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Appellate Division

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Section 4—The writ-petitioner is a Government servant and her whole grievance is that she was not being given promotion as Headmistress of the primary school counting her seniority from the date of her appointment like the other persons who were appointed along with her on the same date. The proper forum for redressing her grievance was the Administrative Tribunal under section 4 of the Act. *Government of Bangladesh and others vs Mukul Begum (Civil)* 188

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Articles 117 and 29—Claim of seniority and promotion of the writ-petitioner definitely falls within the terminology "of the terms and conditions of his service" as used in section 4 of the Act the Administrative Tribunal had the absolute jurisdiction to look into the matter including the question of discrimination as envisaged in Article 29 of the Constitution. *Government of Bangladesh and others vs Mukul Begum (Civil)* ... 188

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Section 304, Part I—A sentence of imprisonment of twenty years under the first part of section 304 of the Code is palpably erroneous. If life imprisonment is not awarded, the maximum term of imprisonment that may be imposed upon conviction of an offence under the first part of section 304 of the Code cannot exceed ten years. *Mati alias Md Matiar Rahman vs State (Criminal)* 192

Award—Court is competent to set-aside an award where there is an error of law apparent on the face of award. *Project Director, PL vs A Latif Company Ltd (Civil)* 199

and that the female child given birth by Sufia was the result of such relationship and that she was killed somewhere else by some other persons. The very presence of spermatozoa in the vaginal swab shows that accused-Tajel shared the same bed and he had physical relationship with Sufia on the fateful night. The learned Sessions Judge also came to the same finding considering the post mortem report of Sufia and the other evidence of the PWs discussed above. But the High Court Division, while acquitting accused-Tajel from the charge under section 302 of the Penal Code, did not at all consider that evidence. From the impugned judgment, it appears that the High Court Division did not feel it safe to rely upon the evidence of PWs. 4, 5, 8, 9 and 10 on the ground that there was bitter enmity between the PWs and accused-Dr Nurul Hoque as he filed a criminal case against them.

16. Let us see the evidence in that respect. PW 1 in his cross-examination admitted that before the occurrence, accused-Dr Nurul Hoque filed a case implicating him as an accused alleging the commission of an offence over the catching of fish (in the deposition sheet, in Bangla, it has been recorded as ("মাছ মারা কেসে আমাকে আসামী করে") and in that case, Humayun (PW 5) Asmat (PW 4), Sattar (PW 8), Sona Mia (PW 9) and Shahadat (PW 10) were also made accused and PW 4 in his cross-examination admitted that accused-Dr Nurul Hoque filed a case against him. Thus it appears that by extracting the fact through cross-examination as to the filing of a criminal case by accused-Dr Nurul Haque against the informant and the other witnesses, the defence tried to show that as there was enmity between accused-Dr Nurul Hoque and the prosecution witnesses, they deposed falsely. In the case of *Abdul Mannan and others vs State, 44 DLR (AD) 60,* this Division held "But then in a case where bitter enmity is admitted between the parties it is required as a rule of prudence that there should be some such corroboration of the evidence of the interested witness or witnesses as may inspire confidence in the mind of the court as to the truth of the prosecution case." This view has been reiterated in the case of the *State vs Abdul Kader alias Kada, 19 BLT (AD) 38,* "The recognized principle is that where there is enmity between the parties in the proceeding the Rule of prudence requires corroboration of the evidence of the prosecution witnesses, who are deposing against the accuseds(sic) in the dock and with whom their (sic) is enmity of serious kind, by the independent witness." Except PWs. 1 and 4, no suggestion was given to the other PWs that they deposed in the case falsely because of enmity over the filing of criminal case by accused-Dr. Nurul Hoque against them. Although PWS admitted in cross-examination that accused-Nurul doctor filed a case, he emphatically asserted that he was not an accused in that case. Enmity over the filing of the case by accused-Dr Nurul Hoque, does not appear to be of "serious kind" as observed in the case of *State vs Abdul Kader @ Kada and others,* reason being that the offence alleged in the case filed by accused-Dr Nurul Hoque, was over the catching of fish. More so, in the absence of any suggestion to PWs. 5, 8, 9 and 10 that they deposed in the case falsely as accused-Dr Nurul Hoque filed a case against them, it cannot be presumed that they deposed out of enmity. Admittedly, none saw the occurrence, i.e. to kill the deceased (Sufia and Buri) and the entire prosecution case is dependent upon the facts whether deceased-Sufia was the married wife of accused-Tajel and whether on the occurrence night, she along with her baby daughter was in the house of accused-Tajel, which the prosecution succeeded to prove beyond reasonable doubt. Therefore, the prosecution need not prove any other corroborative evidence.

17. Now, the last question to be decided is whether Sufia met a natural death or was done to death. In the post mortem report (exhibit-'4'), the doctors opined that the death of Sufia Khatun was natural. The learned Sessions

Judge discarded the opinion of the doctors that Sufia died a natural death (reasons assigned by the learned Sessions Judge have been noted hereinbefore, so those are not repeated herein) and considering the evidence of the PWs came to the positive finding that Sufia was done to death on 9-10-1998. The dead body of Sufia was found at the low land behind the house of one Rahman and not at the house of the accused. This fact was proved also by PWs. 1, 2, 6 and 10. The inquest report (exhibit-'1') also shows that the dead body of Sufia was found on the low land behind the homestead of one Rahman, son of late Wahed. Had Sufia met a natural death than the question of lying her dead body on the low lying land behind the house of another instead of her husband's house, would not have arisen. More so, none of the PWs stated that Sufia had been suffering from any disease or illness and she died due to such disease or illness. Even the defence did not give any suggestion that Sufia died due to any disease or illness. The defence only suggested that Sufia died out of shock of the death of her child. PWs. 1, 2, 5, 6, 8, 9 and 10 categorically stated that Sufia was killed. In view of the above facts and circumstances and the evidence of PWs. 1, 2, 5, 6, 8, 9 and 10, no reliance can be put upon the opinion of the doctors that Sufia met a natural death and the learned Sessions Judge rightly discarded the opinion of the doctors. In the context, we like to observe that the 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. In this regard, it may be recalled that though the doctors found "diffused sign of ecymosis on the buttocks", they did not give any comment about the said mark of injury. The doctors did not also give any opinion as to how and for what disease Sufia met a natural death. The evidence as discussed has clearly established beyond doubt that Sufia was done to death and she did not meet a natural death.

18. So far as Buri is concerned in the post mortem report (exhibit-'5'), it has been clearly opined that the cause of death was suffocation which was ante-mortem and homicidal in nature. The dead body of Buri was also found in the bush (ঝোপের মধ্যে) wrapped in a kantha by the side of the pond of accused Dr Nurul Hoque on the next morning following the night in which the dead body of Sufia was found. All the PWs also stated in their testimonies that Buri was killed. We find no reason to hold otherwise.

19. It does not require any reference to any decision for the legal proposition that in the case of killing of a wife, if it is found that wife stayed with the husband at the relevant time, the husband owes an explanation as to how his wife was killed or was done to death. We have already found that deceased Sufia was the married wife of accused-Tajel and through their wedlock a female child named Buri was born and on the fateful night, they were with accused-Tajel. We have also found that on the fateful night, accused-Tajel lived in the same bed with Sufia, so he was under an obligation to explain as to how Sufia and her 2(two) months old baby met the death, but no explanation was given by accused-Tajel Sheikh. Therefore, he cannot escape the liability of the commission of offence under section 302 of the Penal Code and the learned Sessions Judge rightly found him guilty under the said section of the Penal Code.

20. So far as respondent Nos.2-4, namely: Md Rezaul Hoque, Rokeya Begum and Dr Nurul Haque are concerned, the learned Sessions Judge found them guilty under sections 302/201 of the Penal Code on the finding

that they took leading part in the occurrence of the disappearance of the evidence "of murder caused by accused Tajel by leaving the dead body of Sufia in the low land" behind the house of the husband and the dead body of Buri in a bush situated on the western bank of the pond of accused-Dr Nurul Haque and by giving fake information that Sufia Khatun had been missing. The High Court Division did not say anything about the finding of guilt of the charges brought against the above 3(three) accused under sections 302/211 of the Penal Code. From the tenor of the judgment of the High Court Division, it appears that as it disbelieved the prosecution case of marriage between deceased Sufia and accused-Tajel and her staying with accused-Tajel along with her daughter at the house of accused-Tajel, it did not feel it necessary to deal or discuss with the said charge and allowed the appeal on the finding that "the prosecution hopelessly failed to prove the charge levelled against the accused-appellants beyond all reasonable doubt. "On scrutiny of the testimonies of the PWs, it appears that none of the PWs said anything about the involvement of accused-Rezaul Haque and Rokeya Begum in any manner whatsoever with the disappearance of the evidence of murder of Sufia and Buri and in keeping their dead bodies on the land of one Rahman and in the bush on the western bank of the pond of Dr Nurul Haque respectively and in giving fake or false information about the missing of deceased-Sufia. The only evidence that is available in this regard is that accused-Dr Nurul Haque at about 11-30 told PW 1 that Sufia was found missing/untraceable and PW 4 (no time has been mentioned) that Sufia was not traceable though, in fact, she was done to death and her dead body was found on the land of one Rahman. So, the finding of the learned Sessions Judge against accused-Rezaul Haque and Rokeya that they took leading part in the occurrence in disappearing the evidence of murder of Sufia and Buri caused by accused-Tajel has got no basis. Therefore, we find no reason to interfere with the order of acquittal of these two accused of the charges brought against them under sections 302/201 of the Penal Code. But there being evidence of giving false information by accused-Dr Nurul Hoque to PW 1 and PW 4 that Sufia was missing although, in fact, she was killed, he committed the offence within the meaning of sections 302/201 of Penal Code and his conviction under the said sections awarded by the learned Sessions Judge does not call for interference and accordingly, the same is maintained. However, we are inclined to give the benefit of section 35A of the Code of Criminal Procedure to accused-Dr Nurul Hoque, i.e. the period during which he suffered in jail hajat before the order of conviction and sentence passed by the learned Sessions Judge shall be deducted from his sentence of imprisonment.

21. In the result, the appeal is allowed in part. The judgment and order of the High Court Division so far as it relates to respondent No. 1-Tajel Sheikh @ Md Tajul Sheikh (as described in the cause title of the petition of appeal, his correct name is Md Tajel Sheikh as mentioned in the charge-sheet and in the judgment of the trial Court) and Nurul Hoque (as described in the cause title of the petition of appeal, his correct name is Dr Nurul Haque as mentioned in the charge-sheet and the judgment of the trial Court) is set-aside. The order of conviction and sentence passed by the learned Sessions Judge, Rajbari in Sessions Case No.24 of 1999 convicting them under sections 302 and 302/201 of the Penal Code respectively and sentencing Tajel Sheikh to suffer imprisonment for life and to pay a fine of Taka 10,000 (ten thousand) in default to suffer rigorous imprisonment for l(one) year more and sentencing Dr Nurul Haque to suffer rigorous imprisonment for five years and to pay a fine of Taka 5,000 in default to suffer rigorous imprisonment for six months is restored. But Dr Nurul Hoque shall get the benefit of section 35A of the Code of Criminal

Procedure, ie the period which he suffered in jail hajat as under trial prisoner shall be deducted from his sentence.

The judgment and order passed by the High Court Division so far as it relates to respondent Nos.2 and 3, namely, Rezaul Haque and Rokeya Begum is maintained.

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
March 11th, 2014.

Government of Bangladesh and others..Petitioners

vs

Mukul Begum.....
.....Respondent*

Administrative Tribunal Act, 1980 (VII of 1981)
Section 4

The writ-petitioner is a Government servant and her whole grievance is that she was not being given promotion as Headmistress of the primary school counting her seniority from the date of her appointment like the other persons who were appointed along with her on the same date. The proper forum for redressing her grievance was the Administrative Tribunal under section 4 of the Act. .....(13)

*Civil Petition for Leave to Appeal No. 2139 of 2011.

(From the judgment and order dated the 3rd day of January, 2011 passed by the High Court Division in Writ Petition No.980 of 2010 with Writ Petition No.979 of 2010).

Constitution of Bangladesh, 1972
Articles 117 and 29

Administrative Tribunal Act, 1980 (VII of 1981)
Section 4

Claim of seniority and promotion of the writ-petitioner definitely falls within the terminology "of the terms and conditions of his service" as used in section 4 of the Act the Administrative Tribunal had the absolute jurisdiction to look into the matter including the question of discrimination as envisaged in Article 29 of the Constitution. .....(13)

Mujibur Rahman vs Government of Bangladesh, 44 DLR (AD) 111; SP Sampath Kumar vs Union of India, AIR 1937 SC 386 and JB Chopra vs Union of India AIR 1987 SC 357 ref.

Mahbubey Alam, Attorney-General instructed by B Hossain, Advocate-on-Record—For the Petitioners.

Mukul Begum, in person—For the Respondent.

Judgment

Md Abdul Wahhab Miah J: The writ-respondents have filed this petition for leave to appeal calling in question the judgment and order dated the 3rd day of January, 2011 passed by a Division Bench of the High Court Division in Writ Petition No.980 of 2010 heard analogously with Writ Petition No.979 of 2010 making the Rules absolute.

2. From the petition, it appears that the sole respondent, Mukul Begum (hereinafter referred to as the writ-petitioner), filed Writ Petition No.980 of 2010 challenging the provision of bidhi 4 of the উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ১৯৯৫ (the Bidhimala, 1995) promulgated for determining the seniority of the persons absorbed in the revenue budget from the development budget as *ultra vires* the Constitution of

the People's Republic of Bangladesh (the Constitution) and also for direction upon the writ-respondents for promoting her as Headmistress (in the writ petition it was wrongly written as Headmaster) counting her seniority from the date of her appointment as a teacher. But, as it appears from the record that with the leave of the Court, the prayer of the writ petition was corrected and the Rule was issued according to the corrected prayer calling upon the writ-respondents to show cause as to why they shall not be directed to count the seniority of the writ-petitioner with effect from 5-11-1987.

3. The case of the writ-petitioner as made out in the writ petition, in short, was that she participated in the selection process of the primary school teachers held by Tongibari Upazila of Munshiganj District in 1987 by attending written test and viva-voice to get an employment as a primary school teacher. The writ-petitioner stood 5th in the merit list of 49 different candidates prepared on 18th October 1987 on the basis of written examination and viva-voice for the appointment in the post of assistant primary school teacher. The Director General, Primary Education, vide order dated 17-10-1987 bearing Memo No.16735/2 Bidda (Dhaka), appointed the writ-petitioner as an Assistant Teacher of Naya Gaon Government Primary School, Tongibari, Munshiganj under an office order of the Upazilla Parishad, Tongibari, Munshigonj dated 22-10-1987. From 61 candidates, 32 candidates were appointed against vacant posts and 29 candidates were appointed against the newly created post. The writ-petitioner was totally in darkness regarding her appointment in the development budget, because she faced, all the way, the same procedure of appointment, same written test and same viva-voice with the candidates who were appointed in the revenue budget.

4. The writ-petitioner was never aware of "the caricature" of regularization of her job from development to revenue budget and she noticed that the teachers appointed along with her or even the teachers junior to her got promoted as the Headmaster/Headmistress while she faced difficulty to be promoted like them. In the meantime, four assistant teachers who got appointed along with the writ-petitioner, had already been promoted as the Headmasters who were also appointed against the newly created posts in the development budget by the office order of the District Primary Education Officer dated 29-10-1997. When all the colleagues of the writ-petitioner and other junior teachers got promoted as the Headmasters, the writ-petitioner on 22-11-2005 filed an application to the Director General of Primary Education to promote her as the Headmistress counting her seniority from the day of her appointment as a teacher, but the Director General of Primary Education never took any initiative to establish her fundamental rights as guaranteed by the Constitution. Again, in 2009, when the Government was filling the vacant posts of the Headmasters in different schools promoting from the assistant teachers, the writ-petitioner on 18-1-2009 filed an application to the District Primary Education Officer to include her name in the gradation list for promotion. This application of the writ-petitioner proved to be of no use as the District Primary Education Officer never considered her prayer to include her name in the gradation list counting her seniority from the day of appointment. Finally, on 23-8-2009, the writ-petitioner and other five deprived assistant teachers of different schools of Srinagar Upazilla of Munshiganj applied to the Director General of Primary Education to include their names in the gradation list for promotion as the Headmaster/Headmistress from the position of assistant teacher. Their applications were recommended by the local Member of Parliament. The Upazilla Education Officer forwarded the application of the writ-petitioner to the Director General of Primary Education for decision who in turn instructed the Upazilla Education

Officer to count her seniority from the 10th day of January 2008 which is the date of her regularization in the revenue budget. The Upazilla Education Officer accordingly communicated the said decision to the writ-petitioner by a letter dated the 31st day of January, 2010. In the circumstances, the writ-petitioner finding no other equally efficacious remedy provided by law filed the writ petition.

5. In the writ petition, it was contended that bidhi 4 of the Bidhimala, 1995 was, in no way, relevant to the writ-petitioner because she was never communicated by the Government decision to employ her in the development budget. She was appointed before the promulgation of the aforesaid Bidhimala; therefore, the provisions of the Bidhimala could not attract the terms of her employment. A person appointed in 1987 could not be shown regularized in 2008 only showing the excuse of the Bidhimala, 1995. The latches in the Government side to regularize an employee in time even after repeated application could not be supported by any bidhi or otherwise.

6. The writ-petitioner also filed a supplementary affidavit stating, *inter alia*, that the decision of the Director General of Primary Education to count her seniority from the 10th day of January 2008, i.e. the date of her regularization in the revenue budget on the forwarding by the Upazilla Education Officer was taken on the basis of the provision of bidhi 4 of the Bidhimala, 1995. In support of the statement, the letter issued by the Assistant Director (Schools) on behalf of the Director General of Primary Education was annexed.

7. From the impugned judgment and order, it does not appear that any affidavit-in-opposition was filed by the writ-respondents controverting the statements made in the writ petition. However, during hearing, verbal submissions were made on behalf of the writ-respondents opposing the Rule.

8. A Division Bench of the High Court Division, hearing the writ petition along with Writ Petition No.979 of 2010 filed by one Md Arif Hossain having similar grievance, made both the Rules absolute directing the writ-respondents concerned "to count the seniority of the respective petitioners with effect from 5-11-1987 within a period of 90 days from the date of receipt of the judgment and order." Hence this petition for leave to appeal.

9. From the impugned judgment, it appears that the High Court Division considering bidhi ২(ঘ), ২(ছ) with bidhi 3 and bidhi 4(1) of the Bidhimala, 1995 and Memo No. ১আই/১ বিদ্যা-ঢাকা/২০০০/২১৩৫/১৪ dated 9-5-2002 issued by the Assistant Director (Education), Dhaka on behalf of the Director General, Primary Education, Government of Bangladesh and the fact that the other assistant teachers, who were appointed on the same date along with writ-petitioner, i.e. on 22-8-1987 against 'নবসৃষ্ট পদে,' had already been promoted to the posts of Headmaster/Headmistress counting their seniority from the date of their joining came to the finding that the writ-petitioner, who stands at par with those teachers, could not be said that she was appointed in the development project in 1987 and was absorbed subsequently in the revenue budget. The High Court Division came to the further finding that since the writ-respondents hopelessly failed to show that the writ-petitioner was appointed under the development budget and was transferred to the revenue budget in due compliance of the Bidhimala, 1995, the issuance of the impugned order dated 31-1-2010 by respondent No.3 intimating her that her seniority would be counted from the date of regularization i.e. 10-1-2008 was absolutely unlawful and hence, was of no legal effect.

10. From the impugned judgment, it appears that on behalf of the writ-respondents, a point was taken specifically that the writ-petitioner being a Government servant, the proper

forum to redress her grievance, if any, was the Administrative Tribunal and she could not invoke the writ jurisdiction of the High Court Division under article 102 of the Constitution, consequently, the writ petition was not maintainable and the Rule was liable to be discharged on the ground of maintainability alone. The High Court Division discarded the said objection taken by the writ-respondents on the finding that as the colleagues of the writ-petitioner who were appointed on the same date along with her had already been promoted to the posts of Headmaster as back as in 1987, she was discriminated by not promoting her as the Headmistress and thus the writ-respondents violated article 29 of the Constitution, so article 117 thereof could not be a bar for invoking the writ jurisdiction of the High Court Division.

11. Before this Court, besides taking other grounds, a ground has been taken as to the maintainability of the writ petition and that is quoted below:

> "III. For that the writ petitioners being members in the service of the Republic and the matter having being related to the terms and conditions of their service, their remedies if any having lying before the jurisdiction of administrative tribunals, the High Court Division erred in law in entertaining the writ petition and making the rule absolute with some direction sitting in special original statutory jurisdiction under Article 102 of the Constitution of the People's Republic of Bangladesh,"

12. On 27-2-2014, when the leave petition was taken up for hearing, Mr Mahabubey Alam, learned Attorney-General, appeared on behalf of the leave petitioners, whereas the writ-petitioner-respondent appeared in person. The learned Attorney-General vigorously pressed the ground as quoted hereinbefore relying on the case of *Mujibur Rahman vs Government of Bangladesh, 44 DLR (AD) 111.* Considering the fact that the assertions of the writ-petitioner made in the writ petition that the other assistant teachers who were appointed on the same date along with her by the same appointment letter and even the teachers junior to her had already been promoted as the Headmaster/Headmistress of the Primary Schools which were not denied by the writ-respondents by filing any affidavit-in-opposition; it *prima-facie* appeared to this Court that a great injustice had been meted out to the writ-petitioner-respondent in not promoting her to the post of Headmistress; we asked the learned Attorney-General to take up the matter with the relevant authority and to see that the writ-petitioner would get promotion to the post of Headmistress to which he agreed and accordingly, the hearing of the leave petition was stand over till 10-3-2014. And on this date (10-3-2014), the learned Attorney-General informed this Court that he had talked to the Director General, Primary Education and conveyed the message of this Court, but nothing tangible was done. In the circumstances, we asked the Director General, Primary Education to appear before this Court on 11-3-2014 at 9-00 AM. Accordingly, the office of the Attorney-General communicated the said order of this Court to Shyamol Kanti Ghose, Director General, Primary Education and today (11-3-2014), he has appeared in person before this Court and has informed that in the meantime, on 10-3-2014, the writ-petitioner has already been promoted to the post of Headmistress and has been posted against the vacant post at Nagorvogue Government Primary School and produced the letter of appointment issued by the District Primary Education Officer, Munshiganj. The writ-petitioner-respondent who appeared in person has confirmed the said fact and has informed this Court that she has already joined the concerned School as its Headmistress.

13. In view of the fact that the writ-petitioner has already been promoted to the post of Headmistress and she has already joined her new place of posting as the Headmistress. In

fact, the instant leave petition has lost its legal efficacy as regards the grievance of the writ-petitioner. In the context, it will not serve any meaningful purpose if leave is granted on the point raised by the learned Attorney-General before this Court. However, we want to keep on record that the writ-petitioner is a Government servant and her whole grievance is that she was not being given promotion as Headmistress of the primary school counting her seniority from the date of her appointment like the other persons who were appointed along with her on the same date. The proper forum for redressing her grievance was the Administrative Tribunal under section 4 of the Administrative Tribunal Act, 1980 (the Act, 1980). The High Court Division was absolutely wrong in discarding the objection raised by the writ-respondents as to the maintainability of the writ petition in view of the provisions of article 117(2) of the Constitution on the view that "the petitioners cannot be discriminated and the respondents having violated Article 29 of the Constitution. Article 117 of the Constitution cannot be a bar for invoking jurisdiction under Article 102 of the Constitution." In taking the said view, the High Court Division totally failed to take notice of the principle of law enunciated by this Court in the case of Mujibur Rahman (Md) (supra). In that case, this Court held that "within its jurisdiction the Tribunal can strike down an order for violation of principles of natural justice as 'well as for infringement of fundamental rights, guaranteed by the Constitution, or of any other law, in respect of matters relating to or arising of sub-clause (a), but such tribunals cannot, like the Indian Administrative tribunals in exercise of a more comprehensive jurisdiction under Article 323A (see *SP Sampath Kumar vs Union of India, AIR 1937 SC 386 (Para 16) and JB Chopra vs Union of India AIR 1987 SC 357* (Para 2), strike down any law or rule on the ground of its constitutionality. A person in the service of the Republic who intends to invoke fundamental right for challenging the *vires* of a law will seek his remedy under Article 102(1), but in all other cases he will be required to seek remedy under Article 117(2)", this view has been consistently followed by this Court. And the claim of seniority and promotion of the writ-petitioner definitely falls within the terminology "of the terms and conditions of his service (here it would be her service)" as used in section 4 of the Act, 1980, the Administrative Tribunal had the absolute jurisdiction to look into the matter including the question of discrimination as envisaged in article 29 of the Constitution.

With the above observations, this petition is disposed of.

Ed.

Appellate Division
(Criminal)

Nazmun Ara Sultana J
Md Imman Ali J
Md Anwarul Haque J
Hasan Foez Siddique J

Judgment
July 23rd, 2013.

Mati alias Md Matiar Rahman...Appellant

vs

State....Respondent*

Penal Code (XLV of 1860)
Section 304, Part I

A sentence of imprisonment of twenty years under the first part of section 304 of the Code is palpably erroneous. If life imprisonment is not awarded, the maximum term of imprisonment that may be imposed upon conviction of an offence under the first part of section 304 of the Code cannot exceed ten years. .....(10)

*Criminal Appeal No. 51 of 2003.

(From the judgment and order dated 1st July, 2002 passed by the High Court Division in Criminal Appeal No. 303 of 1987)

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

Shohrowardi, Deputy Attorney-General instructed by B Hossain Advocate-on-Record—For Respondent.

Judgment

Md Imman Ali J: This criminal appeal, by leave, is directed against the judgment and order dated 1-7-2002 passed by the Division Bench of the High Court Division in Criminal Appeal No. 303 of 1987 (Dhaka) allowing the appeal in part with modification of the sentence of accused appellant Mati alias Md Matiar Rahman to suffer rigorous imprisonment for 20 (twenty) years under the first part of section 304 of the Penal Code instead of imprisonment for life under section 302/34 of the Penal Code.

2. An incident took place on 27-11-1985 at about 2.00 PM when the accused, appellant herein, along with others is alleged to have caused injury, resulting in the death of victim Wahir Uddin. In due course trial was held and the appellant and another were found guilty under sections 302/34 of the Penal Code and sentenced to imprisonment for life by judgment and order dated 25-3-87. On appeal, by the impugned judgment and order the High Court Division allowed the appeal in part with modification of sentence of the appellant Mati alias Matiar Rahman to suffer rigorous imprisonment for 20 (twenty) years under the first part of section 304 of the Penal Code instead of imprisonment for life under section 302/34 of the Penal Code.

3. Hence, the appellant had filed the Criminal Petition for Leave to Appeal No.99 of 2003 before this Division. Upon hearing, Leave was granted to consider the following ground:

> "Because the Hon'ble High Court Division erred in law in awarding twenty years of sentence upon the accused appellant petitioner after converting his offence under section 302/34 to 304 part I of the Penal Code which means he was found guilty of culpable homicide not amounting to murder and in that case the section 304 part I prescribes two sentences imprisonment for life (which means 30 years as per ordinance XLI of 1985) or imprisonment extending to 10 years and the High Court Division was pleased to award the sentence of 20 years not provided by section 304 part I and in that view of the matter the impugned Judgment and order of sentence is bad in law and is liable to be set-aside ".

4. Mr Muhammad Nawab Ali, the learned Advocate-on-Record appearing on behalf of the appellant submits that the law does not permit imposition of a sentence of rigorous imprisonment of twenty years. The maximum sentence that could be imposed, other than sentence for imprisonment for life, would be a sentence of imprisonment up to ten years. He submits that, therefore, the sentence imposed by the High Court Division is illegal.

5. Mr Shohrowardi, the learned Deputy Attorney-General appearing on behalf of the State submitted that in fact for the reasons given by the High Court Division, the conviction under section 302/34 of the Penal Code should have been upheld. However, having altered the conviction to one under the first part of section 304 of the Penal Code, the sentence of imprisonment for life could have been given. But since a term of imprisonment was imposed by the High Court Division, that term could not exceed 10 years in accordance with the law.

6. We have considered the submissions of the learned Advocate-on-Record appearing on behalf of the appellant and the learned Deputy Attorney-General appearing on behalf of the State and perused the impugned judgment of the High Court Division and other connected papers on record.

7. We note from the leave granting order

that the only point raised in this appeal is with regard to the legality of the sentence of rigorous imprisonment for 20 (twenty) years imposed by the High Court Division upon altering the conviction of the appellant to one under the first part of section 304 of the Penal Code.

8. The first part of section 304 of the Penal Code provides as follows:

> "Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death".

9. It is noted that no appeal has been preferred against the alteration of the conviction from one under sections 302/34 of the Penal Code to one under the first part of section 304 of the said Code. Hence, we are required only to consider the legality of the sentence imposed by the High Court Division.

10. In view of the provisions of the Penal Code quoted above, a sentence of imprisonment of twenty years under the first part of section 304 of the Penal Code is palpably erroneous. If life imprisonment is not awarded, the maximum term of imprisonment that may be imposed upon conviction of an offence under the first part of section 304 of the Penal Code cannot exceed ten years.

11. In the view of the above discussion, we find merit in the appeal. Accordingly, the appeal is allowed. The appellant's conviction having been altered to one under the first part of section 304 of the Penal Code, he is hereby sentenced to rigorous imprisonment for ten years. The sentence imposed by the High Court Division is accordingly modified.

Ed.

Appellate Division
(Civil)

Nazmun Ara Sultana J, Syed Mahmud Hossain J, Md Imman Ali J } Shajahan Mia (Md) and others.....Appellants
vs
Government of the People's Republic of Bangladesh and others.....Respondents*

Judgment
May 22nd, 2014.

Code of Civil Procedure (V of 1908)
Section 98
Proviso

The word 'may' in the proviso cannot be read as equivalent to 'shall'. It is discretionary as no consequence has been provided for not stating the point of law upon which the learned Judges differed. The word 'shall', however, is used in the proviso in respect of hearing of the appeal by the Third Judge, who shall resolve only the law point, on which, the learned Judges differed.

Though the learned Judges did not specify the law point on which they differed, in such a situation, it was the duty of the learned third Judge to whom the matter was referred to ascertain the difference of opinion.

