction)

Sheikh Hassan Arif J
Mohammad Ullah J

Judgment
March 12th, 2014.

Commissioner of Customs, Chittagong.. .....Appellant

vs

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

Pre-Shipment Inspection Rules, 2002
Rule 13(2)(3)

Sub-rule (3) of Rule 13 provides that in determining the price, the PSI agent shall obtain information from the exporter in light with the valuation agreement and the said information should be attached to the CRF certificate concerned. If it appears to the concerned PSI agent that the price of the goods has been under-invoiced, it may increase the price in its certificate. However, before such increase, the exporter has to be given proper opportunity to explain the reasons for declaring the lower price in the invoice and, in that case, the PSI agent must attach such explanation behind such enhanced price in the CRF certificate upon receiving all information from the exporter. .....(8)

Abdus Salam Mamun, Advocate—For the Respondent No.3.

Taposh Kumar Biswas, DAG with Jesmin Sultana (Shamsad) and Beadura Ansary, AAG's—For the Appellant.

*Customs Appeal Nos. 138 & 140 of 2012.

Judgment

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

2. Customs Appeal No. 138 of 2012 is preferred by the Commissioner of Customs, Customs House, Chittagong against order dated 26-8-2012, as communicated vide Nathi No. CEVT/Case (Cus)-906/2010/1312 dated 16-9-2012, passed by the Customs Excise and VAT Appellate Tribunal (Respondent No.1) affirming the decision of the Review Committee dated 10-8-2010 vide order No.28 of 2010. Customs Appeal No. 140 of 2012 is preferred by the same Commissioner of Customs, Customs House, Chittagong against order dated 14-8-2012 passed by the Customs Excise and VAT Appellate Tribunal (respondent No.1), as communicated vide Nathi No. CEVT/Case (Cus)-817/2010/1315 dated 16-9-2012, affirming the decision of the Review Committee dated 6-6-2010 vide appeal order No.23 of 2010.

3. Short facts, relevant for the disposal of the aforesaid two appeals, are that in Customs Appeal No. 138 of 2012, the importer, namely M/s Nur and Brothers, Khatoongonj, Chittagong, imported some Spray Dried Skimmed

Milk powder under L/C No. 1948-10-01-0177 dated 11-4-2010 from Belgium. The invoice price of the said consignment was US $ 2510 per Metric Ton. However, the PSI agent concerned issued CRF certificate declaring the price as US $ 2998 per Metric Ton. Upon arrival of the said consignment, the importer, through its C&F agent, submitted Bill of Entry No. C-72345 dated 7-6-2010 for release of the said consignment, whereupon the Customs Authority assessed the same on the basis of the CRF certificate and released the said goods. Upon release, the importer, being aggrieved by the price as declared in the CRF certificate, filed a complaint before the Review Committee. Whereupon, the Review Committee, after hearing the parties including the PS1 agent, by order dated 10-8-2010, set-aside the said price as declared in the CRF certificate and fixed the price at US$ 2510 per Metric Ton. Being aggrieved by this decision of the Review Committee, the PSI agent preferred appeal before the Appellate Tribunal, whereupon the Appellate Tribunal, vide impugned order dated 26-8-2012, dismissed the said appeal and, thereby, affirmed the decision given by the Review Committee. As against this, the Commissioner of Customs, Chittagong, though did not prefer any appeal before the Tribunal, has preferred this Appeal under Section 196D of the Customs Act, 1969.

4. In Customs Appeal No. 140 of 2012, the same importer, namely M/s Nur and Brothers, Khatoongonj, Chittagong, imported certain quantity of Skimmed Milk Powder from Germany under L/C No. 1948-10-01-0044 dated 17-1-2010. The Invoice Value of the said consignment was US $ 1980. However, the concerned PSI agent issued CRF certificate declaring the said value as US$ 3002.70. Upon arrival of the said consignment at Chittagong, the C & F agent of the importer submitted Bill of Entry No. C 39842 dated 3-4-2010, whereupon the Customs Authority released the said goods upon assessment of the duties on the basis of the price declared in the CRF certificate. After such release, the importer, being aggrieved by the price declared by the PSI agent, filed a complaint before the Review Committee, whereupon the Review Committee, after hearing the parties including the PSI agent, by order dated 6-6-2010, set-aside the CRF certificate and determined the price at US $ 1990 per Metric Ton for final assessment. Being aggrieved by this decision of the Review Committee, the Commissioner of Customs, Chittagong preferred appeal before the Tribunal, whereupon the Tribunal, after hearing the parties, dismissed the said appeal vide impugned order dated 14-8-2012 and, thereby, affirmed the decision of the Review Committee. The Commissioner of Customs has now preferred this appeal under section 196D before this Court against the said order passed by the Tribunal.

5. Mr Abdus Salam Mamun, learned advocate appearing for the respondent No.3 in both the appeals, at the very outset, submits that the Commissioner of Customs having not preferred any appeal before the Tribunal against the decision of the Review Committee, the Customs Appeal No. 138 of 2012 is not at all maintainable before this Court. Mr Mamun further submits that since the Commissioner of Customs decided not to prefer any appeal before the Appellate Tribunal against the decision of the Review Committee, they should be deemed to have waived their right to prefer any appeal and, as such, the Customs Appeal No. 138 of 2012 should be dismissed in lemine. As regards the merit of both the appeals, Mr Mamun submits that in both matters the Review Committee as well as the Tribunal correctly applied the law and accordingly, set-aside the CRF certificate as the same unreasonable enhanced the price of the said consignment without following the due process of law, in

particular the provisions under Rule 13 of the PSI Rules, 2002. Mr Mamun points out that since the data base of the Customs house concerned showed the value of the recently imported identical or similar goods at much more lower rate, the Review Committee rightly set-aside the CRF certificate concerned and, as such, the said decision of the Review Committee having been affirmed by the Appellate Tribunal, this Court has got nothing to interfere into the same.

6. Mr Taposh Kumar Biswas, learned Deputy Attorney-General appearing on behalf of the Commissioner of Customs, frankly concedes that since the Customs House, Chittagong did not prefer appeal before the Tribunal against the decision of the Review Committee, the Customs Appeal No. 138 of 2012 should be held to be not maintainable as the Commissioner of Customs should be regarded to have waived his right to raise any objection against the decision of the Review Committee in that matter. As regards the merit of the Appeal in Customs Appeal No. 140 of 2012, learned Deputy Attorney-General submit that since the PSI agent concerned declared the price at higher rate than the invoice price, the Customs Authority did not have any other option but to do the assessment on the basis of the same in view of the mandatory provisions under section 25B of the Customs Act, 1969. Thus, he continues, at least in Customs Appeal No.140 of 2012, the lower authority has committed illegality in setting-aside the certificate issued by the concerned PSI agent.

7. It appears that in Customs Appeal No. 138 of 2012, the Commissioner of Customs, Chittagong in fact did not prefer any appeal before the Tribunal against the decision of the Review committee. It was the PSI agent concerned who preferred the appeal before the Tribunal and the said appeal was dismissed by the Tribunal by the impugned order. The Tribunal, by the impugned order, did not modify or set-aside the decision passed by the Review Committee. Rather, in dismissing the appeal, it, in clear terms, affirmed the decision of the Review committee. This being so, since the Commissioner of Customs did not raise any objection against the decision of the Review Committee before the first appellate forum, namely the Tribunal, at proper time, they should not be allowed to take recourse to a leap-frog approach, namely they should not be allowed to skip one forum and prefer an appeal before the High Court Division directly under section 196D. Since they did not raise objection against the decision of the Review Committee at proper time before the proper forum, they should of course be regarded to have waived their right to raise such objection now. This being so, the Customs Appeal No. 138 of 2012 should be dismissed *in lemine.*

8. However, since the entire materials have been placed before us, we have had the opportunity to go through the relevant documents connected to both the appeals. It appears that, in both appeals, the PSI agent exorbitantly enhanced the price mentioned in the concerned invoices. Sub-rule (2) of Rule 13 of the Pre-shipment Inspection Rules, 2002, in clear terms, provides that in increasing the price than the price declared in the invoice, the PSI agent concerned is obliged to give reasonable opportunity to the exporter to place its statement. Sub-rule (3) of Rule 13 further provides that in determining the price, the PSI agent shall obtain information from the exporter in light with the valuation agreement i.e. the Agreement on Implementation of Article VII of GATT, 1994, and the said information should be attached to the CRF certificate concerned. According to the GATT valuation agreement, the price of a particular goods being the real transaction value, it is the obligation of the PSI agent to declare the price

in light with the said transaction value as declared in the invoice. If it appears to the concerned PSI agent that the price of the goods has been under-invoiced, it may increase the price in its certificate. However, before such increase, the exporter has to be given proper opportunity to explain the reasons for declaring the lower price in the invoice and, in that case, the PSI agent must attach such explanation behind such enhanced price in the CRF certificate upon receiving all information from the exporter.

9. However, in the instant two appeals, we do not see any such practice as adopted by the concerned PSI agent. Rather, it exorbitantly enhanced the price in the CRF certificate without giving such proper opportunities to the exporter and even without attaching any explanation to the said CRF certificate. This being so, we do not find any merit in both the appeals. Accordingly, both the appeals should be dismissed.

10. In the result, the Appeals are dismissed. The price of the concerned consignment as determined by the Review Committee in both the appeals are, thus, affirmed. Customs authority is directed to refund the excess duty, as realized on the concerned consignments to the importer within a period of 02(two) months from receipt of the copy of the judgment.

11. Let a copy of this judgment be sent to the Tribunal under the seal and signature of an officer of this Court in view of section 196G of the Customs Act, 1969.

Send down the records of the lower authorities.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Md Abu Zafor Siddique J

Judgment
May 15th, 2014

Jahar Lal Biswas.....Convict-Appellant

vs

State.....Respondent*

Code of Criminal Procedure (V of 1898)
Section 342

Object of section 342 of the Code is to invite the attention of the accused person to the points in the evidence which are against him for which he may be convicted, so that he may have a chance to offer his explanation.

.....(48)

Code of Criminal Procedure (V of 1898)
Section 342

While examining the appellant under section 342 of the Code the Tribunal did not put the incriminating evidences before the appellant for enabling him to explain the circumstances, which has prejudiced him. .....(47)

Muslimuddin vs State, 38 DLR (AD) 311; Md Chan Mia vs State, 6 MLR (AD) 279 = 53 DLR (AD) 115; Habibur Rahman @ Habib vs State, 18 BLC (AD) 218 (2013); State vs Monu Mia, 54 DLR (AD) 60 (2002); Mohiruddin Mondal alias Md Mohiruddin Mondal vs State, 57 DLR 779 and Nurul Islam vs State 10 BCR (AD) 339 (1990) = 43 DLR (AD) 6 ref.

SM Rezaul Karim with Abdur Razzaque and Afifa Begum, Advocates—For the Appellant.

Md Fazlur Rahman Khan, DAG with Md Yousuf Mahmud Morshed and Kazi Ebadoth Hossain, AAG—For the State.

*Criminal Appeal No.6378 of 2013.

Judgment

This appeal is directed against the judgment and order of conviction and sentence dated 26-9-2013 passed by the learned Metropolitan Senior Special Judge Court, Dhaka in Metropolitan Special Case No. 120 of 2013 arising out of Biman Bondar Police Station Case No.47 dated 10-7-2012, corresponding to GR No.711 of 2012 (AC GR No.221/12), convicting the appellant under section 161 of the Penal Code and sentencing him to fine of Taka 25,000 in default to suffer imprisonment for 3(three) months more.

2. The prosecution case, in short, is that, one Md Alamgir Mondal lodged a First Information Report with the Officer-in-charge of Biman Bondar Police Station alleging *inter-alia* that on 10-7-2012, he arrived at Hajrat Shah Jalal International Airport from Kolkata at 13.15 hours by Flight No.4H-0574. After the informant had collected his luggage, the appellant Jahar Lal Biswas, an Assistant Revenue Officer, Custom House, demanded Taka 20,000 from him as bribe money, otherwise he would start a smuggling case against him. Thereafter, the informant gave Taka 15,000 to the appellant, withdrawing the same from the ATM booth of Brac Bank located at the Airport area. Subsequently, he lodged a complaint with APBN Office and the police arrested the convict-appellant and recovered the said amount from him. Hence the case.

3. Mr Md Nazrul Islam, Sub-Inspector of Police investigated the case as an Investigating Officer. He visited the place of occurrence, made a seizure list and examined the witnesses and recorded their statement under section 161 of the Code of Criminal Procedure. Upon completion of investigation, having found *prima-facie* case, he submitted charge-sheet against the appellant under section 161 of the Penal Code read with section 5(2) of the Prevention of Anti-corruption Act, 1974 being charge-sheet No.309 dated 10-4-2013.

4. After submission of the charge-sheet, the case record was transmitted to the Metropolitan Senior Judge Court, Dhaka for trial and disposal. The Trial Court took cognizance and accordingly charge was framed against the appellant under section 161 of the Penal Code and the same was read over to him, to which he pleaded not guilty and claimed to be tried in accordance with law.

5. During trial, the prosecution examined as many as 8 witnesses, but none was examined from the defence.

6. From the trend of cross-examination of the PWs, the defence case appears to be that the convict appellant is innocent and he has been falsely implicated with this case out of previous enmity and conspiracy by the vested quarter.

7. After conclusion of hearing and upon considering the evidence and materials on record, the trial Court convicted the appellant in the manner already stated above.

8. Being aggrieved by and dissatisfied with the aforesaid impugned judgment and order of conviction and sentence 26-9-2013, the convict appellant has preferred the instant appeal.

9. Mr SM Rezaul Karim, the learned Advocate appearing on behalf of the appellant has submitted that the learned Judge of the trial Court has failed to consider the major discrepancies in the evidence of the prosecution witnesses and the First Information Report. Mr Karim contends that there is no First Information Report in the eye of law as the prosecution case was started on the basis of a General Diary, but the General Diary was not treated as the First Information Report. He submitted that according to law, there is no scope

of lodging an FIR after recording of the General Diary.

10. He next submits that the framing of charge is defective under section 221. Moreover, after conclusion of recording of evidence, of the learned Judge of the Trial Court examined the convict-appellant under section 342 of the Code of Criminal Procedure. He further submits that the case was not properly investigated by the investigating officer, because there is no sketch map in the police report the convict-appellant was the victim of circumstances and was falsely implicated in this case out of previous enmity and ulterior motive.

11. Mr Karim contends that not a single independent and credible eye witness was examined before the trial Court and the prosecution hopelessly failed to prove the allegation brought against the appellant beyond reasonable doubt and therefore, the impugned judgment and order of conviction and sentence was not sustainable in the eye of law and the same was liable to be set-aside.

12. In support of his submission, Mr Karim has referred to several decisions, which will be discussed in the latter part of the judgment.

13. Mr Md Yousuf Mahmud Morshed, the learned Assistant Attorney-General appearing on behalf of the State supported the impugned judgment and order of conviction and sentence passed by the learned Judge of the Trial Court. He submits that the allegation has been proved by the informant himself as well as by all the witnesses adducing corroborative evidence. He submits that bribe money of Taka 15,000 was recovered from the pocket of the convict-appellant by producing sufficient evidence. The prosecution has been able to prove the case beyond all reasonable doubt and, as such, the appeal is liable to be dismissed.

14. I have considered the arguments advanced by the learned Advocate of both the sides and perused the Memorandum of appeal, the impugned judgment of the trial Court, the evidence on record and the lower Court record.

15. Let me now refer to the evidence on record.

16. PW 1 Moniruzzaman, a Constable of Armed Police Batalion, was on duty at the Airport and he is one of the seizure list witnesses of the case. He deposed that-

> "আলামগীর ১৫ হাজার টাকা ঘুষ দেয়। তখন ডিউটি অফিসার এহেতেশামের নির্দেশে আসামীকে খুজে ইমিগ্রেশন এর কাছে পায়। জিজ্ঞাসাবাদে সে তার পকেট থেকে ১৫ হাজার ঘুষের টাকা বের করে দেয়।"

17. In cross-examination he stated that-

> "টাকা লেনদেন আমি দেখি নাই, আমি ব্যাংকের কাগজ পড়ে দেখি নাই।"

18. PW2 Md Nazrul Islam, Sub-Inspector of Police, deposed that-

> "১০-৭-১২ তারিখে জিডি নং ৩৯০ মতে ডিউটি করা কালে থানা হতে বেতারে সংবাদ পাই ১(এক) জন রাজস্ব কর্মকর্তা বিমান বন্দর এপিবিএন অফিসে ঘুষের টাকা সহ আটক আছে। আমি উক্ত সংবাদের ভিত্তিতে ১৪.০০ মিঃ, এপিবিএন অফিসে পৌঁছে আসামী জহর লালের পকেট থেকে ১৫,০০০ টাকা বের করি।"

19. In his cross-examination he stated that "জব্দ তালিকা টাইপ করা হয় APBN অফিসে।"

20. PW3 Md Alamgir Mondal, the informant of the case, supported his First Information Report.

21. In cross-examination, he stated that-

> "ঘটনার সূত্রপাত অনুমান ২$^{১}/_{২}$ টার সময় আমার সংগে শাশুড়ি ছিলেন, শাশুড়ি সাক্ষী নাই। ঘটনাস্থল গ্রীন চেনেল। সেখানে অনেক যাত্রী ছিল কিনা বলতে পারবো না। ঘটনাস্থলে সিসি টিভি আছে কিনা জানি না। আমার কাছে টাকা চায় ও আমি দিয়েছি এবং বিমান বন্দর থেকে বের হয়ে এই অভিযোগ করি। এজাহার এপিবিএন থেকে টাইপ করে দেয়। ৩ টার দিকে জব্দ তালিকা হয়। টাকার কোন চিহ্ন ছিল না।"

22. PW 4 Saifur Rahman, Anti-Corruption Commission, Dhaka, was a mere formal witness and he knew nothing about the case.

23. PW 5 Ehateshamul Haque, Senior Assistant Police Super, APBN, Uttara, Dhaka, he supported the prosecution case and he deposed that-

> "আসামীকে জিজ্ঞাসায় সে ঘুষ নেওয়ার কথা স্বীকার করে ও আমার পা ধরে ক্ষমা চান ও বলেন ভূল হয়েছে। তার পকেট থেকে ১৫,০০০ পাই।"

24. In cross-examination he stated that-

> "আসামী পকেট থেকে টাকা বের করে দেয়, বাদী আমাকে লিখিত অভিযোগ করে নাই। প্রথমে মৌখিক ভাবে করে। আমি টাকা চাওয়া নেওয়া এটিএম বুথ থেকে উঠানো দেখি নাই।"

25. PW 6 Md Salim Bepari, a Police Constable and seizure list witness, exhibited the seizure list and his signature as Exbt-1(4).

26. In cross-examination he stated that- "টাকার কোন চিহ্ন নাই।"

27. PW 7 Md Nazrul Islam, Constable of Anti-Corruption Commission, Head Office, Dhaka. He deposed that- "বাদীর উপস্থাপন মতে পাসপোর্ট জব্দ করে নূর হুসেন ডি,ডি।"

28. He exhibited seizure list and his signature as exhibit-4/2.

29. PW 8 Nur Hossain Khan, Deputy Director, Dudak is the investigating officer of the case and he visited the place of occurrence, but did not prepare sketch map of the place of occurrence. After investigation, he submitted charge-sheet against the convict-appellant under section 161 of the Penal Code read with section 5(2) of the Prevention of Corruption Act 1947.

30. In cross-examination he stated that-

> "বাদীর শ্বাশুড়ীকে সাক্ষী করি নাই। ডি,জি,এফ, আই এর লোকদের সাক্ষী করি নাই। সি,সি টিভি দেখার চেষ্টা করেছি কিন্ত দেখতে পারি নাই। টাকার কোন চিহ্ন নাই।"

31. These are all evidence adduced by the prosecution.

32. I have carefully examined the evidence of the prosecution witnesses and other materials on record.

33. It appears that the prosecution witnesses have not corroborated each another. PW 1, a police personnel, deposed that "জিজ্ঞাসা বাদে সে তার পকেট থেকে ১৫,০০০ ঘুষের টাকা বের করে দেয়।"

34. PW 2, Sub-Inspector of Police, deposed that "আমি উক্ত সংবাদের ভিত্তিতে ১৪.০০ মিঃ এ,পি,বি,এন অফিসে পৌছে আসামী জহর লালের পকেট থেকে ১৫,০০০ টাকা বের করি।"

35. PW 5, an Assistant Police Super, deposed that "তার পকেট থেকে ১৫,০০০ টাকা পাই।"

36. From the above statements, it appears that PWs 1, 2 and 5 made contradictory statements as to the manner of recovery of the bribe money.