Learned Judge could detect the difference of opinion of the learned Judges of the Division Bench about the law point and resolved the issue accordingly. Therefore, for not merely stating the law point by the learned Judges, who differed with each other, the judgment delivered by the Third Judge cannot be said to have been passed without jurisdiction.

.....(16, 24 & 25)

*Civil Appeal No. 3 of 2003.

(From the judgment and order dated 17th May, 2001 passed by the High Court Division in First Appeal No.139 of 1997).

Sriram Industries Enterprise Ltd vs Union of India, AIR 1996 Allahabad 135 (FB) and Kazi Mukhlesur Rahman vs Bangladesh 26 DLR (SC) 44 ref.

Syed Amirul Islam, Senior Advocate, instructed by Md Nawab Ali, Advocate-on-Record—For the Appellants.

Abdur Rahman Howlader, Assistant Attorney General, instructed by B Hossain, Advocate-on-Record—For the Respondents.

Judgment

Syed Mahmud Hossain J: This appeal by leave by the plaintiffs-appellants is directed against the judgment and order of May 17, 2001 of the High Court Division passed by the learned 3rd Judge concurring with one of the learned Judges of the Division Bench before whom the First Appeal No.139 of 1997 came up for hearing and the learned Judges differed with each other in their decision. The learned Single Judge dismissed the appeal and consequent thereupon the appeal stood dismissed by majority view.

2. The appeal was filed against the judgment and decree of May 17, 1997 of the First Court of Subordinate Judge, Gazipur in Title Suit No.218 of 1985 (previously numbered as Title Suit No.48 of 1983) dismissing the same. The suit was filed by the predecessor of present leave petitioners and he died during pendency of the suit.

3. The plaintiff filed the suit seeking declaration of title in the suit land and for further declaration that the notification dated 11-8-1952 so far as it related to the suit land and the notification dated 29-4-1982 were illegal, null and void and not binding upon them.

4. Plaintiffs' case, in short, is that the suit land originally belonged to Girish Chandra Roy Chowdhury, the Zaminder of Kaliakoir. In the year 1342 BS, the plaintiff took settlement of 10.91 acres of land from the said Zaminder. Khondker Badaruddin and Khondker Amzad Hossain took settlement of 3.40 and 6.04 acres of land respectively from the said Zaminder and in respect of the said land S.A. records were prepared in their names. The said 2 persons transferred 3.04 acres of land to the plaintiff. Tirtha Boshi Roy and Sukur Ali transferred 3.00 and 2.99 acres of land respectively to the plaintiff. Thus the plaintiff acquired 22.99 acres of land. The plaintiff sold 3.20 acres of land to Kitab Ali and thus remained owner of 19.70 acres of land. Out of this land 10.32 acres of land were shown to have been acquired by the Forest Department. Plaintiff's contention is that the said inclusion was made without compliance with the provision of law and without serving notice upon him. It is also the contention of the plaintiff that while holding enquiry, the local Kanangoo found right, title and possession of the plainiff in the acquired land. Kitab Ali who purchased 3.20 acres of land from the plaintiff filed Title Suit No.142 of 1976 against the Forest Department seeking decree for a permanent injunction and the said suit was decreed.

5. The defendants contested the suit by filing written statement denying all the material statements made in the plaint. Their case, in short, is that the land in suit was acquired by notification dated 11-8-1952 of the Forest Department and later in LA Case No.4848 and 4849 of 1956-57 under section 20 of the State Acquisition and Tenancy Act the said land was acquired being non-retainable land of the Zaminder. It was also the case of the defendants that the decree in the suit filed by Kitab Ali was obtained *ex parte* upon suppression of summons and that an appeal as against the said decree has been pending.

6. On consideration of the materials on record by its judgment and order dated

17.05.1997, the trial Court dismissed the suit on the finding that the plaintiff failed to prove his title and possession in the suit land and that by forging papers plaintiff had been trying to grab the land and that from the evidence on record, it transpired that one Kitab Ali was in possession of a portion of the suit land.

7. Being aggrieved by and dissatisfied with the judgment and decree of the trial Court, the plaintiff preferred First Appeal No.139 of 1997 before the High Court Division.

8. The appeal came up for hearing before a Division Bench of the High Court Division. The learned Judges of the Division Bench differed with each other in arriving at common decision in the appeal and thereupon the appeal was referred to another Judge of the High Court Division. The learned Third Judge upon detailed discussion of the evidence and consideration of the materials on record by the judgment and order dated 17-5-2001 dismissed the appeal affirming the judgment and decree passed by the trial Court.

9. Feeling aggrieved by and dissatisfied with the judgment and order dated 17-5-2001 passed by the High Court Division, the plaintiff as the leave-petitioner moved this Division by filing Civil Petition for Leave to Appeal No.1843 of 2001, in which, leave was granted resulting in Civil Appeal No.3 of 2003.

10. Mr Syed Amirul Islam, learned Senior Advocate, appearing on behalf of the appellants, submits that since the learned Judges of the High Court Division did not state the law points, on which, they differed with each other and, as such, the judgment delivered by the learned Third Judge shall be deemed to have been passed without jurisdiction. He further submits that since the judgment passed by the learned Third Judge is without jurisdiction, First Appeal No.139 of 1997 should be heard afresh by a Division Bench of the High Court Division and, as such, the impugned judgment should be set-aside.

11. The plaintiff filed the suit seeking declaration of title in the suit land and also for declaration that the notification dated 11.08.1952 so far as it related to the suit land and the notification dated 29-4-1982 were illegal, null and void and not binding upon them.

12. First Appeal No.139 of 1997 was filed against the judgment and decree dated 17-5-1997 passed by the then learned Subordi-nate Judge, First Court, Gazipur in Title Suit No.212 of 1995 dismissing the same.

13. The learned Judges of a Division Bench of the High Court Division differed with each other in arriving at a common decision in the appeal and therefore, the appeal was referred to another Judge of the High Court Division by the learned Chief Justice. The learned Third Judge dismissed First Appeal No.139 of 1997 concurring with one of the learned Judges of the Division Bench.

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

> "Because of the provision in the proviso to the sub-section 2 of section 98 of the Code of Civil Procedure, the learned Judge on reference is to sit on judgment of 2 Judges differing with each other on point of law but in First Appeal No.139 of 1997, the learned Judges of the Division Bench without specifying the point of law as to which the learned Judges failed to arrive at a common decision referred the matter to the Hon'ble Chief Justice and thereby the Hon'ble Chief Justice referred the matter to the learned Third Judge who heard the appeal in the absence of different opinion by the learned Judges of the Division Bench on any point of law and, as such, the hearing of the appeal by the learned Third

Judge and giving judgment by the said learned Judge was an exercise without cause."

15. In order to address the grounds and the submissions made by the learned Senior Advocate of the appellants, it is necessary to go through the proviso to section 98 of the Code of Civil Procedure, which is quoted below:

"Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it."

16. Having gone through section 98 of the Code of Civil Procedure as a whole and the proviso thereto, in particular, we find that the word 'may' in the proviso cannot be read as equivalent to 'shall'. It is discretionary as no consequence has been provided for not stating the point of law upon which the learned Judges differed. The word 'shall', however, is used in the proviso in respect of hearing of the appeal by the Third Judge, who shall resolve only the law point, on which, the learned Judges differed.

17. In the case of *Sriram Industries Enterprise Limited vs Union of India, AIR 1996 Allahabad 135 (FB),* the question arose if the point of difference of the Judges is not stated what would happen. The above case did not arise out of section 98 of the Code of Civil Procedure but the principle laid down in that case may be followed. The learned Judges of the Full Bench held as under:

"There can be no doubt that the proper course for the Judges who have dissented in their respective opinions while hearing a writ petition is not to pass final order either allowing or dismissing the same but to state their point of difference after expressing their opinions. However, it will still be open to them to state the point upon which they have differed even if they have passed final orders. If the point of difference is not stated, it will be for the third Judge (or Judges) to whom the case is referred to ascertain the same and to give his (or their) opinion thereon." *(emphasis supplied)*

18. Having gone through the principle laid down in the above case, it appears that if the point of difference is not stated by the learned Judges, it will be for the Third Judge to whom the case is referred to ascertain the same and to give his opinion thereon.

19. According to Sub-Article (2) of Article 103 of the Constitution, an appeal to the Appellate Division from the judgment, decree, order or sentence of the High Court Division shall lie as of right where the High Court Division.

(a) Certifies that the case involves a substantial question of law as to the interpretation of the Constitution; or

(b).....

(c).....

20. In the case of *Kazi Mukhlesur Rahman vs Bangladesh 26 DLR (SC) 44,* the question arose before this Division as to what would happen when the High Court Division issued a certificate of appeal without stating the question of law involved as to the interpretation of the Constitution of Bangladesh.

21. This Division in paragraphs 7 and 8 of the judgment held as under:

7. We are in respectful agreement with the above views Article 103(2)(a) of our Constitution, *inter alia*, provides that an

appeal to the Appellate Division of the Supreme Court from the judgment, decree, order and sentence of the High Court Division shall lie as of right where the High Court Division certifies that the case involves a substantial question of law as to the interpretation of this Constitution. In the instant case a certificate purported to be under Article 103(2)(a) is there, but it gives no indication of application of the judicial mind to the question as to whether the case is a fit one for appeal to this Division. It is not only that the question or questions of law as to the interpretation of the Constitution which the learned Judges might have thought needed our consideration have not been mentioned, the certificate speaks of 'leave' which did not concern that Division at all. Strangely enough, the learned Judges thought the points raised in the application were so simple as to merit summary disposal and yet they granted the certificate. Such a mechanical approach cannot but call for strong disapproval. Indeed it was not that the appellant alone who felt aggrieved by the summary dismissal of his application by the High Court Division, the respondents also made the grievance that they were prejudiced by the summary disposal of the application since because of this they were denied the opportunity of filing an affidavit in that Division incorporating material facts.

(emphasis supplied)

8. In view, however, of the objection raised by the respondents against the form of the certificate, by way of abundant caution, the appellant filed a petition for special leave to appeal in which he raised the question whether Article 55(2) of our Constitution, by virtue of which the Prime Minister exercises the executive power of the Republic, authorizes him to enter into an international agreement of the kind as Delhi Treaty. This is a constitutional question which also floats on the surface of the brief judgment of the High Court Division, summarily dismissing the appellant's application. We are, therefore, of the opinion that the appeal before this Division is not incompetent, on the score of defective certificate.

(emphasis supplied)

22. From the principle expounded in the case referred to above, we find that though the learned Judges of the High Court Division did not state in their judgments, which question of law as to the interpretation of the Constitution is involved in the case, this Division held that for such defect, the appeal before this Division was not incompetent on the score of defective certificate.

23. The principle expounded in the case of Kazi Moklesur Rahman (ibid) may be applied in the case in hand by analogy.

24. In the case in hand, we are also of the view that though the learned Judges did not specify the law point on which they differed, in such a situation, it was the duty of the learned Third Judge to whom the matter was referred to ascertain the difference of opinion.

25. Having gone through the judgment of the Third Judge, we find that the learned Judge could detect the difference of opinion of the learned Judges of the Division Bench about the law point and resolved the issue accordingly. Therefore, for not merely stating the law point by the learned Judges, who differed with each other, the judgment delivered by the Third Judge cannot be said to have been passed without jurisdiction.

26. Therefore, we find that the grounds, on which, leave was granted are answered and accordingly, we do not find any substance in this appeal.

Accordingly, this appeal is dismissed without any order as to costs.

Ed.

Appellate Division
(Civil)

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

Project Director, PL and another.....
.....Appellants

vs

A Latif Company Ltd.....Respondent*

Judgment
May 14th, 2014.

Contract Act (IX of 1872)
Section 73

When an employer commits breach of contract, the contractor is entitled to claim damages. Section 73 of the Act provides for compensation of the party aggrieved by the breach of the contract. .....(17)

Arbitration Act (X of 1940)
Section 17

When the Court acts *suo motu* no question regarding making of deposit can arise. *Suo motu* power of the Court to invalidate an award can be exercised when there is a patent illegality or voidness. Under section 17 of the Act, the Court had ample power to go into the question of the validity of the award without any objection being filed by any of the parties to the arbitration. .....(18)

Contract Act (IX of 1872)
Section 73

The Arbitrator's defiance of the obvious policy enshrined in the provision of section 73 of the Act is so blatant that the Court may be justified in coming to the conclusion that the arbitrator was biased which became known only when the award was passed. .....(19)

Award

Court is competent to set-aside an award where there is an error of law apparent on the face of award. .....(16)

House of Lords in Government of Kelantan vs Duff Development Company LR 1923 AC 395; KM Shafi Ltd vs Government of Bangladesh, (1983) BLD (AD) 109; Adamjee Sons Ltd vs Jibon Bima Corporation, 45 DLR 89; Dwarka Das vs State of MP, (1993)3 SCC 500; AT Brij Paul Singh and Brothers vs State of Gujarat, AIR 1984 (SC) 703; Gujarat Water Supply and Sewerage Board vs Unique Erector (Gujarat) (P) Ltd. AIR 1989 (SC) 1973; Union of India vs Ajit Mehata, AIR 1990 Bombay 45; P. Mulji and Sons vs Kerala Produce Exporting Co. AIR 1976 Ker.03 and Premji Khubhabhai vs Union of India, AIR 1965 Assam and Nagaland 81 ref.

Rajik-al-Jalil, Deputy Attorney-General, instructed by B Hossain, Advocate-on-Record—For the Appellants.

Ahsanul Karim, Advocate, instructed by Mvi. Md Wahidullah, Advocate-on-Record—For the Respondent.

Judgment

Syed Mahmud Hossain J: This appeal by leave by the appellants is directed against the judgment and order dated August 23, 2003 passed by a Division Bench of the High Court Division in First Miscellaneous Appeal No.71 of 2001 arising out of the judgment and decree dated 8-1-2001 passed by the then learned Subordinate Judge, Third Court (now Joint District Judge), Dhaka in Title Suit No.153 of 2000 dismissing the same upon setting aside the award dated 5-2-2000 passed by the sole arbitrator.

*Civil Appeal No. 75 of 2006.

(From the judgment and order dated 23-8-2003 passed by the High Court Division in First Miscellaneous Appeal No.71 of 2001).

2. The title suit was filed for making the award dated 5-2-2002 a Rule of the Court.

3. The facts leading to the filing of this appeal, in a nutshell, are:

The respondent was awarded the contract for construction of 112 meters long pre-stressed bridge on Turag River and the Work Order was issued on 4-11-1995, but the same was sent to the contractor on 28-11-1995. While the contractor was executing the work, the Project Director, i.e., appellant No.1 cancelled the licence of the contractor on 3-4-1997 and also confiscated the earnest money. For settlement of the dispute that arose because of cancellation of the licence and confiscation of security money between the contractor and the authority, the contractor approached the authority for settling the dispute by arbitration and the authority being reluctant to appoint an Arbitrator the contractor applied to the Court for appointment of an Arbitrator and an Arbitrator was appointed by the Court on the joint application of the parties.

4. The contractor submitted his statement before the Arbitrator claiming Taka 18,00,31,308.80 and the authority submitted its rejoinder as against the claim of the contractor denying his claim. The Arbitrator made the award for an amount of Taka 7,07,35,962.40 with interest @ 16% till payment. In due course, the contractor filed the aforesaid title suit seeking a decree for making the award made by the Arbitrator a Rule of the Court.

5. The defendant filed written objection stating, *inter alia*, that although the initial bid was of Taka 99,49,729 and the same was the lowest and keeping the same effective the tender was invited for the 2nd time but nobody having had dropped bid the 1st bid was accepted. The contractor was required to execute the work by 6 months but he failed. As the contractor from the beginning was violating the terms of the contract and had failed to execute the work within the time fixed and, as such, the authority took action against the contractor in accordance with law. The contractor having had failed to execute the work, the authority had to take step for execution of the work since the work was a development work. The suit filed seeking a decree for making the award a Rule of the Court is liable to be dismissed.

6. The trial Court came to the findings, amongst others: After receiving the Work Order the contractor did not take any preliminary step for the construction of the bridge and that it did not complete the work within the time fixed. On different occasions the authority directed the contractor to start the work but the contractor did not start the work. The plea of not giving the lay-out plan was only an excuse since the plaintiff was not sincere in obtaining the lay- out plan. The contractor stacked some quantity of stones at the site of the bridge. The cement brought by the contractor was of inferior quality and the same was not accepted by the authority. Therefore, the trial Court dismissed the suit and set-aside the award dated 5-2-2000.

7. The contractor went on appeal before the High Court Division. The High Court Division allowed the appeal and thereupon made the part of the award (for Taka 1,07,35,962.40) a Rule of the Court on the finding that the trial Court misdirected itself in its approach on the legal debate and committed substantial error in the decision and the decision being unsustainable called for interference. The appellate Court has observed that awarding of Taka 6(six) crores as damage for loss of reputation and good will of business "get no leg to stand" and thereupon set-aside the award relating to that part of the claim of the contractor and held that awarding of Taka 92,55,140 towards the arrear contract money and Taka 14,80,822.40 i.e. 16% simple interest on Taka 92,55,140.00 as compensatory cost is quite legal and proper and thereupon maintained the part of the award amounting to Taka 1,07,35,692.40.

the cases. That opposition was placed before the Court by the learned Advocate for the BOT, Mr Kamal-ul-Alam who submitted that the Job Description Chart merely sets out the Petitioners' job description and that this refers only to the nature of the work done by them and not the mode or manner in which they discharge their responsibility. Predicated on this stance, Mr Alam has submitted that the Annexure 'X-2 Job Description Chart can, therefore, not be used as the basis for determining the manner in which the Petitioners perform their functions. The learned Advocate for the Petitioners Mr Siddiq in response to this contention of the BOT has referred to the judgment of the *Indian Supreme Court in DC Works. Ltd vs State of Saurashtra* reported in *AIR 1957(SC) 264* wherein it has been held that the *prima facie* test for the determination of the relationship between an employer and employee is that of the authority concentrated in the former to supervise and control work done by the latter not only in the matter of directing what kind of work the employee will engage in but also the manner in which this shall be discharged. Mr Siddiq submits that the job description in Annexure-, 'X2', therefore, reflects not only the work done by any given Petitioner but is also declaratory of the manner he or she does it. In this regard, he does the examples of certain of the Petitioners ostensibly exercising supervisory powers in the discharge of their responsibilities, thereby, bringing to the fore the manner or mode of discharge of their function. The mere reference to exercise of supervisory power, however, Mr Siddiq cautions, must not readily lead one to deduce that such powers of themselves cause an employee to cease to be treated as a worker with the meaning of section 233(1)(Ja) of the Act of 2006. This Court finds in that line of argument an appeal to this Court to necessarily draw a line between a general description of the mode of discharge of responsibility and the substance of that which is involved in the actual discharge of such responsibility. The appeal here is also to the tests laid down in the *Omar Sons* and *Hussain Mithu Cases*, i.e., that of ascertaining "the predominant nature of the services" rendered. Therefore, this Court finds it plausible that a person may indeed be exercising supervisory power short of engaging in managerial or administrative activity and, thereby, not falling under the mischief of the exclusionary provisions of section 233(l)(Ja)(2) of the Act of 2006. That seems to be in this Court's opinion the rationale behind the High Court Division's Judgment in *Mujibur Rahman vs Chairman, L, Court* reported in *31 DLR, 301*, wherein interpreting section 2(v) of the Employment of Labour (Standing Order) Act, 1965 (which is similar to section 233(l)(Ja) it was held that "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 the exercises function mainly of a managerial and administrative nature".

53. In light of the above, reversing to the Job Description Chart in Annexure-'X2' and as asserted by the learned Advocates both for the Company i.e., Mr Ashraful Hadi and indeed for the Petitioners, i.e., Mr Siddiq it is evident, that the Petitioners are therein shown not to have any power to appoint and dismiss other employees and/or make policy decisions on behalf of the Company. That being the case, and given this Court's subscription to the judicially sanctioned objective standards as above enumerated, it is found that the Petitioner before us in these Writ Petitions not being authorized to function in managerial or administrative capacities do indeed qualify to be termed 'workers' by operation of section 233(l)(Ja) of the Act of 2006.

54. It has been brought to this Court's attention that the state of affairs that has so operated within the Company for an unduly long period as above addressed has not only witnessed the BOT wresting full control of the

management and administration of the Funds from the Company as goes against the scheme and spirit of both the statutory regimes but that the BOT has done so in a manner resorting to arbitrary selection of beneficiaries for disbursal of the benefit from the Funds. This Court's attention has been drawn to the fact that the BOT has been disbursing funds on the basis of membership of the CBA, thereby, dislodging the applicable statutory criterion of entitlement to beneficial administration of the Funds based on employment status with that of membership in the CBA. Here, Mr Siddiq has explained at length that an employee in a Company while not figuring in the CBA Member, List may yet qualify to be termed a worker within the meaning of section 233(l)(Ja). Mr Siddiq aptly highlights that Chapter 15 of the Act of 2006 as relates to disbursement of funds in favour of workers by the BOT contains section 233(l)(Ja) as incorporates a specific definition of 'worker' exclusively for the purposes of that Chapter. On the other hand, the inclusion of names of workers in the CBA Member List as governed by section 202 of the Act of 2006 is governed wholly separately under Chapter 13 where yet a different definition of 'worker' is to be found. The obvious selective reliance, therefore, by the BOT on a Chapter 13 standard in preference to that found in section 233 (l)(Ja) is in the circumstances satisfactorily submitted to be arbitrary and manifestly perverse.

55. It is against that backdrop of an obvious arrogation of authority by the BOT clearly beyond the legislative intent and contemplation, egged on by the abdication of statutory responsibilities by the Company as well as the Government, that there arises a very aggravated situation in which the BOT is found over a prolonged period to have continued to ask itself the wrong questions in law and prevailed with impunity to exercise a jurisdiction that clearly is not within its mandate to exercise. Resultantly, the BOT has over this period continued to adversely impact upon the legitimate rights and interests of the Petitioners. Appropriately, to address and rectify such illegality this Court has not previously in similar circumstances shied away from intervening. Therefore, in Writ Petition No. 5111 of 2008 it was held, by this Court, that the voter list of a CBA election cannot be the basis and determinant of the status of a worker. Indeed, that Judgment in Writ Petition No. 5111 of 2008 has been expressly relied upon in Writ Petition No. 5024 of 2012. Furthermore, in favourably finding on the Petitioner's status as a 'worker' under section 233(l)(Ja) of the Act of 2006 in light of absence of any evidence forthcoming to establish that the Petitioner there otherwise discharged administrative, managerial or supervisory function, this court in Writ Petition No. 5011 of 2008 also pertinently referred to section 336 of the Act of 2006 as 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 অনুকুল হয়।"

56. Section 336 was found in that case to be declaratory of the fact that the Act of 2006 does not indeed take away any greater financial benefit that may have been enjoyed by a worker under the earlier legislation given of course he/she fulfils the criteria to be treated as a worker under the provisions of the law as above discussed. Their Lordships in Writ Petition No. 5111 of 2008 also found implicit in section 336 the principle that new legislation ought not to be applied detrimentally to workers and that financial benefits once given to a worker ought not to be readily taken away by subsequent law. Upon a specific query by this

Court, the learned Advocates for the Respondent No. 4, Company Mr Hadi and the Petitioner Mr Siddiq inform that an Appeal was filed by the BOT in Civil Appeal being No. 72 of 2010 against the Judgment in Writ Petition No, 5111 of 2008 but was subsequently dismissed for non-prosecution by the Appellate Division on 4-1-2012.

57. This Court finds section 336 an underpinning legislative intent to generally continue to extend benefits to workers meeting the criteria therein in preference to taking it way from them. Facts in the present instances attesting to fulfillment of the conditions to continued entitlement to benefit are found on record with regard, for example, to the Petitioner Nos. 1 and 2 in Writ Petition No. 7326 of 2009 whose earnings including entitlements received from the Funds under the Act of 1968 were much greater than that subsequently earned given that they were unlawfully deprived of sharing in the Company's profit as disbursed from the Funds. In that light, this Court finds merit in the submissions that section 336 may be invoked in the Petitioners' favour in the facts and circumstances.

58. At this juncture it is deemed prudent to consider a yet outstanding yet related issue, Mr Mahmudul Islam, appearing for the Respondent No. 2, BOT in Writ Petition No. 2227 of 2007 has argued against the maintainability of the said Writ Petition submitting that the Petitioners in that Writ Petitioner ought rather to have agitated their grievances under forums provided under labour law or even have filed a general Suit. Given the nature of the claims under Writ Petition No. 227 of 2007, Mr Islam has argued that under section 3(6) of the Act of 1968, the right to profits for 2006 was to have accrued to the Petitioners at the end of the year and are payable no later than nine months thereafter. In that context, Mr Islam argues that the maturity of that right, however, get arrested on 11-10-2006 with the coming into force of the Act of 2006 that, he submits, changed the definition of a 'worker' with a notably exclusionary connotation attached to it. The question posed by Mr Islam is whether the concerned Petitioners are therefore, to be deemed 'workers' at the time that their right would have otherwise matured under the Act of 1968, i.e., on 31-12-2006 but in fact could not under above circumstance. The response, Mr Islam submits, has inevitably to be in the negative given that on 31-12-2006 the BOT would on that date have to determine who a 'worker' is under the new Act of 2006. Mr Islam stresses that, should the Act of 2006 instead have come into effect on 1-1-2007 the scenario could have been vastly different and possibly more favourable for the Petitioners. Under that alternate scenario, the Petitioners would indeed have had a fully matured right on 31-12-2006 under the still extant Act of 2006 and, accordingly, been claimants to a fully matured entitlement.

59. This Court is unable to take into favourable consideration Mr Mahmudul Islam's argument above given its findings both regarding the maintainability of these two Writ Petitions and concerning clothing the Petitioners with the status of 'workers'. Given further that there is the common thread of employment for a minimum of six months that binds both definitions, of 'worker' in the Acts of 1968 and 2006, Mr Imran Siddiq has satisfactorily argued for the Petitioners in Writ Petition No. 2227 of 2007 to qualify as 'workers' on that criterion and, thereby, to be brought under the protective umbrella of section 336 of the Act of 2006 as above enunciated. It is noted further that this was the very legal rationale behind all of those Petitioners in Writ Petition No. 2227 of 2007 applying to this Court variously to be added as Petitioners in Writ Petition No. 7326 of 2009. It was expressly averred in these various applications for addition as parties that the applicants therein had fulfilled the conditions set out in section 2(f) of the Act of 1968 to be

classified as 'workers'. As such, the said applicants 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. The assertion further was of such vested right of the said applicants under the Act of 1968 to participate in the Company's profits in fact having been expressly preserved by section 336 of the Act of 2006. This Court, in allowing these applications variously, e.g. on 10-11-2009 and 19-1-2010, notably found in the applicants having an interest in the subject matter in Writ Petition No. 7326 of 2009 and indeed not having any interests inimical to the original Petitioners in Writ Petition No. 7326 of 2009. With the benefit of hindsight, this Court now finds that the said Orders of this Court stood and continue to stand on a firm substantive legal footing.

60. Given the findings above, and this Court's reading of the relevant provisions of law as above enunciated and their application to the facts and circumstances, it is found that the Petitioners do indeed qualify to be termed as 'workers' within the meaning of section 233(l)(Ja) of the Act of 2006. Those of the Petitioners who had been in employment of the Company prior to 2006 are also found by reference in particular to the Job Description Chart in Annexure-'X2' each to be of a status as does not bring them under the mischief of the exclusionary provisions of section 233(1)(Ja) (1) and (2). It is also found that the Company being the primary authority within the statutory scheme to determine on the nature, mode or manner and substance of the function and authority that each of the Petitioners discharges is, therefore, also necessarily clothed with the authority to authoritatively declare on the same in the manner as done in the preparation of the Job Description Chart in Annexure 'X-2'. Within such statutory scheme the Company is also found to discharge such function for the benefit and ready reference of the BOT that without further ado must rely on the adequacy and the veracity of the same and ensure a due disbursement of benefits from the Funds. To that end, and bearing in mind that this is a Writ in Mandamus, this Court now directs the Company to forward the Job Description Chart annexed as Annexure 'X2' in its entirety and with other supporting documents as relevant to the BOT within a period of 1 (one) week from receipt of a certified copy of this judgment and Order for due disbursement of funds to all the Petitioners concerned. The BOT shall, effect such disbursals no later than a period of 3 (three) weeks of receipt of such a list of job descriptions from the Company. It will be borne in mind by the BOT, the Company and indeed the Government acting in discharge of its function of oversight that the findings of this Court operate wholly within the statutory parameters of the Act 2006, in particular and which shall be read by these three actors as being declaratory of the law in Act of 2006 and as well as of the statutorily defined roles assigned to each of these actors operating within their specific statutory boundaries, in that sense, the direction herein made must be read as one already sanctioned in law the provisions of which law had become noteworthy in the past decade or so not by any notable degree of compliance but more by the incidences of outright violation of the same. This Court's directions should be treated as a reminder to all three actors of the necessity of due compliance of the letter of the law and not to treat the cases of the Petitioners as an exception to the statutory norms of compliance found in the Act of 2006. The Company and the BOT as ordered above will, therefore, be obliged to revive statutory compliance measures and practices that had fallen into disuse for a decade or so and, therefore, ensure the due and sustained operation of the Funds with the active support of the Government. All three rotors shall do well to bear in mind that the

Bangladesh Labour Act, 2006 first and foremost is a beneficial piece of legislation intended to strike and maintain a harmonious relationship between workers and the employer. To that end, it is necessary that the provisions of the Act of 2006 are given as wide an interpretation as possible in consonance with such objective.

61. In light of the above, we find merit in both the Applications and substance in the Rules Nisi issued. In the result, the Rules Nisi in both the Applications are made absolute with the specific observations and directions as above.

There are no orders as to costs.

Ed.

High Court Division
(Special Original Jurisdiction)

Syed Refaat Ahmed J
Mahmudul Hoque J

AB Mannaf Sheikh (Md).....Petitioner

vs

1st Joint District Judge Court and Artha Rin Adalat and others .....Respondents*

Judgment
February 19th, 2014.

Artha Rin Adalat Ain (VIII of 2003)
Section 57

Section 57 of the Act, empowers the Adalat to give adequate relief in cases as in hand, even if it is assumed but not conceded that there is no scope to give the petitioner appropriate relief by the Adalat under the other provision of the Act. .....(27)

Artha Rin Adalat Ain (VIII of 2003)
Sections 38, 45, 49 & 57

The Adalat almost in every case is reluctant to extend its hands to help the litigants taking recourse to the sections of the Ain making them virtually ineffective. .....(30)

Abdul Momen Bhuiyan vs District Judge, Dhaka; M. Karunakara Menon vs M. Krishna Menon, 39 ILR (Madras), 429; Banesa Bibi vs Senior Vice President, 63 DLR (AD) 160, Antibiotic Stores vs Artha Rin Adalat, Dhaka, 8 MLR (AD) 1 = 55 DLR (AD) 13, M/s Janapriya Rice Mills Ltd. vs Bangladesh, 17 BLD 63 = 49 DLR 277; Govt. of Bangladesh vs Sheikh Hasina, 16 BLT (AD) 233 and Md Junnur Rahman vs Bangladesh Shilpa Rin Sangstha 17 BLD (HCD) 488 = 50 DLR 39 ref.

Awsafer Rahman, Advocate with MG Mahmud Shahin and M Shaeedul Islam—For the Petitioner.

Md Kamruzzaman, Advocate with Nur-a-Alam—For the Respondent No. 2 Bank.

Golam Arshad with Md Rafiqul Imam, Advocates—For Respondent No. 3 (Auction Purchaser)

Judgment

Mahmudul Hoque J: On an application under Article 102 of the Constitution of Bangladesh this Rule Nisi has been issued at the instance of the petitioner calling upon the respondents to show cause as to why the impugned orders, dated 3-10-2011 and 9-10-2011 passed by the respondent No. 1 , 1st Joint District Judge Court and Artha Rin Adalat, Faridpur in Artha Rin Execution Case No. 1 of 2010, allegedly rejecting the application dated 26-9-2011 and 27-9-2011 filed by the petitioner for staying the auction process and accepting the auction bid of one Khaja Abdus Sattar (Annexure-B) should not be declared to have been passed without lawful authority and is of no legal effect, and/or why such other or further order or orders as this Court may deem fit and proper, should not be passed.

*Writ Petition No. 8742 of 2011.

2. Facts of the petitioner's case, in brief, are that the respondent No. 2 Bank as plaintiff instituted Artha Rin Suit No. 13 of 2007 before the Artha Rin Adalat, Faridpur, against the petitioner for recovery of Taka 3,90,882 granted as loan. The said Artha Rin suit was heard exparte in the absence of the petitioner and the respondent No. 1, Court decreed the suit exparte in favour of the respondent No. 2 Bank by its judgment and decree dated 12-5-2009 and by the said decree the petitioner was directed to make payment of the decretal amount to the Bank within 40 days from the date of the order. The petitioner having failed to repay the same, the respondent No. 2 Bank put the said decree into execution by filing Artha Rin Execution Case No. 1 of 2010 in the Court of Artha Rin Adalat, Faridpur on 4-2-2010. The petitioner on coming to know about the filing of the Execution case filed an application on 29-9-2010 seeking time to pay the Bank's dues stating that the petitioner earlier paid Taka 50,000 before the Artha Rin Adalat which was fixed for hearing amongst other dates and finally on 20-6-2011. But on the date fixed the said application was rejected by the court refusing time to the petitioner to make payment of the outstanding dues to the bank. Thereafter, the petitioner again deposited Taka 50,000 with the respondent No. 2 Bank towards repayment of the loan on 26-9-2011 and filed an application before the Artha Rin Adalat praying for three months time to pay the rest of the amount. On the following date on 27-9-2011 the petitioner filed another application before the executing Court praying for stay of the auction process and also to be granted time for repayment of the loan. The Artha Rin Adalat after hearing the application mentioned above rejected the same by its order dated 3-10-2011 observing that the petitioner is unnecessarily delaying the disposal of the execution case and proceeded to hold the auction on 3-10-2011. Subsequently, the Artha Rin Adalat accepted the auction bid of one Khaja Abdus Sattar in rejecting the prayer of the petitioner. The petitioner contends that by this time the petitioner by various installments in total deposited Taka 1,15,000 with the respondent No. 2, Bank. At this stage the petitioner moved this court by filing this application under Article 102 of the Constitution of the People's Republic of Bangladesh and obtained the present rule and stay. Further case of the petitioner is that after acceptance of the auction bid the petitioner filed an application before the Artha Rin Adalat under Order XXI, rule 89 of the Code of Civil Procedure ("Code") on 16-11-2011 by depositing 5% of the bid money for payment to the auction purchaser praying for allowing the petitioner to get the mortgaged property released/redeemed upon payment the outstanding dues to the bank. But the court fixed on 20-11-2011 for hearing the application allowing time to the decree holder to file written objection. On 20-11-2011 the petition was heard and upon hearing the Artha Rin Adalat rejected the same, not on merit but only observing that since the matter is pending before the High Court Division the petition is not at all considerable at this stage. Thereafter, the petitioner filed another application on 4-1-2012 under Order XXI, rule 89 of the Code praying for setting aside the auction sale. The said petition was heard on 5-1-2012 and after hearing, the court rejected the same as the proceeding has been stayed by the High Court Division in this instant application.

3. On the other hand, the respondent No. 2 Bank and auction purchaser as added respondent No. 3 contested the Rule by filing separate affidavits-in-opposition. The case of the respondent No. 2 Bank, in short, is that the petitioner was granted a loan of Taka 2,00,000 on 11-8-2002 and against the loan the petitioner executed relevant charge documents, promissory note and created mortgage of his landed property as security by a deed of mortgage No. 5026 and also executed a power of attorney on 4-8-2002 authorizing the Bank to sell the mortgaged

property. The petitioner, however, failed to pay the outstanding dues within the stipulated time inspite of repeated demands and reminders of the Bank. The Bank finding no alternative was compelled to sell the property under section 12 of the Artha Rin Ain, 2003 ("Act") and published tender notice in "The Daily Jugantor" on 19-8-2005. But no bidder participated in the tender. As a result the Bank filed the Artha Rin Suit No. 13 of 2007 before the Artha Rin Adalat, Faridpur. The Artha Rin Adalat decreed the suit against the petitioner on 18-5-2009. The petitioner having failed to repay the total amount as per decree passed by the Adalat, the respondent Bank put the decree into execution by filing Execution Case No. 1 of 2010 in the Artha Rin Adalat. In the process of execution, the mortgaged property was put into auction by the court and in the auction sale, the intended buyers submitted "Sealed quotation" and amongst the bidders the bid of respondent No. 3 became highest and upon compliance of relevant provision of law the respondent No. 3's bid was accepted by the Adalat. Thereafter, entire bid money has been deposited by the respondent No. 3 to the Court and, as such, there has been no irregularity and illegality in holding auction of the mortgaged property. Hence, the Respondent's submit, the present Rule is liable to be discharged.

4. The added respondent No. 3, auction purchaser's case, in short, is that the respondent No. 3 is a lawful purchaser of the mortgaged property in auction and he has paid the entire bid money and, as such, has acquired the lawful right in the purchased property. The respondent No. 3 affirms that he has participated in the auction and has become the highest bidder. The court accepted his bid by its order dated 9-10-2011. Submitting that there is no illegality in the impugned order passed by the court, the respondent No. 3 stresses that the petitioner had remedy against the auction held under rules 89 and 90 of Order XXI of the Code but he having failed to avail the same, this petition is not tenable in law and the Rule is liable to be discharged.

5. Mr Awsafur Rahman, the learned advocate appearing for the petitioner submits that on 26-9-2011 the date fixed for holding auction, the petitioner appeared in court and filed an application praying 3 months' time to pay the bank's dues stating that he has paid Taka 50,000 to the bank out of the decretal amount. The said application was kept in file and the court fixed 3-10-2011 for hearing and order. On the following day the petitioner again filed an application praying for time to pay the decretal amount and staying execution proceedings stating the situation and expressing his willingness to liquidate the bank's outstanding dues. The court kept the same in record and fixed 3-10-2011 for hearing the same and upon hearing rejected the same stating that the petitioner with an intention to cause delay in disposing the case filed the application. By its order dated 03-10-2011 the Court fixed date on 9-10-2011 for hearing the decree holder bank giving it an opportunity to raise objections, if any, regarding auction and for order. On that date the petitioner filed an application praying stay of the execution proceedings which was rejected by the Court on the ground that a similar application filed by the petitioner had already been rejected on 3-10-2011.Consequentially, the Court accepted the bid of the respondent No. 3 auction purchaser given that his bid was found to be the highest and directed the respondent No. 3 to pay the balance bid money by 20-10-2011.

6. It is also argued that the decree was passed *exparte* and the petitioner had no knowledge about filing of the suit but he only came to know when auction notice was published in the daily news-paper. It is also submitted that the petitioner availed loan of Taka 2,00,000 out of which the petitioner paid Taka 1,15,000 to the bank on different dates. Had the court allowed time to the petitioner, the petitioner would have

been able to make payment of the balance amount to the bank and, as such, the impugned orders are bad in law. He further submits that the property in question is the homestead of the petitioner and the petitioner will be homeless if the property is sold by the bank. It is noted that in addition to the applications of 16-11-2011 and 4-1-2012, the petitioner filed an application on 13-2-2012 seeking a direction upon the bank to accept the balance decretal amount from the petitioner. Upon hearing the court rejected the said application as the Execution proceedings has been stayed by this Court. Mr Rahman, therefore, referring to the various applications and orders of the Artha Rin Adalat annexed to the petition, supplementary affidavit and affidavit-in-opposition submits that the petitioner from the date of auction onwards approached the Court in various ways to get the property released upon payment of the balance outstanding dues to bank. Referring to the provisions of sections 38, 45, 49 and 57 of the Act and Order XXI, rule 89 of the Code he further argued that the court had ample scope to consider the prayer and approach of the petitioner under sections 38 and 45 of the Act, by referring the matter to the parties for compromise, or by allowing the petitioner to make instalment payments under section 49 of the Act, or under section 57 of the Act by directing the bank to accept the balance amount from the petitioner. Indeed, the court could have also proceeded under Order XXI, rule 89 the Code by setting aside the sale upon acceptance of 5% interest above the bid money. He also submits that though the bid has been accepted by the court, sale has not yet been confirmed and the bid money not withdrawn by the bank and, as such, the execution proceedings is still pending. Under these circumstances, it is argued, the dispute can still be settled under sections 38 and 45 of the Act or by passing an appropriate order for ends of justice under section 57 of the Act. But the court below without appreciating all these avenues and ignoring the provisions of law most illegally rejected the applications of the petitioner and accepted the bid of the added respondent No. 3. In support of his submissions Mr Rahman referred to the judgment of *Abdul Momen Bhuiyan and others vs District Judge, Dhaka* dated 17-11-2013 passed by the Appellate Division in Civil petition for leave to Appeal No. 2228 of 2011. It suffices to note at this point that the Appellate Division's order as is reproduced later in this judgment is clearly indicative of the need for the Artha Rin Adalat to actively pursue these avenues available under the existing law and, thereby, arrive at a fair and just resolution of the dispute between the parties.

7. Mr Kamruzzaman, learned advocate appearing for the respondent No. 2, in bank opposing the Rule submits that the petitioner has availed of the loan facilities from the bank but failed to repay the loan within time notwithstanding of repeated requests and demands of the bank. The bank tried to sell the mortgaged property through auction under section 12 of the Act but failed as no bidder was found. Thereafter, the bank filed Artha Ain Suit before the Artha Rin Adalat for recovery of the loan against the petitioner. Said Artha Rin Suit was decreed *exparte* against the petitioner giving him 40 days time to pay the decretal amount but the petitioner failed to pay the money within the said period. Resultantly, the bank filed Artha Jari case and put the decree into execution. The court upon compliance of all relevant provisions of the Act published auction notices in the dailies for sale of the mortgaged property. In the auction three bidders participated and among the bidders the quotation of respondent No. 3 being found highest the court accepted the same with the consent of the bank. There was no illegality in the orders passed by the Adalat. The petitioner got sufficient time to make payment of the decretal amount. But he by filing various applications tried to drag the disposal of the case. It is contended, therefore, that the petitioner in reality is

not at all willing to pay the decretal amount. He further submits that the petitioner has no way to get the sale set-aside according to law and prays for discharging the rule.

8. Mr Md Golam Arshad, the learned advocate appearing for the added respondent No. 3 auction purchaser submits that the respondent No. 3 as highest bidder purchased the mortgaged property and paid entire amount of bid money and the court accepted the bid and, as such, he has acquired a right in the property. He further submits that the mortgagor Judgment debtor had two options under rules 89 and 90 of Order XXI of the Code to get the sale set-aside by depositing the decretal amount and 5% above the bid money or by filing an application under rule 90 on the ground of fraud, and illegality, or could claim compensation against the bank. But the petitioner failed to take such steps and, as such, the petitioner has no scope presently to get the sale set-aside. In support of his submissions Mr Arshad referred to the case of *M. Karunakara Menon vs M. Krishna Menon* reported in *39 ILR (Madras), 429, Banesa Bibi vs Senior Vice President* reported in *63 DLR (AD) 160, M/s Antibiotic Stores vs Artha Rin Adalat* reported in *8 MLR (AD) 01 = 55 DLR (AD) 13, M/s Janapriya Rice Mills Ltd. vs Bangladesh* reported in *17 BLD 63 = 49 DLR 277, Govt. of Bangladesh vs Sheikh Hasina* reported in *16 BLT (AD) 233* and *Md Junnur Rahman vs Bangladesh Shilpa Rin Sangstha* reported in *17 BLD 489 = 50 DLR 39.*

9. Heard the learned advocates for the parties, perused the petition, affidavits-in-opposition along with the Annexures appended thereto.

10. Before going through the merit of the rule it would be expedient to look into the relevant provisions of law regarding auction sale and settlement of dispute upon compromise. sections 38 and 45 of the Act deal with the settlement of dispute through mediation or compromise at any stage of the proceedings and runs thus:

৩৮। (১) এই আইনের অধীন অর্থ ঋণ আদালত মামলায় প্রদত্ত ডিক্রীর ধারাবাহিকতায় জারী কার্যক্রম অব্যাহত থাকার যে কোন পর্যায়ে পক্ষগণ মধ্যস্থতার মাধ্যমে জারী মামলার বিষয়বস্তু নিষ্পত্তি করিয়া আদালতকে অবহিত করিতে পারিবে।

(২) উপ-ধারা (১) এর অধীন মধ্যস্থতার ক্ষেত্রে ধারা ২২ এর উপ-ধারা (২), (৩) ও (৪) এ উল্লিখিত বিধান অনুসরণ করিতে হইবে।

(৩) আদালত, উপ-ধারা (১) এর অধীন অবহিত হইলে এবং নিষ্পত্তির বিষয়ে সন্তুষ্ট হইলে, উক্ত জারী মোকদ্দমা চূড়ান্তভাবে নিষ্পত্তি করিয়া আদেশ প্রদান করিবে।

৪৫। (১) (****) এই আইনের কোন কিছুই, বিচার কার্যক্রমের পরবর্তী যে কোন পর্যায়ে, কোন মামলার আপোষ নিষ্পত্তি করা হইতে পক্ষগণকে বারিত করিবে না।

(২) উপ-ধারা (১) এর অধীনে প্রদত্ত মামলার আপোষ নিষ্পত্তির সুযোগ এই আইনে মামলা নিষ্পত্তির জন্য ব্যবস্থিত অন্যান্য পদ্ধতি এবং নির্ধারিত সময়সীমার হানি বা ব্যত্যয় ঘটাইতে পারিবে না।

11. Both the sections above quoted provide provisions and avenues for the court as well as for the parties to the proceedings to get the dispute settled through mediation and compromise at any stage of the proceedings. In the instant case the execution process is not yet complete. So avenues remain open for the parties to the litigation to get the dispute settled upon taking recourse to the provisions of sections 38 and/or 45 of the Act.

12. Section 49 of the Act deals with the power of the court to allow instalments to the Judgment debtor and runs thus:

৪৯। (১) উপ-ধারা (৩) এর বিধান সাপেক্ষে অর্থ ঋণ আদালত, বিবাদী-দায়িকের আবেদনের প্রেক্ষিতে বা স্বীয় উদ্যোগে উপযুক্ত মনে করিলে, ডিক্রীকৃত টাকা ১(এক) বৎসরে ৪(চার)টি সমকিস্তিতে পরিশোধের জন্য দায়িককে সুযোগ প্রদান করিতে পারিবে।

(২) বাদী-ডিক্রীদার সম্মত থাকিলে, উপ-ধারা (৩) এর

বিধান সাপেক্ষে, ডিক্রীকৃত টাকা ৩(তিন) বৎসরে ১২(বার)টি সমকিস্তিতে পরিশোধের জন্য আদালত, দায়িককে সুযোগ প্রদান করিতে পারিবে।

(৩) উপ-ধারা (১) বা (২) এ উল্লিখিত কোন একটি কিস্তি বকেয়া হওয়া মাত্রই সমুদয় বকেয়া তখনই পরিশোধিতব্য হইবে এবং তদউদ্দেশ্যে জরী কার্যকর যথাবিধি অনুসৃত হইবে।

13. This section authorizes the court to allow the judgment debtor to pay the decretal amount by four instalments within one year or by twelve installments within three years if decree holder gives consent.

14. Section 57 of the Act empowers the court to pass any order for the purposes of securing justice and runs as follows;

৫৭। এই আইনের অধীন অভিপ্রেত ন্যায় বিচারের উদ্দেশ্য সাধনকল্পে অথবা আদালতের কার্যক্রমের অপব্যবহার রোধকল্পে প্রয়োজনীয় যে কোন পরিপূরক আদেশ প্রদানে আদালতের সহজাত ক্ষমতা কোন কিছু দ্বারা সীমিত করা হইয়াছে বলিয়া গণ্য হইবে না।

15. This section speaks that nothing in the Act shall limit the power of the court in passing any order which, in the opinion of the court, is just and practicable for securing ends of justice.

16. Apart from this, the provisions in Order XXI, rule 89 of the Code in allowing for a sale to be set-aside runs as follows;

17. R 89 Application to set-aside sale on deposit. (1) Where immovable property has been sold in execution of a decree, any person, whose interest has been affected by such sale (provided that such interest has not been voluntarily acquired by him after such sale), may apply to have the sale set-aside on his depositing in Court,

(a) for payment to the purchaser, a sum equal to five percent of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less

any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

18. Said rule 89 of Order XXI gives the judgment debtor an opportunity to get the sale set-aside upon payment of 5% above the bid money and payment of the decretal amount within a specified time. Mr G. Arshad relied upon the judgment in the Karunakara holding that,

"Order XXI, rule 89, Civil Procedure Code, is in the nature of an indulgence to judgment-debtors; and a judgment-debtor who wishes to take advantage of the provisions must strictly comply with the same, by paying all the amounts so directed by the rule, less any amount that may have been paid by himself, and he cannot take credit for any amount paid by a co-judgment-debtor who has not joined him in the application; and according to the rule, credit can be taken only for any amount that may have been actually or constructively received by the decree-holder and not for one which, having been deposited would have been received by him, had he been minded to do so.

19. We are in complete agreement with the above observations regarding the circumstances under which sale may be set-aside by invocation of the process under Order XXI, rule 89.

20. Section 26 of the Act also provides that notwithstanding anything which is not repugnant to the Act relating to the execution of the money decree, the provisions of the Code of Civil Procedure shall be applicable under the Act. But from the said provision it is obvious that when necessary provisions are already in the Act, the provisions of the Code, would not normally be applicable.

21. Admittedly the execution proceedings is still pending. In view of the provisions contained in sections 38 and 45 of the Act the dispute between the parties can be settled or resolved through mediation and compromise. The petitioner, in fact has taken no step for such mediation and compromise, but filed an application seeking time to pay the bank's dues and for stay of the auction proceedings. Objecting to the perceived dilatory tactic of the petitioner, the Court refused to allow time and/or instalment payments by exercising power under section 49. Therefore, in rejecting the application of the petitioner the Court instead of extending its hand, indeed, narrowed its power in discharging justice.

22. It is also noted that the petitioner filed an application on 16-11-2011 under Order XXI, rule 89 of the Code praying for release of the mortgaged property upon payment of 5% interest above the bid money within time as provided by law which was heard on 20-11-2011 and upon hearing the court below vide Order No. 26 of 20-11-2011 rejected the same holding that the petitioner having already filed this writ petition the petition cannot be considered at this stage, the fact of which is reflected in the rule issuing order of this court. This Court is of the view that the court below ought to have disposed of the application on merit in view of the provisions of Order XXI, rules 89 and 92(2) of the Code of Civil Procedure, but in not disposing the matter on merit in the light of the provisions of law virtually abdicated its power conferred by law. It is also noted that the petitioner again filed an application on 4-1-2012 for direction upon the bank to accept the balance decretal amount from the petitioner and to set-aside the auction sale upon receipt of 5% interest above the bid money. The court after hearing the said application on 5-1-2012 rejected the same vide its order No. 28 dated 5-1-2012. All these attempts of the petitioner primarily shows his willingness to pay the outstanding dues to the bank.

23. It appears from the available papers in file that the auction was held on 28-9-2011 and accepted on 9-10-2011. The petitioner filed applications praying for time on 26-9-2011, 27-9-2011 and 9-10-2011 to pay the decretal amount which were rejected by the court. In this regard, the court below could have allowed the application at least under section 57 of the Act as the statutory recognition of its inherent power to do so.

24. Messrs Kamruzzaman and Golam Arshad giving emphasis on section 33 of the Act and Order XXI, rule 89 of the Code argued that the petitioner after holding auction had the option to get the sale set-aside by filing application alongwith the deposit of 5% interest above the bid money for payment to the auction purchaser and the decretal money for payment to the decree holder but the petitioner has failed to do so and, as such, there is no scope left for the petitioner to get the sale set aside at this stage other than claiming compensation against the bank. But it appears to the Court from the Order Sheets of the court below that the petitioner repeatedly approached it to allow time at the first instance and urged upon the court to release the property upon depositing 5% interest above the bid money and sought a direction upon the bank to accept the balance decretal money at the latest. All those efforts of the petitioner prove to be futile. Had it been considered by the Court at the 1st instance the matter would have been settled long ago.

25. From the papers available on record, it appears that the sale is yet to be confirmed as contemplated in rule 92 (1) of the Order XXI of the Code. Admittedly, in the instant case the sale has hot yet been confirmed. Nor has it become absolute as no formal order of confirmation of sale has been passed by the court below. In paragraph 2 of his supplementary affidavit, the petitioner has stated that he

already paid Taka 1,15,000 to the bank out of the decretal amount of Taka 4,60,735. It is evident furthermore that the auction purchaser added respondent on 3 deposited the balance auction money amounting to Taka 5,10,000 on 16-10-2011.

26. Mr. Rahman the learned advocate for the petitioner further submits that in a similar situation our Appellate Division passed a judgment in CPLA No. 2228 of 2011 in the case of *Abdul Momen Bhuiyan vs District Judge, Dhaka & others* wherein it has been held that:

> "In several cases including the cases of Ganyson Ltd. and another vs Sonali Bank and other, (1985) 37 DLR (AD) 42 and AFM Naziruddin vs Mrs Hameeda Banu (1993) 45 DLR (AD) 38, this Division previously exercised the power of doing complete justice under Article 104 of the constitution. The subject matter of the instant case represents on occasion to and demands exercise of this by this Division for the purpose of protection of the dwelling house of the petitioners. The petitioners stated to have paid the entire dues payable to the HBFC. Admittedly, the auction purchaser, respondent No. 3 deposited 75,25,000 on 22-6-2010 and he should be compensated by the petitioners to retain their valuable house situated at Mirpur, Dhaka. Therefore, the petitioners are directed to pay Taka 12,00,000 (twelve lakh) to the auction purchaser (respondent no. 3) as compensation within 45 days ".

27. Under our constitutional scheme, this court has no scope to do complete justice as does the Appellate Division. But this court finds that section 57 of the Act, empowers the Artha Rin Adalat to give adequate relief in cases as in hand, even if it is assumed but not conceded that there is no scope to give the petitioner appropriate relief by the Artha Rin Adalat under the other provision of the Act. Furthermore, in view of the facts and circumstance of this case, the High Court Division is competent enough to give such relief in exercise of its powers under Article 102 of the Constitution as is necessary to safeguard the petitioner's fundamental right to property under Article 42 of the constitution.

28. It is also noted that the impugned orders passed by the court are interlocutory and not final orders and thus no appeal/revision can be taken therefrom as per provision of section 44(2) of the Act and, therefore, the present writ is maintainable.

29. Given the facts and circumstances of the present case, since the auction has not yet been confirmed by the executing court and since the mortgaged property is the only homestead of the petitioner as claimed by the petitioner, for protecting the homestead of the petitioner in our considered view, it was a fit case to exercise the powers under section 57 of the Ain to give adequate relief to the petitioner, but which the Artha Rin Adalat failed to exercise under said section. In these circumstances we are inclined to dispose of this Rule with the direction to the petitioner judgment debtor to pay 10% above the bid money to the auction purchaser and the balance decretal amount along with the other costs to the bank decree holder within 30 days of the receipt of the certified copy of this judgment and order, failing which the auction sale shall stand absolute.

30. Before parting with, this court observes that since the Artha Rin Adalat Ain, 2003 is a special law and some latitude is being given to the judgment debtor to get the dispute settled through mediation or compromise and an extensive power has been given to the court to secure justice under sections 38,45,49 and 57 of the Act, the Artha Rin Adalat ought to have acted following the provisions contained in law as observed above by this court in supersession of the other provisions contained in any other law as per section 3 of the Act. But to our utter

surprise we see that the Artha Rin Adalat almost in every case is reluctant to extend its hands to help the litigants taking recourse to the above mentioned sections of the Ain making them virtually ineffective.

31. It is also noted that the intention of the legislature is to recover money not to sell or own the property of the mortgagor making them homeless. Keeping in mind the intention of legislature the Artha Rin Adalat can pass any order for the purpose of securing justice considering facts and circumstances of each individual case.

32. With the above observations and directions the rule is disposed of however without any order as to costs.

33. Order of stay granted at the time of issuance of rule is hereby recalled and stand vacated.

34. Communicate a copy of the judgment to the court concerned.

Syed Refaat Ahmed J: Concurring as I do with the findings and observations of Mahmudul Hoque, J. above, I feel nevertheless the necessity to emphasize the point made by him as to the need to apply the Artha Rin Adalat Ain, 2003 ("Act") in light of its true ambit and purport. This necessarily entails a balancing of all Acts provisions applicable in each given case and aiming at achieving the best possible practicable solution for the ends of justice. In that regard, it is this Court's view that the statutorily designated court, i.e. the Artha Rin Adalat consistently appears to shy away from giving a beneficial interpretation to the Act. Thereby, precious opportunities are readily passed over under the Act to mitigate that statute's obvious harshness as operates against judgment-debtors. This stems, this Court finds, from an ingrained inability to appreciate that the core objective of the Act at debt recovery must not invariably without further qualification entail the acquisition of a defaulter/judgment-debtor's property. On the contrary there is nothing in the Act that dictates the inevitability of such consequence. Rather, the Act aims expressly to achieve the opposite. Provisions, most notably, in sections 22, 38, 45, 49 and 57, emphatically attest to that statutory intent. But undue conservatism *per se* or misconceived reservations either to explore avenues of equitable alternative amicable settlement processes endorsed by the Act itself or to exercise its inherent jurisdiction, for reasons not entirely evident to this Court, operate regrettably to bind the Adalat's hand as it were. In that context, the Adalat has instead grown so complacently used to a selective and preferential reliance of certain provisions of the Act, that the said Act, particularly through over-subscription to the provisions of section 33(5) and (7), is inappropriately seen as pandering to the acquisitive tendencies of decree-holder banks and financial institutions rather than to facilitating the full recovery of their loans. There is seen, therefore, a failure by the Adalat to strike an essential balance between financial interests of financial institutions and the fundamental proprietary interests of judgment- debtors that clearly is the Act's objective and purpose. Such abdication of statutory authority and jurisdiction by the Adalat as a matter of course has led to the above-referred provisions being relegated by disuse to the unavoidable status as dead letters of the law in stark discordance with clear legislative intent to the contrary. This Court is of the view, therefore, that such a situation needs to be addressed and redressed urgently. It is with that intent that this judgment and Order is particularly being communicated to the concerned Artha Rin Adalat.

Ed.

High Court Division
(Special Original Jurisdiction)

M Moazzam Husain J
Md Badruzzaman J

Sajid Washing and Dying Limited.....
.....Petitioner

vs

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

Judgment
February 23rd, 2014.

Gas Marketing Regulations, 2004
Clause 17

Neither *vires* of a statute nor a statutory provision has been challenged. Without exhausting the alternative forum of arbitration, writ petition is not maintainable. .....(12)

Dhaka Warehouse Ltd. vs Assistant Collector of Customs, 11 BLD (AD) 227 and Bangladesh Power Development Board vs Md Asad-uz-Zaman Sikder, 9 BLC (AD) 1 ref.

Md Asad-uz-Zaman with SM Aslam, Advocate—For the Petitioner.

AKM Akhtarul Kabir, Advocate—For Respondent No. 4.

Judgment

Md Badruzzaman J: On an application under Article 102 of the Constitution, this Rule Nisi was issued calling upon the respondents to show cause as to why the letter bearing No. Shutru No. AB/CA, Tongi/110/7637 dated 27-7-2008 issued by respondent No. 4 allowing the expansion of gas connection of the petitioner with retrospective effect upon imposing harsh conditions and charging additional bill and imposing fine without any legal basis (Annexure-A) should not be declared to have been made without lawful authority and is of no legal effect.

*Writ Petition No. 6039 of 2008.

2. At the time of issuance of Rule on 12-8-2008 the operation of the impugned letter dated 27-7-2008 was stayed and the respondents were also directed to allow the expansion of the gas connection subject to payment of fees at the existing rate which are presently being paid by the petitioner for a period of 3(three) months and the said order is still existing.