37. PW 3, the informant, PW 4 an official witness, PWs 6 and 7, police personnel and PW 8, being the Deputy Director of Dudak and also the investigating officer of the case, are all highly interested witnesses. The most important eye witness, being the mother-in-law of the informant, was not examined as she was not cited in the charge-sheet as a prosecution witness. On the other hand, the prosecution witnesses have made contradictory statements before the trial Court. The trial Court failed to consider the major discrepancies in between the evidence of the prosecution witnesses.

38. With regard to section 154 of the Code of Criminal Procedure, Mr Karim has referred to two reported cases, namely *Muslimuddin and others vs State,* reported in *38 DLR (AD) 311,* where it has been held;

> "In the early morning ''somebody'' was sent to the Police Station to give an information about this gruesome murder. In

point of time that information carried to the police "by somebody" is the First Information Report within the meaning of section 154 of the CrPC and all subsequent information fall within the purview of section 161 of the CrPC."

39. A similar view was taken by their Lordships in the case of *Ansar Md Chan Mia vs State,* reported in *6 MLR (AD) 279*= 53 DLR (AD) 115, wherein the Court held:

"Investigation started upon information recorded as GD is the FIR as contemplated under section 154 CrPC FIR lodged after commencement of investigation is not FIR but a statement recorded under section 161 of the Code of Criminal Procedure."

40. In this regards the law is settled that whatever information, be it oral or written, is made after occurrence, that is First Information Report.

41. Section 154 of the Code of Criminal Procedure reads as under:

"Every information relating to the commission of a cognizable offence if given orally to an Officer in Charge of a police-station, shall be reduced to writing by him or under his direction and be writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid shall be entered in a book to be kept by such officer in such form as the Government may prescribe in this behalf."

42. The next legal question raised by learned Advocate for the appellant that the framing of charge against the appellant under section 221 of the Code of Criminal Procedure was not done in accordance with law.

43. Framing charge correctly in accordance with the relevant provisions of this Code and the relevant Penal law is very important for holding a trial. If there is any flaw in the framing of charge, the whole trial may be vitiated.

44. I have gone through the order of framing of charge by the trial Court under section 221 of the Code on 26-5-2013, which is quoted below;

"আমি মোঃ জহুরুল হক, সিনিয়র স্পেশাল জজ, ঢাকা। এতদ্বারা আপনি আসামী জহর লাল বিশ্বাস কে নিম্নলিখিতরুপে অভিযুক্ত করিতেছি যেঃ-

আপনি বিগত ১০-৭-২০১২ ইং তারিখে হযরত শাহজালাল আন্তঃ বিমানবন্দরে গ্রিন চ্যানেল এলাকায় কর্তব্যরত থাকাকালে অনুমান ১৪.৩০ ঘটিকার সময় মামলার বাদী মোঃ আলমগীর মন্ডলের নিকট হইতে ১৫,০০০ টাকা উৎকোচ গ্রহণ করিয়াছেন এবং উক্তরূপ উৎকোচ গ্রহণ করিয়া আপনি দন্ড বিধির ১৬১ ধারায় শাস্তিযোগ্য অপরাধ করিয়াছেন। যাহা বিশেষ আদালত কর্তৃক বিচার্য।

অভিযোগ পাঠ করিয়া শুনানো ও ব্যাখ্যা করিয়া বুঝানো হইলে আসামী নিজেকে নির্দোষ বলিয়া দাবী করেন ও বিচার প্রার্থনা করেন।"

45. Now, the relevant law under section 221 of the Code of Criminal Procedure is quoted below-

"Section 221

Charge to state offence.-(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) Specific name of offence sufficient description. If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

(3) How stated where offence has no specific name. If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice

of the matter with which he is charged.

(4) The Law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) What implied in charge. The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charge was fulfilled in the particular case.

(6) .....

(7) ....."

46. I have gone through the examination of the appellant under section 342 of the Code of Criminal Procedure which is quoted below;

"আপনার বিরুদ্ধে বিগত ১০-৭-২০১২ ইং তারিখে হযরত শাহজালাল আন্তঃ বিমানবন্দরে গ্রিন চ্যানেল এলাকায় কর্তব্যরত থাকাকালে অনুমান ১৪.৩০ ঘটিকার সময় মামলার বাদী মোঃ আলমগীর মন্ডলের নিকট হইতে ১৫,০০০ টাকা উৎকোচ গ্রহণ করিয়াছেন মর্মে অভিযোগ আনয়ন করা হইয়াছে।

রাষ্ট্রপক্ষ আপনার বিরুদ্ধে আনীত অভিযোগ প্রমানের লক্ষ্যে অত্র মামলায় মোট ৮ জন সাক্ষীকে আদালতে উপস্থাপন করিয়াছেন। আপনি আদালতের ডাকে উপস্থিত থাকিয়া উল্লিখিত সাক্ষীগনের জবানবন্দি শুনিয়াছেন এবং আপনার পক্ষে সাক্ষীগণকে যথারীতি জেরা করা হইয়াছে। এক্ষণে আপনার জবাব কি–

(১) আপনি দোষী না নির্দোষ?

উত্তরঃ-নির্দোষ।

(২) আপনি সাফাই সাক্ষী দিবেন কি?

উত্তরঃ-না।

(৩) আপনি আর কিছু বলিবেন কি?

উত্তরঃ-না।"

47. From the above statement, it appears that while examining the convict-appellant under section 342 of the Code of Criminal Procedure, the Tribunal did not put the incriminating evidence before the accused person for enabling him to explain the circumstances, which has prejudiced him.

48. The real object of section 342 of the Code of Criminal Procedure is to invite the attention of the accused person to the points in the evidence which are against him for which he may be convicted, so that he may have a chance to offer his explanation. But from a plain reading of the examination of the accused under section 342 of the Code of Criminal Procedure, quoted above, it is evident that the petitioner was not given a proper opportunity to offer his explanation as to the offence for which he was charged and therefore, the appellant has been prejudiced.

49. The relevant law under section 342 of the Code of Criminal Procedure is quoted below;

Power to examine the accused-

(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such question, or by giving false answers to them; but the Court may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has commit-

ted.

(4) No oath shall be administered to the accused.

50. On the issue of section 342 of the Code, Mr Karim has referred to three reported case as discussed below;

51. In the case of *Habibur Rahman @ Habib and others vs State*, reported in *18 BLC (AD) 218 (2013)*, the Court held that;

"Trial Court has not at all followed the provision of law and convicted the appellants without application of its judicial mind. It is an irregularity on the part of the trial court, at the same time it cannot be ignored that this irregularity has prejudiced the appellants. Failure on the part of the learned Sessions Judge is not a mere irregularity; is a grave irregularity which has occasioned failure oj Justice. "

52. In the case of *State vs Monu Mia*, reported in *54 DLR (AD) 60 (2002)*, the Court held that;

"The Court below also found that the examination of the accused under section 342 CrPC have been perfunctory which has seriously prejudiced the accused as incriminating evidence or circumstances sought to be proved against the accused was not put to the accused during examination under section 342 CrPC causing gross miscarriage of justice. In the case of *Mizazul Islam @ Dablu vs State 41 DLR (AD) 157* sandal which was the incriminating material sought to implicate the accused was not drawn to the attention of the accused at the time of examination under section 342 CrPC and, as such, the same was left out of consideration. Accordingly, it was held in that case that incriminating evidence or circumstances sought to be proved by the prosecution must be put to the accused during examination under section 342 CrPC otherwise it would cause miscarriage of justice to the great prejudice of the accused."

53. In the case of *Mohiruddin Mondal alias Md Mohiruddin Mondal and others vs State*, reported in *57 DLR 779 (2005)*, the Court held that;

"Section 342 of the Code being a mandatory provision of procedural law the departure from the principles of the section causes grave prejudice to the accused. In this case the accused having not been given any opportunity to explain the circumstances, the order of their conviction is liable to be set-aside."

54. The facts of the above three cases are different from one another. But the essence of the views are helpful for arriving at a correct decision in the present case.

55. Lastly, in respect of the principle of benefit of doubt, Mr Karim has referred to a reported case as discussed below.

56. In the case of *Nurul Islam vs State* reported in *10 BCR (AD) 339 = 43 DLR (AD) 6* , in the Court held that;

"Thus, on a careful consideration of the eye-witnesses as discussed above, it is very difficult to rely upon their evidence in view of the glaring omissions and contradictions in their testimonies in court. The learned judges of the High Court Division have not considered the material discrepancies, contradictions and omissions of the eye-witnesses in their judgment for which an error has crept in the judgment resulting in the conviction of the appellants.

On a careful consideration of the evidence on record particularly of the eye-witnesses, we are of the view that the appel-

lants are entitled to a benefit of doubt and they are acquitted. Accordingly, the appeal is allowed and the order of conviction and sentence is set-aside. "

57. Fundamental principle is that a charge against an accused, in order to convict him, must be proved beyond all reasonable doubt. If any reasonable doubt is created as to the involvement of the accused in the offence alleged, he will be entitled to get the benefit of doubt and shall be acquitted.

58. Considering the above discussions and the relevant provisions of law and other aspects of the case, I am of the view that the prosecution has failed to prove the charge brought against the appellant beyond all reasonable doubt. Furthermore, the examination of the convict appellant under section 342 of the Criminal Procedure was not made in accordance with law. The learned Judge of the trial Court did not apply his judicial mind in passing the judgment and order of conviction and sentence.

59. Consequently, the impugned judgment and order of conviction and sentence dated 26-9-2013 is liable to be set-aside.

60. In the result, the appeal is allowed.

61. The impugned judgment and order of conviction and sentence dated 26-9-2013 passed by the learned Metropolitan Senior Special Judge Court, Dhaka in Metropolitan Special Case No.120 of 2013 arising out of Biman Bondar Police Station Case No.47 dated 10-7-2012, corresponding to GR No.711 of 2012 is hereby set-aside.

62. Accordingly, the appellant Jahar Lal Biswas, son of late Modhusudon Biswas is acquitted from the charge levelled against him.

63. The appellant is hereby discharged from his respective bail bond.

64. The office is directed to send down the lower court records along with a copy of the judgment to the concerned Court at once.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Sheikh Abdul Awal J

Judgment January 16th, 2014.

Min Oils Limited.....
.....Plaintiff-Petitioner

vs

Bangladesh Petroleum Corporation & others.....Defendant-Opposite Parties*

Bangladesh Petroleum Corporation Ordinance (LXXXVIII of 1976)
Section 27

No suit lies against the Chairman, any Director or any officer, adviser, consultant or employee of the Corporation for anything which is in good faith done or intended to be done under the Law. .....(15)

Bangladesh Petroleum Act (LXIX of 1974)
Section 4

Empowers Petroleum Corporation to do any act in good faith for the interest of Corporation in which no suit lies against the Chairman, any Director or any officer, adviser, consultant or employee of the Corporation.

.....(18)

Yousuf Hossain Humayun, Advocate—For the Petitioner.

*Civil Revision No.1007 of 2013.

Md Abdul Hai, DAG—For the Opposite Parry Nos.1-4.

Habibul Islam Bhuiyan with Swapan Kumar Mitro, Advocates—For the Opposite Party No.5.

Judgment

This Rule was issued calling upon the opposite parties to show cause as to why the order dated 26-2-2013 passed by the Additional District Judge, 6th Court, Dhaka in Misc. Appeal No.214 of 2012 dismissing the appeal and affirming the order dated 3-7-2012 passed by the learned Senior Assistant Judge, 2nd Court, Dhaka in Title Suit No.300 of 2012 rejecting the application for temporary injunction should not be set-aside.

2. Material facts of the case, briefly, are that the petitioner as plaintiff instituted a suit being Title Suit No. 300 of 2012 in the Court of Senior Assistant Judge, 2nd Court, Dhaka for declaration that Memo No. বিপিসি.....প্রশাসন ৩৪.১৯ (অংশ)/০৬.২৬ (ট)/৯৭ dated 1-3-2012 issued under the signature of defendant-opposite party No.3 is illegal, inoperative and without jurisdiction along with further declaration that Memo No. ৩৪.১৯/বিপনন/৪৯৭ dated 21-11-2010 issued under the signature of defendant-opposite party No.4 is also illegal, inoperative and without jurisdiction and not binding upon the plaintiff-petitioner. The plaintiff's case, in-short, is that the company represented by him is a reputed private limited company established under the Company Act, 1913 and the defendant-Bangladesh Petroleum Corporation established under Petroleum Corporation Ordinance, 1976 an autonomous body under the Government engaged in producing various petroleum products and marketing . According to sections 4(1) and (2) of the Petroleum Act, 1974 no person shall carry on any petroleum operation except under a petroleum agreement with the corporation. The plaintiff-petitioner has entered into a petroleum agreement with the defendants on 25-4-2011 and since then started marketing with the products of the corporation with full satisfaction. The defendant No.3 after being influenced by the vested quarters published an office circular under Memo No. বিপিসি/প্রশাসন/০৬২৬(ট)/৪০৫ তারিখ ২৪-১০-২০১১ stating "ব্যবহৃত ট্রান্সফরমাল অয়েল রিফাইনিং এর জন্য সুনির্দিষ্ট কোন নীতিমালা না থাকায় পরবর্তী নির্দেশ না দেওয়া পর্যন্ত ইতিপূর্বে ব্যবহৃত ট্রান্সফরমার অয়েল, রিসাইক্লিং পূর্বক বাজারজাত করার ক্ষেত্রে বিপিসির সাথে চুক্তিবদ্ধ হওয়ায় আবশ্যকতা আরোপের সংক্রান্ত বিপিসির পত্র সূত্র বিপিসি/প্রশাসন/০৬২৬(ট)/৪০৫ তারিখ ২৪-১০-২০১৩ মুলে জারীকৃত নির্দেশনা এতদ্বারা বাতিল করা হল ।." The defendant opposite party No.2 issued the disputed circular by violating the clear provision of sections 4(1) and (2) of the Bangladesh Petroleum Act, 1974 with intent to give undue and illegal benefit to defendant No.5 and, as such, the impugned circular dated 24-10-2011 and 21-11-2010 are liable to be declared illegal, void and not binding upon the plaintiff. In view of the fact that since the defendant opposite party Nos. 1-4 have allowed the defendant No. 5 to marketing with petroleum products without written agreement and deposit of service charge by violating the mandatory provision of section 4(1) & (2) of the Bangladesh Petroleum Act, 1974 causing irreparable financial loss and injury to the plaintiff and hence, the suit.

3. Immediately after institution of the suit the plaintiff filed an application under Order XXXIX, Rule i and 2 read with section 151 of the Code of Civil Procedure for temporary injunction restraining the defendant No.1, Petroleum Corporation from allowing any person to deal with the petroleum products except under a petroleum agreement according to provision of section 4(1) and (2) of the Bangladesh Petroleum Act, 1974 and also restraining the defendant corporation from executing the office order under Memo No. বিপিসি.....প্রশাসন ৩৪.১৯ (অংশ)/০৬.২৬ (ট)/৯৭ dated 1-3-2012 issued by the defendant No.3 and office circular under Memo

No. বিপিসি.....প্রশাসন ৩৪.১৯ (অংশ)/০৬.২৬ (ট)/৯৭ তারিখ ২১-১১-২০১০ issued under the signature of the defendant No.4 as well as restraining the defendant No.5 from marketing petroleum products of defendant No.1 in violating the provision of sections 4(1) and (2) of the Bangladesh Petroleum Act, 1974.

4. The defendant No.1 resisted the application for temporary injunction by filing written objection on the grounds that: (i) the plaintiff-petitioner has no *locus standi* to file the suit and make prayer for injunction, (ii) the defendant-opposite party is an autonomous body and has the right to formulate its own administrative measures, (iii) the defendants have not violated the terms of the agreement and (iv) the defendant No.1 is an autonomous corporation and has the legal right to issue administrative orders.

5. The learned Senior Assistant Judge, 2nd Court, Dhaka upon hearing the parties by his order dated 3-7-2012 rejected the application for temporary injunction on the finding that the plaintiff has no *locus standi* to make prayer for an order of injunction restraining the Petroleum Corporation from allowing any person to deal with the petroleum products except under a petroleum agreement as per provisions of sections 4(1) and (2) of the Bangladesh Petroleum Act, 1974.

6. The unsuccessful plaintiff, thereupon, preferred Misc. Appeal No.214 of 2012 before the learned District Judge, Dhaka, which was eventually transferred to the Court of Additional District Judge, 6th Court, Dhaka for disposal, who by the impugned judgment and order dated 26-2-2013 dismissed the appeal and affirmed the order passed by the trial Court below on the finding that balance of convenience and inconvenience is not in favour of the plaintiff rather it is in favour of the defendant, petroleum corporation.

7. Being aggrieved and dissatisfied with the aforesaid judgment and order dated 26-2-2013 the present petitioner has come before this Court and obtained the present Rule.

8. Mr Yousuf Hossain Humayun, the learned Advocate appearing for the plaintiff-petitioner in the course of his argument after placing the impugned judgment as well as the order of the trial Court below along with other connected documents submits that both the Courts below misconceived the facts of the case and law bearing on the subject and thereby committed an error of law resulting in an error in the impugned decision occasioning failure of justice. He next submits that admittedly the petitioner executed an agreement with the Petroleum Corporation for 2(two) years on 25-4-2011 and thereafter it was renewed time to time for dealing business with regard to petroleum products and, as such, he has legal right to protect his business interest though both the courts below failed to consider that section 4(1) and (2) of the Bangladesh Petroleum Act, 1974 provided that "(i) the Government may enter into a petroleum agreement with any person for the purpose of any petroleum operation and (ii) no person shall undertake or carry on any petroleum operation except under a petroleum agreement entered into under sub-section (i)" and in this case the defendant opposite party No.2 issued the disputed circular by violating the clear provision of section 4(1) and (2) of the Bangladesh Petroleum Act, 1974 with intent to give undue and illegal benefit to defendant No.5 which occasioned a failure of justice.

9. Referring to the provisions of section 4(1) and (2) of the Bangladesh Petroleum Act, 1974 Mr Yousuf Hossain Humayun finally submits that in the facts and circumstances of the case both the courts below ought to have granted temporary injection till disposal of the suit inasmuch as the defendant opposite party No.2

issued the disputed circular by violating the clear provisions of section 4(1) and (2) of the Bangladesh Petroleum Act, 1974 and in not doing so committed an error of law resulting in an error in the impugned decision occasioning failure of justice.

10. Mr Md Abdul Hai, the learned Deputy Attorney-General, on the other hand, appearing for the opposite party Nos.1-4 supports the impugned judgment as well as order of the trial Court below. The learned Deputy Attorney-General in the course of his argument after placing the relevant law with regard to Petroleum Corporation submits that the present suit filed by the plaintiff-petitioner challenging the circular dated 1-3-2012 and 21-11-2010 is plainly misconceived inasmuch as in view of the express provision of section 27 of the Bangladesh Petroleum Corporation Ordinance, 1976 and section 10 of the Petroleum Law, no suit, prosecution or other legal proceedings lie against the Chairman, any Director or any officer, adviser, consultant or employee of the Corporation for anything which is in good faith done or intended to be done under this Ordinance. The learned Deputy Attorney-General further submits that it is now well settled that in order to get an order of injunction the petitioner has to show that he has a strong *prima facie* case but in the instant case the plaintiff-petitioner has miserably failed to make out a *prima facie* case in his favour and taking the same into consideration the Courts below rightly rejected the prayer for injunction. The learned Deputy Attorney-General further submits that the Courts of facts below were perfectly justified in refusing the petitioner's prayer for temporary injunction on the clear finding that plaintiff has no *prima facie* case for injunction as in the facts and circumstance of the case balance of convenience and inconvenience is in favour of the defendant-opposite party No. 1.

11. Mr Habibul Islam Bhuiyan, the learned Advocate appearing for the opposite party No.5 at the very outset adopting the submission of the learned Deputy Attorney-General.

12. I have heard the learned Advocates and the learned Deputy Attorney-General at length and perused the revisional application, impugned judgment and other materials on record including the connected law and Ordinance. The facts of the case have already been set out so, I need not to repeat the same again. Now, to appreciate the points raised by the learned Advocates, I feel it necessary to decide first whether the Courts below were justified in refusing the petitioner's prayer for temporary injunction on the finding that plaintiff has no *prima facie* arguable case for injunction inasmuch as in the facts and circumstances of the case balance of convenience and inconvenience is in favour of the defendant-opposite party No. 1.

13. In deciding this point the certain provisions of law are required to be referred to for having a better view of the dispute in question. Section 10 of the Petroleum Law reads as follows:

> "Indemnity—No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act or the rules made thereunder."

14. Section 27 of the Bangladesh Petroleum Corporation Ordinance, 1976 reads as follows:

> "No suit, prosecution or other legal proceedings lie against the Chairman, any Director or any officer, adviser, consultant or employee of the Corporation for anything which is in good faith done or intended to be done under this Ordinance."