3. Facts, for the purpose of disposal of the rule, in short, are that the petitioner is a limited company having 100% export orientated garments business. The main function of the petitioner is, among others, to wash the export oriented garments which are exported by its sister concern Ha-meem Group of Industries. As per prayer of the petitioner the respondent Nos. 2 to 4 installed gas connection in the factory of the petitioner in 2004 with a maximum hourly load of 12,200 cft, and monthly load of 86228.11 cubic meter under certain terms and conditions and the petitioner had been using gas facility by paying bills regularly. Subsequently, the load was enhanced by the respondents vide letter dated 9-5-2006. The petitioner applied on 27-4-2008 for expansion of load of gas for operating one boiler with a power of 3 (three) tons and 10(ten) dryers having the size of 200 cft. load capacity. The petitioner was waiting for receiving the said expansion but to the utter surprise of the petitioner it received the impugned letter on 27-7-2008 from the gas authority (as contained in Annexure-A) from where it revealed that the authority approved the expansion of load of gas under certain terms and conditions which were harsh, illegal and without any lawful authority and they imposed fine upon the petitioner in a most arbitrary and capricious manner. The impugned letter also contains that special inspection team inspected the factory of petitioner on 28-2-2007 and 12-3-2008 but in fact no such inspection was held by the authority and was beyond the knowledge of the petitioner. Being aggrieved by the said letter dated 27-7-2008 and having no other efficacious alterna-

tive remedy the petitioner has come up to this Division and obtained the instant Rule.

4. On behalf of the respondent No. 3 Titas Gas Transmission and Distribution Company Ltd. (hereinafter referred to as the respondent company) its Managing Director, respondent No. 4 filed affidavit-in-opposition and supplementary affidavit-in-opposition denying the material facts set out in the writ petition. The case of the respondent company, in a nut shell is that, on 6-10-2004 the petitioner company filed an application with other necessary documents before the office of the respondent No. 4 for connection of gas to its factory. On 7-10-2004 and 3-11-2004 the petitioner filed two other applications to the respondent No. 4 for advance approval of industry gas connection to it's Industry. On 17-2-2005, the petitioner and respondent company entered into a contract for supply of gas and the respondent company provided gas connection to the factory of petitioner with maximum hourly load of 12,200 cft. and monthly load of 86228.11 cubic meter under certain terms and conditions.

5. When a special inspection team of respondent company found unapproved 12.5 PSIG gas pressure instead of 10 PSIG approved pressure and other irregularities by inspection dated 22-12-2005 in presence of the representative of the petitioner company and a report was submitted to that effect, the petitioner on 26-12-05, filed an application to the respondent company for expansion of gas load. Accordingly load of gas was enhanced by a letter being No. Shutro No. ABICA, Tongi 110/2217 dated 9-5-2006 (Annexure-B-1). Thereafter, on 5-12-2006 the petitioner and respondent company entered into a fresh contract where the respondent company approved maximum hourly 12,360 cft. gas load and monthly 87359 cubic meter load with 10 PSIG external pressure under certain terms and conditions.

6. Again special inspection team of respondent company found unapproved 25 PSIG gas pressure instead of 10 PSIG approved pressure and also found other irregularities by inspection dated 28-2-2007 and 12-3-2008 in presence of the representative of the petitioner company and reports counter-signed by the representatives of the petitioner were submitted to that effect. In such situation the petitioner on 27-4-2008, filed another application for expansion of load of gas for operating one boiler with a power of 3(three) tons and 10(ten) dryers having the size of 200 cft. load capacity. Considering the inspection report and after completion of legal formalities, respondent company charged additional bill and imposed fine as per the provision of rule 7 of the 'গ্যাস বিপনন নিয়মাবলী, ২০০৪' and also allowed the expansion of gas connection to the petitioner by the impugned letter dated 27-7-2008 (Annexure-A). So question of imposing harsh condition or illegal additional bill or illegal fine upon the petitioner does not arise at all. The petitioner also failed to make out a case as to how the additional bill, imposing fine and the other conditions imposed upon it for expansion of gas are harsh and illegal. The petitioner raised some disputed question of fact in the writ petition which cannot be resolved under writ jurisdiction and, as such, the petitioner is not entitled to any remedy under this jurisdiction.

7. Mr SM Aslam, learned Advocate appearing on behalf of the petitioner submits that the respondents without issuing any show cause notice or without giving the petitioner any opportunity of being heard imposed fine and additional bill at the time of approving the expansion of gas by the impugned order which is *malafide*, illegal, arbitrary and against the principle of natural justice. Learned Advocate further submits that the concerned authority had never inspected the factory of the petitioner on 28-2-2007 and 12-3-2008 and no notice was served upon the petitioner before such inspection and, as such, question of submission of report by the inspection team does not arise at all, but the impugned letter was issued rely-

ing upon the so called report of the inspection team and, as such, the impugned order is illegal, unjust and liable to be declared to have been passed and issued without lawful authority and is of no legal effect. Learned Advocate relied upon a decision of Appellate Division of the case *Dhaka Warehouse Ltd. vs Assistant Collector of Customs* reported in *11 BLD (AD) 227.*

8. Dr AKM Akhtarul Kabir, learned Advocate appearing on behalf of respondent Titas Gas, on the other hand, submits that the writ petition itself is not maintainable as there is scope for arbitration for violation of any terms of contract in view of the express provision of arbitration clause in the contract. The learned Advocate also submits that as the writ petition relates to the matter involving contractual obligation and the subject matter of the writ petition having arisen out of commercial contract, the writ petition is not maintainable. Learned Advocate again submits that there is no provision in 'গ্যাস বিপনন নিয়মাবলী, ২০০৪' to issue show cause notice to the customer before taking any action for any illegal act done by the customer. As per the provision of rule 8.1 kha of the নিয়মাবলী, ২০০৪ the respondent company is authorised to take any urgent action against its customer to prevent illegal act of the customers including inspection, disconnection etc without serving any prior notice to the customer. The inspection team found unapproved 25 PSIG gas pressure instead of approved 10 PSIG and unapproved boiler of 6 tons, 21 dryers, 2 ovens were also found in the factory of the petitioner in presence of the representative of the petitioner, who counter-signed in the inspection reports on the spot and, as such, issuance of impugned letter dated 27-7-2008 was lawful and within the legal authority of the respondent and accordingly no interference is called for by this Court and the Rule should be discharged.

9. We have considered the submissions of the learned Advocates, perused the writ petition, its annexures, the affidavit-in-opposition and supplementary-affidavit-in-opposition along with annexures appended thereto.

10. As regards invoking writ jurisdiction in case of breach of contract attached with an arbitration clause, reliance may be made in the case *Bangladesh Power Development Board vs Md Asaduz-Zaman Sikder, 9 BLC (AD) 1,* where our apex Court held:

> "A person can invoke the writ jurisdiction in case of breach of contract when; (a) the contract is entered into by the Government in the capacity as sovereign, (b) contractual obligation arises out of statutory duty or sovereign obligation or public function of a public authority, (c) a statutory contract, (d) the contract was entered into by the public authority invested with a statutory power, (e) the relief sought is against breach of statutory obligation.
>
> The contract in question does not fulfil any one of the requirements to make the same a statutory contract or contract entered into by the Government in the capacity as sovereign. The contract that was entered into by the appellants with the respondent was an ordinary commercial contract or contract of general nature or a pure and simple contract. So the relief sought for and granted by the High Court Division is not legally available to the respondent in respect of the contract entered into between the appellants and the respondent. The course that respondent ought to have pursued in respect of his claim of payment for works executed by him at the rate schedule of 1999 and not at the rate schedule of 1992 was either arbitration as provided in the work order or the Civil Court."

11. In the instant case, the respondent company and the petitioner entered into a contract

on 5-12-2006 for consumption of gas to the factory of the petitioner. Clause 17 of the contract provides for arbitration in the event of any dispute arising under or in connection with use of gas, preparation of bill and payment thereof and incidental thereto shall be referred to the arbitration for settlement in accordance with the provision of 'গ্যাস বিপনন নিয়মাবলী, ২০০৪'. The clause also provides that reference to arbitration as aforesaid shall be condition precedent to any other legal action.

12. In the decision, cited by the learned Advocate for the petitioner, reported in *11 BLD (AD) 227* our apex Court held:—

> "In spite of an alternative statutory remedy an aggrieved person may take recourse to Article 102 of the constitution where the vires of a statute or a statutory provision is challenged"

Neither vires of a statute nor a statutory provision has been challenged by the petitioner. So without exhausting the alternative forum of arbitration this writ petition is not maintainable. The *ratio of* the case reported in *11 BLD (AD) 227* is not applicable in the instant case.

13. Given the facts and circumstances of the case and law applicable thereto, we are of the view that since the contract provided for arbitration of disputes arising out of the contract between the parties, this writ petition is not maintainable. Since the writ petition is not maintainable we are refrained from entering into the merit of the case. This Rule is, therefore, liable to be discharged as being not maintainable.

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

The order of stay and direction granted at the time of issuance of the Rule are recalled and vacated.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Soumendra Sarker J } Nargis Aktar..... Defendant-Respondent-Petitioner

vs

Judgment March 13th, 2014. } Md Jalaluddin and others .....Defendant-Respondent-Opposite Parties*

Specific Relief Act (I of 1877)
Section 42
Code of Civil Procedure (V of 1908)
Section 9

A person can enforce his substantive right, even though time barred, it there are other legal remedies available for the enforcement of the same. .....(12)

Code of Civil Procedure (V of 1908)
Section 9
Order VII, rule 11

Ouster of jurisdiction of civil court cannot be readily inferred unless expressly taken away and "impliedly barred" means barred by general principles of law or equity of public policy. .....(13)

Forest Officer vs Md Shahabuddin, 12 BLC (AD) 138 ref.

Kazi Akhtar Hosain, Advocate—For the Petitioner.

Shaheen Akther, Advocate—For the Opposite Party No. 1.

Judgment

The Rule issued calling upon the opposite party No.1 to show cause as to why the judgment and decree dated 27-3-2007 passed by the learned Joint District Judge, 3rd Court, Dhaka in Title Appeal No.250 of 2005 allowing the appeal reversing those of dated 19-4-2005 and 26-4-2005 respectively passed by the learned Senior

*Civil Revision No. 1747 of 2007.

Assistant Judge, Dhaka in Title Suit No.352 of 2004 rejecting the plaint under Order VII, rule 11 of the Code of Civil Procedure.

2. The facts leading to the issuance of the Rule in a nutshell can be stated thus, the present opposite party No.1 as plaintiff filed the original suit being Title Suit No.352 of 2004 in the 1st court of learned Assistant Judge, Dhaka for a declaration that the appointment of the defendant No. 1 as Headmistress of Hazrat Shah Ali High School is illegal contending inter-alia that the son of the plaintiff is a student of the High School and being the guardian and a local elite person the plaintiff is a voter from the guardian category in the school. The defendant No. 1 was an illegally appointed Headmistress of the School having no required qualification for the post and practicing fraud suppressing the defendant No.1 has been appointed as Headmistress of the School and withdrawing the salary of the post. During pendency of the original suit the defendant No.1 filed an application under Order VII, rule 11 of the Code of Civil Procedure for rejecting the plaint and after hearing the learned trial court allowed the application and rejected the plaint of the suit vide order dated 19-4-2005.

3. Being aggrieved the plaintiff preferred an appeal being Other Class Appeal No. 250 of 2005 in the court of learned District Judge, Dhaka which was heard and disposed of by the learned Joint District Judge, 3rd Court, Dhaka and the learned appellate court below by the impugned judgment and order dated 27-3-2007 allowed the appeal reversing the judgment and decree passed by the trial court.

4. Being aggrieved by and dissatisfied with the impugned judgment and decree the defendant-respondent-petitioner has preferred this revisional application under section 115(1) of the Code of Civil Procedure and obtained the Rule with an interim order of stay.

5. Mr Kazi Akhtar Hosain, the learned Advocate appeared on behalf of the petitioner while Mrs Shaheen Akther, the learned Advocate appeared on behalf of the opposite party No.1.

6. The learned Advocate appearing on behalf of the petitioner submits that the learned court of appeal below during disposal of the appeal committed illegality and that the impugned judgment and decree is not a proper judgment and decree of reversal. The learned Advocate further submits that the appointment of the defendant-petitioner is legal and on compliance of the Rules of Non-Government Institution Instruction Manual issued from the ministry of education the appointment was completed. The learned Advocate also submits that the plaintiff-opposite party has no *locus-standi* to institute the original suit under section 42 of the Specific Relief Act and secondly the plaintiff before institution of the suit without exhausting the proper forum to seek redress of his grievances filed the original suit and as a result of which the learned trial court was quite justified to reject the plaint under Order VII, rule 11 of the Code of Civil Procedure. The learned Advocate lastly submits that no fruitful result can be given from a decree by a civil court in the instant nature of suit and the learned appellate court without proper appreciation of law decided the merit of the appeal illegally which deserve interference of this court.

7. As against the aforesaid submissions of the learned counsel for the petitioner the learned Advocate appearing on behalf of the opposite party opposing the Rule controverted the arguments advanced from the side of the learned Advocate for the petitioner and submits that there is no ingredient for rejection of the plaint under Order VII, rule 11 of the Code of Civil Procedure and the learned appellate court below rightly after proper appreciation of law and materials on record reversed the judgment and decree passed by the trial court rebutting the findings of the trial court adverting the

relevant provisions of law in consultation with the pleadings of the plaintiff. The learned Advocate further submits that the plaintiff-opposite-party have every *locus-standi* to institute the suit under the purview of section 42 of the Specific Relief Act and if the relief is granted by the civil court that would be a fruitful result for the plaintiff-opposite party. The plaintiff after exhausting the legal requirements for filing a civil suit before a competent court of law instituted the suit. The learned Advocate for the plaintiff-opposite party in this context pointed out the facts of the case and content of the pleading which was brought by the plaintiff. Learned Advocate has drawn the notice of the court in paragraph Nos.2, 3, 8, 9 and 11 of the plaint which are related with the *locus-standi* of the plaintiff and the cause of action of the suit. The learned Advocate lastly submits that after serving legal notice upon the defendants while the plaintiff did not obtain any relief he was constrained to file the original suit. The learned trial court misconstrued the actual position of law as well as the content of the pleadings in its true perspective and subsequently the appellate court below rightly appreciated the law and acted under the provisions laid down in Order XLI, rule 31 of the Code of Civil Procedure and in compliance of that reversed the judgment and decree passed by the learned Assistant Judge and there is nothing to interfere with the impugned judgment and decree.

8. Heard the learned Advocates of both sides, perused the case records, connected papers, impugned judgment and decree along with the judgment and decree passed by the trial court in Title Suit No.352 of 2004.

9. On perusal of the connected papers it transpires that during pendency of the original suit the defendant-petitioner submitted an application under Order VII, rule 11 of the Code of Civil Procedure for rejection of the plaint. In the said application the defendant No.1 states that her appointment in the post of Headmistress of the institution is legal and after compliance of all legal formalities and fulfillment of requirements she has been appointed as Headmistress of the school but the plaintiff in collusion with the interested corner instituted the suit on false allegation having no *locus-standi* to file the suit. The learned trial court being satisfied rejected the plaint vide judgment and order dated 19-4-2005.

10. Being aggrieved the plaintiff preferred Title Appeal No.250 of 2005 and the appellate court below at the time of disposal of the appeal finding the status of the plaintiff and *locus standi* to prefer civil suit under the purview of section 9 of the Code of Civil Procedure in a civil court reversed the judgment and decree of the trial court by the impugned judgment and decree dated 27-3-2007.

11. Having gone thorough the certified copy of the plaint marked Annexure-"A" I find that in paragraph Nos.2 and 3 of the plaint there is a clear contention of the plaintiff that he has *locus standi* as well as legal status i.e. to institute the suit under section 42 of the Specific Relief Act. Being a guardian of a ward of the institution and having vote casting authority in the governing body of the institution he felt aggrieved by the misdeed of the defendants and in the appointment of the Headmistress of the institution, which was done in collusion and practicing fraud. Paragraph Nos.8 and 9 of the plaint disclosed the specific allegation against the defendant No.1 who is admittedly holding the post of Headmistress of the institution and there is an allegation on violation of the government Rules for the post. Paragraph No. 11 of the plaint speaks about the cause of action which was acquired after serving legal notice upon the defendants. Besides this; there is an allegation on the defendants that they have practiced fraud as well as unholy alliance in the appointment of the defendant No.1 to the post of Headmistress of the institution.

Under section 42 of the Specific Relief Act, 1877 any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

12. Under the purview of section 42 of the Specific Relief Act i.e. Act I of 1877 the spirit of the section contemplates that any member of a institution having a right to the properties of the institution has right to sue for proper relief under section 9 of the Code of Civil Procedure and in section 42 of the Specific Relief Act. A person can enforce his substantive right, even though time barred, it there are other legal remedies available for the enforcement of the same. Our Apex court in the case of Divisional *Forest Officer vs Md Shahabuddin* reported in *12 BLC (AD) 138* held:

"A suit for declaration is maintainable under section 42 of the Specific Relief Act as to any legal character or to any right as to any property of the plaintiff if the defendant denies or is interested to deny his title to such character or right. If the above conditions are satisfied, the plaintiff need not ask for any further relief than a mere declaration."

13. It is a fact that section 9 of the Code of Civil Procedure confer jurisdiction of the Civil court to entertain all civil suit in civil nature excepting the suit which is expressly or impliedly barred under law. Ouster of jurisdiction of civil court cannot be readily inferred unless expressly taken away and "impliedly barred" means barred by General Principles of law or equity of public policy. In our instant suit there is no baring clause by which it can be held by any means that civil suit is barred either expressly or impliedly.

14. In view of the above discussions and findings I have every reason to draw such inference that the lower appellate court is quite justified in holding that the trial court committed gross illegality in rejecting the plaint under the ambit of Order VII, rule 11 of the Code of Civil Procedure.

15. Order VII, rule 11 of the Code of Civil Procedure can be invoked only—

(a) where the plaint does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a lime to be fixed by the Court, fails to do so;

(d) Where the suit appears from the statement in the plaint to be barred by any law.

16. The learned trial court misconstrued the law in its total approach and the appellate court below deserve appreciation of this court in passing the impugned judgment and decree after correct findings of law.

17. In the result the Rule having no merit is discharged without any order as to costs. The judgment and decree dated 27-3-2007 passed by the learned Joint District Judge, 3rd Court, Dhaka in Title Appeal No.250 of 2005 reversing those of dated 19-4-2005 and 26-4-2005 respectively passed by the learned Senior Assistant Judge, Dhaka in Title Suit No. 352 of 2004 is hereby affirmed.

18. The order of stay granted earlier by court at the time of issuance of the Rule stands

vacated.

Communicate the judgment and order at once and send back the lower court's records immediately.

Ed.

High Court Division
(Special Original Jurisdiction)

Md Ashfaqul Islam J
Md Moinul Islam Chowdhury J

Judgment
July 23rd, 2009.

Firoza Begum and 87 others.....Petitioners

vs

People's Republic of Bangladesh and 8 others .....Respondents*

Constitution of Bangladesh, 1972
Article 102

Doctrine of reasonableness is based upon a rationale which cannot be undermined by avoiding responsibility entrusted with the respondents. All these days the petitioners were moving from pillar to post to settle their reasonable and legitimate expectations that they would be absorbed in the revenue budget of the Dhaka City Corporation failing which they have come before this Court.

.....(23)

Constitution of Bangladesh, 1972
Article 102

Petitioners deserve the same treatment on the ground of their reasonable and legitimate expectation to consider their case on the same way according to the settled principle and proposition of law governing the subject.

.....(27)

Constitution of Bangladesh, 1972
Article 102

The petitioners with the passage of time has developed in their mind a legitimate and reasonable expectation that their fate will find out a positive way ie they would be absorbed in the revenue budget of the Dhaka City Corporation. .....(22)

Constitution of Bangladesh, 1972
Article 102

Petitioners from the year 1988 up till now have been diligently and persistently trying to establish their claim on the basis of reasonableness. The petitioners were given assurance from time to time, as it appears from the different Annexures, which we have mentioned earlier that their services would be absorbed in the revenue Budget. Even in the highest body of the Government "ECNEC" a positive decision was taken to absorb the petitioners and others standing on the same footing in the revenue budget as per rules and regulation. .....(21)

The Chairman, Bangladesh Textile Mills Corporation vs Nasir Ahamed Chowdhury, 22 BLD AD 199 = 7 BLC (AD) 144 and Ashutosh Chakma vs Rajdhani Unnayan Kartipakkha (RAJUK), 60 DLR 273 ref.

Mahabub Shafique, Advocate—For the Petitioner.

Tafilur Rahman, Advocate—For the Respondent No. 3.

M Khurshid Alam Sarker, DAG with Abdul Rahaman Howlader, AAG—For the Respondents.

*Writ Petition No. 9675 of 2008.

The above judgment has been affirmed by the Appellate Division, reported in 65 DLR (AD) 145

Judgment

Md Ashfaqul Islam J: At the instance of petitioners, who are all Caretaker, Local partnership for Urban Poverty Alleviation project Part-2, Support For Basic Service. In Urban Areas Project this Rule Nisi was issued calling upon the respondents to show cause as to why the respondents should not be directed to declare the petitioners as the employees of Dhaka City Corporation Respondent No. 3 and to absorb the petitioners in the revenue budget of Dhaka City Corporation and to pay their arrear salaries and other service benefits.

2. Background of the case as it appears from the petition is that Slum Improvement Project (2nd phase) was commenced in July, 1988 to be completed on June, 1993 with the help of Community Organizers appointed for the purpose as per the approved Project Proforma for Slum Improvement Project (2nd Phase) revised in April, 1989 with objects detailed in the Project Proforma. The said project proforma contained a condition as under—

> "The community Organizer will be an appointed staff member of the Munici pality. The salary of the Community organizers will be paid by the project for the duration of the Project. Upon completion of the project they will continue as Pourashava Employees paid under the Pourashava budget. Community Health Worker will be working on honorarium."

3. The petitioner Nos.1-10 were originally appointed in the 1st project namely SIP (2nd Phase) as a community Organizer under Dhaka City Corporation, respondent No.3.

4. The Urban Basic Service Delivery Project under the Local Government Rural Development Co-Operative (herein after referred to as UBSDP, Local Government Division was commenced on 1st January, 1996 and the said project was approved by ECNEC on 1st April 1997. The project was implemented by Local Government Engineering Department (LGED) through 4 City Corporations and 21 Pourashavas. The support staff was engaged from Previous Slum improvement Project (2nd Phase). The petitioner Nos.1-10 were absorbed in the said 2nd Project i.e. UBSDP on 19th October of 1997 and petitioner Nos.11 to 76, 86 to 88, 77 to 79 and 80 were directly appointed through competitive examination as caretaker in the said UBSDP on 11th June of 2008 and December 1998 respectively.

5. The respondent No.8 the project Director of UBSDP by its letter dated 23rd March of 1998 informed that salaries of the caretakers of the said 2nd project will be paid as per national Pay scale 1997 with effect from 1st July, 1997 (Annexure-E). The third project ie Local partnerships for Urban Poverty Alleviation Project (Revised) was commenced on 1st September 1998 to be completed on 30th June, 2006. The petitioner Nos. 1 to 80 and 86 to 88 caretakers of 2nd Project ie UBSDP were absorbed in the 3rd project on 15th of July 2001 and petitioner Nos. 81 to 85 were appointed on 26th July 2005 in the said 3rd Project.

6. Thereafter the Ministry of LGRD by its Office Order dated 3rd June 2002 requested the respondent No.6 Chief Executive officer, DCC to continue the activities of the said 3rd project even after the completion of the said project and by its letter dated 2nd October 2002 Ministry of LGRD directed the respondent No.6, Chief Executive officer, DCC to continue the activities of the 3rd project even after completion of the same with own fund of DCC (Annexure-H).

7. Followed by the Office order dated 23rd of April 2003 Secretary, DCC approved the payment of arrear salaries and other service benefits to the petitioners from February, 2001 to February, 2003 and asked the appropriate

authority to take necessary steps. The petitioners received their salaries and other service benefits normally till 30th June 2007.

8. Thereafter the petitioners vide letter dated 19th September of 2006 and 20th September 2006 respectively requested the Mayor, Dhaka City Corporation and Secretary, Ministry of LGRD to absorb the petitioner in the revenue budget.

9. On receipt of the said letter dated 20th of September 2006 the Secretary, Ministry of LGRD vide its letter dated 31st October 2006 requested the Chief Engineer, LGED and the City Corporation to give opinion as to the absorption of the petitioners in the revenue budget of Dhaka City Corporation and in response to said letter dated 31st October 2006, vide its letter dated 20th November 2006, Chief Engineer, LGED recommended to continue the activities of the said project and to absorb the petitioners in revenue budget. Subsequently, on 14th May 2007 the Chief Slum Development Officer and Member Secretary SBSUAP requested the Zonal Executive Officer, Dhaka City Corporation to shift the 84 Urban Development Centre to Dhaka City Corpo-ration and accordingly the Urban Development Centers were shifted within the establishment of the Dhaka City Corporation.

10. The Chief Slum Development Officer and Member secretary, SBSUAP, DCC, Dhaka in compliance with the direction as contained in the letter dated 28th June 2007 of LGED/PD (SBSUAP) forwarded the staff service particulars of 100 employees employed in the said project in DCC (Annexure-N). The respondent No.3 Dhaka City Corporation vide Office order dated 9th October 2007 allowed the petitioners-caretakers to draw salary and allowances of 1st 2nd and 3rd time scale as they completed 8th 12th and 15th years of their service under DCC, Dhaka in Support For Basic Service in Urban Areas' Project.

11. It is stated that on 2nd September 2007, a Committee was formed with Chief Revenue Officer as the convener and 10 Zonal Executive officers, Chief Urban Planner, Law Officer and Principal Development Officer and principal Development Officer to report amongst others whether the manpower of the project can be transferred in the revenue budget of DCC. The said Committee submitted a report on 10th of December 2007 recommending amongst other that the 512 persons employed in the project considering their long service can be absorbed within the administrative frame work of DCC.

12. Thereafter the Chief Executive Officer of DCC vide his letter dated 14th of January 2008 sent a proposal to respondent No.2 Secretary, LGRD, requesting him to transfer 512 officers and employees of "support for basic service in Urban Areas Project" in the service of DCC under revenue budget as per the decision of ECNEC dated 3rd January 2008. Be it mentioned that joint Chief, Planning Division, Government of Bangladesh vide its letter dated 10th January 2008 requested all concerned including Chief Executive officer, DCC to transfer manpower from completed projects to revenue budget following the existing Rules and Regulations as per the decision of ECNEC dated 31st December 2007.

13. The Government in the Ministry of local Government Rural Development and Co-Operatives, Local government Divisions vide letter dated 4th March 2008 through its Senior Assistant Secretary requested the Chief Executive Officer of DCC to send a specific proposal for transferring the manpower of the projects to revenue budget following all Rules and Regulations.(Annexure-S) and thereafter the respondent No.3 (DCC) took no steps whatsoever for absorption of the petitioners in the revenue budget of the DCC and also to pay the arrear-salaries and other service benefits inspite of the decisions of the ECNEC to absorb the petitioners in the revenue budget as per Rule

and Regulations. The petitioners thereafter served a legal notice 29th June 2008 claiming arrear salaries amounting to Taka 1,07,08,048.

14. Consequently upon a meeting held on 12th July 2008 with the Chief Executive Officer of DCC for deciding the demand of salaries and allowances of 300 employees for Support for Basic Service in Urban Areas Project. A positive initiative was taken. In that meeting it was decided that as per the direction of mayor of DCC in compliance with the Government Rules, 2 Officers of DCC were required to submitt a proposal regarding the salary and allowance of 300 employees within 10 days. They accordingly submitted their report on 11th August 2008 recommending of pay of salary. On 21st September 2008 Chief Executive Officer, DCC wrote a letter to respondent No.2 praying for sanctioning of Taka 3,51,84,800 for payment of salary and allowances of 300 employees and officers of Support For Basic Service in Urban Areas Project for December 2008, (Annexure-W) and accordingly DCC paid Taka12 lakhs for distribution amongst 300 employees on 29th September 2008 and lastly in a General meeting of commissioners of DCC in its 14th meeting decided to send a request letter for transferring 300 employees of the said project in revenue budget of DCC.

15. Therefore, the petitioners are entitled to get all benefits such as selection grade, promotion, time scale etc as they served in the projects of DCC and they are legally entitled to continue as Pourashava employees paid under Pourashava budget. legitimate they have reasonable expectation as the petitioner on a served DCC continuously for a period of 10 to 18 years. The petitioner moved this Division under Article 102 of the constitution and obtained the present Rule.

16. Mr Mahabub Shafiq, the learned Advocate appearing on behalf of the petitioners after taking us through the entire petition and several Annexures Annexed thereto mainly submits that the petitioners are entitled to get all the benefits such as selection grade scale, promotion, time scale etc as they served in the Project of DCC. In elaborating his contention the learned Counsel further submits that in view of the fact that as per the condition contained in the approved project Performa in the Slum improvements project (2nd phase) (Annexure-B) the petitioners are legally entitled to continue as Pourashava employees paid under Pourashava budget. He further submits that the petitioners served DCC continually for a period of 10 to 18 years and, as such, they have reasonable expectation to be absorbed in the revenue budget of DCC and asked for a declaration to be given upon the respondents in that respect. In support of his contention he has placed reliance on the decision of *Asotosh Chakma vs RAJUK* reported in *60 DLR 273.*

17. Respondent No.3 Dhaka City Corporation, by filing affidavit in opposition on the other hand, vehemently opposes the Rule. Their contention is very specific. They stated that (2nd Phases) of project known as a "support for Basic service of Urban Area which covered the period between 1996-2000 and in the 3rd phase, which covered the period from 2001-2007, work of the project was completed and the work concerned was carried under the name of "স্থানীয় অংশীদারিত্বেও মাধ্যমে দারিদ্র দূরীকরন প্রকল্প". It is further stated that Dhaka City Corporation is governed by Dhaka City Corporation Ordinance and not by Pourashava Ordinance. It is their clear assertion that the manpower of development project can never be included in the revenue budget. They rather shifted this responsibility upon the engineering directorates of local Government and stated that it is not included in the administrative organogram of Dhaka City Corporation. They further stated the reasons in Paragraph Nos.7 to 34 of the affidavit in opposition justifying why the Dhaka City Corporation is not in a position to transfer the services of the petitioners to the revenue budget and also stated that in no way they are

liable to pay salaries etc of the said employees.