15. From a combined reading of the above quoted provisions of law, it transpires that no

suit lies against the Chairman, any Director or any officer, adviser, consultant or employee of the Corporation for anything which is in good faith done or intended to be done under the Petroleum Law.

16. I have already noticed that the plaintiff-petitioner filed Title Suit No.300 of 2012 challenging the circular and order dated 1-3-2012 and 21-11-2010 issued by the defendant-petroleum corporation which are required to be referred to for determining the real question of controversy. The office circular dated 21-11-2010 reads as follows:

Bangladesh Petroleum Corporation

BSC Bhaban, Saltgola Road, Post Box No. 2025, Chittagong.

সূত্র নং-৩৪.১৯/বিপনন/৪৯৭ নভেম্বর ২১, ২০১০ খ্রিঃ

ব্যবস্থাপনা পরিচালক
মেসার্স মামুন এন্ড ব্রাদার্স
পুলের হাট, চাঁচড়া,
যশোর।

বিষয়ঃ পেট্রোলিয়াম জাতীয় পদার্থ (ট্রান্সফরমার তেল) রিফাইনিং ও মার্কেটিং এর অনুমোদন প্রসংগে।

উর্পযুক্ত বিষয়ে বিপিসিতে প্রেরিত আপনাদের পত্রের প্রতি দৃষ্টি আকর্ষন করা যাচ্ছে যে, পেট্রোলিয়াম জাতীয় পদার্থ হিসাবে ট্রান্সফরমার অয়েল রি-রিফাইনিং বিষয়ে বর্তমানে কোন নীতিমালা নেই বিধায় সংস্থা কর্তৃক আলোচ্য বিষয়ে করনীয় কিছু নাই। তদুপরি বিষয়টি বিদ্যুৎ উন্নয়ন বোর্ড/পল্লী বিদ্যুতায়ন বোর্ডের এখতিয়ার ভুক্ত।

স্বাক্ষর/অস্পষ্ট
২১-১১-২০১০
(মোঃ আবু হানিফ)
মহাব্যবস্থাপক (বন্টন ও বিপনন) পক্ষে
ব্যবস্থাপনা পরিচালক
ইষ্টার্ন রিফাইনারী লিঃ ও
সংশ্লিষ্ট টেকনিক্যাল কমিটির সদস্য সচিব

17. The office circular dated 1-3-2012 reads as follows:

বাংলাদেশ পেট্রোলিয়াম কর্পোরেশন
বিএসসি ভবন, সল্টখোলা রোড, চট্টগ্রাম

স্মারক নং-বিপিসি/প্রশাসন/৩৪/১৯(অংশ)/০৬.২৬(ট)/৯৭
তারিখঃ ১-৩-২০১২ খ্রিঃ

বিষয়ঃ ব্যবহৃত ট্রান্সফরমার অয়েল রিফাইনিং ও ব্লেন্ডিং এর বিষয়ে চুক্তি সম্পাদন প্রসংগে।

উপযুক্ত বিষয়ে সংশ্লিষ্ট সকলের অবগতির জন্য জানানো যাচ্ছে যে, ব্যবহৃত ট্রান্সফরমার অয়েল রিফাইনিং ও ব্লেন্ডিং এর জন্য সুনির্দিষ্ট কোন নীতিমালা না থাকায় পরবর্তী নির্দেশ না দেয়া পর্যন্ত ইতিপূর্বে ব্যবহৃত ট্রান্সফরমার অয়েল রিসাইক্লিং পূর্বক বাজারজাত করার ক্ষেত্রে বিপিসির সাথে চুক্তিবদ্ধ হওয়ার আবশ্যকতা আরোপ সংক্রান্ত বিপিসির পত্র নং-বিপিসি/প্রশাসন/০৬.২৬(ট)/৪০৫ তারিখ ২৪-১০-২০১৩ মুলে জারীকৃত নির্দেশনা এতদ্বারা বাতিল করা হলো।

স্বাক্ষর/অস্পষ্ট
১-৩-২০১২
(মুহাম্মদ নুরুল আলম)
পরিচালক (বিপনন)
ও
সচিব (অতিরিক্ত দায়িত্ব)

18. On a reading of the above quoted circulars together with the section 10 of Petroleum Law and section 27 of the Bangladesh Petroleum Corporation Ordinance, 1976, I do not find any reason to hold that both the Courts below committed any wrong in refusing the prayer for temporary injunction or in the facts and circumstances of the case findings of 2(two) Courts below are contrary to the provisions of section 4 of the Petroleum Act, 1974 inasmuch as Petroleum Law itself empowering the defendant-opposite party No. 1, Petroleum Corporation to do any act in good faith for the interest of Petroleum Corporation in which no suit lies against the Chairman, any Director or any officer, adviser, consultant or employee of the Corporation. Therefore, I do not find any substance in the submission of the learned Advocate for the petitioner, rather I find con-

siderable merit in the submission of the learned Deputy Attorney-General.

19. Taking everything into consideration, I think that both the Courts of facts below were perfectly justified in refusing the petitioner's prayer for temporary injunction on the clear finding that the petitioner has failed to make out a *prima-facie* arguable case for getting an order of injunction retraining the defendant No.1, Petroleum Corporation from allowing any person to deal with the petroleum products except under a petroleum agreement. In any event, this is not a case in which the Court has jurisdiction to grant the relief asked for by the plaintiff-petitioner.

20. Having regard to the facts of the case and the reasons given by the Courts below, I do not think the refusal of injunction was either illegal, improper or inequitable. To avoid any prejudice to the plaintiff in the suit, it is better to refrain from making any further observation.

21. In view of my discussions made in the foregoing paragraphs it is by now clear that the instant Rule must fail.

22. In the result, the Rule is discharged without any order as to costs. The trial Court concerned will, however, expedite the trial of the case.

Let a copy of this judgment be communicated to the Courts concerned at once.

Ed.

High Court Division
(Criminal Miscellaneous Jurisdiction)

Quamrul Islam Siddiqui J
Sheikh Md Zakir Hossain J

Judgment
July 31st, 2013.

Mahfuz Ali.....
...Accused-Petitioner

vs

State, represented by the DC, Chittagong.....
.....Opposite-Party*

Code of Criminal Procedure (V of 1898)
Section 498

The accused-petitioner is a patient of transitional carcinoma of ureter and kidney (Rt) and he has already received seven cycle chemotherapy. The present accused-petitioner has been suffering from the deadly disease like transitional carcinoma (cancer). The accused-petitioner is entitled to bail on health ground as he has been suffering from deadly disease like cancer. .....(7, 8 & 10)

Md Abdul Hamid vs State, 3 BCR (AD) 86 ref.

AKM Faiz, Advocate with Mohammad Bakir Uddin Bhuiyan, Advocates—For the accused-Petitioner.

Abdul Baset Majumder, Advocate—For the informant-Opposite-Party.

Judgment

Quamrul Islam Siddiqui J : On 1-7-2013 a Division Bench of this Court granted bail to the accused-petitioner Mahfuz Ali for a period of 6(six) months. Against this order dated 1-7-2013 passed by the High Court Divisions the State and the informant preferred Criminal Miscellaneous Petition Case Nos. 293 of 2013 and 300 of 2013 before the Appellate Division. The learned chamber Judge of the Appellate Division by the order dated 14-7-2013 stayed

*Criminal Miscellaneous Case No. 24586 of 2013.

the order of the High Court Division dated 1-7-2013 for two weeks and directed this Court to hear the Rule and dispose of the same within two weeks from the date of receipt of the order of the Appellate Division. Accordingly, we posted the matter in the cause list and heard both the sides at length.

2. We have perused the impugned order dated 1-7-2013 passed by the High Court Division and the direction dated 14-7-2013 given by the Appellate Division, the FIR and other relevant papers. In fact there is specific overt act against the accused-petitioner in the FIR and the injury alleged to have been caused by the accused-petitioner as mentioned in the FIR corresponds to the injury mentioned in the post mortem report. However, considering the health condition of the accused-petitioner the High Court Division granted bail to the accused-petitioner for a period of 6(six) months.

3. Mr AKM Faiz, learned Advocate appearing for the accused-petitioner submits that on l6-6-2011 the accused-petitioner consulted the doctor and the doctor diagnosed that the accused-petitioner had been suffering from transitional carcinoma of ureter and kidney (Rt). The doctor also stated that the accused-petitioner has been under this treatment from September, 2007 and by now the accused-petitioner has received seven cycle chemotherapy with compete response. The learned Advocate refers to Annexure-F and submitsß that this accused-petitioner had a check up from Medinova Medical Services Ltd. and the report shows that the accused-petitioner is a patient of transitional cell carcinoma at urinary bladder and he is in post chemotherapy stage. He then submits that considering the fact that the accused-petitioner has been suffering from a deadly disease like cancer, a Division Bench of this Court enlarged the accused-petitioner on bail for 6 months. He lastly submits that since the accused-petitioner has been suffering from a deadly disease of transitional carcinoma of ureter and kidney (right) (cancer), he may be allowed to continue with the bail. The learned Advocate for the accused-petitioner also refers to a medical certificate issued on 16-6-2011 by Dr ABMF Karim, Md FRCR PhD. This certificate was issued by the doctor on 16-6-2011 and the occurrence took place on 21-10-2012. The learned Advocate for the accused-petitioner submits that it is not conceivable that the accused-petitioner has procured the doctor's certificate relating to his deadly disease much before the occurrence took place and he also submits that it is equally inconceivable that a person falsely claims that he has been suffering from deadly disease like cancer for the purpose of granting bail.

4. Mr Abdul Baset Majumder, the learned Advocate appeared in aid of the State and submits that there is specific overt act allegation against this accused-petitioner that he dealt with ballam blow in the chest of the deceased and that this injury also corresponds to the injury mentioned in the post mortem report. He again submits that the certificate produced by the accused-petitioner has been procured from a private clinic and that this certificate creates doubts about its genuineness.

5. Dr Md Bashir Ullah, the learned Deputy Attorney-General adopts the submission of the learned Advocate Mr Abdul Baset Majumder and submits that since there is specific overt act against the accused-petitioner there is no scope to consider the application of bail of the accused-petitioner at this stage.

6. We have perused the FIR and other relevant papers. The accused-petitioner has submitted a certificate from Medinova Medical Services Ltd. and the report shows that the accused-petitioner has been suffering from transitional cell carcinoma at urinary bladder and he is in post chemotherapy stage. This

report for Medinova was issued 19-9-2012, that is, one month prior to the occurrence. Therefore, papers submitted by the accused-petitioner show that the accused-petitioner was provided with treatment by the doctor much before the occurrence took place.

7. From the doctors report we find that the accused-petitioner is a patient of transitional carcinoma of ureter and kidney (Rt) and he has already received seven cycle chemotherapy. The learned Advocate for the accused-petitioner refers to a case of *Md Abdul Hamid, vs State, 3 BCR (AD) 86.* In the case referred to above, the Appellate Division has held as under:

> "We are satisfied that the appellant is a heart patient and he is suffering from serious disease. Such hypertension and serious anaemia from bacilary dysentery, treatment of which is not available in the jail and unless the appellant is enlarged on bail to enable him to better medical treatment by specialist inside the jail there is risk of his life. In view of the matter, on this special ground, the appeal is allowed and the order of the High Court Division is set-aside. Let the appellant be released on bail to the satisfaction of the Deputy Commissioner, Sylhet till conclusion the trial, subject to his not misusing the bail."

8. From the above pronouncement of the Appellate Division, we find that on the ground of illness the Appellate Division enlarged the accused-petitioner on bail. The present case is much more serious than the case referred to above as the present accused-petitioner has been suffering from the deadly disease like transitional carcinoma (cancer).

9. We find that the facts and circumstances of the case referred to above and the facts and circumstances of the case in hand are identical. Therefore, the principle expounded in the case referred to above fully applies in the case in hand.

10. In view of the facts and circumstances of the case and the discussions made hereinbefore we are of the opinion that the accused-petitioner is entitled to bail on health ground as he has been suffering from deadly disease like cancer. Accordingly, we find substance in this Rule.

In the result, the Rule is made absolute. The *ad-interim* bail granted to the accused-petitioner by a Division Bench of the High Court Division on 1-7-2013 is hereby confirmed.

Ed.

High Court Division
(Statutory Original Jurisdiction)

Md Rezaul Hasan J

Judgment March 11th, 2014.

MA Quasem Member of MAQ Paper Industries Ltd.....Petitioner

vs

Registrar of Joint Stock Companies and Firms and others.....Respondents*

Companies Act (XVIII of 1994)
Section 3

Companies Rules, 2009
Rules 8

In an appropriate case, this court, in appointing auditor, may exercise its inherent jurisdiction, for ends of justice, particularly when the inaction, neglect of duty or malafide on the part of concerned authority/regularity body is apparent from the materials on record.

Before parting of, this court notes dissatisfaction to the inaction, non-performance of statutory duties and indifferences on the part of the SEC, and their go slow or keeping the eyes closed like attitude in per-

*Company Matter No. 55 of 2014.

forming its duties entrusted upon it, to ensure compliance of the applicable laws, Rules and the notifications issued by it. How far the SEC is efficient and anxious in protecting interest of the small investors and in maintaining discipline in the capital market needs to be screened by studing its function since 1995 to 2012. SEC even did not appear in this case, although it is respondent No. 2. It has utterly failed to perform its duties as per provision of sub-rule (3A) of Rule 12 of the SEC Rules, 1987, in appointing auditor. If the small investor's trust in capital market is diminished then this the alternative source (the capital market) to procure equity, without recurring interest, will become a desert, unlike the industrialized economies. Besides, this alternative source (the capital market) available for procuring interest free equity must have positive impact on the economy in that it will most likely compel reducing bank interest rate and will have its competitive role as an alternative to money market. These deserves active attention of the authority which is entrusted to oversee the activities of the SEC, so that necessary enactments/amendment and/or guidelines can be made or formulated, as the case may be. .....(16 & 17)

1986 BLD (AD) 311 = 38 DLR (AD) 296, Ghyasuddin Ahmed vs QA Faruque ref.

Shah Monjurul Hoque, Advocate—For the Petitioner.

None appears—For the Respondents.

Judgment

This is an application under section 81(2) read with sections 83 and 85 of the Companies Act, 1994 (the Act). Let the supplementary affidavit do from part of the substantive application.

2. It has been stated in the petition, amongst other, that the petitioner is the Shareholder-Member of MAQ Paper Industries Ltd, a public company limited by shares and incorporated in the year 1992, having its head office at 141/1, Segunbagicha, Dhaka (henceforth referred to as the Company). It has been listed with the Dhaka Stock Exchange (DSE) in the year 2009 and now it falls under Z-category; that from its incorporation till 2000 the Company had been duly submitting all necessary documents and papers to the concerned authorities, including RJSC, in the result nothing remained pending/due till the FY 1999-2000; that the Company obtained last clearance certificate of submission of minutes of Annual General Meeting (AGM), returns of the share capital and other documents of the Company on 30-8-2001; that the Company could not hold its AGM in time due to unavoidable loss and damage suffered by the Company from fire accidents, change of directorships and members etcetra; that consequently, the Company has failed to submit AGM and Returns of Shares from 2000-2005; that thereafter, Company filed a petition, being Company Matter No. 5 of 2005, before the High Court Division under section 81(2) read with sections 83 and 85 of the Companies Act, 1994, for condonation of delay in holding those AGMs and also for obtaining permission to submit the reports and returns of shares to RJSC for the years 2001-2005; that when that matter was pending before the Court, the Company was informed by the respondent No. 2 (SEC), vide letter dated 22-8-2005; that it was directed by the Secretary of the concerned Ministry, vide notification dated 6-8-2005 that a recommendation was proposed that for condonation of delay in holding those AGMs and for submitting the same before the RJSC no further permission might be required to be taken from High Court Division; that the respondent was also orally informed earlier that the concerned

Ministry and the respondent Bangladesh Securities Exchange Commission (SEC) was under legal obligation to re-consider the matter that whether it was necessary to obtain permission from the High Court Division for condonation of delay in holding AGM and they were trying to find out a solution since June, 2004, which was evident from the letters dated 6-12-2004 and 5-1-2005; that BSEC sent those letters also to the Company; that therefore, the Company caused default under the instruction of the SEC and the aforesaid company matter was dismissed for default; therefore the Company was requested not to proceed with the pending matter on this issue before the Court; that thereafter the Company kept waiting by the SEC for the final decision, but no such positive decision has yet been given by the SEC. Thereafter, petitioner repeatedly requested the SEC to receive Audited Account Reports, AGM, Returns of Shares and other relevant documents of the Company to the SEC and also sought for its advice; but the BSEC paid no heed thereon; that lastly, the petitioner approached before the RJSC for submitting the AGM, Returns of Shares and other documents of the Company, but BSEC refused to accept the same without having prior permission of the High Court Division.

3. Hence this application for condonation of delay to holding the Annual General Meeting for the years 2001 to 2012.

4. The learned Advocate Mr Shah Monjurul Hoque, alongwith Ms Fatema Khatun, appearing for the petitioner, having placed the petition alongwith the documents annexed therewith, submits that the company was incorporated on 27-2-1992, vide certificate of incorporation No. C-21829(236)/96, as a public company limited by shares and that the company is listed with the Stock Exchanges as a 'Z' category company. He further submits that since incorporation till 2000 the company duly held its Annual General Meetings and complied with all legal formalities, but the company could not hold its Annual General Meetings from 2001 to 2012. He also submits that the company filed an petition, being company matter No. 5 of 2005, before the High Court Division under section 81(2) read with section 83 and 85 of the Companies Act, 1994, for condonation of delay in holding AGMs and also for obtaining permission to submit AGM and Returns of Shares to RJSC for the years 2001-2005. When that matter was pending before the Court, the Company was informed by the respondent no. 2, BSEC, vide letter dated 22-8-2005 that it was directed by the secretary of the concerned Ministry, vide a notification dated 6-8-2005, that a recommendation was proposed that for condonation of delay in holding AGM and for submitting the same before the RJSC no further permission might be required to be taken from High Court Division. He next submits that, in these circumstance the Company Matter No. 5 of 2005 was dismissed for default. He also submits that thereafter the company was kept waiting by the SEC for its final decision, but no decision has yet been given by the SEC. Thereafter, petitioner repeatedly requested the SEC to receive Audited Account Reports, AGM, Returns of Shares and other relevant documents of the Company to the SEC and also sought for advice; but SEC paid no heed thereon. Lastly, the petitioner approached before the RJSC for submitting the AGM, Returns of Shares and other documents of the Company, but SEC refused to accept the same without having prior permission of the Hon'ble High Court Division. Accordingly, he concludes that there was no willful laches on part of the company in holding the aforesaid Annual General Meetings for the period from 2001 to 2012. He continues that this petition has been filed in good faith and unless the delay occurred in holding the aforesaid Annual General Meetings is not condoned the company as well as the

share-holders/members will suffer irreparable loss. On a query from the Bench, as to whether the company is a going concern, the learned advocate has submitted a supplementary affidavit, sworn on 5-3-14, enclosing auditors report for the year ended on 31-12-2012 and submits that the company has been auditing its account on regular basis since 1st January 2001 to 31st December 2012 and, as such, evidently the company is a going concern. At last, based on foregoing facts and circumstances, he has prayed that the entire period of delay in holding the Annual General Meetings for the years from 2001 to 2012 may be condoned and the company may be permitted to hold its AGM for the aforesaid years.

5. No one appeared to oppose the application, even the SEC although it is respondent No. 2 and the petition contains certain statements about it.

6. I have heard the learned advocate, perused the petition and the documents annexed therewith.

7. Admittedly, the company was incorporated in the year 1992. It has been stated that till 2000 the company has held each Annual General Meeting without any default. Thereafter, as stated in the petition, the company could not hold its Annual General Meetings from for the years 2001 to 2012 for the reasons as stated in the substantive petition and as explained in the course of submission of the learned advocate for the petitioner. Hence, these are not needed to be repeated. Be that as it may, admittedly the company could not hold its Annual-General Meetings for the years 2001 to 2012 and filed this petition for condonation of delay in holding those Annual-General Meetings. The petitioner has submitted an audit report ended as at December 30th 2012 to show that it is a going concern and has been regularly auditing account its since 2001.

8. In this connection, I have taken for consideration section 210 of the Companies Act, 1994 that reads as follows:

"210. Appointment and remuneration of auditors—(1) Every company shall, at each annual general meeting appoint an auditor or auditors to hold office from the conclusion of that meeting until the next annual general meeting and shall within seven days of the appointment, give intimation thereof to every auditor os appointed:

Provided that no person can be appointed auditor of any company unless his written consent has been obtained prior to such appointment or re-appointment.

(2)Every auditor appointed under subsection (1) shall, within thirty days of the receipt from the company of the intimation of his appointment, inform the Registrar in writing that he has accepted, or refused to accept, the appointment.

(3) At any annual General meeting a retiring auditor, by whatsoever authority appointed, shall be reappointed, unless-

(a) he is not qualified for re-appointment; or

(b) he has given the company notice in writings of his unwillingness to be re-appointed; or

(c) a resolution has been passed at the meeting appointing some body else instead of him or providing expressely that he shall not be re-appointed:

Provided that for the purpose of passing a resolution under clause (c), a notice thereof shall in accordance with section 211 be issued prior to the meeting, and such resolution cannot be passed except on the ground of death, incapacity or dishonesty or disqualification of the retiring auditor,

(4) if an appointment of an auditor is not made at an annual general meeting, the Government may appoint a person to fill the vacancy.

(5) The company shall, within seven days of the Governments power under sub-section (4) becoming exercisable, give notice of that fact to the Government; and, if a company fails to give such notice, the company, and also every officer of the company who is in default, shall be punishable with fine which may extend to one thousand taka.

(6) The first auditor or auditors of a company shall be appointed by the Board of Directors within one month of the date of Registration of the company, and the auditor or auditors so appointed shall hold office until the conclusion of the first annual general meeting:

Provided that—

(a) the company may, at a general meeting remove any such auditor or all or any of such auditors and appoint in his or their place any other person or persons who have been nominated for appointment by any member of the company, and or whose nomination notice has been given to the members of the company not less than fourteen days before the date of the meeting; and

(b) if the Board of Directors fails to exercise its powers under this sub-section, the company in a general meeting, may appoint the first auditor or auditors.

(7)The Board may fill any casual vacancy in the office of any auditor, but while any such vacancy continues, the remaining auditor or auditors, if any, may act:

Provided that where such vacancy is caused by the resignation of an auditor, the vacancy shall only be filled by the company in general meeting.

(8) Any auditor appointed in a casual vacancy shall hold office until the conclusion of the next annual general meeting.

(9) Except an provided in the process pursuant to sub-section (7), any auditor appointed under this section may be removed from office before the expiry of his term only by a special resolution of the company in the general meeting.

(10) The remuneration of the auditors of a company—

(a) in the case of an auditor appointed by the Board or the Government, shall be fixed by the Board or the Government respectively; and

(b) subject to clause (a), shall be fixed by the company in the general meeting or in such manner as the company in the general meeting may determine.

(11) For the purposes of sub-section (10), any sums paid by the company in respect of the auditors expenses shall be deemed to be included in the expression "remuneration". *(empasis added)*

9. Evidently, sub-section (4) of section 210 stipulates that, if appointment of an auditor is not made at an Annual General Meeting the government may appointment a person to fill the vacancy. Admittedly, the company did not hold its Annual General Meetings for the Financial year 2000-2001 (FY 2000-2001), in respect of the AGM schedule to be held on in the year 2011. As such, no auditor was appointed in the Annual General Meeting scheduled to be hold in the year 2011, as required by the pro-

vision of sub-section (1) of section 210 of the Companyies Act, 1994. Therefore, the auditors alleged to have been appointed by the Board of Directors for the FY 2000-2001 to FY 2001-2012 is contrary to the provisions sub-section (1) of section 210 of the Companies Act, since no Annual General Meeting was held in the year 2001 or in the subsequent years. Hence, in may considered opinion, the auditor(s) appointed by the Board of Director for the FY 2000-2001 to FY 2011 and 2001 to 2012 is country to the provision of sub-section (1) of section 210 of the Companies Act. Therefore, the auditors appointed by the Board for auditing the account of the company for FY 2000-2011 to 2001-2012 was beyond there authority of the Board of Directors because, except the first auditor/auditors, all other auditors shall be appointed in the Annual General Meetings, vide the provisions of sub-section (6) read with sub-section (1) of section 210 of the Companies Act. Hence, I hold that the auditor(s) appointed for auditing the account for the years 2001 to 2012 was ultravires the authority of the Board of Directors and the audit reports submitted for the years 2001 to 2012 are of no legal effect and are not acceptable in law.

10. The directors may fill up any casual vacancy occurred in the office of the auditors. But, the question of casual vacancy would arise only when an auditor was duly appointed. In the instant case, no auditor was appointed in the Annual General Meetings (scheduled to be held in the year 2001), so the question of any casual vacancy or to fill the same up by the board of directors does not arise.

11. On the other hand, Rule (3A) of Rules 12 Securities & Exchange Rules, 1987, (hearing after referred as the Rules) provides as follows: "(3A) The financial statements referred to in sub-rule (1) shall be audited within one hundred and twenty days from the date on which the issuer's financial year ends and a copy of such audited financial statements shall be submitted to the Commission and the Stock Exchange within fourteen days thereof:

Provided that on the application filed by the issuer within the aforesaid specified time the Commission may on good cause shown and only under extreme circumstances extend the time for a auditing the financial statements or submission of the financial statements to the Commission, as the case may be, as it deems fit:

Provided further that if an issuer fails to get its financial statement, audited in the manner as specified in sub-rule (3) and fails to submit the same to the Commission and the stock exchange within the said specified time, or extended time, as the case may be, the Commission may appoint an auditor to audit the accounts of the issuer at the issuer's cost." But there is nothing on record to show that any auditor was appointed under sub-rules (3A) of Rule 12 of the SEC Rules, 1987, or in the manner as prescribed under the provisions of sections 210 of the Companies Act.

12. It is legal duty on the part of a listed company to get its account audited within the time or within the extended time, as the case may be, as laid down in sub-rules (3A) of Rule 12 of SEC Rules, 1987. Otherwise, the Commission (SEC) may appoint an auditor to audit the account of the issuer at the issuer's cost.

13. For the reasons herein before recorded, I am of further view that the auditors appointed by the Board of Directors for auditing the accounts of the company, not being appointed in the manner laid down in sub-section (1) of section 210 of the Companies Act, they had no authority to audit the financial statements of the company, and the audit reports for years 2001 to 2012 are not audit reports in the eye of law and shall not be treated as compliance on the part of the company or as proper audit of the accounts of the company, for those financial

years.

14. Having considered the provisions of sub-section (4) of section 210 of the Companies Act vis-a-vis the provision laid down in sub-rules (3A) of Rules 12 of the SEC Rules, 1987, I am of the considered opinion that, in respect of a company listed with the Stock Exchanges, the Rules made under the Securities and Exchanges Commission Ordinance, 1969, being a Special Law, the provision of sub-rule (3A) of Rule 12 of the SEC Rules, 1987, shall override the provision of sub-section (4) of section 210 of the Companies Act, 1994, authorizing the government to appoint auditor, if no auditor is appointed in the AGM, as required by sub-section (1) of section 210 of the Act. Commission shall appoint an auditor, as per provisions of sub-rule (3A) of Rule 12 of SEC Rules, 1987, to audit the accounts of the company for the FY 2000-2001, to be submitted in the AGM scheduled to be held in the year 2001. This auditor appointed by the Commission, for FY 2000-2001, may either be continued or a new auditor may be appointed in the subsequent Annual General Meetings to be held pursuant to the order of this court, as permitted by the provision of sub-section (1) of section 210 of the Companies Act that stipulates that every company shall, at each Annual General Meeting, appoint auditor or auditors to hold office from the conclusion of that meetings until the next Annual General Meeting.

15. I have also considered the decision reported in *1986 BLD (AD) 311 = 38 DLR (AD) 296: Ghyasuddin Ahmed vs QA Faruque.* That judgment was delivered by the Appellate Division with a direction to hold the first Annual General Meeting of the company under the chairmanship of a neutral person and for placing balance sheets, profit and loss accounts before the meetings after auditing the same. That matter was considered as per provision of section 79(3) of the Companies Act 1913 and this is the consistent view of this court. This court's power to pass a direction to call, hold and conduct the Annual General Meeting is undisputed. However, in the instant case, this court is not appointing an auditor, nor the company has appointed any auditor in its Annual General Meeting, in this case. Hence, on this aspect, the instant case is liable to be distinguished from the case reported in *1986 BLD (AD) 311.* Besides, another aspect, having jurisdictional relevance, to be noted here is that the judgment reported in *1986 BLD (AD) 311* was passed on 24-3-1986 i.e. before Companies Rules, 2009, has been framed. The Rules has invested inherent jurisdiction in this court under Rule 8, in addition to the inherent power vested in this court under Rule 263 of the said Rules.

16. The concept 'inherent jurisdiction' is far wider than the concept 'inherent power'. This court derives jurisdiction in company matters from two sources, one is section 3 of the Companies Act, 1994, and another is Rule 8 of the Companies Rules, 2009. Therefore, in an appropriate case, ourt, in appointing auditor, may exercise its inherent jurisdiction, for ends of justice, particularly when the inaction, neglect of duty or malafide on the part of concerned authority/regularity body is apparent from the materials on record. In otherwords, provision of Rule 8 of the Companies Rules, 2009 has overriding effect upon sub-rule (3A) of Rule 12 of the SEC Rules, 1987 as well as upon the provision of sub-section (4) of section 210 of the Companies Act, 1994.

17. Before parting of, this court notes dissatisfaction to the inaction, non-performance of statutory duties and indifferences on the part of the SEC, and their go slow or keeping the eyes closed like attitude in performing its duties entrusted upon it, to ensure compliance of the applicable laws, Rules and the notifications issued by it. How far the SEC is efficient and

anxious in protecting interest of the small investors and in maintaining discipline in the capital market needs to be screened by studing its function since 1995 to 2012. SEC even did not appear in this case, although it is respondent No. 2. It has utterly failed to perform its duties as per provision of sub-rule (3A) of Rule 12 of the SEC Rules, 1987, in appointing auditor. If the small investor's trust in capital market is diminished then this the alternative source (the capital market) to procure equity, without recurring interest, will become a desert, unlike the industrialized economies. Besides, this alternative source (the capital market) available for procuring interest free equity must have positive impact on the economy in that it will most likely compel reducing bank interest rate and will have its competitive role as an alternative to money market. These deserves active attention of the authority which is entrusted to oversee the activities of the SEC, so that necessary enactments/amendment and/or guidelines can be made or formulated, as the case may be.

18. In view of the facts, circumstances and the deliberation recorded above, I find merit in this petition.

19. In the result the petition is allowed subject to certain directions.

20. Accordingly, the entire period of delay that has occurred in holding the Annual General Meetings of MAQ Paper Enterprise Ltd for the period of 2001 to 2012, is hereby condoned and the company is permitted to hold those Annual General Meetings, within 6(six) months from drawing up of this order and upon following the provisions of law and the Rules applicable to a public company listed with the Stock Exchanges and subject to appointment of auditor and doing fresh audit in respect of those years as per provisions laid down in sub-rule (3A) of Rules 12 of the Securities & Exchange Rules, 1987, read with sub-section (1) of section 210 of the Companies Act, 2010.

21. The appointment of auditors by the Board of director, to audit the accounts of the company for the FY 2000-2001 to FY 2001-2012 is hereby declared ultravires and the audit reports for those period are neither to be treated as valid reports, nor to be placed for approval in any AGM for the said period.

22. The respondent No. 2 (SEC) is directed to appoint, within 14 days from receiving copy of this judgment and order, an auditor, from any one of the reputed audit firms having at least 3 years experience in auditing the account of a listed company, to audit the account of Paper Industries Ltd, for the FY 2000-2011 only and to submit a compliance report within 7(seven) days thereafter.

23. The auditors for the FY 2001-2002 to FY 2011-2012 is/are to be appointed in the respective AGM, according to the provision of sub-section (1) of section 210 of the Companies Act, 1994.

24. This order will be effective subject compliance of the direction regarding donation.

25. Cost will be borne by the company.

26. Let a copy of this judgment and order be sent to the Registrar of the Joint Stock Companies and Firms for record and for acceptance of the documents to be filed pursuant to the meetings to be held pursuant to this court's order and as may be required to be filed as per law.

Let another copy of this judgment and order be sent to the Chairman, Bangladesh Securities & Exchange Commission, Jibon Bima Tower, Dilkusha C/A, Dhaka, though special messenger, at the cost of the petitioner.

Ed.

High Court Division
(Special Original Jurisdiction)

Farah Mahbub J
AKM Zahirul Hoque J

Judgment
April 7th, 2014

Mahmodul Hasan (Md) .....Petitioner

vs

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

Muslim Marriages and Divorce (Registration) Rules, 2009
Rule 11

Question of revocation of license will come into play only on the allegation of misconduct as defined in Rule 11 of the Rules, 2009. .....(18)

Muslim Marriages and Divorce (Registration) Rules, 2009
Rule 8

The word "তথ্য" correspond to the information as provided under Rule 8 of the Rules, 2009. Since government has not alleged violation of Rule 8 on the allegation of submitting forged DO letter, which does not regulate the appointment of a Nikah Registrar cannot be cancelled within the framework of Rules, 2009, the license of the petitioner as a Nikah Registrar cannot be knocked down on that count only. .....(18)

Md Ziaul Haque, Advocate—For the Petitioner.

Syed Mamun Mahbub with Md Mesbahul Islam Asif, Advocates—For the Respondent No.5.

Titus Hillol Rema, AAG with Farida Yeasmin, AAG—For the Respondent-Government.

*Writ Petition No. 3173 of 2011.

Judgment

Farah Mahbub J: In this Rule, issued under Article 102 of the Constitution of the People's Republic of Bangladesh, the respondents have been called upon to show cause as to why the impugned Memo No. Bichar-7/2N-72/2003-243 dated 11-4-2011 (Annexure-H) issued under the signature of respondent No.2 cancelling the petitioner's license of Nikah Registrar under Kapasia Union, Kapasia, Gazipur should not be declared to have been issued without lawful authority and is of no legal effect.

2. Facts, in brief, are that pursuant to the recommendation of the Member of Parliament of Gazipur-3, Kaliganj, Gazipur dated 29-1-2005 and 9-11-2005 respectively as well as the DO (Demi-Official) letter issued by another Member of Parliament of Gazipur-4, Kapashia, Gazipur dated 15-1-2003 (Annexure-A, A-l and A-2 respectively) the respondent No.2 had appointed the petitioner as Nikah Registrar of Kapasia Union, Police Station.-Kapasia, District-Gazipur vide Memo No. Bichar-7/2N-127/80/716 dated 1-10-2006 on temporary basis (Annexure-B). Since then he had been discharging his duties as Nikah Registrar with full satisfaction of the authority concern.

3. Challenging the said appointment letter of the petitioner one Mohammad Ali Akon, added respondent No.5 (ex-Nikah Registrar) of the said area filed writ petition No.9774 of 2006 before this Hon'ble Court. However, the Rule Nisi issued therein was ultimately discharged vide judgment and order dated 7-5-2008 (Annexure-C). Being aggrieved the said respondent had filed Civil Petition for Leave to Appeal No.440 of 2009 before the Appellate Division which was also dismissed upon hearing the respective contending parties vide Order dated 10-11-209 (Annexure-D).

4. Meanwhile, the respondent No.5 made an application to the Hon'ble Minister, Ministry of Law, Justice and Parliamentary Affairs (in

short, the Ministry concern) to cancel the appointment letter of the petitioner on the allegation that basing on a false DO letter dated 25-2-2003 issued by the local Member of Parliament the petitioner had managed to obtain the said appointment letter (Annexure-E). Accordingly, legal opinion was sought for in the matter in question by the ministry concern vide Memo No. বিচার-৭/২ এন-৭২/২০০৩/২০২ dated 18-4-2010 from the said local Member of Parliament. On receipt thereof the local Member of Parliament gave reply to the Ministry concern on 5-10-2006.

5. Consequent thereto the respondent No.2 issued show cause notice vide Memo dated 15-12-2010 to the petitioner with request to give reply within 15(fifteen) days of receipt thereof. The petitioner in response thereof duly gave reply to the ministry concern on 27-12-2010 (Annexure-G). His reply having been found not satisfactory the respondent No.2 had cancelled the license of the petitioner vide the impugned Memo No. Bichar-7/2N-72/2003-243 dated 11-4-2011 (Annexure-H).

6. Being aggrieved by and dissatisfied with the petitioner has preferred the instant application and has obtained the present Rule.

7. Mr Md Ziaul Haque, the learned Advocate appearing for the petitioner submits that the petitioner has obtained three DO letters from the respective Member of Parliament in due process and that on the basis of the same he was issued license as Nikah Registrar for the respective Union vide the order passed by the respondent concern on 1-10-2006 and that he has been discharging his duties with satisfaction and without any objection from any quarter whatsoever. In this regard, he further goes to submit that the added respondent No.5 with *malafide* intention upon tempering the DO letter dated 15-1-2003 made an allegation with the Ministry concern against the petitioner. Ultimately, the respondent No.2 without perusing the so-called tempered DO letter and considering the context that the said respondent has always been after the petitioner with view to have his license cancelled in order to be reinstated in the respective post ultimately cancelled his license. He further goes to submit drawing attention to the"মুসলিম বিবাহ ও তালাক (নিবন্ধন) বিধিমালা, ২০০৯" (in short, the Rules, 2009) that on the recommendation of the Member of Parliament neither a license is issued for the respective area nor the said license can be cancelled. In this regard, he also submits that the petitioner was appointed as the Nikah Registrar for the respective union having requisite qualifications, but his license had been cancelled pursuant to the alleged issuance of forged DO letter; whereas within the frame work of the Rules, 2009 for issuing license DO letter so issued by the local Member of Parliament has no role to play. He also goes to submit that in his service career never any allegations whatsoever was brought against him within the mischief of "অসদাচরন" (misconduct). In addition to that he submits that the authority has cancelled his license basing on the alleged forged DO letter which had been issued 3 (three) years prior to the appointment of the petitioner for the respective area. Accordingly, he submits that the impugned order having been passed by the Ministry concern bringing on the basis of allegations which do not come within the mischief of "অসদাচরন" (misconduct) as defined in rule 11 of the Rules, 2009 hence, it is liable to be declare to have been passed without lawful authority and is of no legal effect.

8. Conversely, Mr Mamun Mahbub, appearing with Mr Md Mesbahul Islam Asif, the learned Advocates on behalf of the respondent No. 5 submits drawing attention to rule 11 of the Rules, 2009 that as per the said provision the word"অসদাচরন"means ".....আইন বা বিধিমালার যে কোন বিধান লংঘন, একাধিক এলাকার নিকাহ রেজিস্ট্রার হওয়া বা যে কোন ধরনের তথ্যের মিথ্যা বর্ণনা নৈতিক স্খলনকে বুঝাইবে।" In this regard he goes to argue that though DO letter is not required for the purpose of getting license of Nikah Registrar but in the instant

case a forged DO letter of the respective local Member of Parliament was submitted by the petitioner for the said purpose; hence it comes under the purview of misconduct which also includes "যে কোন ধরনের তথ্যের মিথ্যা বর্ণনা". He also goes to submit that the issues so have been raised by the petitioner in the instant Rule involves disputed question of fact and, as such, cannot be adjudicated by this Hon'ble Court while exercising writ jurisdiction and, as such, on that score as well this Rule is liable to be knocked down as being not maintainable. He further goes to contend that the Ministry concern after issuing show cause notice and complying all legal formalities had lawfully cancelled the license of the petitioner and thereby had declared the respective post vacant; thus this Rule being devoid of any substance for consideration it is liable to be discharged and that the Ministry concern should be allowed to initiate process for fresh appointment of a Nikah Registrar in the respective area in accordance with law. Lastly, he goes to contend by submitting a supplementary affidavit today, particularly drawing attention to the opinion so had been given by the Inquiry Officer who inquired into the matter on 17-4-2005(Annexure-11(B) on the issue as to whether the petitioner is the permanent resident of the respective Union, where it has been categorically observed, *inter alia*,-

> "অতএব, সরেজমিনে তদন্তে প্রাপ্ত সকল তথ্যাদি, উপস্থিত সকল সাক্ষীগনের লিখিত এবং মৌখিক বক্তব্য এবং পারিপার্শ্বিকতা বিচার বিবেচনায় প্রতীয়মান হয় যে, জনাব মাহমুদুল হাসান কাপাসিয়া ইউনিয়নের স্থায়ী বাসিন্দা নহেন।"

9. Controverting the said assertion the learned Advocate for the petitioner submits that the said inquiry report has subsequently been reversed by the authority concern as such, the opinion so had been made in the said inquiry report has no force in the eye of law, at the moment.