18. Mr M Khurshid Alam Sarker, the learned Deputy Attorney-General appearing on behalf of respondent No. 5, Chief Engineer, local engineer LGED Bhabon, entered appearance by filing a vokalatnama and submits that the local government engineering development has no concern over the claim of the petitioners and they also adopted the same stand as adopted by the respondent No. 3 Dhaka City Corporation. In other words, as the learned Deputy Attorney-General submits, the decision whether the petitioners can be absorbed in the revenue budged can only be resolved by the Dhaka City Corporation alone, it is not within their organogram by which effectively this issue can be resolved by them.

19. By taking all these grounds respondent No. 3 Dhaka City Corporation and the respondent No.5 Local Government Engineering Development submit that this Rule should be discharged being devoid of any substance.

20. We have heard the learned advocate appearing on behalf of the petitioners and the learned Deputy Attorney-General at length and in our anxiety glean the entire facts and circumstance of the case after going through the different letters and correspondents by the petitioners with DCC and also with the Ministry of LGRD communicated in different point of times.

21. It appears to us that the petitioners from the year 1988 up till now have been diligently and persistently trying to establish their claim on the basis of reasonableness. The petitioners were given assurance from time to time, as it appears from the different Annexures, which we have mentioned earlier that their services would be absorbed in the revenue Budget. Even in the highest body of the Government "ECNEC" a positive decision was taken to absorb the petitioners and others standing on the same footing in the revenue Budget as per rules and regulation as discussed above in particular the Annexure R dated 10th January 2008. In that letter we found that the decision of ECNEC was communicated to all the city Corporations including the Dhaka City Corporation, respondent No.3.

22. Certainly in the back drop of the above, the petitioners with the passage of time has developed in their mind a legitimate and reasonable expectation that their fate will find out a positive way ie they would be absorbed in the revenue budget of the Dhaka City Corporation. We have no hesitation to observe that both the Dhaka City Corporation and the Government is trying to shun this responsibility in a conscious manner. One wing is trying to thrust the responsibility on the shoulder of the other wing. We deprecate this propensity.

23. Doctrine of reasonableness is based upon a rationale which cannot be undermined by avoiding responsibility entrusted with the respondents. All these days the petitioners were moving from pillar to post to settle their reasonable and legitimate expectations that they would be absorbed in the revenue budget of the Dhaka City Corporation failing which they have come before this Court. In the decision of *The Chairman, Bangladesh Textile Mills Corporation vs Nasir Ahamed Chowdhury 22 BLD AD 199 = 7 BLC (AD) 144,* their lordships of the Appellate Division while considering the scope of legitimate expectation observed:

> "For a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue until sane rational grounds for withdrawing it are communicated to him and he is given an opportunity to defend his cause."
>
> "An expectation could be based on an

express promise or representation or by established past action of settled conduct. The representation must be clear and unambiguous it could be a representation to the individual or generally to a class of persons." *(Underlined by us)*

24. Their Lordships of the Appellate Division further held:—

"Every such expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."

25. In the said decision we found that our Appellate Division has also hinted what should be the yardstick to be following in the exercise of discretion in this situation. Our Appellate Division maintained:

"The exercise of discretion must be a real exercise of discretion with due regards to statute conferring such discretion."

26. Reflection of this decision has also been echoed in the decision of *Ashutosh Chakma and others vs Rajdhani Unnayan Kartipakha (RAJUK)* as refer to earlier *60 DLR 273* wherein this Division almost in a similar case, relating to the service of RAJUK employees considered their legitimate expectation of being regularized in permanent posts as per the consistent practice of RAJUK.

27. Fortified with the above two decisions one of which is binding on us, we are of the view that the petitioners in the present writ petition also deserve the same treatment on the ground of their reasonable and legitimate expectation to consider their case on the same way according to the settled principle and proposition of law governing the subject.

28. In view of the discussions as made above and after considering the facts and circumstances of the present case, we hold that the petitioners should be absorbed in the revenue budget of Dhaka City Corporation, respondent No.3 with their arrear, salaries and benefit as expeditiously as possible without any fail. The respondents are directed to comply with the order and do the needful in that respect.

With this observation this Rule is made absolute without any order as to cost.

Ed

High Court Division
(Criminal Appellate Jurisdiction)

Md Miftah Uddin Chowdhury J
Md Shawkat Hossain J

Judgment
March 15th, 2012.

Shahidur Rahman @ Shahid.....Appellant

vs

State.....Respondent*

Narcotics Control Act (XX of 1990)
Section 19, Table 1(b)

The quantity of heroine was not at all ascertained. Without ascertaining the quantity of heroine the conviction is illegal and not sustainable. .....(12)

Md Khurshid Alam Khan, Advocate—For the Appellant.

Kazi M Ejarul Haque, Deputy Attorney-General, with Md Shafquat Hussain and Kazi Bazlur Rashid Assistant Attornies-General—For the Respondent.

Judgment

Miftah Uddin Chowdhury J: This arises out of the judgment and order dated 7-8-2005, passed by the Additional Sessions Judge, Narail, in Sessions Case No. 39 of 2004, arising out of GR Case No. 19 of 2004 corresponding to Lohagora Police Station Case No. 19 dated 19-1-2004, convicting the appellant with sentence to suffer rigorous imprisonment for life and to pay fine of Taka 10,000 in default to suffer rigorous

*Criminal Appeal No.3885 of 2005.

imprisonment for further 2 (two) years, finding him guilty under section 19, Table l(b) of the Narcotics Control Act, 1990.

2. PW 1 Sub-Inspector Md Rafiqul Islam as an informant lodged the FIR alleging that on 16-1-2004 he received an information from a secret source that Shahidur Rahman, son of Abdul Halim Master of Charkalna, will bring a lot of heroine and transfer the same to drug dealers at Dhaka. On such information by making General Diary being GD entry No. 479 dated 16-1-2004 he alongwith constables Mohabbat Ali, Abul Kalam and Omar Ali went to Charkalna. After reaching therein while they had been waiting by forming ambush received information from the source that the lot of heroine was brought to the house of the appellant Shahidur Rahman. He alongwith Azizur Rahman (PW 3) and Aminur Rahman, of Charkalna and Gaffar of Noagram, at 6-30 PM entered into the residential hut on northern viti of accused/appellant and found him (accused/appellant) and another Aktar-uz-Zaman therein. After search of their bodies he recovered chocolate coloured heroine measuring about 2 pounds valued at Taka 1,00,00,000 (Taka one crore only) contained in a packet kept under the sweater of accused-appellant Shahidur Rahman. After such recovery he made seizure list in presence of his aforesaid three companions and PW 2 Union Parishad Member Rehana Begum, took the seized goods to her custody. He arrested the said two persons under section 54 of the Code of Criminal Procedure and brought them to the police station wherein a General Diary being GD entry No.485 dated 16-1-2004 was made in respect of their arrest with heroine. They were forwarded to the Court. As per Court's order sample of heroine was sent for test by chemical expert in Dhaka who reported that the sample contained in a bottle made of glass sent to him is mixture of brown coloured heroine, and hence the case.

3. After investigation charge-sheet was submitted against the aforesaid two accused under section 19 Table l(b) of the Narcotics Control Act.

4. On receipt of the charge-sheet the case record was sent for trial to the Court of Sessions Judge, Narail wherein it was numbered and registered as Sessions Case No.39 of 2004 and cognizance was taken under the aforesaid section of the Narcotics Control Act.

5. During trial charge was framed against the appellant under section 19 table l (b) of the Narcotics Control Act who pleaded not guilty.

6. To establish the charge the prosecution examined 7(seven) PWs and on the other side one DW was examined on behalf of the accused. After examination and cross examination of the witnesses the accused was examined under section 342 of the Code of Criminal Procedure wherein he repeated his innocence. After hearing the parties, the learned Additional Sessions Judge, Narail, who disposed of the case on transfer by the impugned judgment and order convicted the appellant with the aforesaid sentence and finding.

8. Mr Md Khurshid Alam Khan, Advocate, appearing for the appellant took us through the evidence on record and submits that the prosecution hopelessly failed to prove the case against the appellant. He referred the deposition of PW 2 Rehana Begum who was admittedly a Local Union Parishad Member at the relevant time. The said PW 2 in her deposition deposed that she alongwith accused Shahidur, his sister Panna and other children had been watching television in the house of Halim Mollah, being afraid of the presence of police they were scattered. She was informed about the presence of police by her son, she came out of the house with accused Shahidur and others, the Police asked her about ownership of the house, in reply accused Shahidur claimed his father's ownership. At that time Daroga Rafique asked him whether any person came to

that house, he replied in negative. The Police searched the house and found none. Thereafter finding Aktar-uz-Zaman under a chouki in the veranda the police handcuffed him and also arrested accused Shahidur alleging that he told lie. Police had mercilessly beaten him and had taken him to the police station. She requested the police to release him since he is innocent, but for telling lie police refused to release him. The Daroga took her signature in a paper on the road 200 yards away from the house of Shahidur. At that time the prosecution declared her hostile. In cross-examination made on behalf of the prosecution she deposed that she did not hear about recovery of any heroine from the body of Shahidur. She denied the suggestion that heroine was recovered in her presence from the house of Halim Mollah. On further cross examination made on behalf of the defence she deposed that the police arrested Shahidur in their veranda and had beaten him mercilessly. PW 3 Md Azizur Rahman deposed that he has put his signature on the seizure list standing on the road 200 yards away from PO house. He had been residing in his house which is 2 (two) kilometers away from the place of occurrence. In the seizure list it was not mentioned from where the heroine was recovered. The Daroga took him and his companion Aminul to the place of occurrence and asked them to put signatures. PW 4 Md Aminul Islam also deposed that the Daroga asked them to come to the place of occurrence and took his signature on the road on a paper in which it was not written that any heroine was recovered. They did not go to the house of Halim Mollah. PW 5 Constable Abul Kalam deposed that witness Gaffar is a driver of the van used for carrying dead bodies concerned with unnatural death from police station to morgue. PW 6 Mollah Mohhabat Ali did not support the contention of the FIR and the deposition made by the informant Sub-Inspector Rafiqul Islam. PW 7 Sub-Inspector Nurul Akhlak Hussain Khan during his cross-examination deposed that "খসরা মানচিত্রে "ক" চিহ্নিত স্থান ঘটনাস্থল। ঘটনাস্থলের ঘরটির সামনের বারান্দাও আমি দেখাইয়াছি। সামনের বারান্দায় আমি কোন কক্ষ পাই নাই। "ঙ" চিহ্নিত কাঁচা রাস্তার পশ্চিম পাশে কোন বাড়ী নাই। ঘটনাস্থলের উত্তর পূর্ব ও দক্ষিণ পার্শ্বে কিছু দূরে বাড়ী ঘর আছে। কিন্তু আমি খসড়া মানচিত্রে সেগুলির বর্ণনা প্রদান করি নাই।" The only defence witness the DW 1 Md Hemayet Hossain in his deposition deposed that accused Saidur is known to him who is residing only 100/150 yards away from him. Accused Saidur is a farmer and a man of good character and never involved in any criminal activities. On 16-1-2004 he came to know that the police visited the house of Halim Master, he went there and found Saidur as being handcuffed. Aktar-uz-Zaman was an employee of the local branch of the Janata Bank. The elder persons and female UP member present therein informed that the police came there for Aktar-uz-Zaman, but for telling lie they arrested Saidur. He made request to release Saidur but refused. In cross-examination he further deposed that in the place of occurrence he found both Aktar-uz-Zaman and Shahidur as arrested. He did not find Aminul and Azizul with UP member Rehana etc.

9. After reading the deposition of the witnesses Mr Khan submits that the PWs in their deposition did not support the prosecution case, their depositions are contradictory to each other and inconsistent to the FIR story. The trial court did not consider the deposition of the DW.

10. Mr Khan further submits, that the charge framed against the accused/ appellant is also not proper and examination of him under section 342 of the Code of Criminal Procedure was also not made properly. Moreover, the period of punishment depend upon the quantity of Narcotics under section 19 of the Narcotics Control Act, but in the instant case it was not ascertained how much heroin was recovered from appellant Shahidur.

11. Mr Kazi M Ejarul Haque, the learned

Deputy Attorney-General, appearing for the State opposes the argument advanced by Mr Khan and submits that the prosecution successfully proved the case against the appellant and, as such, the appeal should be dismissed.

12. Hearing the learned Advocates of both the sides and on perusal of the record it appears to us, that amongst the witnesses only the PW 2 UP member Rehana Begum is a local person who did not support the prosecution case. PW 3 Azizur Rahman and PW 4 Md Aminul Islam are not inhabitants of the village of the accused appellant from where the heroine was recovered and seized, rather they are inhabitants of different village having distance of 2 (two) kilometer from the PO village. As per their evidence they were collected by the police to make them seizure list witnesses, they were not present at the time of alleged recovery of heroin from Shahidur, rather their signatures were taken on the road 200 yards away from the PO room. These witnesses are apparently chance witnesses set up by the police. Reading the depositions of other witnesses who are nothing but formal witnesses, we found that the prosecution failed to establish recovery of any heroine from the body of the appellant who had been allegedly sitting within his room, rather it appears that co-accused Aktar-uz-Zaman who was not tried as being discharged at the time of framing charge may be involved in dealing with the drug as disclosed by the DW 1. Moreover, the quantity of heroine was not at all ascertained. Without ascertaining the quantity of heroine the conviction under section 19, Table 1 (b) is illegal and not sustainable.

13. Hence, this appeal is hereby allowed. The appellant is acquitted from the charge leveled against him. He is released from his bail bond.

Send down the lower Court's records immediately.

Ed.

High Court Division
(Special Original Jurisdiction)

Syed Refaat Ahmed J
Mahmudul Hoque J

Judgment
April 3rd, 2014

Airtel Bangladesh Ltd and others....Petitioners

vs

Chairman, First Labour Court, Dhaka and others.....Respondents*

Constitution of Bangladesh, 1972
Article 102(2)

Judicial review—When a tribunal with limited Jurisdiction reaches a wrong conclusion as to the width of its powers then this Court sitting in judicial review must be able to correct that situation. .....(29)

India in Workmen Food Corporation of India vs M/s. Food Corporation of India, (1985) AIR 670; Karnaphuli PMWU vs KPM Employees Union, 11` ADC (2005), 300; Power Development Board vs Chairman, Labour Court, Khulna Division, 1981 BLD (AD) 59; Lord Diplock in O'Reilly vs Mackman, [1982] 3 All ER 1124; Anisminic Ltd vs Foreign Compensation Commission [1969] 1 All ER 208 (HL)] and Pabna Mental Hospital vs Tossadek Hossain, 13 BLT (AD) 2005, 91 ref.

Tanjib-ul-Alam, Advocate—For the Petitioners (In all Writ Petitions)

No one Appears—For the Respondents.

Judgment

Syed Refaat Ahmed J: These twenty Writ Petitions are bound by common questions of interpretation of law applicable to similar facts by reason of which these have been heard together and are now being disposed of by this common Judgment.

*Writ Petition No. 1105-1123 & 1251 of 2012

2. Given further the fact that the learned Counsel for the Petitioner in all these Writ Petitions has placed his submissions based on the records in Writ Petition No. 1106 of 2012, this Court proceeds to dispose of all these Writ Petitions by reference to that particular application under Article 102 of the Constitution and the consequential Rule Nisi issued on 1-2-2012. This is of course without prejudice to the facts, issues and merits of the other Writ Petitions involved.

3. In Writ Petition No. 1106 of 2012, the Rule Nisi was issued calling upon the Respondent No. 1 to show cause as to why the Order No. 1 dated 24-11-2009 passed by the Respondent No. 1 First Labour Court registering BLL, (IR) Case No. 362 of 2009 and Violation Misc. Case No. 181 of 2011 arising out of the aforesaid BLL Case, now pending before the First Labour Court, Dhaka, should not be declared to have been passed/commenced without lawful authority and are of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

4. The Petitioner No. 1 Airtel Bangladesh Limited ("Airtel") is a Limited Company engaged in providing telecommunication services in Bangladesh in the course of which it regularly procures outsourcing services variously from outsourcing service-providers. The Respondent No. 2 (as similarly placed like all the other Respondent employees of the Pro forma Respondent Elite Logistic Services Limited ("ELSL") in the other related Writ Petitions) is an employee of ELSL in which capacity he has been posted in the Petitioner No. 1 Company, i.e., Airtel as a driver. It is stated that ELSL, engaged as it is in outsourcing business, has been supplying, *inter alia*, personnel services support services etc. to various businesses including Airtel.

5. Airtel is aggrieved by and herein impugns the BLL (IR) Case No. 362 of 2009 along with the interim Order dated 24-11-2009 passed by the First Labour Court, Dhaka in the said BLL Case directing Airtel to maintain *status quo* with regard to the conditions of employment of the Respondent No. 2. Airtel further impugns the proceedings in Violation Misc. Case No. 181 of 2011 filed by the Respondent No. 2 for Airtel's alleged violation of the said Order of *status quo*.

6. On 1-5-2006 and 27-10-2009, Airtel entered into contracts ("the Agreements") with ELSL for outsourcing of, amongst other, drivers from time to time to work at the Head Office/Branch Offices of Airtel whereby it was clearly mentioned, *inter alia*, that the drivers so outsourced would be deemed to be employees of ELSL.

7. The Agreement of 1-5-2006, titled the "Contract For The Provision Of Auxiliary Services", identifies ELSL as the Contractor and Warid Telecom International Ltd. LLC (as subsequently came to be known as Airtel) as the Service Receiver as is "desirous of engaging the services of the Contractor for providing certain personnel such as... Driver,..". The consideration for the contract is specifically identified as the service charge payable by the Service Receiver to the Contractor in return for which the latter undertook to render services "by way of providing trained auxiliary staffs". Predicated on this contractual term, the Agreement at the very outset establishes that the staff or personnel provided by the Contractor as part of the contract services "shall at all times be considered the employees of the Contractor". That status of employer and employee being so established under the Agreement between ELSL and any given personnel independently of the Service Receiver, the Agreement spells out the rights and obliga-

tions of ELSL with regard to outsourcing personnel in terms of selection or recruitment, payment of salary and allowance, regulation of holidays and leave etc., collectively constituting the terms of employment establishing an employer and employee relationship between ELSL and any individual member of its staff like the Respondent No. 2. It is to be noted in this regard that the Agreement of 27-10-2009 between ELSL and Warid Telecom further builds on the terms and conditions of provision of auxiliary services by ELSL as the Contractor without in any way detracting from the employer and employee relationship already established between ELSL and the Respondent No. 2 as early as in 2006.

8. In furtherance of the Agreements, ELSL recruited a large number of drivers including the Respondent No. 2 on its own account without any involvement of Airtel and subsequently placed some of them with Airtel. The Respondent No. 2 had at all material times while working in the premises of Airtel been employed by ELSL evident in the appointment letter and ID card issued by ELSL. Airtel had, evidently, in no sense engaged in any such activity *vis-s-vis* the Respondent No. 2 in this regard. Airtel asserts that since the Respondent No. 2 was, therefore, not appointed by Airtel, that establishment had no control or authority over the incidences of employment of the Respondent No. 2. Accordingly, it was only ELSL alone as the appointing and retaining authority that had the power and legal capacity to take any disciplinary action against the Respondent No. 2, including that of effecting his dismissal, if required.

9. Elaborating on the fact of the contractual consideration for the Agreements of 2006 and 2009 being in the form of service charge payable by Warid/Airtel as Service Receiver to ELSL, it is stated in the Application that the Respondent No. 2 driver was supplied by EL SL, to work in the Warid/ Airtel establishment against which ELSL submitted monthly invoices to Airlel prepared on the basis of Time/Attendance Sheets provided by Airtel. The only payment obligation by way of consideration undertaken by Airtel under the Agreements comprised of making payments to ELSL against the said monthly invoices submitted by the latter. This necessarily obviated the necessity under the very schemes of the Agreements for Airtel either to make or in any way be under any contractual obligation to make any payment to the Respondent No. 2 directly. Notably, therefore, the bottom line of the dynamics of Airtel's relationship with the Respondent No. 2 is that the company at all material terms operated within a strictly limited and well-defined contractual sphere. In this regard, administrative control over the terms of service of the Respondent No. 2 clearly, exclusively and overwhelmingly lay with ELSL. The Respondent No 2 was recruited by ELSL on its own account, received his salary including overtime allowance, bonus etc. from ELSL as determined by ELSL and could only, therefore, be dismissed by ELSL.

10. It is against this factual backdrop that the Respondent No. 2 while being an employment with ELSL filed BLL Case No. 362 of 2009 under section 213 of the Bangladesh Labour Act, 2006 ("Act") praying (as did the other Respondent drivers in the other Writ Petitions), *inter-alia*, for a direction upon Airtel in general to pay all the benefits and allowances otherwise claimed by "permanent workers" working in the Airtel establishment. This was accompanied by an application for an interim injunction under section 216 of the Act against Airtel seeking to injunct any attempt by Airtel to dismiss or discharge the Respondent No. 2. This having elicited a response from the Respondent No. 1 First Labour Court in the form of an interim Order favouring the Respondent No.2 appli-

cant before it and directing Airtel to maintain *status quo* with regard to the appointment of the Respondent No.2, it is contended by Airtel that the First Labour Court erred on the point of jurisdiction since in law in the circumstances it did not have the authority to entertain the application under section 213, thereby, necessitating the filing of this Writ Petition. Airtel is further aggrieved by the fact of the Respondent No. 2 having additionally filed before the First Labour Court a Violation Misc. Case No. 181 of 2011 for ostensible violation by Airtel of the said *status quo* Order previously granted.

11. The learned Advocate for the Petitioners in all these Writ petitions Mr Tanjib-Ul-Alam has taken care to apprise this Court that the Violation Miscellaneous Cases in all these instances have arisen in the context of Dismissal Orders variously issued by the appointing and retaining authority ELSL affecting the twenty drivers supplied to Airtel in its capacity as employer. This is a fact that is notably clearly asserted by each such Respondent No. 2 driver evident in the applications filing the Violation Miscellaneous cases, thereby, implicitly acknowledging a subsisting contractual relationship of employer-employee between ELSL and each such driver but without further elaborating on the same. It is to be noted that other than this stray and tacit acknowledgment of a probable and extant employer and employee and master and servant relationship between ELSL and each such driver in question, all these individuals have otherwise striven to establish Airtel as their rightful employer against whom their putative rights as employees awaited declaration by the First Labour Court in each case in ostensible exercise of authority and jurisdiction under section 213 of the Act. According to Mr Tanjib-ul-Alam therein lies the crux of the Petitioners' case in all these Writ Petitions seeking this Court's determination whether the First Labour Court at all had any jurisdiction reserved to it to entertain each such individual case under section 213 of the Act in the facts and circumstances. It is in that context that the Petitioners emphatically state that it ought to have been evident to the Respondent No. 1 First Labour Court that the Respondent No.2 drivers in fact and in law were retained as employees of ELSL and not by Airtel as such and that any claim of any of the Respondent No. 2 drivers pertaining to such employment was maintainable against ELSL and not Airtel.

12. Given that no one has appeared in any of these Writ Petitions to contest the Rules Nisi before this Court, Mr Tanjib-ul-Alam has had the sole responsibility to submit on the issues of law that reign supreme in all these cases. The focus of such submission primarily falls on the true ambit and purport of the provisions in section 213 of the Act under which all the BLL cases were filed by each of the Respondent No. 2 drivers against Airtel and under which the Respondent No. 1 First Labour Court purported to exercise its jurisdiction. Section 213 reads thus:

> "২১৩। শ্রম আদালতে দরখাস্ত।–কোন যৌথ দরকষাকষি প্রতিনিধি অথবা কোন মালিক অথবা কোন শ্রমিক এই আইন বা কোন রোয়েদাদ বা কোন নিষ্পত্তি বা চুক্তির অধীন বা দ্বারা নিশ্চিত বা প্রদত্ত কোন অধিকার প্রয়োগের জন্য শ্রম আদালতে দরখাস্ত করিতে পারিবেন।" *(Emphasis provided by this Court)*

13. The above provision permits of translation to the effect that Collective Bargaining Agent or any employer or worker may apply to the Labour Court "for the enforcement of any right" guaranteed or secured by or under this Act or any award, settlement or contract. A related and equally significant provision of the law that merits consideration in the facts and circumstances is section 2(65) of the Act which defines a শ্রমিক or a worker as:

> "শ্রমিক অর্থ শিক্ষাধীনসহ কোন ব্যক্তি, তাহার চাকুরীর

শর্তাবলী প্রকাশ্য বা উহা যে ভাবেই থাকুক না কেন, যিনি কোন প্রতিষ্ঠানে বা শিল্পে সরাসরিভাবে বা কোন ঠিকাদারের মাধ্যমে মজুরী বা অর্থের বিনিময়ে কোন দক্ষ, অদক্ষ, কায়িক, কারিগরী ব্যবসা উন্নয়নমূলক অথবা কেরানীগিরির কাজ করার জন্য নিযুক্ত হন, কিন্তু প্রধানতঃ প্রশাসনিক বা ব্যবস্থাপনামূলক কাজে দায়িত্বমূলক কাজে দায়িত্বপ্রাপ্ত কোন ব্যক্তি ইহার অন্তর্ভূক্ত হইবেন না।" *(Emphasis provided by this Court)*

It suffices to note here that so much of the section 2(65) definition as is relevant for our purpose identifies a worker as one who is employed in an establishment or industry directly or through a contractor.

14. This Court is of the view that in order to understand the true purport and ambit of the Labour Court's authority under section 213 it is essential first to visit the definition clause in section 2(65) with a view to clarifying the specific connotation of the term "worker" so defined. Indeed Mr Tanjib-ul-Alam has submitted that the term "worker" cannot stand in a vacuum and must be considered in conjunction with the related term "employed", as indeed appears in section 2(65), and that these two terms must be considered as inextricably linked giving rise to a specific meaning of the term শ্রমিক or "worker". This Court finds in that regard that the relationship of an employer and employee as contemplated in the section 2(65) presupposes primarily a formal contractual bind between one employed and an employing/appointing authority. It is this Court's view that such contractual bind dictates that an employed person not merely works for or under a managing authority or management but is additionally formally employed by such authority in a substantive sense. This necessarily entails or involves such employing authority having direct control and supervision of appointment, payment of salary and benefits, discipline and removal and dismissal from and termination of service. In other words, the employing authority must necessarily have reserved to itself powers of control and supervision over wide-ranging incidences of employment that collectively merit categorization as the terms and conditions of service akin to those spelt out, as for example, in the Agreements of 1-5-2006 and 27-10-2009 and which fell to be dealt with under the purview and by authority of ELSL exclusively *vis-a-vis* the Respondent No. 2 driver. In this regard, this Court wholly subscribes further to the interpretation given to a similar definition of "worker" by the Supreme Court of *India in Workmen Food Corporation of India vs M/s. Food Corporation of India* reported in *(1985) AIR 670* at paragraph 11 as reads thus:

> "The essential conditions of a person being a workman within the terms of the definition is that he should be employed to do the work in that industry and there should be, in other words, an employment of his by the employer and that there should be a relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus employed, there can be no question of him being a worker within the definition of the terms and contained in the Act."

15. Predicated on that understanding of the connotation of the term "worker" this Court has further considered, and as submitted by Mr Alam, the elaboration provided by the Appellate Division of the definition of a "worker" under section 2(XXVIII) of the Industrial Relations Ordinance, 1969 ("IRO") which, considered along with the Employment of Labour Standing Orders Act, 1965, in fact constitutes the essential basis of the codification of the Act of 2006. The expression "worker" as defined in section 2(XXVIII) of the IRO stood thus:

> "any person including an apprentice not falling within the definition of employer who is employed in an establishment or

industry for hire or reward either directly or through a contractor to do any skilled, unskilled, manual, technical or clerical work whether the terms of employment be expressed or implied".

(emphasis provided by this Court).

16. It is noted that the Appellate Division in *Karnaphuli PMWU vs KPM Employees Union* reported in *II ADC (2005), 300* was faced with the question of the extent to which the definition above contemplated the status of workers who are engaged in Karnaphuli Paper Mills ("KPM") through contractors, thereby, qualifying to be treated, if at all, as workers of the KPM establishment itself. In other words, the enquiry was of the extent to which each such worker could be said to be bound in a relationship of employer and employee with KPM. In examining that claimed status and entitlement as KPM workers/employee the Appellate Division pertinently pursued a line of enquiry that focused primarily on the true construction of the terms of employment in each case to determine whether the incidences of employment of each individual claimant with KPM were present or not. Such exercise would finally determine whether any individual claimant was actually employed by KPM or by the concerned independent contractor personally. It is in that context that Justice Bimalendu Bikash Roy Chowdhury laid down what this Court views to be the most succinct and authoritative interpretation of the true import of the words "directly or through a contractor", featured in section 2(XXVIII) of the IRO and incidentally in section 2(65) of the Act with which we are presently concerned.

17. Indeed a worker may be one who is employed by the management directly e.g., by an entity like Airtel, the Petitioner before us, or through a contractor e.g., in the likeness of an outsourcing enterprise like ELSL before us and in both instances will be considered as employed by the management itself, provided, as Justice Bimalendu Bikash Roy Chowdhury stressed, in "either case there [is] a contract of employment between the management and the person employed". Applied to this case, that would mean the existence of a direct contractual nexus between each individual driver and the Airtel management binding one to the other by privity of contract. That privity, this Court finds, is however, significantly absent in all the cases before us. For what the present facts manifest is yet a different scenario distinguishable in Justice Chowdhury's words by all the important element of each of the twenty drivers in these Writ Petitions working instead "under the control and supervision of the contractor". In other words, such direct control and supervision by a contractor wholly excludes the possibility of employment by the management itself i.e., by Airtel in the present instances. The fact that each such driver works on the premises of Airtel makes no substantive difference in this regard. They remained at all material times workers under the employment of the independent contractor ELSL and ELSL alone.

18. Premised on that essential determinant of the status of a worker under the IRO, and by extension under the Act, being that of a person who enters into a contract of service under the management itself (i.e., in the capacity and status of any appointing entity like the Petitioner Airtel before us), Justice Bimalendu Bikash Roy Chowdhury observed thus at paragraph 12 at page 303:

"In order to arrive at the conclusion whether a person working in the establishment is a worker under the establishment or a worker under an independent contractor, that is, whether the employment is by and under the establishment through a contractor or by the independent contractor for the benefit of whom the employment is given, one has to look to the terms of

employment."