10. Mr Titus Hillol Rema appearing with Ms. Farida Yeasmin, the learned Assistant Attorney-Generals on behalf of respondent-government submits that the impugned order of cancellation of license had been passed by the respondent concern in due compliance of rule 11 of the Rules, 2009, for before such cancellation the petitioner was duly issued show cause notice bringing notice specifying the allegation of submitting a forged DO letter of the respective Member of Parliament. As such, on that score it cannot be said that the same had been passed without lawful authority. He also goes to submit drawing attention to rule 9 clause (ga) of the Rules, 2009 that the relevant documents which are required to be submitted by the aspirant candidates along with the application are "জাতীয় পরিচয়পত্র বা ইউনিয়ন পরিষদের চেয়ারম্যান বা পৌরসভা বা সিটি কর্পোরেশন এর কাউন্সিলর বা কমিশনার কর্তৃক প্রদত্ত নাগরিকত্বের সনদ।" Moreso, in Form-Ka, as is incorporated in the schedule which has been framed pursuant to rule 9, it has been clearly prescribed, *inter alia*- "যাহাদের নিকট হইতে চারিত্রিক সনদপত্র সংগ্রহ করিয়া দরখাস্তের সহিত পেশ করা হইয়াছে তাহাদের নাম ও ঠিকানা." In that view of the matter he submits that the Demo Official letter so has been issued by the respective Member of Parliament clearly comes within the mischief of the information so is required to be given with regard to the character certificate and, as such, the DO letter so had been issued by the concern local Member of Parliament has a role to play towards issuance of license of Nikah Registrar of a particular area. In that view of the matter he submits that this Rule should be discharged being devoid of any substance for consideration.

11. From record it appears that the petitioner was the aspirant candidate for appointment of Nikah Registrar of Kapasia Upazilla, Kapasia Union, District-Gazipur. To that effect the local Member of Parliament of Gazipur-3 issued 2 (two) DO letters dated 29-1-2005 and 9-11-2005 (Annexure-A and A-l respectively). From Annexure-A-2 however, it appears that another DO letter has been claimed to have been given to the petitioner by the respective local Member of Parliament of Kapasia Union

on 15-1-2003. Pursuant thereto vide Memo No. Bichar-7/2N-127/80/716 dated 1-10-2006 (Annexure-B) the petitioner had been issued license as Nikah Registrar of Kapasia Union, on temporary basis.

12. The cause of action arose when an allegation had been made by the added-respondent No.5 that the said DO letter dated 15-1-2003 (Annexure-A-2) is a forged one, consequent thereto the matter was brought to the notice of the concern local Member of Parliament vide Memo No. বিচার-৭/২ এন-৭২/২০০৩/ ২০২ dated 18-4-2010 (Annexure-J of the supplementary affidavit); in reply, he duly opined, *inter alia*-

> "Attention: Mr Secretary, Ministry of Law, Justice and Parliamentary Affairs. This is to inform you that this letter has not been issued by me or my office and is therefore, a forgery, My signature has been forged. I urge you to investigate this serious violation and take legal action against the person responsible.
>
> Sd./.....
> Tanjim Ahmad (Sohel Taj)
> 196, Gazipur-4"

13. Ultimately, on 15-12-2010(Annexure-F of the writ petition) the petitioner was issued a show cause notice directing him to give reply to the allegation so brought against him. The petitioner duly gave reply on 27-12-2010 (Annexure-G-l). His reply having been found not satisfactory, his license was cancelled.

14. In the given facts and circumstances, the issue to be resolved is whether the DO letter issued by the respective Member of Parliament can go to regulate the appointment of a Nikah Registrar within the frame work of the "Muslim Marriages and Divorce (Registration) Act, 1974 and the Rules, 2009. However, rule 8 of the Rules, 2009 prescribed the requirement to be eligible for appointment as a Nikah Registrar, which runs as under-

> "প্রার্থীদের যোগ্যতা, ইত্যাদি।-কোন ব্যক্তি নিকাহ রেজিস্ট্রারের লাইসেন্স পাইবার যোগ্য হইবেন না, যদি না-
>
> (ক) তিনি সরকার কর্তৃক স্বীকৃত [বাংলাদেশ মাদরাসা শিক্ষা বোর্ড, ঢাকা][৬] কর্তৃক নিবন্ধিত কোন মাদ্রাসা হইতে আলীম সার্টিফিকেটধারী না হন;
>
> (খ) তাহার বয়স কমপক্ষে একুশ এবং অনূর্ধ্ব [পঁয়তাল্লিশ][৭] বৎসর না হয়;
>
> (গ) তিনি সংশ্লিষ্ট এলাকার বাসিন্দা না হন।"

15. In addition to that rule 9 also prescribes certain documents to be affixed with the application of the aspirant candidate for having license of a Nikah Registrar of the respective area, which is quoted hereinbelow-

> "নিকাহ রেজিস্ট্রারের লাইসেন্সের জন্য দরখাস্ত-নিকাহ রেজিস্ট্রার লাইসেন্সের জন্য প্রতিটি দরখাস্ত, নিম্নবর্ণিত কাগজপত্রসহ, ফরম 'ক' তে সংশ্লিষ্ট উপদেষ্টা কমিটির সদস্য সচিবের নিকট দাখিল করিতে হইবে, যথাঃ
>
> (ক) তিন কপি পাসপোর্ট সাইজের ছবি।
>
> (খ) শিক্ষাগত যোগ্যতার সনদপত্রের সত্যায়িত কপি এবং
>
> (গ) জাতীয় পরিচয়পত্র বা ইউনিয়ন পরিষদের চেয়ারম্যান বা পৌরসভা বা সিটি কর্পোরেশন এর কাউন্সিলর বা কমিশনার কর্তৃক প্রদত্ত নাগরিকত্বের সনদ।"

16. In view of the above (2) two provisions of the Rules, 2009, along with the requirement to have the certificate issued by the Madrasha Education Board, along with the certificate as to whether he is within the age limit and that he is the resident of the respective area the candidate also has to produce the citizenship certificate to be issued by the Chairman of the respective Union Parishad or Mayor of the Pourashava or Counsellor of the Commissioner of the City Corporation or the National ID Card. However, in Form-Ka, as incorporated in the schedule which has been framed pursuant to rule 9, under clause 9 he has to mention the name and address of the person from whom he has obtained character certificate.

17. Mr Mamun Mahbub, the learned Advocate in this regard submits that the legis-

lature having used the words "যে কোন ধরনের তথ্য" in rule 11 while defining the word "অসদাচরন" misconduct" thus, brings supply of forged DO letter by the petitioner within the mischief of misconduct and, as such, on the allegation of submitting forged DO letter, which has also been confirmed by the respective Member of Parliament on query by the Ministry concern vide Annexure-J of the supplementary affidavit, the petitioner was issued show cause notice, he gave reply and his reply having been found not satisfactory hence, it has been cancelled by the Ministry concern under rule 11 of the Rules, 2009.

18. It is evident that within the frame work of the Rules, 2009 DO letter being issued by the respective Member of Parliament of the respective constituency has no role to play towards issuance of license of a Nikah Registrar. In that view of the matter, question of revocation of license will come into play only on the allegation of misconduct as defined in rule 11 of the Rules, 2009. However, one of the misconducts is "যে কোন ধরনের তথ্যের মিথ্যা বর্ণনা". In this regard, the word "তথ্য" correspond to the information as provided under rule 8 of the Rules, 2009. Since the respondent-government has not alleged violation of rule 8 of the Rules, 2009 as such, on the allegation of submitting forged DO letter, which does not regulate the appointment of a Nikah Registrar cannot be cancelled within the framework of Rules, 2009, the license of the petitioner as a Nikah Registrar cannot be knocked down on that count only.

19. However, if it is found by the authority concern in an enquiry or investigation that the said DO letter has been produced by the petitioner resorting to forgery legal steps may be taken by the respondent concern in accordance with law.

20. In view of the facts and circumstances of the case, observations and findings made above we find substance so made by the petitioner and, as such, we are inclined to allow the same.

21. In the result, the Rule is made absolute.

22. The impugned Memo No. Bichar-7/2N-72/2003-243 dated 11-4-2011 (Annexure-H) issued under the signature of respondent No.2 cancelling the petitioner's license of Nikah Registrar under Kapasia Union, Kapasia, Gazipur is hereby declared to have been issued without any lawful authority and is of no legal effect.

There will be no order as to costs.

Ed.

High Court Division
(Criminal Miscellaneous Jurisdiction)

Enayetur Rahim J
Mohammad Ullah J

Order
February 9th, 2014.

Engineer Abdul Wadud .....Accused-Petitioner (on bail)

vs

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

Anti-Corruption Commission Rules, 2007
Rule 24
SRO 265 dated 26-11-2007

Rule has been amended on 26-11-2007 by SRO No. 265/Ain/2007; by that amendment the inquiry officer has got the authority to investigate the case. .....(11)

We are sorry to say that possibly Mr Mobin is not aware about the amendment of the Rule. Rule 24 of the Durnity Daman Commission Bidhimala 2007 has been amended by SRO No.265/Ain/2007 dated 26-11-2007. By that amendment the informant officer

*Criminal Rule No. 288 (Suo-Motu) of 2014.

The above judgment affirmed by the Appellate Division on 16-6-2014 in Criminal Petition for Leave to Appeal No. 170 of 2014.

of the Commission is legally empowered to hold investigation into the Case. .....(16)

Criminal Law Amendent Act (XL of 1958) **Section 10(1A)**

Suo Motu Rule—Suo-motu Rule be issued so far as it relates to discharging accused persons from the charges should not be set-aside and why they should not be proceeded with trial in accordance with law.

In rejecting the application filed by the accused petitioner refusing to discharge him, the Special Judge, did not commit any error or illegality. However, it is kept open for the petitioner to prove him innocent at the event of trial of the case. ...(24 & 20)

ASM Abdul Mobin, Advocate with Sayem M Murad, Advocate—For the Petitioner.

MH Sarder, DAG with Gazi Md Mamunur Rashid, AAG and Md Asaduzzaman, AAG—For the State.

Khurshid Alam Khan, Advocate—For ACC (Opposite Party No. 2)

Order

The accused petitioner has filed this application under section 10(1A) of the Criminal Law Amendment Act, 1958 challenging the order dated 28-11-2013 passed by the learned Divisional Special Judge, Sylhet in Special Case No.3 of 2013 arising out of GR Case No.51 of 2009 corresponding to Golapgonj Police Station Case No. 9 dated 9-3-2009 refusing to discharge the accused-petitioner from the case.

2. Md Abdul Mazed, an Assistant Director of Anti-Corruption Commission, on 9-3-2009 lodged a First Information Report with the Golapgonj Police Station implicating 5 (five) persons excluding present petitioner alleging, *inter alia*, that there is a plant under RPGCL (Rupantarita Prakritic Gas Company Ltd) for producing Motor Spirit and liquidified Petroleum Gas (LPG) from Natural Gas liquid found in Kailastilla Gas Field. The Natural Gas Liquid is received through a pipe line of Sylhet Gas field Ltd. (SGFL). The Meter set at RPGCL. used to keep the account of Gas till July 2002 and Meter reading is noted in the log book on hour basis. After setting up a meter al SGFL, the price of Gas is being paid on the basis of Meter reading of SGPL since July, 2002. But account NGL is maintained as earlier as per meter reading of RPGCL. When Meters were set up at both ends, the amount of NGL at the meter reading of RPGCL is shown much more then the meter reading of SGPL and the same was also noted in the log book. The sale officer and plant in charges did not inform excess amount to the higher authority and they used to show the meter reading of SGFL. They also did not inform the variation recorded in the log book to the higher authority and they misappropriated the petrol produced from excess amount of NGL by selling it secretly. On the other hand amount of Petrol reserved in production as per meter reading was found much more than that of deep measurement and it was not shown to the higher authority. Inspite of direction to submit a report by the Managing Director-in-Charge of RPGCL the Plant-in-Charges did not submit any report. At one point of time, Plant-In-Charge Shuvo Borwa caused the meter of RPGCL unworkable for keeping the matter untraceable. From July, 2002 to June 2007 Taka 10, 74, 822 and Taka 30,08,975 in total Taka 40, 83, 797 were misappropriated by selling excess NGL and petrol.

3. Golapgonj Police Station registered the case as Golapgonj Police Station case No. 9 dated 9-3-2009 under sections 409 and 109 of the Penal Code read with section 5(2) of the prevention of Anti-Corruption Act, 1947.

4. The informant himself took the case for investigation and after holding investigation submitted charge-sheet against the petitioner and 7(seven) other under sections 409 and 109

of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947.

5. The case being ready for trial, the case record, was sent to the Divisional Special Judge, Sylhet and the case was registered as Special Case No. 3 of 2013.

6. On behalf of the present accused petitioner and other accused persons separate applications under section 265C of the Code of Criminal Procedure were filed to discharge them from the charges brought against them.

7. The learned Divisional Special Judge, Sylhet after hearing the respective parties by the impugned order dated 28-11-2013 rejected the application under section 265C of the Code of Criminal Procedure filed by the present accused petitioner and thereby refused to discharge him from the case and fixed 19-10-2004 for framing charge.

8. Being aggrieved by the said order the accused petitioner has filed this application.

9. Mr ASM Abdul Mobin appearing with Mr Sayem M Murad, the learned Advocates for the accused petitioner submits that co-accused Shafi-ul-Azam and Abdul Khaleque Khan who stood in worse fooling but were discharged and the petitioner stands on better footing but he was not discharge from the case and therefore the impugned order is liable to be set aside.

10. Mr Mobin further submits that rule 24 of the Durnity Daman Commission Rule, 2007 provides that the officer who conducted inquiry should not hold investigation but in the instant case, the inquiry officer, informant and as well investigating officer is the same person which is clear violation of the provision of Rule 24 of the Durnity Daman Commission Rules 2007 as such very investigation as well as the proceeding is a nullity in the eye of law and thus the impugned order is liable to be set aside and the petitioner should be discharged from the alleged police report brought him.

11. On behalf of the Anti-Corruption Commission opposite party No. 2 Mr Khurshid Alam Khan, learned Advocate has appeared and opposes the application. Mr Khan submits that grounds taken by the petitioner for setting aside the impugned order arc misconceived and not tenable in Law. Mr Khan placing Rule 24 of the Durnity Commission Bidhimala 2007 submits that said rule has been amended on 26-11-2007 by SR No. 265/Ain/2007; by that amendment the inquiry officer has got the authority to investigate the case.

12. We have gone through the materials on record particularly the First Information Report and the charge-sheet and relevant Provision of Law and Rule.

13. It is true that in the FIR the name of the present petitioner was not mentioned. But in the report under section 173 of the Code of Criminal Procedure it has been categorically alleged against the accused petitioner that;

> "৫) প্রকৌশলী জনাব আবদুল ওয়াদুদ, ব্যবস্থাপনা পরিচালক হিসেবে দায়িত্ব পালনকালে চলমান আত্মসাত প্রক্রিয়া অব্যাহত রাখার অসদুদ্দেশ্যে উৎপাদন ট্যংকে এমএস বেশী পাওয়ার ঘটনা সম্পর্কে নিজে জানা সত্বেও এ ব্যাপারে তিনি কোন ব্যবস্থা নেননি। ফলে চলমান আত্মসাত প্রক্রিয়া অব্যাহত থাকতে পেরেছে। দীর্ঘ দিন প্রতিষ্ঠানের ব্যবস্থাপনা পরিচালক হিসেবে দায়িত্ব পালন করলেও তিনি উদ্দেশ্য প্রণোদিতভাবে প্লান্টের পণ্য ঘাটতির কোন হিসাব নিকাশ করার উদ্যোগ গ্রহণ করেননি।
>
> আসামী আব্দুল ওয়াদুদ কৈলাশটিলা এলপিজি প্লান্টের পণ্য ঘাটতির বিষয়টি গোপন করার জন্যই নিয়মিত বুয়েট থেকে এনজিএল পরীক্ষার ব্যবস্থা করেননি এমনকি প্লান্টে রক্ষিত গ্যাস ক্রোম্যাটোগ্রাফ মেশিনের সাহায্যে এনজিএল এর আপেক্ষিক গুরুত্ব/ঘনত্ব পরীক্ষার বিষয়টি নিশ্চিত না করে তা অকেজো অবস্থায় ফেলে রেখেছিলেন। তিনি কোম্পানীর ব্যবস্থাপনা পরিচালক হিসাবে নিয়মিত এনজিএল পরীক্ষা না করিয়েই ক্ষান্ত হননি, অধিকন্ত যে কয়েকটি নমুনা পরীক্ষা করানো হয়েছে তা ব্যবহার করে পণ্য ঘাটতির হিসাব নিকাশও করে দিখেননি। ফলে পণ্য আত্মসাতের বিষয়টি গোপন করে রেখে দীর্ঘদিন যাবৎ আত্মসাত প্রক্রিয়া চালিয়ে যাওয়া সম্ভব হয়েছে। তিনি আর্থিকভাবে লাভবান হওয়ার হীন মানসে তার উপরে অর্পিত দায়িত্ব

যথাযথভাবে পালন না করে, দায়িত্ব ও কর্তব্যে অবহেলা করে, বিপুল পরিমান উৎপাদিত পণ্য নিজে আত্মসাত করে এবং অন্যকে আত্মসাত সহায়তা করে দন্ডবিধি ৪০৯/১০৯ ধারা এবং ১৯৪৭ সনের দূর্নীতি প্রতিরোধ আইনের ৫(২) ধারায় শাস্তিযোগ্য অপরাধ করেছেন।"

14. The above allegation clearly shows that there is a *prima-facie* case against the accused petitioner for committing offence under sections 409 and 109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947.

15. It was the contention of Mr Mobin, learned Advocate for the petitioner that the informant should not hold the investigation and thus the impugned investigation as well as the proceeding of the case is a nullity in the eye of law.

16. We are sorry to say that possibly Mr Mobin is not aware about the amendment of the Rule. Rule 24 of the Durnity Daman Commission Bidhimala 2007 has been amended by SRO No.265/Am/2007 dated 26-11-2007. By that amendment the informant officer of the Commission is legally empowered to hold investigation into the Case.

17. Thus, the question raised by Mr Mobin in the matter does not hold good.

18. Mr Mobin has tried to impress us that the co-accused Md. Abdul Khaleq and Shafi-ul-Azam having worse footing than that of the petition, have been discharged by the Divisional Judge, Sylhet and, as such, the present accused petitioner having stand on a better footing is also entitled to be discharged.

19. We have already observed that the Anti-Corruption commission after investigation found *prima facie* case against the accused-petitioner and submitted charge-sheet against him along with others.

20. Thus, we are of the view that in rejecting the application under section 265C of the Code of Criminal Procedure, filed by the accused petitioner refusing to discharge him, the learned Division Special Judge, Sylhet did not commit any error or illegality. However, it is kept open for the petitioner to prove him innocent at the event of trial of the case.

21. Accordingly, the application is rejected summarily.

22. However, it has surprised to us that the learned Special Judge discharged Md Abdul Khaleq and Shafi-ul-Azam against whom the specific allegations have been brought in the charge-sheet having *prima-facic* case for committing offence under sections 409/ 109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947. Thus, *prima-facic* we are of the view that the learned Special Judge acted illegally in discharging the said accused from the charges brought against them.

23. In view of the above, we are inclined to issue a *Suo-motu* Rule.

24. Let a Suo-motu Rule be issued calling upon (1) Abdul Khaleq, son of Golam Khan General Manager (Planning and Development) Rupantarita Prakritic Gas Company Ltd. (RPGCL), RPGCL Bhaban, New Airport Road Plot No.27, Nikunja-2, Khilkhat Dhaka-1229, at Present 69/1, Brobagh, Mirpur, Dhaka, 2) Shafi-ul-Azam son of late Abdul Hafiz, Director (operation) Rupantarita Prakritic Gas Company Ltd. (RPGCL), RPGCL Bhaban, New Airport Road Plot No. 27, Nikunja-2, Khilkhat Dhaka-1229, at present 132, Malibagh, 1st lane, Dhaka-1217 and 3) The Anti-Corruption Commission Segunbagicha to show cause as to why the order dated 28-11-2013 passed by the Divisional Special Judge, Sylhet in Special Case No. 3 of 2013 so far as it relates to discharging the said accused persons from the charges should not be set-aside and why they should not be Proceeded with trial in accordance with law and/ or pass such other or further order or

orders as to this may seem fit and proper.

25. The Rule is made returnable within 4(four) weeks.

26. Abdul Khaleque Khan and Shafi-ul-Azam arc directed to surrender before the Divisional Special Judge, Sylhet within 4(four) weeks from the date of receipt of this order. The trial Court is directed to grant them bail, if they surrender in compliance of the Courts order.

27. However, the trial will proceed as against other accused in accordance with law.

Communicate a copy of this order at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Syed Refaat Ahmed J
Sheikh Hassan Arif J

Judgment
November 12th, 2012.