(Emphasis provided by this Court)

19. Having this focused on the proximity of the contractual bind between an individual with an establishment and/or a contractor being determinable by reference essentially to the terms of employment, Justice Bimalendu Bikash Roy Chowdhury appears to this Court to subscribe to the ratio above cited in the Workmen Food Corporation of India case in narrowing down the test of a worker's status to that of an existence of a relationship of employer and employee spelt out in such terms of employment. Accordingly, the learned Judge observed thus:

> "The terms of employment must establish a relationship of master and servant or employer and employee between the person employed and the establishment and it is not enough that a person is working in the premises of a certain establishment" (Emphasis Added by this Court).

20. It is in this context Mr Tanjib-ul-Alam has satisfactorily submitted that the Respondent No. 2 driver in Writ Petition No. 110 of 2012, by his very terms of employment discernible from the Agreements of 2006 and 2009 falls in all aspects of his employment to be absolutely controlled and supervised by the independent Contractor ELSL under whose payroll he and the other Respondent drivers in all these Writ Petitions were at all material times and by dint of which each such driver received payments from the Contractor ELSL. Such payroll was maintained separately and independently by the Contractor of ELSL exclusively of Airtel with the latter having no authority of hiring and firing any of the Respondent No. 2 drivers in the Writ Petitions. It is submitted satisfactorily that clearly these contractual arrangements squarely fall into the scheme of the Agreements of 2006 and 2009 between the Service Receiver Airtel and the Contractor ELSL marked by the payment of the service charge payable by Airtel to ELSL.

21. This Court finds that nothing in the contractual regime governing these cases has gone to establish to the contrary that any of the Respondent No. 2 drivers discharged their duties and contractual obligations of service for consideration due them directly by Airtel in the form of salary earned. In fact, the Appellate Division in the Karnaphuli PMWU Case presided over a rather similar factual scenario of the contractor submitting bills for services rendered to an establishment and payment under the bill being satisfied upon receipt of the bill amount by the independent contractor into its account from which it would be at liberty to disburse payments of salary and benefits to each individual member of its staff otherwise working in the premises of KPM.

22. Considered in terms of a juxtaposition of competing rights and obligations in these cases therefore, arises the manifest scenario of the First Labour Court being called upon to undertake an exercise of establishing or declaring a set of rights rather than dealing with rights that are extant and, therefore, statutorily that enforceable by it. It is in this context that Mr Tanjib-ul-Alam submits that the purport of the jurisdiction granted the Labour Court under section 213 of the Act is that of enforcing established rights arising from the variously identified scenarios therein as opposed to taking on itself the task of declaring or establishing rights not presently there but contended to be in a putative form. To engage in the latter exercise, Mr Alam submits, would amount in law to the Labour Court exceeding its authority in jurisdiction, travelling beyond the jurisdictional parameters unique to section 213, consequently arrogating authority not within the legislative intent, erring in law and, thereby, risking an intervention in judicial review by this

Court in a Writ of Certiorari.

23. It is against this backdrop that this Court finds that the term প্রয়োগ as figures in section 213 of the Act readily permits the enforcement of existing rights as opposed to an establishment, creation or declaration of rights anew. In the present facts and circumstances, given this Court's finding above that absent a contractual bind between the Respondent No. 2 driver and Airtel resulting in a substantive employer employee relationship between the two there is necessarily no existing enforceable right that has at any material date accrued to the Respondent No. 2 driver that would permit of consideration and disposal by the Labour Court by invocation of section 213 of the Act.

24. Clearly, however, the Respondent No.1 First Labour Court by purported exercise of jurisdiction under section 213 notwithstanding the above scenario has proceeded to clothe section 213 with an interpretation that would amount to the Labour Court being reposed with jurisdiction in far excess of that otherwise expressly provided for. Therein lies the First Labour Court's erroneous interpretation of the law proceeding from a misconception of the law and resulting in an exercise of jurisdiction which it never was possessed of.

25. This fine distinction of an extant right and the establishment of a putative right as clearly defines the boundaries and substantive limits of the Labour Court's powers under section 213, by this Court's understanding came to be recognized vis-a-vis section 34 of the IRO which as a precursor in many way of section 213 of the Act emphasized on that distinction.

26. In this instance as well the Appellate Division in *Chairman, Power Development Board vs Chairman, Labour Court, Khulna Division* reported in *1981 BLD (AD) 59* held that where the relief prayed for is the establishment of a right of an employee as opposed to the enforcement of any existing right guaranteed or secured under an award or settlement, section 34 could not be relied upon.

27. Following that construction it is equally this Court's finding that the Respondent No. 2 driver having sought the First Labour Court's intervention under section 213 by seeking effectively an establishment or declaration of a right that otherwise does not accrue to him in the context of the relationship shared with the Petitioner Airtel, his invocation of section 213 was clearly misconceived and the entertainment of that application by the First Labour Court was Clearly erroneous leaving all interventions by and Orders stemming consequentially from the Labour Court to be equally deprived of all legal authority and to be of no legal effect.

28. This Court in this regard, clearly finds that the First Labour Court being a tribunal with limited jurisdiction, mistook the law as, declared in section 213 of the Act and by that reason clearly asked itself the wrong question. That is one into which, in the words of *Lord Diplock in O'Reilly vs Mackman* reported in *[1982] 3 All ER 1124*, declaring the virtues of the principles elaborated in *Anisminic Ltd vs Foreign Compensation Commission [1969] 1 All ER 208 (HL)]*, the Labour Court -

" was not empowerd to inquire and so had no jurisdiction to determine. Its purported 'determination", not being "a determination" within the meaning of the empowering legislation, was accordingly a nullity. "

29. Accordingly, this Court finds itself echoing firmly the sentiment of Lord Reid in the Anisminic Case that when a tribunal with limited Jurisdiction reaches a wrong conclusion as to the width of its powers then this Court sitting in judicial review must be able to correct

that situation-

> "not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal. If they base their decision on some matter which is not prescribed for their adjudication, they are doing something which they have no right to do and if the view which I expressed earlier is right, their decision is a nullity."

30. It has not further escaped this Court's attention that in this very jurisdiction, the Appellate Division itself has clearly subscribed to and upheld this dictum, for example, in *Pabna Mental Hospital vs Tossadek Hossain* reported in *13 BLT (AD) 2005, 91* in holding thus:

> "No authority can exceed the power given to it. Any action taken by the Petitioner in derogatory to the law or rules set for the purpose or in defiance of the principles of natural justice would make the purported exercise of jurisdiction invalid or in excess of jurisdiction. Thus High Court Division could interfere with the impugned order when the person proceeded did not get proper opportunity to defend himself and when it found that the act done or proceeding taken is vitiated by lack of jurisdiction or by being in excess of jurisdiction."

31. Noted also is the fact that such an intervention in judicial review in Certiorari drawing on the express limits of exercise of jurisdiction by the First Labour Court under section 213 of the Act has also previously been addressed by this Court with regard to Airtel as a Service Receiver and ELSL as the Contractor. These cases pertained to services provided in the establishment of Airtel by 51 individuals as peons/teaboys and in which this Court in its judgment of 27-10-2011 in Writ Petition No.5561 of 2011 and 50 other Writ Petitions made the Rule absolute and quashed the section 213 proceedings before the First Labour Court. This Court in the present facts and circumstances finds no reason to digress from that course of action and interventions as previously undertaken given its findings and observations of law specifically as elaborated hereinabove.

32. Considering the above this Court finds merit in the Application and substance in the Rule issued.

33. In the result, the Rule is made absolute. The Impugned Order No. 1 dated 24-11-2009 passed by the Respondent No. 1 registering BLL (IR) Case No. 362 of 2009 and Violation Misc. Case No/181 of 2011 arising out of the aforesaid BLL Case, now pending before the First Labour Court, Dhaka, are, hereby declared to have been made without lawful authority and to be of no legal effect. Consequentially, BLL Case No. 362 of 2009 stands declared to have been dismissed.

34. This Judgment by its very terms findings and observations shall without prejudice govern the substantive consideration and final disposal of Writ Petition Nos. 1105 of 2012, 1107 of 2012, 1108 of 2012, 1109 of 2012, 1110 of 2012, 1111 of 2012, 1112 of 2012, 1113 of 2012, 1114 of 2012, 1115 of 2012, 1116 of 2012, 1117 of 2012, 1118 of 2012, 1119 of 2012, 1120 of 2012, 1121 of 2012, 1122 of 2012, 1123 of 2012 and 1251 of 2012 in like forms as above to the fullest.

There is no Order as to costs.

Ed.

High Court Division
(Special Original Jurisdiction)

Farah Mahbub J
Kazi Md Ejarul Haque Akondo J

Judgment
February 2nd, 2014.

Tajuddin (Md).....
.....Petitioner

vs

Bangladesh and others.....Respondents*

Artha Rin Adalat Ain (VIII of 2003)
Section 13(3)

In order to pass judgment and decree under the provision the Adalat has to be satisfied that there is an admission by the defendant concern over the claim so made by the plaintiff bank and to that effect the Bank is required to make an application. The legislature having used the word "এবং" after the words "বাদীর আরজির বক্তব্য স্বীকৃত হইয়া থাকিলে" and "উক্তরুপ স্বীকৃতির ভিত্তিতে যেরুপ রায় বা আদেশ পাইতে বাদী অধিকারী" made those two requirements conjunctive. .....(7)

Md Afran Uddin Akand vs Artha Rin Adalat, 15 BLT 343 and Md Kamal Uddin Akand vs Artha Rin Adalat, VI ADC (2009) 383 ref.

Sifar Mustafa, Advocate—For the Petitioner. (In both the writ petitions)

Kazi Akhtar Hossain, Advocate—For the respondent No.3.

Judgment

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

2. In these Rules Nisi 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 judgment and decree dated 6-3-2013 (Annexure-D) passed by the learned Joint District Judge and Artha Rin Adalat, 1st Court, Jessore in Artha Rin Suit No. 35 of 2011 as well as the judgment and decree dated 6-3-201 (Annexure-D) passed by the learned Joint District Judge and Artha Rin Adalat, 1st Court, Jessore in Artha Rin Suit No. 36 of 2011 should not be declared to have been passed without any lawful authority and hence, are of no legal effect.

3. In view of the statements so have been made in both the writ petitions Mr Sifar Mustafa, the learned Advocate appearing for the respective petitioners of both the writ petitions drawing attention to the impugned judgment and decree dated 6-3-20013 (Annexure-D) submits that the same has been decreed under section 13(3) of the Artha Rin Adalat Ain, 2003 (in short, the Ain, 2003). In this regard, drawing attention to the said provision of law he goes to submit that in order to invoke section 13(3) the Adalat has to be satisfied that the defendants concerned have admitted the claim of the plaintiff bank and that to that effect the bank has to make an application. In this regard, referring to paragraph Nos. 5, 7, 11,1 2 and 13 of the written statements so have been filed by the respective defendants including the petitioner he goes to argue that this petitioners, the defendant No. 2 has categorically denied the claim of the plaintiff bank, as is apparent therefrom; rather making an application on 24-1-2013 (Annexure-C) this petitioner brought attention to the Adalat about the disputes so have been agitated therein and made a prayer to fix up another date for peremptory hearing upon taking evidence on the assertion so made by the petitioner. But the Adalat without giving any observation and findings whatsoever on the application dated 24-1-2013 and also in the absence of any application of the respondent bank has decreed the suit invoking the provision as contained in section 13(3) of the Ain, 2003. Accordingly, he sub-

*Writ Petition Nos. 4579 & 4580 of 2013

mits that both the impugned judgment and decree should be knocked down for having been passed without jurisdiction. In support he has referred the case of *Md Afran Uddin Akand vs Artha Rin Adalat and others* reported in *15 BLT 343.*

4. Conversely, Mr Kazi Akhtar Hossain, the learned Advocate by filling affidavit in opposition on behalf of respondent-bank submits drawing attention to the statement so made in paragraph 13 of the written statements so filed by the defendants submits that there the petitioner has admitted the claim of the bank stating, *inter-alia*, "অত্র বিবাদী ইচ্ছাকৃতভাবে লোন পরিশোধ করিতে গড়িমসি করেন নাই।" In view of the stated admissions of the defendant petitioner the Adalat has rightly exercised power under section 13(3) of the Ain in decreeing the suit. In support, he has referred the case *Md Kamal Uddin Akand vs Artha Rin Adalat and other* reported in *VI ADC (2009) 383.* He further submits that for challenging the judgment and decree this petitioner has alternative forum as provided under section 41 of the Ain, 2003. Having not invoked the same these Rules must fail on the count of maintainability.

5. In order to appreciate the respective arguments of the contending parties let us first have a look at section 13 of the Ain, 2003, which runs as under-

"১৩। মামলার বিচার্য্য বিষয় গঠন ও নিষ্পত্তি। ১। বিবাদী কর্তৃক লিখিত জবাব দাখিল হওয়ার পরবর্তীতে ধার্য্য একটি নির্ধারিত তারিখে আদালত উভয় পক্ষকে যদি উপস্থিত থাকে শুনানী করিয়া এবং আরজি ও লিখিত বর্ণনা পর্যালোচনা করিয়া মামলর বিচার্য্য বিষয়, যদি থাকে গঠন করিবে এবং যদি বিচার্য্য বিষয় না থাকে আদালত অবিলম্বে রায় বা আদেশ প্রদান করিবে।

২। উপ-ধারা (১) এ নির্ধারিত তারিখে, কোন বা উভয় পক্ষ যদি অনুপস্থিত থাকে তা হইলে আদালত, আরজি ও লিখিত বর্ণনা পর্যালোচনা করিয়া মামলার বিচার্য বিষয়, যদি থাকে, গঠন করিবে এবং যদি বিচার্য বিষয় না থাকে, আদালত অবিলম্বে রায় বা আদেশ প্রদান করিবে।

৩। মামলার যে কোন পর্যায়ে, লিখিত বর্ণনায় কিংবা অন্য কোনভাবে বিবাদী কর্তৃক বাদীর আর্জিও বক্তব্য স্বীকৃত হইয়া থাকিলে, এবং উক্তরুপ স্বীকৃতির ভিত্তিতে যেরুপ রায় বা আদেশ পাইতে বাদী অধিকারী, সেরুপ রায় আ আদেশ প্রার্থনা করিয়া বাদী আদালতের নিকটে দরখাস্ত করিলে, আদালত, বাদী ও বিবাদীর মধ্যে বিদ্যমান অপরাপর বিষয় নিষ্পত্তির জন্য অপেক্ষা না করিয়া, উপযুক্ত রায় বা আদেশ প্রদান করিবে।

৪। মামলার শুনানীর জন্য ধার্য প্রথম তারিখে অথবা মামলার যেকোন পর্যায়ে যদি আদালতের নিকট প্রতীয়মান হয় যে, পক্ষদ্বয়ের মধ্যে ঘটনা অথবা আইনগত বিষয়ে কোন বিবাদ নাই, তাহা হইলে, আদালত অবিলম্বে রায় বা আদেশ প্রদান করিয়া মামলা চুড়ান্ত নিষ্পত্তি করিবে।"

6. "Upon reading section 13 it is clear that after filing of the written statement the court, on a subsequent date, upon hearing both the parties if they are present and on perusal of the plaint and written statement will frame issue, if there be any and if there is no issue to be framed then the court may dispose of the suit by delivering judgment or order. That means the court will have to peruse the plaint and written statement filed by both the parties on a subsequent date and come to a conclusion as to whether issues are to be framed or judgment and order is to he delivered. Again, in section 13(3) it has been categorically stated that on perusal of the written statement if it appears to the court that the defendant admitted the claim of the plaintiff the court can pass judgment or order on the basis of such admission. This may be done even before deciding any other issues, if framed. Again section 13(4) on the other hand, categorically says that when the court will be of the opinion at any stage of the suit that there is no dispute between the parties as regards the facts and circumstances or the law then the court can dispose of the suit finally. So on perusal of the aforesaid provisions of law it appears that the court before passing any judgment or order or finally disposing of the suit shall have to take into consideration the facts stated in the plaint and written statement of the

parties and to determine that whether the defendants admit the claim of the plaintiff and also to determine whether there is any dispute between the parties as regards the facts as stated in the pleadings" as has been observed in *Md Arfanuddin Akan vs Artha Rin Adalat* reported in *15 BLT 343.*

7. In view of the above, it is apparent that in order to pass judgment and decree under the said provision the Adalat has to be satisfied that there is an admission by the defendant concern over the claim so made by the plaintiff bank and to that effect the Bank is required to make an application. Moreso, the legislature having used the word "এবং" after the words "বাদীর আরজির বক্তব্য স্বীকৃত হইয়া থাকিলে" and "উক্তরুপ স্বীকৃতির ভিত্তিতে যেরুপ রায় বা আদেশ পাইতে বাদী অধিকারী" made those two requirements conjunctive. In the instant case, the defendants including the petitioner in their written statements, so filed in both the suits, have categorically disputed the claim of the plaintiff bank, as is apparent in particular from paragraph Nos. 5 and 7 of the written statements. However, on examining the entire order sheets, as have been annexed as Annexure-C-1, it does not reflect that on the alleged admission of the defendant-petitioner the bank has made an application to the Adalat with a prayer to pass judgment and decree under section 13(3) of the Ain. Rather, the Adalat has decreed the suit invoking the said provision of law and based its findings on the assertion -

> "..... বিবাদী কর্তৃক লোন পরিশোধে ইচ্ছাকৃত ত্রুটি ছিলনা মর্মে উল্লেখ থাকায় লোনের বিষয়টি বিবাদী কর্তৃক স্বীকৃত হইয়াছে বলিয়া বিবেচিত হয়।....."

8. This statement was not the only pleadings of the defendants, rather in their written statements they have categorically disputed the claim of the plaintiff bank and to that effect the petitioner made a prayer before the Adalat by filing an application on 24-1-2013 to fix up another date for peremptory hearing of the suit upon recording evidence on that score. But the Adalat has rejected the same and ultimately, decreed the suit under section 13(3) of the Ain without taking any evidence whatsoever.

9. Be that as it may, we have no manner of doubt to find that the impugned judgment and decree dated 6-3-2013 passed in connection with Artha Rin Suit Nos.35 and 36 both of 2011 have been passed without jurisdiction. The said view of ours also finds support in the case reported in *15 BLT 343* at paragraph 13 which are quoted hereinbelow—

> "Considering the decisions referred above and discussions made herein above we are of the view that if the Adalat passes any order which is wholly without jurisdiction not is excess of jurisdiction, when despite of the fact that the law provided forum for appeal, the petitioner cannot be debarred from availing the jurisdiction under Article 102 of die Constitution. Because the question of jurisdiction of the Court goes to the very root of the matter brought before it and when the court does not have any jurisdiction to see, everything done subsequent thereto shall fall through and the Court which has got no jurisdiction to pass such order over the matter shall not go into the merit of the matter as decided in the case of the case of Managing Director, *Rupali Bank Ltd vs Tafazal Hossain and others* reported in *44 DLR (AD) 260."*

10. In that view of the matter the decision so has been referred by the respondent Bank cannot be made applicable in the facts and circumstances of the present case.

11. In the result, both the Rules are made absolute.

12. The impugned judgment and decree dated 6-3-2013 (Annexure-D) passed by the learned Joint District Judge and Artha Rin Adalat, 1st Court, Jessore in Artha Rin Suit Nos. 35 and 36 both of 2011 are hereby declared to have been passed without any lawful authority and hence, are of no legal effect.

13. The Adalat is hereby directed to frame issues upon considering the pleadings of both the contending parties and to hear and dispose of both the suit expeditiously in accordance with law.

There will be no order as to costs.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Md Rezaul Haque J
Md Abu Zafor Siddique J
} Aku Gazi and another .....Accused-Appellants

vs

Judgment
January 17th, 2014
} State and another..... .....Respondents*

Evidence Act (I of 1872)
Section 114(g)

Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. This doubt is not an imaginary doubt. Benefit of doubt to the accused would be available provided there is supportive evidence on record. For creating doubt or granting benefit of doubt, the evidence is to be such which may lead to such doubt. The law would fail to protect the community, the society, if fanciful possibilities is admitted, thus, deflecting the course of justice." .....(59)

Yogeshwar Gope vs State, 58 DLR (AD) 73; Tungo Veskata Krishnaiah vs State of Andra Prodesh (1985) 29 MLJr (Cr) 130, at page (AP); Taneshwar Sahi vs State of Uttar Prodesh, 1976 CrLJ 6 9 (All); Abdul Sobhan Biswas vs State, 54 DLR 556; Shibu Pada Achariee vs State, 8 MLR (2003) 275= 56 DLR 285; State of Rajasthan vs Om Prakash, AIR 2002, Supreme Court, 2235; Al-Amin vs State, 51 DLR 154; Md Shamim Hossain (Shamim) vs State, 19 BLD 307; Rehana Begum vs State, 63 DLR 2011, 548; Abdul Aziz vs State, 2 BLC (1997) 630; Abdul Wahed vs State, 4 BLC 320; Bazlu Talukder vs State, 1 BLC 261; Mohammad Siddiqur Rahaman vs State, 7 BLD (AD) 93 ; Nayan vs State, 37 DLR 237 and Badal vs State, 19 BLD 527= 4 BLC 381 ref.

Kh Gulzar Hossain, Advocate—For the Convict-Appellants.

Md Zahurul Haque, DAG with Md Abdul Khaleque, AAG—For the State.

SMA Sabur with Masuda Rehana Begum, Advocates —For the Respondent No.2.

*Criminal Appeal No.4538 of 2004.

Judgment

Md Abu Zafor Siddique J: This appeal is directed against the judgment and order of conviction and sentence dated 16-9-2004, passed by the learned Judge, Druto Bichar Tribunal No.3, Dhaka, in Druto Bichar Tribunal Case No. 16 of 2004, arising out of Shibalay Police Station Case No. 25(4)2003 under section 9(1)/30 of the Nario-Shishu Nirjatan Daman Ain-2000 (shortly the Ain-2000) convicting the appellants under section 9(1) of the said Ain-2000 and sentencing them to suffer rigorous imprisonment for life and also to pay a fine of Taka 20,000 each, in default to suffer rigorous imprisonment for l(one) year more. The amount of fine is to be given to the victim.

2. The prosecution case in short, is that on 29-4-2003 the victim Shilpi Chakrabarty aged about 18 years, daughter of Shamol Chakraborty, of Village-Arua, Police Station-Shibalaya, District-Manikgonj lodged an allegation as to that on 27-4-2003 at about 10-00 PM the informant after having supper along with her family members went to bed with her father and mother in the eastern viti of their residence,

after about 12-30 AM (28-4-2003) she woke up with the sound of cutting of the door of their thatched house, then they raised hue and cry, at that time the accused persons namely-1) Aku Gazi, son of late Akali Gazi, 2) Lutfor Pramanik, son of Nabin Pramanik, 3) Mannan Sheikh, son of Balai Sheikh and 4) Khadu, son of Wazuddin, all of village-Arua, Police Station- Shibalaya, District-Manikgonj, entered into the house and confined her father and mother, at that time she was laid down on the floor by Aku Gazi and forcefully raped, after that accused Nos. 2, 3 and 4 forcibly raped her and in consequence of that gang rape she fainted. When she woke up she came to know that another 5/6 accused-persons also raped her at the time of her unconsciousness. At the time of occurrence all other accused-persons who were staying in the court-yard threatened the brothers of victim not to come out from their own room, otherwise they would be murdered. Thereafter the local people arranged for primary medical treatment by the local village Doctor, hence the case.

3. One Mr Khandakar Md Shafiqul Alam, Officer-in-Charge of Shibalaya Police Station under the District of Manikgonj, investigated the case. During investigation he visited the place of occurrence, prepared sketch map along with index and recorded statements of the witness under section 161 of the Code of Criminal Procedure. The investigating officer made arrangement for medical examination of the victim and also produced some important witness for recording their statements under section 22 of the Ain-2000 before the Magistrate, 1st Class, and after investigation having found *prima-facie* case he submitted charge-sheet under section 9(3) and 30 of the Ain-2000 vide charge-sheet No.55 dated 10-6-2003.

4. On the other hand, one Alhaj Salauddin Ahamed, Secretary General of Human Right Development Organization for helpless (NGO), suo muto investigated the same and prepared a report in his own way. Thereafter the Ministry of Home Affairs took up the case for speedy trial and the same was transmitted to the Druto Bichar Tribunal No. 3, Dhaka for speedy Trial Vide Memo No. স্বরাষ্ট্র মন্ত্রণালয় আইনশাখা-১ এর ১-৩-২০০৪ ইং তারিখের আঃ প্র-২/২০০২(আইন-১)/১০৭ নং স্মারক মূলে বিলিকৃত ২৯-২-২০০৪ ইং তারিখের বাংলাদেশ গেজেট প্রজ্ঞাপন অতিরিক্ত সংখ্যা (এস, আর, ও নং ৫১-আইন/২০০৪). And the same was renumbered as Druto Bichar Tribunal Case No. 16 of 2003 and the learned Judge of the Tribunal No. 3, I haka, took cognizance against the appellants and others. Accordingly, charge was framed against the accused-persons under section 9(1) and 30 of the Ain-2000 and the same was read over to the accused-persons who pleaded not guilty of the offence and claimed to be tried in accordance with law.

5. During trial the prosecution examined as many as 18 witnesses out of 21 cited witnesses in the charge-sheet and the defence examined 1 (one) as defence witness.

6. From the trend of cross-examination of the PWs the defence case is that the convict-appellants are innocent and they have been falsely implicated with this case out of local enmity and no rape had been committed by the accused-persons.

7. After conclusion of the hearing of both parties and on consideration of the evidence and the materials on record and in view of the facts and circumstances of the case the learned Judge of the Tribunal came to the finding that the prosecution proved the charge beyond all reasonable doubt and accordingly, the court below convicted the 4 accused-persons and acquitted other accused-persons from the charge levelled against them.

8. Being highly aggrieved by and dissatisfied with the aforesaid impugned judgment and order of conviction and sentence the convicts being appellants preferred the instant appeal for setting-aside the impugned judgment and order of conviction and sentence passed against them.

9. Mr Kh Gulzar Hossain, the learned Advocate appearing on behalf of the appellants submits that the learned Judge of the Druto Bichar Tribunal No.3, Dhaka has misread the evidence and misinterpreted the law has passed the judgment and order of conviction which is not tenable in the eye of law. He further submits that the convict-appellants are innocent and they have been falsely implicated with the case out of local enmity. He next submits that not a single independent witness has supported the prosecution case. PWs 1, 2, 3, 5 and 6 are highly interested witnesses ie, PW 1 is the victim of the case, PWs 2 and 3 are mother and father of the victim, PWs 5 and 6 are full brothers of the victim. PWs 4, 7 and 8 are neighbouring witnesses and they did not corroborate with each others, PWs 9 and 14 are elected Member and Chairman of the local Union Parishad and they are the party men of the victim's father. PWs 10, 11 and 15 have been tendered by the prosecution and rest of the PWs are official witnesses and they did not corroborate with each others. He submits that there is a delay of 34 hours in lodging the FIR which has not been explained and that the case is doubtful. He next submits that the defence examined 1 (one) witness as DW 1, Mr Salauddin, the Secretary General of Manabadhikar Unnayan Shangstha and he did not support the prosecution case. He lastly submits that not a single independent witness was examined in this case and this is a case of no evidence, thus, the prosecution has failed to prove the allegations against the appellants beyond reasonable doubt. He therefore, prayed that the impugned judgment and order are not sustainable in the eye of law and the same are liable to be set-aside. In support of his submission Mr Gulzar Hossain, learned Advocate for the appellants referred decisions of several cases which will be discussed in the later part of the judgment.

10. Mr SMA Sabur along with Mrs. Masuda Rehana Begum, the learned Advocate appearing on behalf of the informant and victim Shilpi Chakrabarti, placed the prosecution case and evidence before us. He submits that PW 1, is the victim as well as the informant of this case, PWs 2 and 3 are mother and father of the victim, PWs 5 and 6 are full brothers of the victim and they all are eye-witnesses and their evidence have been corroborated with each other and the neighbouring witnesses namely PWs 4, 7 and 8 are also corroborated each other. PW 12 is the medical officer who proved their report and medical certificate. PW 17 is the Magistrate, 1st Class, Manikgonj, who recorded the statement of the victim, and proved his signature on that statement under section 22 of the Ain, 2000, and the same have been marked as exhibits and other official witnesses have corroborated each other. The learned Advocate opposes the appeal contending that the offence alleged has been proved by the victim herself and also by the corroborative evidence of other witnesses who were examined by the prosecution. He submits that the PW 12 doctor has found the sign of forceful sexual acts which is the evidence of committing rape on the victim and, as such, the prosecution has been able to prove its case beyond all reasonable doubt, as such, there is nothing to be interfered by this court in the instant appeal. Accordingly, he prayed for dismissal of the appeal.

11. In support of his submission Mr SMA Sabur, the learned Advocate for the informant-victim, referred several reported decisions which will be discussed in the later part of the judgment.

12. On the other hand, Mr Md Zahurul Islam, the learned Deputy Attorney-General with Mr Md Abdul Khaleque, learned AAG appearing on behalf of the State, supported the impugned judgment and order of conviction and sentence passed by the learned Judge of Druto Bichar Tribunal No.3, Dhaka. He submits that the alleged offence has been proved by victim herself as well as by all the witnesses by

adducing corroborative evidence. It is further contended that doctor have found the sign of forceful sexual acts. He next submits that the prosecution by producing sufficient evidence has been able to prove the case beyond all reasonable doubt, as such, the appeal is liable to be dismissed.