Mehdi Hassan (Md) and another.....
.....Petitioners
[In WP No. 7326 of 2009]

vs

Government of Bangladesh and others
.....Respondents*
[In both Writ Petitions]

Bangladesh Labour Law Act (XLII of 2006)
Sections 233(1)(Ja) and(2)

A person may be exercising supervisory powers, but if he/she is not engaged in managerial or administrative responsibilities, he cannot be termed a 'worker'. .....(50)

Companies Profit (Workers Participated) Act, 1968
Section 2(f)

Applicants who had participated in the profits of the Company in their capacity as 'workers' in accordance with the Act of 1968, had acquired a vested right to participate in the Company's profits, which has not been taken away by an express 'provision of law. .....(59)

Bangladesh Labour Law Act (XLII of 2006)
Sections 233(1)(Ja)

Employment of Labour (Standing Orders) Act [VIII of 1965]
Section 2(v)

A person does not cease to be a worker only because he is a employed in a supervisory capacity. It has to be established that he exercises function mainly of a managerial and administrative nature. .....(52)

Arif Sultan vs DESA, 60 DLR 431; Mofizul Huq vs Mofizur Rahman, 49 DLR (AD) 38; MH Chowdhury vs GM Titas Gas 1981 BLD (AD) 61; New Dacca Industries vs Quamrul Huda, 31 DLR (AD) 234; Zakir Hossain Munshi vs Bangladesh, 55 DLR 130; Farzana vs Securities and Exchange Commission, 54 DLR 6.6; Abdus Sabur vs REB, 10 BLC 502; Zahir Akhter vs Bangladesh Biman, 61 DLR 446; Conferee Limited vs Titas Gas Transmission, 42 DLR 33; Shafiqur Rahman vs Bangladesh, 8 BLC 521; Vaish Degree College vs Lakshmi Narain, AIR 1976 (SC) 888; Chittagong Port Authority vs Sadharan Bima, 1981 BLD (AD) 373; Pubali Bank vs Chairman, Labour Court, 44 DLR (AD) 40; Mujibur Rahman vs Chairman Labour Court, 31 DLR 301 and Indian Supreme Court in DC Works. Ltd vs State of Saurashtra, AIR 1957 (SC) 264 ref.

Abdur Razzaq, Senior Advocate with Ehsan A Siddiq, Imran A. Siddiq, M Belayet Hossain, Dr Chowdhury Ishrak Ahmed Siddiky and Salman A Nabi, Advocates—For the Petitioners. (In both Writ Petitions)

Ramzan Ali Sikdar with Ashraful Hadi, Tanim

*Writ Petition No. 7326 of 2009 *with* Writ Petition No. 2227 of 2007.

Hussain Shawon and Abdullah M, Hassan, Advocates—For the Respondent. No. 4 (In Writ Petition No. 7226 of 2009)

Kamal-ul-Alam, Senior Advocate—For the Respondent No. 2 (In Writ Petition No. 7326 of 2009)

Mahmudul Islam, Senior Advocate with Md Ahsan Habib, Advocate—For the Respondent No.2 (In Writ Petition No. 2227 of 2007)

AJ Mohammad Ali, Senior Advocate with Rubaiyat Hossain, Advocates—For the Respondent Nos. 3 and 4 (In Writ Petition No. 2227 of 2007)

Razik-al-Jalil, DAG with Israt Jahan, AAG and Kashefa Hussain, AAG—For the Respondents. (In both Writ Petitions)

Judgment

Syed Refaat Ahmed J: Both the Rules Nisi are predicated on similar facts find the application of the Companies Profit (Workers Participation) Act, 1968 ("the Act of 1968") as repealed by the Bangladesh Labour Act, 2006 ("the Act of 2006") and are, therefore, taken up for joint consideration and disposed of by this common judgment.

2. In Writ Petition No. 7326 of 2009 the Rule Nisi was issued calling upon the Respondents to show cause as to why they shall not be directed to pay the Petitioners' share of the profits earned by Unilever Bangladesh Ltd (the Respondent No. 4 Company) which has accumulated in the Workers Participation Fund and welfare Fund of the Respondent No. 4 Company January, 2007 and/or such other or further order or orders passed as to this Court may seem fit and proper. As regards Writ Petition No. 2227 of 2007, the Rule Nisi was issued calling upon the Respondents to show cause as to why they shall not be directed to pay the Petitioners their share of the profits earned by the Proforma Respondent No, 4 Company in the year 2006 which has accumulated in the Workers Participation Fund of Unilever Bangladesh Limited (Proforma Respondent No. 4) and/or pass such other or further order or orders as to this Court may seem fit and proper.'

PURVIEW OF THE LAW

3. These Writ Petitions, by their very nature require the purview of both the Act of 1968 and the Act of 2006 as provide the legal basis for the disposal of the same. This introduction to the law, as extensively submitted on by the learned Advocate for the Petitioners in both the Writ Petitions Mr Abdur Razzaq, begins first with the definition of a worker as found in the Act of 1968 and its metamorphosis in the Act of 2006. A simply structured definition of a worker is to be found in section of 2(f) of the Act of 1968 thus:

> "2(f) "Worker" in relation to a company means an employee of the company whose basic monthly wages does not exceed Taka nine thousand and who has been in the employment of the Company for a period of not less than six months."

Section 233(1)(Ja) of the Act of 2006 brings about a change in that definition by introducing, an exclusionary standard leaving out those performing administrative, management and supervisory roles from its purview. That section reads thus:

> "২৩৩। (১)(জ) কোন কোম্পানীর "শ্রমিক" বলিতে ঐ ব্যক্তিকে বুঝাইবে যিনি পদ-মর্যাদা নির্বিশেষে উক্ত কোম্পানীতে অন্যূন ছয়মাস যাবত চাকুরীতে নিযুক্ত রহিয়াছেন; তবে নিম্নোক্ত কোন ব্যক্তি এই আইনের আওতায় শ্রমিক সংজ্ঞার অন্তর্ভূক্ত হইবে না–
>
> ১। ব্যবস্থাপনা কিংবা প্রশাসনিক দায়িত্বে নিযুক্ত ব্যক্তি,
>
> ২। তদারকি কর্তৃত্বে নিযুক্ত ব্যক্তি যিনি পদাধিকারবলে বা তাহার উপর অর্পিত ক্ষমতাবলে ব্যবস্থাপনা বা প্রশাসনিক ধরণের কাজ করিয়া থাকেন।"

4. Going beyond the definition of 'work-

er', the two Acts however follow a common pattern of setting out the manner of establishment and management of a Workers Participation Fund and Welfare Fund thereby delineating the spheres of function and statutory duties of three entities i.e., the Government, the employer Company and the Board of Trustees ("BOT"). Reproduced hereinbelow are such of the provisions of the Act of 1968 followed by the corresponding provisions of the Act of 2006 appearing in the Bangla Text.

"3. Establishment of (Participation Fund and welfare] Fund—Every company to -which the scheme applies shall-

(a) establish a Workers Participation Fund and a Worker Welfare Fund in accordance with the scheme within one month of the date on which the scheme becomes applicable to it; and

(b) pay every year to the participation fund and welfare find, not later than nine months from the close of the year, five percent of its net profits during such year, the proportion of the payment to the participation Fund and the Welfare Fund being 90 : 10.

4. Management of the Participation Fund and Welfare Fund– (1) As soon as may be, after the establishment of the Participation Fund and a Welfare Fund, there shall be constituted a Board of Trustees consisting of the following, namely:

(a) two persons Dominated by the collective bargaining agent as defined in clause (v) of section 2 of the industrial Relations Ordinance, 1969 (XXIII of 1969), and if there be no collective bargaining agent in the company, two persons elected by the workers of the company from amongst themselves and

(b) two persons nominated by the management of the company of whom at least one shall be a person from the accounts branch of the company.

(2) The persons holding office as Trustees shall elect for one year a person to be the Chairman of the Board alternately from amongst the Trustees [nominated or elected] under clause (a) of sub-section,(1) and those nominated under clause (b) of that sub-section, the first Chairman being from amongst, the latter.

(5) The Board shall manage and administer the Participation Fund and the welfare Fund in accordance with the provisions of this Act, the scheme and any rules made in this behalf.

(6) The Board shall, in the exercise of its powers and performance of its functions under this Act, be subject to such, directions by the Government as may, from time to time, give.

(7) the Government if it is of opinion that a Trustee or a Board has been persistently failing in the performance of his or its functions or has generally been acting in a manner inconsistent with the objects and interests of the Participation Fund and the Welfare Fund may, after giving such Trustee or, as the case may be, the .Board, an opportunity of showing cause against it by order.

(a) remove such Trustee from his office or direct that the Board shall stand superseded for such period as may be specified in the order, and

(b) direct that, pending the election or nomination of a person in place of the Trustees removed from office or, as the case may be, the reconstitution of the Board, the powers and functions of the Trustees so removed or the Board shall exercised and performed by a person specified in the order.

5. Penalty—(1) Where any company fails to comply with the provisions of sec-

tion 3, the Government may, by order in writing, require it to comply with those provisions within such time as may be specified in the order.

6. Power to call for information.—The Government may, at any time, call upon a company or a Board to furnish it with such information or documents, including the records of the proceedings of the company or the Board, as may be relevant or useful for the purposes of, or necessary, for ensuring proper compliance with, the provisions of this Act, the rules and the scheme.

7. Settlement of disputes, etc.—(1) Any differences arising between the Board and the company relating to the administration of the scheme shall be reported to the Government whose decision thereon shall be final.

9. Powers to make rules.—The Government may make rules to carry out the purposes of this Act."

5. As contemplated in section 4(5), find relevant to our purpose, are provisions as to the powers of the Government in the context of the 'Scheme' spelt out in the Schedule to the Act of 1968 ("the Schedule") Paragraph 14 of which specifically provides thus:

> "14. Special provisions for industries working seasonally.- Notwithstanding anything contained in this Act or this Scheme, the Government may, by notification in the official Gazette, make special provisions for the participation of the workers in the profits of companies engaged in industrial undertakings which operate only for a part of the year."

6. Paragraph 14 of the Scheme is cited here chiefly as an indicator of the extent of control and authority the Government is intended to wield in the overall workings of the Participation and Welfare Fund.

7. Similar to the provisions of the section 3 of the Act of 1968 are those of section 234 of the Act of 2006 which reads thus:

"২৩৪। অংশগ্রহণ তহবিল ও কল্যাণ তহবিল স্থাপন।-(১) এই অধ্যায় প্রযোজ্য হয় এরূপ প্রত্যেক কোম্পানী-

(ক) এই অধ্যায় প্রযোজ্য হইবার তারিখ হইতে এক মাসের মধ্যে এই অধ্যায়ের বিধান মোতাবেক একটি শ্রমিক অংশগ্রহণ তহবিল ও একটি কল্যাণ তহবিল স্থাপন করিবে; এবং

(খ) প্রত্যেক বৎসর উহা শেষ হইবার অন্যূন নয় মাসের মধ্যে, উক্ত বৎসরের নীট মুনাফার পাঁচ শতাংশ অংশগ্রহণ তহবিল ও কল্যাণ তহবিলে ৮০ঃ২০ অনুপাতে প্রদান করিবে।

(২) উপ-ধারা (১) (খ) এর অধীন উক্ত তহবিলদ্বয়ে প্রদত্ত অর্থ যে বৎসরের জন্য প্রদান করা হইবে সে বৎসর শেষ হইবার অব্যবহিত পরের বৎসরের পহেলা তারিখে উহা তহবিলদ্বয়ে বরাদ্দ হইয়াছে বলিয়া গণ্য হইবে।"

8. Section 235 of the Act of 2006 is equivalent to section 4 of the Act of 1968 and reads thus:

"২৩৫। তহবিলদ্বয়ের ব্যবস্থাপনা-(১) অংশগ্রহণ তহবিল ও কল্যাণ তহবিল স্থাপিত হইবার পর যথাশীঘ্র সম্ভব নিম্নরূপ সদস্য সমন্বয়ে একটি ট্রাস্টি বোর্ড গঠিত হইবে, যথা-

(ক) কোম্পানীর যৌথ দরকষাকষি প্রতিনিধি কর্তৃক মনোনীত দুইজন সদস্য এবং এইরূপ কোন প্রতিনিধি না থাকিলে, কোম্পানীর শ্রমিকগণ কর্তৃক তাহাদের নিজেদের মধ্য হইতে নির্বাচিত দুইজন সদস্য; এবং

(খ) কোম্পানীর ব্যবস্থাপনা কর্তৃপক্ষ কর্তৃক মনোনীত দুইজন সদস্য, যাহাদের মধ্যে অন্তত একজন হইবেন কোম্পানীর হিসাব শাখা হইতে মনোনীত ব্যক্তি।

(২) ট্রাস্টি বোর্ডের সদস্যগণ পালাক্রমে উপ-ধারা (১) (ক) ও (১) (খ) এর অধীন সদস্যগণের মধ্য হইতে প্রত্যেক বৎসরের জন্য উহার একজন চেয়ারম্যান নির্বাচিত করিবেন, তবে প্রথম চেয়ারম্যান উপ-ধারা (১)(খ) এর অধীন সদস্যগণের মধ্য হইতে হইবে।

(৩) এই অধ্যায় এবং এতদউদ্দেশ্যে প্রণীত বিধির বিধান অনুযায়ী ট্রাস্টি বোর্ড তহবিলদ্বয়ের ব্যবস্থাপনা ও পরিচালনা করিবে।

(৪) ট্রাস্টি বোর্ড উহার ক্ষমতা প্রয়োগ ও দায়িত্ব পালনের ব্যাপারে সরকার কর্তৃক সময় সময় প্রদত্ত নির্দেশের অধীন থাকিবে।

(৫) সরকার যদি এই মত পোষণ করে যে, ট্রাস্টি বোর্ড বা উহার কোন সদস্য দায়িত্ব পালনে পুনঃ পুনঃ ব্যর্থ হইতেছে অথবা সাধারণত তহবিলদ্বয়ের লক্ষ্য ও স্বার্থের সহিত অসংগতিপূর্ণভাবে কাজকর্ম করিতেছে তাহা হইলে সরকার, বোর্ড বা সদস্যটিকে কারণ দর্শাইবার সুযোগ দান করিয়া, আদেশ দ্বারা–

(ক) উহাতে নির্দিষ্ট মেয়াদের জন্য বোর্ড বাতিল করিতে পারিবে, অথবা সদস্যটিকে তাহার পদ হইতে অপসারণ করিতে পারিব; এবং

(খ) ট্রাস্ট্রি বোর্ড পুর্নগঠিত না হওয়া পর্যন্ত বা উক্ত সদস্যের পদে নূতন সদস্য মনোনীত বা নির্বাচিত না হওয়া পর্যন্ত বোর্ডের বা উক্ত সদস্যের ক্ষমতা ও দায়িত্ব, আদেশ উল্লিখিত ব্যক্তি কর্তৃক প্রয়োগ ও পালনের জন্য নির্দেশ দিতে পারিবে।

(৬) উপ-ধারা (৫) এর অধীন ট্রাস্টি বোর্ড বাতিল হইবার পর, উহার সদস্যগণ তাহাদের পদে আর বহাল থাকিবেন না এবং এই অধ্যায়ে বা কোন বিধিতে ট্রাস্টি বোর্ডের উল্লেখ থাকিলে উহা উক্ত উপ-ধারার অধীন প্রদত্ত আদেশে উল্লিখিত ব্যক্তিকে বুঝাইবে।

(৭) বাতিলের মেয়াদ শেষ হইবার পূর্বেই এই অধ্যায়ের বিধান অনুযায়ী ট্রাস্টি বোর্ড পুনর্গঠিত হইবে যাহাতে উহা উক্ত মেয়াদ শেষ হইবার পর উহার কার্যভার গ্রহণ করিতে পারে।"

9. Section 236 of the Act of 2006 as is equivalent to section 5 of the Act of 1968 reads thus:

"২৩৬। দন্ড–(১) সে ক্ষেত্রে কোন কোম্পানী ধারা ২৩৪ এর অধীন বিধানগুলি মানিতে ব্যর্থ হয়, সেক্ষেত্রে সরকার, আদেশ দ্বারা, উক্ত আদেশে উল্লিখিত সময়ের মধ্যে উক্ত বিধানগুলি মানিবার জন্য নির্দেশ দিতে পারিবে।"

10. Section 237 of the Act of 2006 as is equivalent to section 6 of the Act of 1968 reads thus:

"২৩৭। তথ্য তলবের ক্ষমতা–এই অধ্যায় অথবা সংশ্লিষ্ট কোন বিধির যথাযথ প্রয়োগ নিশ্চিত করার লক্ষ্যে এবং ইহার প্রয়োজনে সরকার যে কোন সময়ে কোন কোম্পানী বা ট্রাস্টি বোর্ডের নিকট হইতে তথ্য, দলিল-দস্তাবেজ অথবা কার্যধারার নথি-পত্র তলব করিতে পারিবে।"

11. Section 238 of the Act of 2006 as is equivalent section 7 of the Act of 1968 reads thus:

"২৩৮। বিরোধ নিষ্পত্তি, ইত্যাদি–(১) তহবিলদ্বয়ের প্রশাসন সংক্রান্ত কোন বিষয়ে ট্রাস্টি বোর্ড এবং কোম্পানীর মধ্যে কোন মতবিরোধ দেখা দিলে বিষয়টি সরকারের নিকট পেশ করিতে হইবে এবং ইহার উহার সরকারের সিদ্ধান্ত চুড়ান্ত হইবে।

(২) তহবিলদ্বয় হইতে প্রাপ্ত সুযোগ-সুবিধা সম্পর্কে ট্রাস্টি বোর্ড অথবা কোম্পানীর বিরুদ্ধে কোন শ্রমিকের কোন অভিযোগ থাকিলে উহা দশম অধ্যায়ে বর্ণিত মজুরী হইতে কর্তন সম্পর্কে বিরোধ নিষ্পত্তির পন্থা অনুযায়ী নিষ্পত্তি করিতে হইবে।"

12. Section 250 of the Act of 2006 follows on the lines of Paragraph 14 of the Schedule of the Act of 1968 and reads thus:

"২৫০। মৌসুমী কাজে নিযুক্ত শিল্পের ক্ষেত্রে বিশেষ বিধান-এই অধ্যায়ে যাহা কিছু থাকুক না কেন যে সকল কোম্পানী সমস্ত বৎসরের পরিবর্তে উহার কোন অংশে উহাদের কাজ চালায় সে সকল কোম্পানীর মুনাফায় শ্রমিকগণের অংশগ্রহণের জন্য সরকার, সরকারী গেজেটে প্রজ্ঞাপন দ্বারা, বিধান করিতে পারিবে।"

FACTS GERMANE

13. The above provisions of law come into play in the facts as arise commonly in both these Writ Petitions. This Court notes further at the outset that facts common to both these Writ Petitions have been argued upon by the learned Advocate for the Petitioners Mr Razzaq and Mr Imran Siddiq by treating Writ Petition No. 7326 of 2009 to be the lead Petition in that regard. The Respondent No. 2 BOT (or "Board" as and where necessary) has been established by section 4 of the Act of 1968 which provides that there shall be a Board comprising of two persons nominated by the collective Bargaining Agent ("CBA") of the Respondent No. 4 Company, Unilever Bangladesh Limited, a private limited company incorporated under the Companies Act 1913 and two persons nominated by the Company's management. The BOT performs its functions under the direct control and supervision of the Government of Bangladesh under the Act of 1968. Section 4(6) of the Act of 1968 provides that the BOT shall in the exercise of its powers and performance of

its functions be subject to such directions as the Government may from time to time issue. By section 4(7) of the Act of 1968, the Government has been empowered to dissolve the BOT and/or remove a Trustee from office and appoint any other person to perform the functions of the Board. Furthermore, Paragraph 14 of the Schedule provides that the Government may by Gazette notification make special provisions for the participation of workers in the profits of companies engaged in industrial undertakings which operate for only part of the year. Paragraph 15 of the Schedule empowers the Government, at the request of a company engaged in more than one industrial undertaking in different locations, to permit the splitting up of the Participation Fund and Welfare Fund. Furthermore, Paragraph 16 of the Schedule provides that the BOT may with the approval of the Government enter into agreements with the Investment Corporation of Bangladesh or Sonali Bank, entrusting the management of the Workers Participation and Welfare Fund to the said Corporation or Bank. Thus, it is apparent from the aforesaid provisions of the Act of 1968 and the Schedule thereto that the BOT of the Company operates under the complete control and supervision of the Government of Bangladesh.

13A. Furthermore, the affairs of the Respondent No. 4 Company, insofar as it relates to the administration of the Workers Participation and Welfare Fund, are conducted under the direct control and supervision of the Government of Bangladesh, which owns more than 39% of shares in the Company. By section, 5(2) of the Act of 1968, the Government has been empowered to impose a penalty upon the Respondent No. 4 Company if the said Company fails to establish a Workers Participation and Welfare Fund in accordance with section 3 of the said Act. Section 6 of the said Act empowers the Government to call upon the Company or the BOT to furnish it with such information and/or documents as may be necessary for the purpose of determining compliance with the provisions of the Act. By section 7(1) of the Act of 1968; any difference between the Board and the Company relating to the administration of the Scheme is to be reported to the Government, whose decision thereon shall be final.

14. In view of the nature and extent of control of the Government of Bangladesh in relation to the administration of the Workers Participation and Welfare Fund, it is stated that the Company and the BOT are merely acting as subordinate functionaries of the Government in administering the said Funds under the provisions of the Act of 1968. The Company or the Board has no discretion in the administration of the said Funds but are required by the provisions of the Act of 1968 to act in strict compliance with the directions issued by the Government of Bangladesh from time to time in this regard.

15. In categorically introducing the Petitioners as workers it is asserted in the Applications that the Petitioners have no authority to appoint or dismiss any employee of the Company. They have no authority to sign/execute any documents or operate any transaction on behalf of the Company.

16. It is specifically stated that the Petitioners have never been entrusted with any managerial or administrative functions during their tenure of service in the Company. The Petitioners have, at no point in time, been entrusted with any supervisory role in the management of the affairs of the Company. Furthermore, there is no evidence, documentary or otherwise, to show that the Petitioners' duties and responsibilities altered after their promotion.

17. Section 3 of the Act of 1968 provides that every company to which the Scheme

applies shall establish a Workers Participation Fund and a Workers Welfare Fund within one month of the date on which the Scheme became applicable to it. The scope of the Scheme has been defined in the Schedule to the Act of 1968 to include companies engaged in industrial undertakings having a hundred or more workers in one shift or having a paid-up capital of Taka 50 lakh or fixed assets of Taka 100 Lakh.

18. In 1968, the Company established a Workers Participation Fund in accordance with section 3 of the Act of 1968. It is stated that the existence of the Workers Participation and Welfare Fund continues, despite the repeal of the Act of 1968, by virtue of a savings clause contained in section 353(2)(ka) of the Labour Act 2006 i.e., the Act of 2006.

19. Pursuant to the establishment of such Workers Participation and Welfare Fund, the Company deposited 5% of its net profits in the Participation and Welfare Fund each year in the proportion of 90:10 in accordance with section-3(b) of the Act of 1968. By section 234 of the Act of 2006, the proportion to be deposited in the said funds has been changed from 90:10 to 80:20.

20. Once the profits are deposited by the Company in the Workers Participation Fund and Welfare Fund, they are distributed by the BOT in accordance with Paragraph 5 of the Schedule of the Act of 1968, which provides that two-thirds of the said Funds shall be distributed in cash among all workers.

21. It is stated that prior to the coming into force of the Act of 2006, the two original Petitioners in Writ Petition No. 7326 of 209 fulfilled the criteria to be classified as 'workers' within the meaning of section 2(f) of the Act of 1968. Both these Petitioners were in employment of the Company for more than six months and were receiving a monthly salary of less than Taka 9,000. As such, the Petitioners, being 'workers', were receiving their share of the Workers Participation and Welfare Fund in accordance with the provisions of the Act of 1968. A further categorization of the Petitioners in both the Writ Petitions is necessitated, submits the learned Advocate for the Petitioner Mr Imran Siddiq by reference, to section 336 of the Act of 2006 which reads thus:

> "৩৩৬। কতিপয় ক্ষেত্রে চাকুরীর বর্তমান শর্তাবলী সংরক্ষণ।–এই আইন অথবা কোন বিধি, প্রবিধান বা স্কীমের কোন কিছুই এই আইন প্রবর্তন হওয়ার সময় উহার দ্বারা রহিত কোন আইনের অধীন, অথবা কোন রোয়েদাদ, চুক্তি, নিষ্পত্তি বা প্রচলিত প্রথার অধীন কোন শ্রমিকের ভোগকৃত অধিকার বা সুযোগ-সুবিধা, তিনি যতদিন, উক্ত প্রবর্তনের তারিখে যে মালিকের অধীন কর্মরত ছিলেন, সে মালিকের অধীন চাকুরীরত থাকিবেন ততদিন পর্যন্ত ব্যাহত বা ক্ষতিগ্রস্ত করিবে না, যদি তাহার উক্ত অধিকার এবং সুযোগ-সুবিধা এই আইন, বিধি, প্রবিধান বা স্কীমের অধীন প্রদত্ত অধিকার ও সুযোগ সুবিধা হইতে অধিকতর অনুকূল হয়।"

22. Mr Siddiq therefore takes care to point out that in Writ Petition No. 7326 of 2009 the following Petitioners had fulfilled the definition of 'worker' under section 2(f) of the Act of 1968 and continue in their employment of the Company under the Act of 2006 and, therefore, can take advantage of section 336 of the 2006 Act, i.e., the Petitioner Nos. 1-12, 14, 19-22, 24, 26-28, 30, 32-36, 40, 43-45, 46,51, 53, 55, 56, 59, 61, 66-68, 71-75, 78, 94-97, 99, 101-104. This Court is also informed that the following Petitioners, having not fulfilled the definition of 'worker' under the Act of 1968 and/or having been employed under the Act of 2006, cannot take advantage of section 336 of the Act of 2006. These are Petitioner Nos. 13, 15-18, 23, 25, 29, 31; 37-39, 41/42, 47, 48, 49, 50, 52, 54, 57, 58, 60, 62-65, 69, 70, 76-77, 79-93, 98, 100. It is also submitted further by reference to the Petitioners' Affidavit-in-Reply filed dated 26-5-210 that the Petitioner Nos. 79-90 have been inadvertently added as Petitioners and since they have already filed cases before the Labour Court, therefore, Petitioner Nos, 79-90 may be excluded from the ambit of any Order of this Court.

With regard to Writ Petition No. 2227 of 2007, Mr Siddiq submits that all Petitioners i.e., Petitioner Nos. 1-46 fulfilled the definition of 'workers' under the Act of 1968 and continued their employment under the Act of 2006 and, therefore, can take advantage of section 336. As such, any Petitioners who had participated in the profits of the Company in their capacity as 'workers' in accordance with the Act of 1968, had acquired a vested right to participate in the Company's profits, which has not been taken away by an express provision of law. Such vested right of these Applicants under the Act of 1968 to participate in the Company's profits" has in fact been expressly preserved by section 336 of the Act of 2006."

23. On 11-10-2006, the Act of 2006 came into force, repealing the Act of 1968. Under the Act of 2006, the definition of 'worker' has been altered such that an employee may be classified as a ''worker' if he/she has been in service of a company for a minimum period of six months irrespective of his/her designation and pay-scale, however, he/she may not be so classified if he/she is employed in a managerial or administrative position.

24. All the Petitioners above in varying degrees have been deprived of payments from the Funds, till date. This, for example, is attributed in the case of Petitioner Nos, 1 and 2 in Writ Petition No. 7326 of 2009 to their promotions on varied dates completely failing to appreciate, however, that they were performing exactly the same functions after being promoted as were being performed by them in their earlier positions. In this the BOT also completely failed to appreciate the purport of section 233(f)(Ja) of the Act of 2006 according to which an employee, irrespective of his designation and pay, scale, would continue to classified as a 'worker', provided he is not employed in any managerial or administrative position.

25. Furthermore, it is asserted that the Petitioners, being 'workers' under the Act of 1968 and having participated in the Company's profits since their appointment, have acquired a vested right to participate in the profits of the Company, notwithstanding the repeal of the Act of 1968. Such vested right of the Petitioners is submitted to have been protected under section 336 of the Act of 2006. Section 336 of the Act of 2006 provides that a 'worker' who had been enjoying benefits under any scheme framed under an Act which has been repealed by the Act of 2006, would continue to enjoy such benefits, if such benefits are better than those provided under the Act of 2006. As such, by section 336 of the Act of 2006, the Petitioners are submitted to be entitled to participate in the profits of the Company, as availed by them earlier under the provisions of the Act of 1968. Thus, for example, if is stated that the benefits availed of by the Petitioners under the Workers Participation and Welfare fund Scheme set out in the Act of 1968 are much better than those available to the Petitioners under the Act of 2006. In 2007, the annual earnings of the Petitioner No. 1 in Writ Petition No. 7326 of 2009, including the amount he received from the Workers Participation and Welfare Fund under the Act of 1968, amounted to approximately Taka 4,26,000. In 2008, the said Petitioner is stated to have been unlawfully deprived of the Company's profits from the said Fund and earned a total amount of Taka 3,00,000 which was significantly lower than his earnings in the previous year. Furthermore, the Petitioner No. 2 in Writ Petition No. 7326 of 2009 calculates that his total earnings in the year 2009 will be substantially less than his earnings in 2008, which included a share of the profits earned by the Company that accumulated under the Company's Workers Participation and Welfare Fund Scheme set up under the Act of 1968.

26. This Court is informed that on 13-5-2009, a Division Bench of this Court disposed of

a Writ Petition (which was filed by one Md. Jalaluddin, an employee of Meghna Petroleum Ltd. claiming a share of the said company's Workers Participation and Welfare Fund), making the Rule absolute and holding that the new legislation (i.e., the Act of 2006) cannot take away the financial benefit of a worker which was being enjoyed by him earlier (i.e., under the Act of 1968). The said Bench, it is noted, also directed the authorities to pay the Writ Petitioner his share of the company's Workers Participation and Welfare Funds.

MAINTAINABILITY

27. Two specific submissions are made by reference to these Applications. First, that the Respondent No. 2 BOT failed to appreciate the purport of section 336 of the Act of 2006 which protects and preserves the vested right of the Petitioners accrued under the Act of 1968 to receive a share of the Company's profits accumulating each year in the Workers Participation and Welfare Funds of the Company and as such the Respondents should be directed by this Court to pay the Petitioners a share of the Company's profits from the such Funds of the Company. Second, the Petitioners having been classified and treated as 'workers' by the Company under both the Act of 1968 and the Act of 2006, the subsequent refusal of the Company to allow the Petitioners to participate in the profits of the Company is arbitrary and suffers from complete non-application of mind and, as such, the Respondents should be directed by this Court to pay the Petitioners their dues from the said Funds of the Company.

28. It has been asserted at the outset by and on behalf of the Respondent No. 2 BOT that no Writ lies against the BOT given that it is not a 'person' within the meaning of Article 102(5) of the Constitution. In other words, the BOT declares itself as not being a statutory public authority performing any functions in connection with the affairs of the Republic or of a local; authority. That assertion stands to be tested against the Schemes of both the Act of 1968 and that of 2006 by examining the nature and extent of control of the Government over the functions of the BOT. The learned Advocates for the Petitioners Mr Abdur Razzak and Mr Imran A. Siddiq have impressed upon this Court that the rationale of the functions of the BOT and the reason for its establishment under both the 1968 and 2006 statutory regimes is to ensure that workers remain free from exploitation by employers as in fact reflected in the Preamble and Article 14 of the Constitution as enjoins upon the State a duty to ensure such freedom from exploitation. It is asserted that both the 1968 and 2006 legislations operate as beneficial legislations in that light. It is noted that sections 4(6); 4(7), 6, 7 and Paragraph 14, 15 and 16 of the Schedule of the Act of 1968 and the corresponding or similar provisions in sections 235(3)(4)(5), 236, 237, 238, 239, 248, 250-252 of the Act of 2006 do indeed contemplate that the BOT operates under a considerable control and supervision of the Government.

29. It is submitted that the BOT in fact acts as an instrumentality or agent of the Government in administering the Welfare and Participation Funds and that in fact the BOT has not any discretion reserved to itself in the administration of the Funds and is required to act in strict compliance with the directions issued by the Government from time to time. The learned Advocates for the Petitioners in substantiation of this line of argument have introduced strands of reasoning that help in testing the extent to which the BOT may indeed be found to be a, functionary of and administratively dominated by and under the control of the Government. These strands aim at establishing either that the BOT acts as (a) subordinate functionary or (b) is under the effective Government Control, or indeed the nature of its function partakes of both such characteristics. The specific provisions of the two legislations

of 1968 and of 2006 as referred above establish overwhelmingly the fact that the BOT is not only a body the activities or the principal activities of which are authorised by the relevant legislations but that fundamentally these successive enactments have had the intended cumulative effect of both creating and sustaining it.

30. Functioning with such statutory credentials it is also noted that the BOT has been intended to operate with a specific purpose in view. It is agreed by all parties across the board that the purpose of the two successive legislations is indeed to protect the rights of workers and to ensure their share in the Company's profits, thereby, removing the spectre of any form of exploitation of these workers by their employers. That, Messrs Razzaq and Siddiq strenuously argue, brings the activities of the BOT into the public realm thereby, justifying a designation of the BOT not only as a statutory authority but significantly as a statutory public authority. This Court is reminded here that the BOT in administering the Funds in accordance with the Government's directives in fact facilitates the discharge of a fundamental responsibility of the State to ensure the protection of all workers from all exploitation under Article 14 of the Constitution. The two legislative enactments in that context ensure, the mechanism in accordance with which the State can effectively discharge its responsibility as above through the agency of the BOT reserving nevertheless to itself substantial authority of oversight, control, imposing penalties and to act as an arbiter of differences that otherwise hinder a proper administration of the Funds as contemplated in the legislations. That takes us to the provisions in Article 152 of the Constitution that defines 'State' as including, inter alia, statutory public authorities. That provision read with Article 102(5) of the Constitution under which the term 'person' is extended to include a statutory public authority clearly, in this Court's opinion, substantiates the argument on behalf of the Petitioners that Article 102(2)(a)(i) does indeed contemplate a Writ of Mandamus to issue against any entity as the BOT performing any functions in connection with the affairs of the Republic. Extensive arguments have been made by the learned Advocates for the Petitioners by reference to decisions in *Arif Sultan vs DESA* reported in *60 DLR 431, Mofizul Huq vs Mofizur Rahman* reported in *49 DLR (AD) 38, MH Chowdhury vs GM Titas Gas* reported in *1981 BLD (AD) 61, New Dacca Industries vs Quamrul Huda* reported in *31 DLR (AD) 234, Zakir Hossain Munshi vs Bangladesh* reported in *55 DLR 130, Farzana vs Securities and Exchange Commission* reported in *54 DLR 66, Abdus Sabur vs REB* reported in *10 BLC 502, Zahir Akhter vs Bangladesh Biman* reported in *61 DLR 446, Conforce Limited vs Titas Gas Transmission* reported in *42 DLR 33 and Shafiqur Rahman vs Bangladesh* reported in *8 BLC 521.*

31. In this Court's view, the Appellate Division's Judgment in the *Mofizul Huq Case* serves as an appropriate staring point for determining the public nature of the functions of the BOT. In that case, the Appellate Division took due note of the provisions of section 3(28) of the General Clauses Act that identifies a 'Local Authority' as *inter alia* a "body or authority constituted or established by this Government under any law". The *ratio decidendi* of that judgment applied to the BOT serves to establish that the BOT is indeed a 'local authority' within the definition in the General Clauses Act as it owes its existence to the Acts of 1968 and 2006. In other words, indisputably the BOT is a creature of statute which has no identity distinct from that granted it by the two Acts of 1968 and 2006, as held in *Vaish Degree College vs Lakshmi Narain* reported in *AIR 1976 (SC) 888*:

> "...the position seems to be that the institution concerned must once its very existence to a statute which would be the fountainhead of its points. The question in

such cases to be asked is, if there is no statute would the institution have any legal existence. If the answer is in the negatives, then undoubtedly it is a statutory body".

32. It is deduced by this Court from the above that the BOT is so deeply rooted into both the Act of 1968 and the Act of 2006 that it has no separate existence of its own without any reference to either of those statutes. It is of the nature of a statutory body the umbilical cord of which cannot be and was never intended to be severed from its parent statutes.

33. Secondly, perusal of these judicial precedents leads this Court to hold that there is indeed no hard and fast rule in determining the extent to which a creature of a statute like the BOT may or may not have an autonomy of existence distinct from a regulatory entity like the Government. The answer would be dependent m each case on the dynamics of such relationship and the workings of the statutory body within the particular statutory scheme.

34. This Court holds that the tests here, as prescribed in the *Arif Sultan Case,* would be

(1) the existence of deep and extensive control of the Government, and

(2) the true rationale in setting up the BOT as well as the Funds.

In applying the two tests above, it is this Court's conclusion that the purpose of the Acts of 1968 and 2006 has indeed been to establish the BOT as an instrument or agency of the Government over which the Government was always/intended to have a deep and pervasive control. The BOT, thereby, acquiring the complexion of the instrumentality of the Government is found by this Court to be indeed amenable to Writ jurisdiction.

35. It is noted furthermore that taking a cue from the *Arif Sultan Case,* this Court in the *Zahir Akhter Case* deduced that when the Government has a supervisory as opposed to a mere regulatory role over another statutory body, a case of instrumentality or agency of the Government as above is well established. In that Case it was also held that judicial precedents have established that when an authority exercises the power of the Government as its instrumentality in any manner, that makes the authority a public body, amenable to the jurisdiction of judicial review of the superior Court *(61 DLR 446 at para 65, page 461).*

36. The public nature of the functions of the BOT is found further to be predicated on the very scheme of the Acts of 1968 and 2006. The purpose of both the Acts is to protect the rights of the workers i.e., to ensure in the present instance that they get a fair share of the Company's profits and to prevent exploitation of the workers by their employers. The BOT by administering the Welfare and Participation Funds in accordance with the directions of the Government is ensuring that workers are protected from exploitation by their employers. To that extent, the BOT by implementing the provisions presently of the Act of 2006, is intended to facilitate fulfillment of the fundamental responsibility of the State to emancipate workers from all forms of exploitation. In that regard, this Court takes due note of the Preamble of the Constitution which states that it shall be the fundamental aim of the State to realize through the democratic process a socialist state free from exploitation i.e., a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens. Indeed, in keeping with the demands of a socialist state, the framers of the Constitution enacted Articles 10 and 14 of the Constitution, Article 10 provides that a socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from exploitation of man by man (e.g.,, of workers by employers).

Article 14 of the Constitution makes it a fundamental responsibility of the State to protect peasants and workers from all forms of exploitation. Given further that Articles 10 and 14 are fundamental principles of State policy, according to Article 8(2) such fundamental principles of State policy are fundamental to the governance of Bangladesh and shall be applied by the State in the making of laws (i.e., the Acts of 1968 and 2006) and shall form the basis of the work of the State i.e., the duties and responsibilities vested by statute in the BOT (which being a statutory public authority, is a component of the State) to implement the provisions presently of the Act of 2006. This Court holds in this regard that the BOT, being a statutory public authority, is a component of the State. And in view of the socialist character of the State, the functions of the BOT in protecting workers from exploitation by implementing the provisions of the Act of 2006, are in fact public/ governmental functions and closely related to those required to be performed by the State in its sovereign capacity.

37. Furthermore, according to the Judgment in *Khondker Delwar Hossain, Secretary, BNP. Party (in CP, No. 1044/09), Munshi Ahsan Kabir and others (in CP No. 1045/09) vs Bangladesh Italian Marble Works Ltd., Dhaka and others (in-both the cases) (Bangladesh Constitution (Fifth Amendments)* reported *VI(B) ADC (2010) 1,* the socialist character of the State is a basic feature of the Constitution. As such, the functions intended to be performed by the BOT in implementing the provisions presently of the Act of 2006, being such as to strengthen the basic structures or structural pillars of the Constitution, the functions of the BOT are clearly not only of public importance but also are of the same nature as those required to be performed by the State in its sovereign capacity.

38. In view of the fact that the BOT is for all practical purposes, being run by the Government and is also instrumental to the fulfillment of the fundamental responsibility of the State, it is clear to this Court that the illegalities of the BOT in administering the funds of the Workers Participation and Welfare Funds are amenable, therefore, to the Writ jurisdiction.

39. Furthermore the petitioners rely on the judgment of the High Court Division in the *Meghna Petroleum Case* and the *Padma Oil Case* and submit that the High Court Division has held the Writ Petition against Meghna Petroleum Ltd. (which is similar to the instant case) to be maintainable. It is noted that in this regard the Petitioners rely on-Chapter VII of the High Court Rules and the decisions in particular in *Chittagong Port Authority vs Sadharan Bima* reported in *1981 BLD (AD) 373 and Pubali Bank vs Chairman, 'Labour Court reported in 44 DLR (AD) 40.*

40. It is evident, therefore, that the higher judiciary of this land has time and time again endorsed the tests of "subordinate functionary" and "governmental control" to equip various statutory authorities with the status of statutory public authorities whose functions are indeed amenable to Writ jurisdiction. It is indeed ascertainable from a few of these cases additionally that statutory authorities who operate, in particular, in the commercial sector or operate with a profit motive remain all the same amenable to intervention through Writ Applications provided that such nature of the work does not sufficiently detract from the overwhelmingly beneficial or altruistic aspect of their functions. Indeed in one case in particular, i.e., the *Arif Sultan Case,* there is an implicit endorsement of the fact that the profit motive will not necessarily detract from any authority being amenable to Writ Jurisdiction provided sufficient Governmental control over that authority can be established. Of the test or guidelines devised in that case to determine whether an entity is an "instrumentally or an agency" of the Government or indeed "a local authority" those of the existence of an extensive

and pervasive control of the Government and of the true rationale in the setting up of that particular authority are found by this Court to be particularly relevant in the present facts and circumstances.