13. We have considered the arguments as advanced by the learned Advocates of the both sides and perused the Memorandum of appeal, impugned judgment and order of the trial court, evidence on record and the LC Record. Let us now discuss the relevant evidence and other material on record together;

14. PW 1, Shilpi Chakrabarti is an informant and victim of the case. During her Examination-in-chief, she deposed that on 27-4-2003 at about 10-00 PM after having supper she went to sleep with her father and mother in the eastern viti of the residence and at about 12-30 o'clock (28-4-2003) she woke up with the sound of cutting of the door of their thatched house and they started hue and cry. At that time the accused 1) Aku Gazi, 2) Lutfor Pramanik, 3) Mannan Sheikh and 4) Khadu entered into house and wrongfully confined her father and mother. Accused Aku Gazi forcibly laid down her on the floor and putt out her Makchi and raped her. After that accusedes Lutfor Pramanik, Mannan and Khadu raped her one after another, and inconsequence of that gang rape she became faint. When she woke up she came to know that another 5/6 accused-persons also raped her while she became unconscious. She further stated–

"ঐ সময় আমার বাবা তাহার হাতে থাকা টর্চ মারে এবং ঘরে হারিকেনের আলো ছিল। আমি উক্ত টর্চের আলোতে এবং হারিকেনের আলোতে আসামীদেরকে চিনিতে পারি। আসামীরা আমাদের ঘরে ঢুকিয়াই আমাকে, আমার বাবা মাকে মারপিট শুরু করে আকু গাজী। আসামী আকু গাজী আমার বাবাকে অনেক মারধর করে এবং মারতে মারতে ঘরের বাহিরে নিয়া যায়। আসামীরা আমার বাবাকে ঘরের বাহিরে নিয়া একটি চারা আমগাছের সাথে পিঠ মোড়া দিয়া বাধিয়া আটকাইয়া রাখে।"

She also identified accused Aku Kazi, Salam and Khadu in dock and proved her FIR as exhibit-1, and her signature as Exhibit- 1/1, statement under section 22 of the Ain-2000 as Exhibit-2 and signature as Exhibit-2/2, medical certificate Exhibit-3, signature as Exhibit-3/L. In Cross-examination, she denied all the suggestions given by the defence. But in reply she also stated-

"একজন খারাপ কাজ (ধর্ষন) করিয়া যাওয়ার পর পরই আরেক জন আসিয়া ধর্ষন করে। আমি ঐ সময় চিৎকার দিয়াছিলাম। আমার স্তনে আঘাতের চিহ্ন ছিল।" She next denied the defence suggestions and as stated-"আসামী আকু গাজী আমাকে জোর করে টানিয়া আমাদের পূর্ব ভিটার ঘরে নিয়া যায়। আসামীরা আমার মাকে ঘরের বাহিরে আটকাইয়া রাখে নাই উহা সত্য নহে। আসামী আকু গাজী একজন বৃদ্ধ এবং মুরুব্বী লোক উহা সত্য নহে। ঘটনার সময় উত্তর ভিটার ঘরে আমার ভাইদের ভয় ভীতি দেখাইয়া আটকাইয়া রাখে এই কথা এজাহারে লিখিয়াছি।"

15. PW-2, Renu Bala Chakrabarti, mother of the victim Shilpi Chakrabarti, is an eye witness of this case. She supported the prosecution case, date of occurrence, time of occurrence, manner of occurrence, correctly stated in her statement and she also corroborated with PW 1 and identified accused Aku Gazi, Lutfor, Mannan and Khadu, in dock and she clearly stated that the above mentioned accused persons forcefully raped her daughter one after another. She deposed as follows—

"আমার মেয়ে শিল্পীকে আমি জড়াইয়া ধরি,আকু গাজী জোর করিয়া টানা হেচড়া করিয়া শিল্পীকে ঘরের মধ্যে নিয়া শিল্পীকে জোর পূর্বক ধর্ষন করে। আসামী আকু গাজী শিল্পীকে ধর্ষন করিয়া ঘর হইতে বাহির হইলে আসামী লুৎফর ঘরের মধ্যে ঢুকিয়া জোর পূর্বক শিল্পীকে ধর্ষন করে। আসামী লুৎফর ধর্ষন করিয়া ঘর হইতে বাহির হইলে আসামী মান্নান ঘরে ঢুকিয়া শিল্পীকে ধর্ষন করে। আসামী মান্নান ধর্ষন করিয়া ঘর হইতে বাহির হইতেই আসামী খাদু ঘরে ঢুকিয়া শিল্পীকে ধর্ষন করে।" She further deposed that- "আসামীরা চলিয়া যাওয়ার সময় আমাদের বলে যে, ভোরে যেন ঘটনার কথা না জানে তাহা হইলে জান শেষ করিয়া ফেলিব। আমি ঘরে ঢুকিয়া শিল্পীকে ঘরের মেঝের উপর অজ্ঞান

অবস্থায় দেখিতে পাই। আমি ঘরে ঢুকিয়া শিল্পীকে বিবস্ত্র অবস্থায় তাহার শরীর সম্পূর্ণ নোংরা বিপর্যস্ত অবস্থায় দেখতে পাই। সকালে (ভোরের) দিকে শিল্পীর জ্ঞান ফেরে। আমার কন্যা শিল্পীর জ্ঞান ফেরার পর আমাকে জানাইয়াছে আসামী আকু গাজী, লুৎফর, মান্নান ও খাদু তাহাকে পর্যায়ক্রমে ধর্ষন করিয়াছে। আমি তদন্তকারী দারোগার নিকট জবানবন্দি দিয়াছি। গত ৭-৫-২০০৩ইং তারিখে মানিকগঞ্জ ম্যাজিস্ট্রেটের নিকট জবানবন্দি দিয়া ঘটনার কথা বলিয়াছি।"

She identified her statement and signature under section 22 of the Ain-2000, as Exhibits-4, 4/1, and 4/2 respectively. In cross-examination, she denied all the suggestion given by the defence.

16. PW 3, Sree Shamol Kumar Chakrabarti is father of the victim and eye-witness of this case. He was present at the time of occurrence and supported the prosecution case and corroborated with PWs. 1 and 2 and also identified accuseds Aku Gazi, Lutfar, Mannan and Khadu, who forcefully raped his daughter one after another. He deposed that—

"আমি জ্বালানো হারিকেনের আলো এবং টর্চের আলোতে দেখতে পাই যে, আমার ঘরের মধ্যে প্রবেশ করে আসামী আকু গাজী, লুৎফর, মান্নান ও খাদু আমাকে, আমার স্ত্রী এবং আমার কন্যা শিল্পীকে বেদম ভাবে মারপিট করে। আসামীরা আমাকে একটি আমগাছের সাথে পিঠ মোড়া দিয়া বাঁধিয়া মারপিট করে।" He next deposed "আসামী আকু গাজী শিল্পীকে আমার স্ত্রীর নিকট থেকে ছিনাইয়া আমার পূর্ব ভিটার ঘরের মধ্যে নিয়া যায়। আসামী আকু গাজী আমার মেয়ে শিল্পীকে ঘরের মধ্যে নিয়া জোর পূর্বক ধর্ষন করে, আসামী আকু গাজীর পর আসামী লুৎফর শিল্পীকে ধর্ষন করে, উহার পর আসামী মান্নান ও খাদু একের পর এক পর্যায়ক্রমে শিল্পীকে ধর্ষন করে। পরে আরো ৪/৫ জন লোক ঘরের মধ্যে ঢুকিয়াছে আমি তাদেরকে চিনিতে পারি নাই। আসামীরা উত্তর ভিটায় আমার ছেলেদেরকে ভয়ভীতি দেখাইয়া ঐ ঘরের মধ্যে আটকাইয়া রাখে। He next deposed "আমার মেয়ে শিল্পী আমাকে জানায় যে, আসামী আকু গাজী, মান্নান, লুৎফর খাদু তাহাকে পর্যায়েক্রমে ধর্ষন করে উহার পর সে জ্ঞান হারাইয়া ফেলে। শিল্পী আমাকে জানাইয়াছে যে, লুৎফর টর্চ দিয়া তাহার মাথায় আঘাত করে, মান্নান তার দিয়া আঘাত করিয়া ঠোঁটে যখম করে। তদন্তকারী কর্মকর্তা ও ম্যাজিস্ট্রেটের নিকট জবানবন্দি দিয়াছি।"

He identified accuseds Aku Gazi, Khadu and Salam in dock, and he identified his statement under section 22 of the Ain-2000 as Exhibit-5. In cross-examination he denied all the suggestions given by the defence.

17. PW 4, Monowara Begum is a neighbour and independent witness of the case, she deposed,

"শিল্পীর বাড়ীর উত্তর পাশে আমার বাড়ী। ২৮-৪-২০০৩ইং দিবাগত রাত্রে ভোরে শিল্পীর বাড়ীতে চিৎকার ও কান্নাকাটি শুনিয়া শিল্পীদের বাড়ীতে যাইয়া শিল্পীকে কাঁদতে দেখি। শিল্পীর কপালে মাথায় ও ঠোটে আঘাতের চিহ্ন দেখতে পাই। ঐ সময় আরো লোকজন শিল্পীদের বাড়ীতে আসে। শিল্পীর মা জানাইয়াছে যে, আকু গাজী, মান্নান, লুৎফর, খাদু শিল্পীকে ধর্ষন করিয়াছে। She further deposed that- "ম্যাজিস্ট্রেটের নিকট আমি জবানবন্দি দিয়াছি।"

She proved her statement under section-22 of the Ain-2000 as Exhibit.6 and her signatures Exhibits.6/1 and 6/2. She also corroborated with the statement under section 22 of the Ain-2000, before the learned Magistrate 1st class, Manikgonj. In cross-examination, she denied all the suggestions given by the defence.

18. PW 5, Bimal Chakrabarti is full brother of the victim. He deposed—

"গত ইং ২৭-৪-২০০৩ তারিখ দিবাগত রাত্রে অনুমান ১০-০০ টার সময় আমি, মা, বাবা, শিল্পী এবং ভাই কমল খাওয়া দাওয়া করিয়া আমি এবং আমার ছোট ভাই কমল আমাদের উত্তর ভিটার বসত ঘরে শুইয়া পড়ি। অনুমান রাত ১২-০০ টার সময় আমার মা, বাবা এবং বোনের চিৎকারে আমরা ঘুম থেকে জাগিয়া উঠি। আমার ঘরের দরজা খুলিয়া বাহির হইতেই আসামীরা আমাদেরকে মারধর করে এবং আমাদেরকে ঘরের মধ্যে ঢুকাইয়া ফেলে। আসামীরা আমাদেরকে ভয়ভীতি দেখায়, লোকজন ডাকা-ডাকি করিলে জানে শেষ করিয়া ফেলিবে বলিয়া হুমকি দেয়। ভয়ে আমরা কোন কথা বলিতে পারি নাই। আমার ঘরের পাট খড়ির ফাঁক করিয়া দেখতে পাই যে, আসামীরা আমার বাবা মাকে মারতে মারতে ঘরের বাইরে নিয়া আমার বাবাকে একটি চারা আম গাছের সাথে বাঁধিয়া রাখে। আসামীরা আমার মা এবং বোনকে মার ধর করিয়া-ঘরের বাহির দরজার কাছে রাখে। He further stat-

ed, "আমার বোন শিল্পীকে বস্ত্র বিহীন অবস্থায় ঠোট কাটা, মাথায় আঘাতের চিহ্ন দেখতে পাই। পরে শিল্পী, আমার মা, আমার বাবার নিকট জানিতে পারে যে, আসামী আকু গাজী, আসামী মান্নান, আসামী খাদু এবং আসামী লুৎফর আমার বোন শিল্পীকে জোর পূর্বক ধর্ষন করিয়াছে"

In cross-examination he denied all the suggestions given by the defence.

19. PW 6, Kamol Chakrabarti is another full brother of the victim. He deposed that-

"রাত অনুমান ১২-৩০ টার সময় আমার মা, বাবা বোন এর চিৎকারে ঘুম থেকে জাগিয়া উঠি এবং আমাদের ঘরের দরজা খুলি। দরজা খোলার পরে আসামীরা অস্ত্রসস্ত্র দেখাইয়া আমাদেরকে মৃত্যুর হুমকী দেয় এবং টু শব্দ করিলে জানে মারিয়া ফেলার হুমকী দেয়। আমরা ঘরের মধ্যে চুপচাপ থাকি। আমাদের উত্তর ভিটার পাট খড়ির বেড়ার ফাঁক দিয়া আমার বাবা, মা, বোনকে মারতে মারতে পূর্ব ভিটার ঘর থেকে বাহিরে নিয়া আসে। আসামীরা আমার বাবা কে একটি চারা আম গাছের সাথে বাধিয়া রাখে। আমার মাকে ঘরের দরজার সামনে রাখিয়া আমার বোন শিল্পীকে জোর পুর্বক আমার মায়ের নিকট থেকে ছিনাইয়া নিয়া আসামী আকু গাজী শিল্পীকে পূর্ব ভিটার ঘরের মধ্যে নিয়া যায় এবং আকু গাজী জোর পূর্বক শিল্পীকে ধর্ষন করে।" He further stated, "আসামীরা চলিয়া যাওয়ায় আমরা দরজা খুলিয়া বাহির হইয়া আমার বাবাকে বাধাঁ অবস্থায় দেখি। আমার ভাই বিমল বাবার বাধঁন খুলিয়া দেয়। He next deposed, "আমার বোন শিল্পীকে ঘরের মেঝেতে এলোমেলো অবস্থায় তাহার পরনের কাপড়, কপালে, ঠোঁটে রক্তাক্ত যখম, মাথায় আঘাত অবস্থায় দেখতে পাই। দিলীপ ডাক্তার আমার বোনের চিকিৎসা করে। পরে আমার বাবা, মা এবং বোনের নিকট জানিতে পারি যে, আকু গাজী, লুৎফর রহমান, মান্নান, খাদু শেখ শিল্পীকে পর্যায়ক্রমে ধর্ষন করিয়াছে।"

He identified accused Aku Gazi, Khadu Sheikh, Salam in the dock and corroborated with the PW 5, Bimal Chakrabarti. In cross-examination he denied all the suggestions given by the defence.

20. PW 7, Peara Begum is a neighbour and independent witness. She deposed,

"গত ইং ২৭-৪-২০০৩ তারিখে দিবাগত রাত্রে আজানের পরপর শিল্পীর মা, বাবার চিৎকার শুনিয়া শিল্পীদের বাড়ীতে যাইয়া পূর্ব ভিটার ঘরে শিল্পীকে অসুস্থ্য অবস্থায় দেখতে পাই। তাহার পরনের কাপড় চোপড় এলামেলো দেখি। আমি তাহার কাপড় চোপড় ঠিক করিয়া দেই। শিল্পীর মা, বাবা আমাকে জানাইয়াছে যে, আসামী আকু গাজী, লুৎফর, মান্নান ও খাদু শিল্পীকে ধর্ষন করিয়াছে। আমি শিল্পীর মাথায় পানি ঢালিয়াছি। আমি পুলিশ ও ম্যাজিস্ট্রেটের নিকট জবানবন্দি দিয়াছি।"

She proved her statement under section 22 of the Ain, 2000 as Exhibit.-7, signature as Exhibits 7/1 and 7/2 respectively. In cross-examination, she denied all the suggestions given by the defence.

21. PW 8, Md Liakat Hossain is a local business man and hearsay witness. In his Examination-in-chief he stated—

"২৮-৪-২০০৩ ইং তারিখে সকালে আমি বাড়ী থেকে ইউনিয়ন পরিষদ কার্যালয়ে যাইতে ছিলাম। পথিমধ্যে লোকের কানা-ঘুষা শুনতে পাই। আমি উহাতে জানতে পারি যে, চক্রবর্তীর মেয়ে শিল্পী ধর্ষিত হইয়াছে। এই কথা শুনিয়া আমি শিল্পীদের বাড়ীতে যাই এবং শিল্পীকে অসুস্থ্য অবস্থায় দেখতে পাই। তাহার মা পাশে বসিয়া কান্নাকাটি করিতেছে। আমি শিল্পীর বাবাকে জিজ্ঞাসা করিলে সে জানায় যে, আকু গাজী, লুৎফর, মান্নান, খাদু শিল্পীকে ধর্ষন করিয়াছে এবং তাহাকে মারধর করিয়াছে।

In cross-examination he denied all the suggestions given by the defence.

22. PW 9, Md Abdul Jabbar is an elected member of the Arua Union Parishad stated as follows

"গত ইং ২৮-৪-২০০৩ তারিখে ভোর অনুমান ৬-০০ টার সময় শ্যামল চক্রবর্ত্তীর পুত্র বিমল চক্রবর্ত্তী কান্নাকাটি করিয়া আমাকে জানায় যে, তাহাদের বাড়ীতে রাত অনুমান ১২-৩০ মি. এর সময় আকু গাজী, লুৎফর, মান্নান, খাদু সহ আরো অন্যান্য ৫/৬ জন লোক তাহাদের পূর্ব ভিটার ঘরের দরজার বাধন কাটিয়া ঘরের মধ্যে প্রবেশ করিয়া তাহার মা, বাবাকে ঘরের বাহিরে নিয়া যায় এবং তাহার বাবাকে ১টা চারা আম গাছের সহিত বাধিয়া রাখে। আসামীরা তাহার বোন শিল্পীকে, আকু গাজী, লুৎফর, মান্নান, খাদু সহ ৫/৬ জনে ধর্ষন করিয়া ফেলিয়া রাখে।"

He proved his statement under section 22 of the Ain-2000 as Exhibit No. 8 and signature as Exhibit No. 8/1 and 8/2 respectively. In

cross-examination, he denied all the suggestions given by the defence.

23. PW 10, Abdur Rashid Mollah is a local witness. He was tendered by the prosecution. In his cross-examination, he denied all the suggestions given by the defence.

24. PW 11, Hasina Begum is another local witness. She was tendered. In her cross-examination by defence she stated—

> "ঘটনার রাত ১২-০০ টার সময় বাদিনীর বাড়ীতে ঠাকুরানী মারা গেল বলিয়া চিৎকার শুনতে পাওয়ার কথা আমি ক্যাসেটের জবানবন্দিতে বলিয়াছি, চিৎকার শুনিয়া আমি বাদিনীর বাড়ীতে গিয়াছি, শিল্পীর ভাই আমাকে জানাইয়াছে যে ঠাকুরানীর উচ্চ রক্তচাপ দেখা দিয়াছে। এই কথা ক্যাসেটের জবানবন্দিতে বলিয়া ছিলাম। পরদিন দুপুর ১২-০০ টায় জব্বার মেম্বার সুলতান চেয়ারম্যান বাদিনীর বাড়ীতে আসিয়া বাদিনীর ঘরে দরজা জানালা বন্ধ করিয়া বাদিনী তাহার মা/বাবাকে নিয়া দুই ঘন্টা যাবত আলোচনা করে এবং উহার পর সুলতান চেয়ারম্যান ঘর হইতে বাহির হইয়া ঘোষনা দেয় যে, শিল্পীকে আসামীরা ধর্ষন করিয়াছে এই কথা ক্যাসেটের জবানবন্দিতে বলিয়াছি উহা সত্য নহে। জায়গা জমি নিয়া বিরোধের কারনে মামলা হয় আসলে কোন ঘটনা ঘটে নাই কিনা জানি না" She further stated, বাদিনীর কথায় মিথ্যা সাক্ষ্য দিতেছি ইহা সত্য নয়।

25. PW 12, Dr Md Halim Mollah is a residential doctor of the Manikgonj Sadar Hospital and member of the medical examination board. He stated as follows; "opinion that the victim Shilpi Chakrabarti is above 19 (nineteen) years of age and bearing sign of forceful sexual acts." (Underlined by us).

He proved the medical report as Exhibit-3 and his signature as Exhibit-3/2. In cross-examination, he stated "যোগসাজসী ভাবে রির্পোট দিয়াছি উহা সত্য নহে। ইহা সত্য নহে যে, আমাদের opinion সঠিক নহে।"

26. PW 13, Gopal Sarker is a seizure list witness, who proved the seizure list and seized articles as Exhibit-9, and his signature Exhibit-9/1 and articles Exhibit as material Exhibits (i), (ii), (iii) respectively. In cross-examination he denied all the suggestions given by the defence.

27. PW 14, Saifur Rahaman Khan @ Sultan is the elected Chairman of the Arua Union Parishad. He deposed—

> "২৮-৪-২০০৩ ইং তারিখে ঢাকা থেকে মাগরিবের কিছু আগে বাড়ীতে গিয়া পৌঁছি। রাত ৮/৮-৩০ টার সময় শ্যামল চক্রবর্ত্তী তাহার স্ত্রী, শিল্পী এবং আরো কিছু লোক আমার বাড়ীতে আসে এবং কান্নাকাটি করে। আমি তাহাদের শান্তনা দেই এবং জিজ্ঞাসাবাদ করি শিল্পীকে জিজ্ঞাসাবাদ করিলে সে জানায় যে, উল্লিখিত ৪ জনে তাহাকে ধর্ষন করিয়াছে। ঘটনার সময় তাহার বাবাকে ঘরের বাহিরে বাঁধিয়া রাখিয়াছিল বলিয়া জানায়।" In cross-examination, he denied all the suggestions given by the defence.

28. PW 15, Rangalal and PW-16 Nitay are local witnesses and they were tendered by the prosecution and the defence declined to cross-examine them.

29. PW 17, Md Mahabubur Rahaman is the Magistrate lst Class, Manikgonj, who recorded the statement of victim Shilpi Chakrabarti, witnesses Renu Bala, Shamol Chakrabarti, Bimol Chakrabarti, Hasina Begum, Peara and Monowara under section 22 of the Ain-2000 and he proved all the statements and his signatures thereon, he further stated—

> "আমি সকল সাক্ষীর জবানবন্দি রেকর্ড করিয়া তাহাদের পাঠ করিয়া শুনাইলে তাহারা জবানবন্দিতে স্বাক্ষর করেন।" In cross-examination, he denied defence suggestions that- "আদালতের কোন আইনানুগ আদেশ ব্যাতিরেকে তদন্তকারী কর্মকর্তার যোগসাজসে ব্যক্তিগত ভাবে উপস্থিত হইয়া আমি ঘটনা স্থলে গিয়া সাক্ষীদের জবানবন্দি রেকর্ড করি উহা সত্য নহে আমি এবং তদন্তকারী কর্মকর্তার যোগসাজসে কথিত জবানবন্দি তৈরি করিয়াছে উহা সত্য নহে। আমি কথিত জবানবন্দিগুলি সঠিক ভাবে এবং আইনানুগ মতে রেকর্ড করি নাই উহা সত্য নহে।"

30. PW 18, Khandaker Md Shafiqul Alam, Inspector of Police, who is the investigating officer of the case in his Examination-in-Chief stated that he recorded the FIR as a recording officer and investigated the same by himself

and he visited the place of occurrence, prepared the sketch map of the place of occurrence along with index, recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure and arranged for medical examination of the victim and also arranged for recording statements of victim and other local witnesses under section 22 of the Ain-2000. He also stated that at the time of investigation he arrested Aku Gazi and Khadu and having found *prima-facie* case submitted charge-sheet against the convict-appellants and others accused-persons under section 9(3) and 30 of the Nari-o-Shishu Nirjatan Daman Ain 2000. He proved all the documents. In cross-examination he denied all the suggestions given by the defence.

31. These are all the evidence adduced by the prosecution.

32. On the other hand, defence produced one witness as DW-1, namely Alhaj Salauddin Ahamed, Secretary General, Human Right Development Organization for helpless (অসহায়দের পক্ষে মানবাধিকার উন্নয়ন সংস্থা) He saw the report of the alleged offence which was published in many National Dailies. Thereafter, he investigated the case privately and prepared an investigation report and the same was sent to the Hon'ble Prime Minister, Government Peoples Republic of Bangladesh, 2) Hon'ble Minister, Law, Justice and Parliamentary Affairs, 3) Hon'ble Minister, Home Affairs, 4) Inspector General of Police (IGP), 5) DIG Dhaka Range, 6) DC Manikgonj, 7) SP Manikgonj and 8) Judge, Cognizance court Manikgonj and others. He deposed—

> "আমার সংস্থা অসহায়দের পক্ষে মানবাধিকার উন্নয়ন সংস্থা এর পক্ষে এই মামলার ঘটনা সম্পর্কে জানার জন্য মানিকগঞ্জ জেলার ডেপুটি কমিশনার, পুলিশ সুপার এবং ও.সি. শিবালয় থানা সাহেবের নিকট চিঠি দিয়া ঘটনাস্থাল তদন্তের জন্য কার্যক্রম করার জন্য অবগত করাই।" He next deposed, "গত ইং ১৮-৫-২০০৩ তারিখে আমি আমার সংস্থার জি.এম. আবু তাহের চৌধুরী, তদন্ত কর্মকর্তা মহিলা বিশারদ বেগম রোকেয়া এবং আমাদের সহকর্মী মি. মোঃ ইউনুসকে নিয়া ঘটনাস্থলে যাই।" He next deposed, "আমরা বিকাল ৪-০০ টায় আলোচনা করিয়া চেয়ারম্যানকে না জানাইয়া এই মামলার ভিকটিম শিল্পী চক্রবর্ত্তী পিতা শ্যামল চক্রবর্ত্তীর বাড়ীতে যাই। আমরা এই মামলার ঘটনা স্থলে শিল্পী চক্রবর্ত্তীর বাড়ীতে যাইয়া শিল্পী চক্রবর্ত্তী তাহার পিতাকে উপস্থিত পাই নাই। আমরা শিল্পী চক্রবর্ত্তীর মাতাকে ঘটনা সম্পর্কে জিজ্ঞাসা করি। ঐ এলাকার নিকটবর্তী মসজিদের ইমাম, এলাকার স্কুলের একজন শিক্ষক সহ ঐ বাড়ীর নিকটবর্তী বাড়ীর লোকজন সহ ২০/২৫ জনকে ঘটনা সম্পর্কে জিজ্ঞাসাবাদ করি।" He next deposed, "ঐ বাড়ীর আসে পাশের লোকজন ঐ বিষয়ে আমাদের জানায় ভোর হলে ভিকটিমের বাড়ীর কিছু লোক শিল্পীদের বাড়ীতে আসে এবং জানতে পারে যে, শিল্পী চক্রবর্ত্তীর মা উচ্চ রক্তচাপ জনিত কারনে অসুস্থ্য হইয়াছেন। শিল্পী চক্রবর্ত্তী তাহার অসুস্থ্য মায়ের মাথায় পানি ঢালিতেছে।"He further stated, "কিছু লোক আমাদের জানায় যে, ঘটনার রাত্রে শিল্পীদের বাড়ীতে ডাকাত আসিয়াছিল। শিল্পীর বাব ডাকাত চিনিতে পারিয়াছে এই ধরনের কথা শিল্পীর বাবা/মা এবং ভায়েরা তাহাদেরকে বলিয়াছে।" He next deposed, "শিল্পীকে জিজ্ঞাসাবাদ করি, শিল্পী আমাদের জানাইয়াছে যে, ঘটনার রাত্রে আকু গাজী সহ আরো কয়েক জন লোক তাহাকে ধর্ষন করিয়াছে। উহার পরে সে সংজ্ঞাহীন হইয়া পড়ে সংজ্ঞাহীন হইবার পর আরো ৫/৬ জন তাহাকে ধর্ষন করিয়াছে বলিয়া তাহার পিতার নিকট জানিতে পারিয়াছি।"
>
> *(Underlined by us)*

In cross-examination he denied all the suggestion given by the prosecution. On re-call, he proved his report as Exhibit- A and his signature as Exhibit- A/1.

33. At the time of trial after conclusion of the prosecution witnesses the Tribunal examined the accused-appellants under section 342 of the Code of Criminal Procedure on 1-9-2004. It appears that while examining the appellants under section 342 of the Code of Criminal Procedure the Tribunal properly disclosed the available evidence against the appellants who were present in the dock, in reply the accused persons claimed themselves as not guilty of the offence and demanded to be tried in accordance with law. Section 342 of the Code of Criminal Procedure is based on the principle involved in

the *'maxim audi alteram partem'* that is no one should be condemned unheard. It is the utmost duty of the court of law to give an opportunity to an accused to defend himself. The real object of section 342 of the Code of Criminal Procedure is inviting the attention of the accused-person to the points raised in the evidence which are against him for which he may be convicted, so, it is clear from the record that the accused-persons have been given a good chance to offer their explanation as to those. But the accused-appellants not availed the chance of *maxim audi alteram partemt* in this case. The accused-persons in their statement under section 342 of the Code of Criminal Procedure that was made on 1-9-2004, relevant portions are stated as follows—

"আপনি আসামী আকু গাজী; প্রসিকিউশন পক্ষের উল্লেখিত সাক্ষীগণের জবানবন্দি ও জেরা আদালতে উপস্থিত থাকিয়া নিজ কর্নে শ্রবন করেন।

এ ক্ষেত্রে আপনার বক্তব্য কি?

উত্তর-নির্দোষ।

প্রশ্ন-সাফাই সাক্ষী দিবেন কি?

উত্তর-না।

প্রশ্ন-আর কিছু বলবেন কি?

উত্তর-না।

34. The other accused-persons were also examined under section 342 of the Code of Criminal Procedure and they have also replied in the similar way.

35. It appears from the record that Mr Alhaj Salauddin Ahmed was examined as a defence witness. He had also submitted an investigation report before the tribunal by his own accord after 7 days from the examination of section 342 of the Code of Criminal Procedure.

36. We have scrutinized the depositions of the prosecutions and defence witnesses along with the materials on record with attending facts and circumstances of this case in our own way to assertain whether the trial court committed any illegality in passing of the impugned judgment.

37. It appears that PW 1, Shilpi Chakrabarti is the victim and informant of the case, who in her Examination-in-Chief deposed that on 27-4-2003 at about 10-00 PM after having supper went to bed along with her father and mother in the eastern viti of their residence, and about 12-30 AM (28-4-2003) she woke up with the sound of cutting of the door of their thatched house, then they made hue and cry, at that time accused-persons namely—Aku Gazi, Lutfor, Mannan and Khadu entered into the house and wrongfully confined her father and mother. Accused Aku Gazi forcibly laid down her on the floor and put out her wearings and forcefully raped her, after that accuseds Lutfor, Mannan and Khadu raped her one after another. She could recognised them in the following manner "ঐ সময় আমার বাবা তাহার হাতে থাকা টর্চ মারে এবং ঘরে হারিকেনের আলো ছিল। আমি উক্ত টর্চের আলোতে এবং হারিকেনের আলোতে আসামীদের চিনিতে পারি," and she identified accused Aku Gazi, Salam and Khadu on the dock. She also deposed, "এই ঘটনা জানাইয়া ইং ২৯-৪-২০০৩ তারিখে শিবালয় থানায় আমি মামলা দায়ের করি।" She further deposed that on 7-5-13 Magistrate, 1st class, recorded her statement under section 22 of the Ain, 2000 and she was also examined by the medical board at Manikgonj Sadar Hospital wherein doctor found sign of forceful sexual acts upon her. She proved all the documents before the Tribunal. During cross-examination the defence could not shake her.