41. It is this Court's finding, therefore, that the two successive legislations of 1968 and 2006 not only constitute the fountainhead of power granted the BOT, and without which legislative sanctions the BOT would not exist, but also significantly envisage such powers to be exercised for and on behalf of the Government and under its express and continuous supervision. That being the finding of this Court, it is consequentially also found on this preliminary issue of maintainability that the BOT's activities, as appear in the facts and circumstances, are indeed amenable to Writ Jurisdiction as impressed upon this Court by the Petitioners. That leads this Court now to deal with the more substantive issues that arises in these Writ Applications considered in the context of the specific provisions of the law as already referred to above.

SUBSTANTIVE ISSUES

42. In this regard, two avenues of inquiry have had to be undertaken by this Court in the context of the extant provisions of the Act of 2006 in particular. The first relates to the legislative and judicial standards determining whether the petitioners before this Court are indeed 'workers' or not. The second being the entity in which the statutory authority is primarily reposed to decide on such status as 'workers'. These avenues of inquiry do not in fact run parallel to each other but appear somewhat intertwined to this Court given this Court's opinion that unlike a definition of a 'worker' provided in section 2(f) of the Act of 1968, that under section 233(1) (Ja) of the Act of 2006 appears to repose in one authority or the other the responsibility to decide upon the status of a 'worker'. But the assignment of such responsibility is implicit in section 233(1) (Ja). That means that this provision of the law is itself silent in identifying such authority. In other words, section 233(l)(Ja) proceeds to assign such responsibility to an unidentified authority. The matter gets murkier given that this section is also notably vague or silent as to the objective standards that must be taken into consideration by such unidentified authority to necessarily give any meaning to the test introduced therein by drawing a clear line Demarcation between who may and may not be entitled to the beneficial application of the Funds in their favour. However, clear indicators of the intent in the Act of 2006 to ascertain the identity of the authority which may have the primary responsibility to assign the status of a 'worker' or not upon any individual are to be found in the other fairly extensive provisions of that law pertaining to the management and oversight of the Funds in general and in that context, unlike in section 233(l)(Ja), clearly delineating the extent and spheres of the power and authority of the BOT, the Company and the Government in the due and proper administration of the Funds.

43. It is here that arguments have been made on behalf of the BOT that the power in section 235(3) in particular of the Act of 2006 to manage and administer the Funds is to be deemed to be inclusive of determining who is a 'worker' to qualify for the beneficial application of the Funds. In other words, the BOT will have this Court believe that the power of Fund-management and administration under section 235(3) is an all encompassing and an all-empowering power recognized in favour of the BOT. But upon a reading, for example, of sections 240, 242, 243 and 252 of the Act of 2006, it is, however, clear to this Court that such notion of an all-empowering authority gets whittled down somewhat by very specific provisions otherwise laying down the boundaries within which the BOT must operate with regard to, for

instance, investing on behalf of the Funds, the utilization and overall management of the Funds, etc. It is noted further that in so specifically setting out the specific functions of the BOT, significantly no authority is expressly reserved by the terms of the Act of 2006 in the BOT to determine on the powers and duties of the Petitioners, that is, whether these are supervisory, managerial or administrative in nature. It has been submitted on behalf of the Petitioners that such authority in fact, upon a true construction of section 233(l)(Ja), must be read as lying with the Company itself in preference to the BOT. It is here that Messrs Razzak and Siddiq have satisfactorily argued that the notion of an all-encompassing power and discretion in this regard vesting in the BOT as propounded by Counsel for the BOT, Mr Kamal-ul Alam remains notably further qualified by Article 114 of the Articles of Association of the Company under which the power to appoint, fix and determine the power and duties of employees resides solely with the Board of Directors of the Company. Indeed, Article 114, in ideal circumstances, would be the provision by dint of which any company could and should assert itself in this regard to the exclusion wholly of any other authority perniciously arrogating to itself any similar authority to make such determination on the status of workers.

44. It is painfully evident, however, in the facts and circumstances that the situation prevailing within the Company is far removed from such an ideal situation. The Company, since 2006, appears to have abdicated its responsibility to play an assertive role in this regard as reflected in its failure to provide specific, comprehensive and due information as to the status of workers to the BOT. Equally alarming is the case of the Company failing to ensure strict compliance with section 235 of the Act of 2006, sub-section (2) of which mandates, a yearly rotation in the post of Chairman of BOT in a manner that a representative of the Company and of the CBA must alternatively be elected to occupy that post. It is found that the Company has thus directly contributed to the BCT's assumption of apparently extra-statutory responsibility and authority by turning a blind eye to the express violation of Article 235(2) for over twelve years now. Evidently, the Company has opted for such a dent in its authority in administering the Fund much earlier than the coming into force of the Act of 2006. That scenario of express, sustained and tolerated violation of the provisions of both the Acts of 1968 of 2006 is further exacerbated by the Government itself not attaching due significance to its role of oversight and ensuring accountability of the administration of the Funds. In this regard, this Court's attention has been drawn, in particular, to the specific responsibilities to be undertaken by the Government under sections 4, 5 and 6 of the Act of 1968 and corresponding provisions of the-Act of 2006 found in sections 235, 236 and 237. Of these provisions, section 237 of the Act of 2006 corresponding to section 6 of the Act of 1968 is germane given that it grants the Government absolute authority to summon information at any time to examine due compliance with other provisions of the Act and the rule in the administration of the Fund. That power appears, however, never to have been invoked thus far by the Government notwithstanding the festering disputes that have plagued the Company for so many years and have compelled numerous of its employees to seek recourse to this Court's jurisdiction leading to resultant judicial interventions. Cleanly, the Company has not deemed it necessary to treat, for whatever reason such loss of its control over the BOT, evident in it being denied the post of Chairmanship in alternate years, to itself refer the matter to the Government by invocation of the provisions of section 238(1) of the Act of 2006 that gives the Government the

final authority to resolve disputes as may arise with regard to the administration of the Funds. A *laissez-aller* culture has, thereby, been allowed to develop within the Company equipping, and illegally so the BOT so with authority in a manner and to the extent that was clearly never within the contemplation of the two legislations concerned so to grant. It was clearly furthermore not within the legislative intent that the Company should be complicit in contributing to the accretion to the BOT of such authority purely as an apparent trade off between the Company's management and the CBA for considerations that have not been fully explained before this Court but only hinted at, but the reasons for which this Court can clearly guess at. It is crystal clear, however, that adverse impact upon the rights and interests of the Petitioners as a result of such trade off to otherwise ensure a peaceful environment within the company has been considerable.

45. Furthermore, the Government turning a blind eye to this unholy alliance between the Company and the CBA has also led to the operation of entire segments of the Act of 1968 and, thereafter, the Act of 2006 to be held in abeyance. In that context this Court views the merit in this Application to lie in the fact of prodding both the Company and the Government to resuscitate such of those provisions of the law and restore the essential statutory balance between their roles and in their dealings with the BOT.

46. The Company appears, in particular, in these proceedings to be happily sitting on the fence, as it were, in responding to the claims of the Petitioners. Unhappily, however, that has led the Company to be prone to equivocation in adopting a stance vis-a-vis the Petitioners' Case, While for example, therefore, in Writ Petition No. 7326 of 2009 the Company has sought to establish that the Petitioners do not indeed perform managerial and administrative functions as substantiated by a chart ("Job Description Chart") produced and brought on record as Annexure-'X2', to the Company's Affidavit-in-Opposition describing the nature of the work performed by the Petitioners, it appears nevertheless to be more forthcoming in disputing such status to be accorded to the Petitioners in Writ Petition No. 2227 of 2007, "That latter stance is evident from submissions made by the learned Advocate for the Company in Writ Petition No. 2227 of 2007 Mr AJ Mohammad Ali by arguing that the definition in section 233(l)(Ja) of the Act of 2006 is so very exclusionary of the status and the claimed entitlement of the Petitioners as workers that their applications before this Court are devoid of all merit and substance. That line of argument has necessarily required this Court to embark on the exercise of determining the tests of managerial, administrative and supervisory functions under which any employee may be disqualified from the beneficial application of the legislations concerned. That exercise has been undertaken solely to put all three actors concerned i.e., the Company, the BOT and the Government, on notice of the objective judicially endorsed standards that are already in place and which must be referred to prior to determining who is a 'worker' or not. That exercise is also necessitated further by the fact that the Act of 2006, as earlier noted, remains silent in prescribing those standards. Undoubtedly such a statutory lacuna, has led to arbitrary exercises of discretion, and that too by an unauthorized entity being the BOT, to exclude the Petitioners from the beneficial application of the Funds.

47. This Court notes that notwithstanding that the Company at least took a stand, albeit a feeble one, in producing a job description of the Petitioners and stating on record "that the said employees, regardless of the name of their respective designation, discharge their duties and responsibility in accordance with the instructions from their superior and the said

employees do not have any authority to deviate from the instruction, the process, policy and guidance laid down by their superior "and also that "the said employees do not have the authority to hire or fire other employee" it has notably fallen short of stating on record that such employees necessarily, therefore, under the law qualify to be treated as 'workers'. Such reluctance on the part of the Company has been taken by this Court as an indication that the Company would prefer rather that this Court take on itself the responsibility to draw that conclusion. It is noted with some interest that the statement above of the Company is in fact replete with references to objective standards which cumulatively operate to determine the status of the 'worker' who does not discharge managerial, supervisory or administrative functions. In this regard, the learned Advocate for the Petitioner, Mr Imran Siddiq, has referred to a range of cases adjudged in this jurisdiction and otherwise, thereby, identifying certain of those judicially recognized objective standards. Given that the Company has not stated that the Petitioners do not perform managerial or administrative functions, its statement above, read in light of these decisions, in this Court's view, nevertheless clearly establishes that the Petitioners are indeed not performing any managerial or administrative functions. Those tests and decisions are enumerated herein below:

(a) Since the Petitioners have no power to hire or fire their functions are "neither managerial nor supervisory in nature in the sense in which those terms are understood in industrial law" *(Ved Prakash Gupta vs Delton Cable India (P) Ltd.* reported in *1984 2 SCC 569 at para 12);*

(b) the Petitioners have no authority to appoint any employee or take any disciplinary action at their own initiative and, therefore, do not perform managerial or administrative functions *(SK Verma vs Mahesh Chandra* reported in *1983 4 SCC, 214 alone Mcleodead & Co vs Sixth Industrial Tribunal, West Bengal* reported in *AIR 1958 Cal. 273);*

(c) there is nothing on record to show that the Petitioners can remotely discharge any policy-making responsibility on behalf of the Company *(Omar Sons Ltd. vs Chairman 1st Labour Court* reported in *28 DLR 1976, 178).* In the Omar sons Case the Court additionally cautioned against being misled by someone's designation to the exclusion of a probe into the nature of the function actually performed for here the "criterion is not the designation but the function"; and

(d) no discernible degree of discretionary power appears to have been reserved to any of the Petitioners in the discharge of their duties *(Hussain Mithu Mhasvadkar vs Bombay Iron and Steel* reported in *'2001 7 SCC 394).* As in the *Omar Sons Case,* so in the Hussain Mithu Case the "true and proper" test "is the predominant nature of the services" i.e., a consideration of the nature of the duties and the powers conferred upon as well as the functions assigned to an undivided.

48. In Writ Petition No. 7326 of 2009 the' Petitioners to a great extent have relied on the Job Description Chart in Annexure- 'X2' generated by the Company to assert that there is in fact no dispute between the Company and the Petitioners to the effect that the latter are not indeed performing managerial or administrative work and that, accordingly, they are indeed 'workers' within the meaning of section 233 (l)(Ja) of the Act of 2006. The Petitioners relying on Annexure-'X(2)' submit that it is evident from the said document that the petitioners do not have the power to appoint or dismiss other employees nor do they have the power to make policy decisions on behalf of the Company, and that as such, they do not perform any managerial or administrative functions.

49. The BOT has however, submitted that Annexure-'X(2)' merely sets out the Petitioners' Job Description and that this refers only to the nature of the work done by them and not the model or manner in which they discharge their responsibilities. Accordingly, the BOT submits that the Job Description Chart cannot be used as a basis for determining the manner in which the Petitioners perform their functions.

50. The Petitioners dispute such contention of the BOT by arguing that the *prima facie* test for the determination of the relationship between master and servant lies in the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant will do, but also the manner in which he shall do his work. Thus, in determining to job description of an employee, an employer decides not only the work that will be done by him but also the manner in which he shall do his work. As such, the Petitioners contend that it would be incorrect to argue that the job description of the Petitioners, as contained in Annexure-X(2)', does not refer to the mode of discharge of responsibilities of the Petitioners. The Petitioners' contention in this regard is further supported by the Job Description Chart in Annexure-'X(2)', which refers to exercise of supervisory powers by certain of the Petitioners in the discharge of their responsibilities, i.e., the manner or mode, of discharge of their functions (for example the job description of the Petitioner No. 92 includes supervising overall manufacturing operations, encompassing production quality, safety, capacity utilization, people management, conflict management, capacity management and asset care). Here the Petitioners clarify that a mere exercise of supervisory powers, however, does not by itself mean that an employee ceases to be a 'worker' within the meaning of section 233(1) (Ja) of the Act of 2006. According to section 233 (1)(Ja)(l) and (2) of the Act of 2006, the primary determinant of an employee's status as a 'worker' is whether he/she is performing managerial and administrative, functions. Section 233(l) (Ja)(2) refers to persons employed in a supervisory capacity who are performing managerial and administrative functions, such category of persons having been excluded from the definition of workers. Thus a person may be exercising supervisory powers, but if he/she is not engaged in managerial or administrative responsibilities, he cannot be termed a 'worker'. In this regard, the Petitioners rely on the Judgment of the High Court Division in *Mujibur Rahman vs Chairman Labour Court* reported in *31 DLR 301,* wherein interpreting section 2(v) of the Act of 1968 (which is similar to section 233(l)(Ja) of the Act of 2006), the High Court Division held that a person does not cease to be a 'worker' only because of being employed in a supervisory capacity. It has to be further established that such person exercises functions as are mainly of a managerial and administrative nature.

51. Thus the job description of each of the Petitioners (which refers to the nature of their work and the mode of discharge of their functions), as contained in Annexure- 'X(2)' may be resorted to in determining whether the Petitioners perform functions which may be described as managerial or administrative in nature. In this case, the Petitioners reiterate that their job descriptions clearly show that they have no power to appoint or dismiss other employees and/or make policy decisions on behalf of the Company and, as such, they do not perform managerial and administrative functions and thus qualify as 'workers' under section 233(1) (Ja) of the Act of 2006.

52. Barring the somewhat contradictory stance, as above noted, adopted by the Company itself on this point in Writ Petition No. 2227 of 2007, the opposition to recognizing the Petitioners as 'workers' understandingly comes from the Respondent No. 2, BOT in both

High Court Division

Anti-Corruption Commission Rules, 2007

Rule 24—Rule has been amended on 26-11-2007 by SRO No. 265/Ain/2007; by that amendment the inquiry officer has got the authority to investigate the case. *Engineer Abdul Wadud vs State (Criminal)* 468

Bangladesh Petroleum Corporation Ordinance (LXXXVIII of 1976)

Section 27—No suit lies against the Chairman, any Director or any officer, adviser, consultant or employee of the Corporation for anything which is in good faith done or intended to be done under the Law. *Min Oils Limited vs Bangladesh Petroleum Corporation (Civil)* 449

Bangladesh Labour Act (XLII of 2006)

Sections 233(1)(Ja) and(2)—A person may be exercising supervisory powers, but if he/she is not engaged in managerial or administrative responsibilities, he cannot be termed a 'worker'. *Mehdi Hassan (Md) and another vs Government of Bangladesh (Spl Original)* 472

Bangladesh Labour Act (XLII of 2006)

Sections 233(1)(Ja)

Employment of Labour (Standing Orders) Act [VIII of 1965]

Section 2(v)—A person does not cease to be a worker only because he is a employed in a supervisory capacity. It has to be established that he exercises function mainly of a managerial and administrative nature. *Mehdi Hassan (Md) and another vs Government of Bangladesh (Spl Original)* 472

Code of Civil Procedure (V of 1908)

Order XVIII, rule 19(2)

Local Government (Union Parishad) Election Rules, 2010

Rule 61(4)

Local Government (UP) Act (XLI of 2009)

Section 22(3)—The requirement of the 180 day disposal period is indeed of strict application and that the requirement of such disposal demands that this be unqualifiedly adhered to. It also becomes incumbent upon tribunal to keep strictly within that prescription and to secure the public interest by so disposing of duly within the prescribed period the question whether the election has been affected materially in any adverse manner with any or either of the parties contributing to such state of affairs. *Ataur Rahman Manik (Md) vs Pir Md Mojnu Miah (Civil)* 432

Code of Criminal Procedure (V of 1898)

Section 342—Object of section 342 of the Code is to invite the attention of the accused person to the points in the evidence which are against him for which he may be convicted, so that he may have a chance to offer his explanation. *Jahar Lal Biswas vs State (Criminal)* 442

Section 498—The accused-petitioner is a patient of transitional carcinoma of ureter and kidney (Rt) and he has already received seven cycle chemotherapy. The accused-petitioner has been suffering from the deadly disease like transitional carcinoma (cancer). The accused-petitioner is entitled to bail on health ground as he has been suffering from deadly disease like cancer. *Mahfuz Ali vs State, represented by the DC, Chittagong (Criminal)* 454

Companies Profit (Workers Participated) Act, 1968

Section 2(f)—Applicants who had participated in the profits of the Company in their capacity as 'workers' in accordance with the Act of 1968, had acquired a vested right to participate in the Company's profits, which has not been taken away by an express 'provision of law. *Mehdi Hassan (Md) and another vs Government of Bangladesh (Spl Original)* 472

Constitution of Bangladesh, 1972

Article 40—To do lawful business or trade subject to restriction of law is one of those provisions which cannot be curtailed or throttled in any manner by any authority. *Eastern Money Changer vs Bangladesh Bank (Spl Original)* 417

Criminal Law Amendent Act (XL of 1958)

Section 10(1A)—Suo Motu Rule—Suo-motu Rule be issued so far as it relates to discharging accused persons from the charges should not be set-aside and why they should not be proceeded with trial in accordance with law. *Engineer Abdul Wadud vs State (Criminal)* 468

Limitation Act (IX of 1908)

First Schedule, Article 144—Adverse Possession—Whenever the plaintiff claims title by adverse possession he is duty bound to prove that his possession was adverse and hostile against the real owner for more than 12 years within the knowledge of the real owner and others. *Mina Begum and others vs Joj Miah (Civil)* ... 422

Muslim Marriages and Divorce (Registration) Rules, 2009

Rule 8—The word "তথ্য" correspond to the information as provided under Rule 8 of the Rules, 2009. Since government has not alleged violation of Rule 8 on the allegation of submitting forged DO letter, which does not regulate the appointment of a Nikah Registrar cannot be cancelled within the framework of Rules, 2009, the license of the petitioner as a Nikah Registrar cannot be knocked down on that count only. *Mahmodul Hasan (Md) vs Government of Bangladesh (Spl Original)* 464

Rule 11—Question of revocation of license will come into play only on the allegation of misconduct as defined in Rule 11 of the Rules, 2009. *Mahmodul Hasan (Md) vs Government of Bangladesh (Spl Original)* ... 464

Pre-Shipment Inspection Rules, 2002

Rule 13(2)(3)—Sub-rule (3) of Rule 13 provides that in determining the price, the PSI agent shall obtain information from the exporter in light with the valuation agreement and the said information should be attached to the CRF certificate concerned. If it appears to the concerned PSI agent that the price of the goods has been under-invoiced, it may increase the price in its certificate. However, before such increase, the exporter has to be given proper opportunity to explain the reasons for declaring the lower price in the invoice and, in that case, the PSI agent must attach such explanation behind such enhanced price in the CRF certificate upon receiving all information from the exporter. *Commissioner of Customs vs Customs, Excise and VAT (Spl Statu)* 439

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

Section 96—Pre-emption—A year-to-year lessee under the Government cannot defeat the right of pre-emption of the contiguous land-holders. *Chandu Sheikh (Md) vs Aynal Sheikh (Civil)* ... 427

Pre-emption—The statutory right of pre-emption of the pre-emptor cannot be thwarted by mere verbal assurance unless other facts and circumstances clearly make out a case of estoppel, waiver and acquiescence. The right of pre-emption of the pre-emptor cannot be skirted round by mere invocation of their verbal assuranc. *Chandu Sheikh (Md) vs Aynal Sheikh (Civil)* 427

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