38. PWs 2 and 3 are the mother and father of the victim Shilpi Chakrabarti and they are also victim and eye-witnesses of the occurrence and they have categorically stated that the above mentioned accused persons confined them and thereafter accused Aku Gazi, Lutfor, Mannan and Khadu took away her daughter and forcibly raped their daughter one after another. PWs 2 and 3 also supported the prosecution case so far as it relates to date, time and

manner of occurrence. They have corroborated with each other and they have also identified the accused-persons namely-Aku Gazi, Khadu and Salam on the dock.

39. PW 4, Monowara Begum is a neighbour and an independent witness who has supported the prosecution case and corroborated with PWs l, 2 and 3 in the following manner,

> "২৮-৪-২০০৩ ইং তারিখে দিবাগত রাত্রে/ভোরে চিৎকার ও কান্নাকাটি শুনিয়া শিল্পীদের বাড়ীতে যাইয়া শিল্পীকে কাঁদিতে দেখি, শিল্পীর কপালে, মাথায় ও ঠোটে আঘাতের চিহ্ন দেখতে পাই। ঐ সময় আরও লোকজন শিল্পীদের বাড়ীতে আসে। শিল্পীর মা জানাইয়াছে যে, আকু গাজী, মান্নান, লুৎফর, খাদু শিল্পীকে ধর্ষন করিয়াছে।"

She has also stated that, she made a statement under section 22 of the Ain, 2000 before the Magistrate, 1st class, Manikgonj and the same was duly exhibited before the Tribunal during trial.

40. We have found that PW 4, Monowara Begum as a natural and important witness. She also disclosed the circumstantial atmosphere of the victim's house and just after the occurrence she came to the place of occurrence and heard the facts from the victim. The defence also could not shake her during cross-examination.

41. PW 5, Bimal Chakrabarti and PW 6, Kamol Chakrabarti are full brothers of the victim. At the time of occurrence PWs 5 and 6 were confined in their rooms and after occurrence they heard the actual facts from the victim and their parents. They made statements before the Magistrate, 1st Class, under section 22 of the Ain, 2000 and identified the accused-persons on the dock and they corroborated with each other.

42. PW 7, Peara Begum is a very important witness of this case, who is the neighbour and an independent witness. Just after the occurrence she rushed to the place of occurrence. She deposed

> "পূর্ব ভিটার ঘরে শিল্পীকে অসুস্থ্য অবস্থায় দেখতে পাই। তাহার পরনের কাপড় চোপড় ঠিক করিয়া দেই। শিল্পীর মা, বাবা, আমাকে জানাইয়াছে যে, আসামী আকু গাজী, লুৎফর, মান্নান ও খাদু শিল্পীকে ধর্ষন করিয়াছে। আমি শিল্পীর মাথায় পানি ঢালিয়াছি। আমি পুলিশ ও ম্যাজিস্ট্রেটের নিকট জবানবন্দি দিয়াছি।"

She has supported the prosecution story into too.

43. PW 8, Liakat Hossain is a local businessman who is a hearsay witness. He has categorically stated,

> "পথিমধ্যে লোকের কানাঘুষা শুনতে পাই, আমি উহাতে জানতে পারি যে, চক্রবর্তীর মেয়ে শিল্পী ধর্ষিতা হইয়াছে। এই কথা শুনিয়া আমি শিল্পীদের বাড়ী যাই এবং শিল্পীকে অসুস্থ অবস্থায় দেখতে পাই। তাহার মা পাশে থাকিয়া কান্না কাটি করিতেছে। আমি শিল্পীর বাবাকে জিজ্ঞাসা করিলে সে জানায় যে, আকু গাজী, লুৎফর, মান্নান, খাদু শিল্পীকে ধর্ষন করিয়াছে এবং তাহাকে মারধর করিয়াছে।"

PW 9 Md Abdul Zabbar is an elected member of the local Union Parishad and he is also an hearsay witness who supported the prosecution case. PW 14, Saifur Rahman Khan alias Sultan is the elected chairman of the local Arua Union Parishad has also supported the prosecution case. PW 10, Abdur Rashid Mollah, PW 15, Rangalal, PW 16, Nitay are the local witnesses and they have been tendered by the prosecution PW 13, Gopal Sarkar is a seizure list witness and he proved seizure list and seized articles in the court and also exhibited the same. PW ll, Hasina Begum is tendered by the prosecution, in cross-examination, she did not support the prosecution case. PW 17, Md Mahabubur Rahaman, is the Magistrate, 1st Class, Manikgonj, who recorded statement under section 22 of the Ain, 2000. PW 12, Dr. Md Halim Mollah is the Medical Officer of the concerned Medical Board. He has proved the Medical certificate given by them and has also proved their "opinion that the victim Shilpi Chakrabarti is about 19 years of age and bearing sign of forceful sexual acts." PW 18 is the

investigating officer, at the time of investigation he had properly investigated the case having found *prima-facie* case he submitted charge-sheet against the appellants and others.

44. Though the defence has examined 1 (one) witness in its favour but the said witness in the last part of his Examination-in-Chief has categorically stated, "শিল্পীর জিজ্ঞাসা করি, শিল্পী আমাদের জানাইয়াছে যে, ঘটনার রাতে আকু গাজী সহ আরও কয়েক জন লোক তাহাকে ধর্ষন করিয়াছে।" So, it is clear from the above discussion that the victim Shilpi Chakrabarti was raped by a gang of people on the date of occurrence. The eye-witnesses namely the father and mother of victim, the victim herself have categorically narrated the facts corroboratively. The other witnesses have also supported them. Though the defence has produced a witness but this witness at one stage has supported the prosecution, we do not find any anomaly in this case.

45. The learned Advocate for the appellants has tried to raise a question as to that the witnesses are the close relatives and neighbours of the victim, so, they are the interested witness of this case. On question of interested witnesses we have considered the case of *Yogeshwar Gope vs State*, reported in *58 DLR (AD) 73*, wherein the apex court held that;

> "Only because of relationship of witnesses evidence cannot be thrown away unless the evidence is found to be untrue or tainted by motive."

46. We have also taken notice of the views expressed in the case of *Tungo Veskata Krishnaiah vs State of Andra Prodesh (1985) 29 MLJr (Cr) 130, at page 140-141 (AP)* which run as follow:

> "Where a witness is a natural witness to the occurrence and her evidence is consistent and it inspires confidence to accept her evidence to be truthful, her evidence alone is sufficient to base conviction."

47. Similarly, in the case of *Taneshwar Sahi vs State of Uttar Prodesh, 1976 Cr L&J 6 at page 9 (All)* it has been held that,

> "there is no hard and fast rule that the evidence of the partisan witness cannot be acted upon, without corroboration. If his presence at the scene of occurrence cannot be doubted and his evidence is consistent with the surrounding circumstances and the probabilities of the case strikes the court as true it can be good foundation for conviction, more so if some assurance for it is available from the medical evidence."

48. We are respectfully relying upon the views noted above.

49. We have not found upon scrutiny of the evidence and the materials on record, anything to show any motive or intention in the prosecution witnesses No. 2, 3, 5 and 6 or in the deposition of the prosecution witnesses No. 7 and 8 that they have falsely implicated the appellants in this case or other witness to taint the evidence. All the PWs are natural witnesses as to the facts stated by them and they have deposed the entire occurrence and their evidence are consistent and inspires confidence in our mind to be accepted as truthful. Their evidence had also been corroborated with each other.

50. As such we do not find any substance in the submission of the learned Advocate for the appellants.

51. Mr SMA Sabur the learned Advocate of the informant in course of his submission has also referred some decision which runs as follows;

52. In the case of *Abdul Sobhan Biswas vs State*, reported in *54 DLR 556*, wherein it has held;

> "In the absence of evidence to the contrary the only reference that can be drawn is that the victim a helpless village woman is telling the truth about her shameful ordeal in the hands of the accused as she

has nothing to gain by making false statements about subjecting herself to the ignominy of being raped"

53. Delay in lodging FIR, benefit of doubt and technicalities and corroboration of witnesses he also referred in the following decisions.

54. In the case of *Shibu Pada Achariee vs State* reported in *8 MLR 275= 56 DLR 285* wherein The High Court Division on the question of delay in lodging FIR held;

"True it is that delay in lodging First Information Report may give rise to suspicion which put the court on guard to look for possible motive and explanation of delay and consider its effect on righteousness or otherwise of prosecution case but it is equally true that mere delay in laying First Information Report with Police Station, not necessarily as a matter of law, is catastrophic to prosecution case. The effect of delay inputting forward First Information Report in the light of plausibility of explanation forthcoming for such delay, accordingly, must fall for consideration in the fact and circumstances of a given case. Apprehension of victim of sex crime Ratna Rani Achariya of being excommunicated by society, assurance offered to victim Ratna Rani Achariya by accused-appellant and his father and mother to accept her as wife of accused-appellant in an arbitration held for the purpose and, also, by the decision reached between victim Ratna Rani side and accused-appellant side in a meeting held under the auspices of Bangladesh Mahila Parishad and subsequent refusal to give effect to said assurance and other factors contributed the delay in laying First Information Report. Delay in putting forward First Information Report was quite natural and authenticity and integrity of prosecution case cannot be at all subjected to suspicion."

55. The same Bench in the question of corroboration, held,—

"Corroborative evidence is not an imperative component in every case of rape. The rule is not that corroboration is essential before there can be a conviction. The testimony of victim of sexual assault is vital and unless there are compelling reasons which necessities looking for corroboration of her statement the court should find no difficulty in acting on the testimony of a victim of sex crime alone in convicting a rapist when the testimony inspires confidence in the mind of judges as being reliable."

56. And the question of the number of witnesses, the court held,—

"Law does not require particular number of witnesses to prove a case and conviction may be well founded even on the testimony of solitary witness provided his integrity and trustworthiness is not shaken by any adverse circumstances appearing on the record against him and the court at the same time is convinced that his testimony has ring of truth. The well known maxim which is a Golden Rule that "evidence has to be weighed and not counted" has been given statutory placement in section 134 of The Evidence Act which provides that no particular number of witnesses shall in any case be required for the proof of any fact.

57. And in the point of framing charge and related technicalities of the proceeding the court held,

"When the offence of rape was tried by the Special Tribunal under section 4(c) of the Cruelty to Women (Deterrent Punishment) Ordinance 1983 and the convict appellant was sentenced to suffer RI for seven years upon proof of the charge beyond all reasonable doubt and subsequently when it was found that the offence was triable by Sessions Judge who is also

the same person presiding over the special tribunal as well as the Sessions court, the trial so held cannot be vitiated by reason of such technicalties. In the facts and circumstances the charge, conviction and sentence may be altered from section 4(c) of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 into one under section 376 of the Penal Code, 1860.

58. The similar questions have been decided in many cases in the sub-continent i.e, in the case of *State of Rajasthan vs Om Prakash,* reported in *AIR 2002, Supreme Court 2235.* In the case of *Al-Amin vs State,* reported in *51 DLR 154.* In the case of *Md Shamim Hossain (Shamim) and others (several criminal Appeal) vs State,* reported in *19 BLD (1999) 307.* And in the case of *Rehana Begum and another vs State,* reported in *63 DLR 2011, 548.*

59. In respect of the principle of benefit of doubt accepted in England as a matter of public policy is available to an accused on the same ground or to the same extent in our country. Proof beyond reasonable doubt does not mean proof beyond reasonable doubt does not mean proff beyond the shadow of a doubt. This doubt is not an imaginary doubt. Benefit of doubt to the accused would be available provided there is supportive evidence on record. For creating doubt or granting benefit of doubt, the evidence is to be such which may lead to such doubt. The law would fail to protect the community, the society, if fanciful possibilities is admitted, thus, deflecting the course of justice."

60. The facts of the above case are quite different from each other and not applicable in the case in hand. But the essence of the views taken in the aforesaid case are important and helpful for arrival in the correct decision to the present case.

61. Mr Kh Gulzar Hossain, the learned Advocate for the appellants referred the case of *Abdul Aziz (Md) vs State* reported in *2 BLC (1997) 630* wherein the Court held;

> "As the prosecutrix did not sustain any injury on her face, cheeks or breasts at the time of commission of the alleged rape and the Medical Board also did not detect any trace of sexual violence on the two victims the offence under section 376 of the Penal Code is not proved beyond all reasonable doubt for which the appellants are entitled to get benefit of doubt".

62. Though Mr. Gulzar has referred the case of *Abdul Wahed alias Chandu Mia vs State* reported in *4 BLC (1999) 320,* wherein it has been held;

> "Ordinarily in criminal cases the evidence of prosecutrix is believed but in the present case the contradictions are so major that the evidence of the prosecutrix cannot be believed, moreso, when PW-2 is an eye-witness did not prove rape and PW-3 is another eye-witness slept in the same chowki with the prosecutrix was only tendered. Further, the prosecution withheld the charge-sheeted witnesses giving without any explanation and introduced PWs 5, 6 and 7 who are not charge-sheeted witnesses. Even the prosecutrix was no medically examined and her wearing apparels were not chemically examined which is a vital omission on the part of the prosecution and it failed to prove its case beyond doubt and hence the conviction and sentence cannot be sustained."

63. But in the case on hand we have shown categorically that the witnesses have been able to prove the prosecution beyond reasonable doubt. The medical report also has supported the prosecution story and the defence could not shake any witness in any manner, then, there is no application of the aforesaid cited case in the instant case.

64. On the point of improbability of committing sexual intercourse he also referred the

case of *Bazlu Talukder and others vs State*, reported in *1 BLC (1996), 261* wherein the court held;

> "Improbability of committing sexual intercourse together-As the PWs contradicted each other as to who accompanied the appellant Bazlu in kidnapping the girl aged 15 years who was raped by only one convict who is none other than Bazlu but the other convicts are full brother and bhaista of him and it is highly improbable that all those persons together would commit sexual intercourse on the girl when they are not professional or hardened criminals and hence other convicts are entitled to get benefit of doubt."

65. In the case of *Mohammad Siddiqur Rahaman vs State*, reported in *7 BLD (AD) 93 (1987)* relates to delay in filing FIR, Hon'ble Appex Court held;

> "On the point of Assessment of evidence- Delay in filing the case raises serious doubt about the place, time and manner of the incident much more so about the recognition of the miscreants-Identification of the skeletons by a reference to the two bunches of the keys along with the skeletion is itself doubtful in view of the sate introduction of the story through the mouths of the witnesses for the first time in court- Again exclusion of female members of the family of the complainant raises doubt about the time, place and manner of the incident as well as recognition of the miscreants- satisfactory-The whole case has remained shrouded in mistry-It is for the prosecution to clear of all the mystries and suspicions failing which their case shall fail."

66. On the point of FIR he also referred the case of *Nayan vs State*, reported in *37 DLR 237*, wherein the court held—

> "First information report not a substantive piece of evidence-But where there is clear conflict between the version given in the FIR and the story made out in the course of trial-It then becomes imperative to note the conflict between them.

67. He also referred the decisions reported *9 MLR 28= 56 DLR 352, 18 DLR (WP) 91, 31 DLR 16* and *5 BLD 255= 37 DLR 237* which were decided on similar questions respectively. The facts of the cases referred by the learned Advocate of the appellants are quite different and distinguishable from those of the present one. However, we take notice of the principle of the cases.

68. Now let us see the relevant law under which the appellants have been convicted. Sections 9 and 30 of the Nari-o-Shishu Nirjatan Daman Ain-2000 is quoted below—

> "ধারা ৯-(১) যদি কোন পুরুষ কোন নারী বা শিশুকে ধর্ষণ করেন, তাহা হইলে তিনি যাবজ্জীবন সশ্রম কারাদন্ডে দন্ডনীয় হইবেন এবং হইার অতিরিক্ত অর্থদন্ডেও দন্ডনীয় হইবেন।
>
> (২).....
>
> ধারা ৩০। অপরাধ প্ররাচনা বা সহায়তার শাস্তি। যদি কোন ব্যক্তি এই আইনের অধীন কোন অপরাধ সংঘটন প্ররাচনা যোগান এবং সেই প্ররাচনার ফল উক্ত অপরধ সংঘটিত হয় বা অপরাধটি সংঘটনের চেষ্টা করা হয় বা কোন ব্যক্তি যদি অন্য কোন ব্যক্তিকে এই আইনের অধীন কোন অপরাধ সংঘটনে সহায়তা করেন, তাহা হইলে ঐ অপরাধ সংঘটনের জন্য বা অপরাধটি সংঘটনের চেষ্টার জন্য নির্ধারিত দন্ড প্ররাচনাকারী বা সহায়তাকারী ব্যক্তি দন্ডনীয় হইবেন।"

69. We have considered this case with the evidence along with the relevant laws and also carefully considered all decisions referred by the both sides.

70. On the question of medical examination and facts and circumstances we have considered the observation of this court in the case of *Badal vs State*, reported in *19 BLD 527= 4 BLC 381*, which runs as follows;

> "From the oral evidence and from the facts and circumstances it is quiet clear that the informant was raped on the night of

occurrence by accused appellants. Though on medical examination of the victim no sign of rape was found and though no mark of violence was noticed on the body of the victim, in view of the entire evidence on record it appears that the victim was raped by the appellants. So the learned Judge committed no illegality in convicting the appellants under section 6(3) of Nari-o-Shishu Nirjatan (Bishes Bidhan) Ain, 1995.

71. But in the instant case the Medical Board has categorically observed that the victim was bearing sign of forceful sexual acts, moreover, the victim herself and witnesses have corroborated the facts, with each other.

72. In the instant case, the time, place and manner of occurrence as alleged by the prosecution have been conclusively proved by the evidence and the materials on record as well as the attending facts and circumstances of the case. The chain of evidence and materials on record appears to be complete and unbroken.

73. Apart from that in rape case conviction and sentence can be based on solitary evidence of the prosecutrix if the same inspires confidence, which is very much available in the case in hand.

74. Considering the facts and circumstances we are of the view that the trial court has rightly found the accused appellants guilty of rape as charged as per section 9(1) of the Nari-o-Shishu Nirjatan Daman Ain, 2000 and sentenced them to imprisonment for life and fine of Taka 20,000 each.

75. Therefore, we do not find any illegality in the impugned judgment and order. The impugned judgment and order of conviction and sentence being fair and legal does not call for any interference by this Court.

76. In the result, the appeal is dismissed. The order of conviction and sentence dated 16-9-2004 passed by the learned Judge, Druto Bichar Tribunal No.3, Dhaka, in Druto Bichar Tribunal Case No. 16 of 2004, is hereby affirmed.

77. The order of stay is stand vacated.

Send down the lower court records along with copy of the judgment at-once.

Ed.

High Court Division
(Special Original Jurisdiction)

Salma Masud Chowdhury J
Md Habibul Gani J

Judgment
April 10th, 2014.

Belal Uddin.....
.....Petitioner

vs

Bangladesh respondent by the Secretary, Ministry of Housing and Public Works and others....Respondents*

Abandoned Buildings (Supplementary Provision) Ordinance (LIV of 1985)
Section 5

Condition precedent for listing in the impugned gazette, is the issuance of notice for surrendering or taking possession of the abandoned building, failure of which, renders the listing in the official gazette illegal. .....(9)

Secretary, Ministry of Works vs Helaluddin Ahmed, 4 MLR (AD) 140 ref

Moudud Ahmed with ZH Bhuiyan, Advocates—For the Petitioner.

Md Mokleshur Rahman, DAG with Farida Yesmein, AAG and Titus Hillol Rema, AAG—For the Respondents.

Judgment

Salma Masud Choudhury J: This Rule Nisi was issued calling upon the respondents to

*Writ Petition No. 5218 of 2012.

show cause as to why the enlistment of the property of the petitioner to the extent of his share measuring 12 decimals of BS Plot No. 157 appertaining to BS Khatian No. 9 recorded in the name of predecessor of the petitioner/ transferor corresponding to PS Plot No. 99 of PS Khatian No. 52 transformed from RS Plot No. 87/104 as appeared in item No.98 mentioning Plot No.9, Mouza Pahartali under PS Double mooring at page-15656(Kha) published in the Bangladesh Gazette on 26-12-1988 vide SRO 378-Law dated 25-12-1988 purportedly made under section 5(l) of the Bangladesh Abandoned Building (Supplementary Provisions) Ordinance 1985 should not be declared to have been done without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. In the present Writ Petition the petitioner challenges the enlistment of his property appertaining to RS Khatian No.3l, RS Plot No.87/104, PS Khatian No.52, PS Plot No.99, BS Khatian No.9, BS Plot No.157, JL, No.5, Mouza-Lot-9 Pahartali, Police Station-Double Moorings (Pahartali), District-Chittagong in the Kha(2) list as a supplementary to the Kha list of the abandoned properties published in the Bangladesh Gazette Extra-ordinary dated 26-12-1988 at page No.15656(Kha) against serial No.98 under the caption Plot No.9 Pahartali, Police Station-Double Moorings and the total area of 6.94 acres of land including the land in question appertaining to RS (CS) Khatian Nos.15 and 31 under Mouza Lot 9 Pahartali, JL No.5, Police Station- Double Moorings, District-Chittagong originally belonged to one Lalit Mohon Roy and others and in the RS (CS) operation the same was recorded in the names of one Amin Sharif and Serajul Haque as rayati tenants and thereafter the said Amin Sharif died leaving behind one daughter Sajeda Khatun as his sole heir and while enjoying and possessing the above land the said Sajeda Khatun transferred 1.12 acres of land including the land in question in favour of one Anwara Ahammad Chowdhury by a registered sale deed being No.2951 dated 16-4-1956 and delivered possession in favour of the transferee and was completely extinguished therefrom and after purchase, the said Anwara Ahammad Chowdhury, started enjoying and possessing the land peacefully within the knowledge of all and paid upto date land development tax to the government exchequer and during the BS operation, BS Khatian No.9 was correctly prepared and finally published in her name in 1987 and thereafter on 21-8-1994 at about 9-30 PM the said Anwara Ahammed Chowdhury died in Dhaka because of old age complications and during her life time Anwara Ahammed Chowdhury transferred the land in question measuring 12 decimals in favour of the petitioner by a registered sale deed being No. 478 dated 8-1-1985 and on delivering possession in his favour, became completely extinguished therefrom, and after purchase, while the petitioner started enjoying and possessing the land in question peacefully within the knowledge of all, on 1-3-2009, he went to the office of the concerned Assistant Commissioner (Land) for mutation but he came to learn that the land in question has been enlisted as an abandoned property vide the impugned Gazette Notification for which neither he nor his transferor Anwara Ahammed Chowdhury was given any notice.

3. Being aggrieved by the enlistment of the property of the petitioner in the list of Abandoned properties, the petitioner files this Writ Petition through his constituted Attorney and obtained the present Rule.

4. Mr Moudud Ahmed, the learned Advocate appearing on behalf of the petitioner submits that the impugned enlistment of the land in question is in violative of the principles of natural justice in view of the fact that neither any prior notice for the said enlistment nor any subsequent notice either for surrender or for

taking over possession has been served upon the petitioner or his transferor and, as such, the same is illegal and is liable to be declared to have been done without any lawful authority and is of no legal effect. He next submits that the title deeds of the petitioner and his transferor, rent receipts as well as the latest record of rights prepared in their names and other connected papers and documents necessarily imply that the petitioner and his transferor always occupied, supervised and managed the land in question in person and, as such, the impugned enlistment is illegal. Lastly the learned Advocate submits that both the petitioner and his transferor are the citizens of Bangladesh as they were born in Bangladesh and they were always present in Bangladesh and their whereabouts were never unknown and they never ceased to occupy, supervise or manage the property in person deserting the same before the commencement of PO No. 16 of 1972 and as the land in question does not fall within the purview of PO No. 16 of 1972, the impugned enlistment being illegal is liable to be declared to have been done without any lawful authority and is of no legal effect.

5. Mr Md Mokleshur Rahman, the learned Deputy Attorney-General representing the respondent No.4 opposes the Rule.

6. We have heard the learned Advocate for the petitioner and the learned Deputy Attorney-General representing respondent No.4 and perused the Writ Petition along with other materials on record.

7. It appears that the petitioner purchased the property in question by a registered sale deed being Deed No.478 dated 8-1-1985 from one Anwara Ahammed Chowdhury and got the possession and subsequently he came to know that his property was enlisted as an abandoned property without issuing any notice to him.

8. It appears from Annexure-G, the sale deed dated 8-1-1985, that Anwara Ahammed Chowdhury, during her life time, transferred the land in favour of the petitioner by a registered sale deed being No.478 dated 8-1-1185 which deed was never been challenged before any competent Civil Court. The petitioner became the owner and possessor of the property in question by way of a registered-sale deed-through purchase, before the property was declared as an abandoned property.

9. It is an admitted fact that no notice was served upon the petitioner prior to the enlistment of the property as an abandoned property. The petitioner, as it appears from the documents presented before us, is in possession of the property in question. In the instant case no notice for surrendering or taking over possession of the disputed building could be produced by the Govt. In view of section 5 of Ordinance No.54 of 1985 providing for listing in the official gazette of those buildings for which notice has been issued or served or possession pursuant to such notice has been taken as abandoned property, condition precedent for listing in the impugned gazette, as in the instant case, is the issuance of notice for surrendering or taking possession of the abandoned building, failure of which, renders the listing in the official gazette illegal. As no notice under section 5 was served upon the petitioner, prior to enlistment of the building in the official gazette, the petitioner was not bound to seek relief in the Court of Settlement,

10. This view finds support from the judgment as passed in the case of Bangladesh represented by the *Secretary, Ministry of Works and others vs Helaluddin Ahmed as* reported in *4 MLR (AD) page 140.*

11. The assertion of the petitioner that no notice was served at any time to treat the disputed property as an abandoned property, having not been controverted, we have no option but to hold that inclusion of the disputed property in the list of the abandoned properties pub-

lished on 26-12-88 in pursuance of section 5 of the aforesaid Ordinance is without jurisdiction.

12. Inclusion of the disputed property in the list of abandoned properties by the gazette notification having been found to be without jurisdiction, the notification is in violation of the petitioner's right to hold property.

13. From the facts as stated in the Writ Petition and the documents annexed thereto we are satisfied that the petitioner had no knowledge about the inclusion of the disputed property in the list of the abandoned properties till 1-3-2009 when he came to know about the same and when the time for filing the case before the Court of Settlement had already expired. As such, even if the petitioner's fundamental right would not have been affected, his petition under Article 102(2)(a)(ii) of the Constitution would lie inasmuch as the alternative remedy provided became non-existent in the meantime and he could not have availed of any remedy other than by way of a Writ Petition. We, therefore, hold that the petitioner's application challenging the inclusion of the disputed properly in the impugned Gazette is maintainable under Article 102(1) as well as Article 102(2)(a)(ii) of the Constitution.

14. In the result, the Rule is made absolute. The inclusion of the property of the petitioner to the extent of his share measuring 12 decimals of BS Plot No. 157 appertaining to BS Khatian No.9 recorded in the name of the predecessor of the petitioner/transferor corresponding to PS Plot No.99 of PS Khatian No.52 transformed from RS Plot No.87/104 as appearing in item No.98 mentioning Plot No.9, Mouza-Pahartali under PS Double Mooring at page-15656(Kha) published in the Bangladesh Gazette on 26-12-1988 vide SRO No.378-Law dated 25-12-1988 purportedly made under section 5(1) of the Bangladesh Abandoned Buildings (Supplementary Provisions) Ordinance 1985 (Annexure-B to the petition) are declared to have been made without any lawful authority and is of no legal effect and respondent No. 1 is directed to exclude the property in question from the said Gazette notification dated 26-12-1988.

Ed.

High Court Division
(Special Original Jurisdiction)

Md Ashiaqul Islam J
Md Ashraful Kamal J

Judgment
May 5th, 2014

Rafia Ashraf Polly and another.....Petitioners

vs

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

Artha Rin Adalat Ain (VIII of 2003)
Section 26

Procedure of money execution proceeding as laid down in the Code shall equally apply in case of provision of Ain (execution). .....(9)

Artha Rin Adalat Ain (VIII of 2003)
Section 26

It has made provision for depositing of 25% of the decretal amount where any 3rd party wants to join in execution proceeding to ventilate grievances. Since the Artha Rin Adalat Ain is a special law it will override any other law if there is no inconsistency in the special law itself.

There is no conflict or inconsistency in respect of the relevant law so to say in any manner even with the Code of Civil Procedure far less to talk about any other law. Then how can it be thought that this provision of special law has infringed or has been passed in violation of any fundamental right as enshrined in the Constitution we do not understand. There is no dearth of law in our armoury but often

*Writ Petition No. 3094 of 2004.

we come across that on a flimsy ground as it has happened in the present case effort being made by bringing some un-call for arguments to establish a case on the ground of violation of fundamental rights of the Constitution. Artha Rin Adalat Ain is a special law making a special provision for recovery of outstanding dues of the financial institution which we have already mentioned. We hold that none of the laws under the Artha Rin Ain is in conflict with any of the fundamental rights guaranteed by the Constitution.

.....(10)

None Appears—For the Petitioners.

Md Kamruzzaman, Advocate—For the Respondent No.4.

Judgment

Md Ashfaqul Islam J: At the instance of the petitioners, this Rule was issued in the following terms:

> "Let a Rule Nisi be issued calling upon the respondent Nos.l to 10 to show cause as to why section 32(2) of the Artha Rin Adalat Ain, 2003 (Annexure-G) shall not be declared void and ultra vires and as to why Order No.9 dated 10-5-2004 (Annexure-F) dismissing the Miscellaneous Case No.17 of 2004 filed by the petitioners passed by the Joint District Judge and Artha Rin Adalat No.2, Dhaka in Miscellaneous Case No. 17 of 2004 rejecting the application filed by the petitioner under Order XXI, rule 58 of the Code of Civil Procedure shall not be declared to have been passed without lawful authority and is of no legal effect."

2. The Rule has two parts. In one part section 32(2) of Artha Rin Adalat Ain,2003 (Annexure-G) (hereinafter referred to as Ain) has been challenged and other part deals with order by which Artha Rin Adalat No.2 Dhaka (hereinafter referred to as Adalat) has rejected the application filed by the petitioner under Order XXI, rule 58 of the Code of Civil Procedure.

3. The background leading to the Rule, in short, is that the petitioners as 3rd party in the Artha Rin Execution Case No.89 of 2003 having knowledge of the auction sale of the suit property on 26-4-2004 filed Miscellaneous Case No. 17 of 2004 against order of the Auction Sale of the suit property which was rejected by order impugned against dated 10-5-2004 (in Miscellaneous Case No. 17 of 2004). The application of the petitioners was rejected as Miscellaneous Case No. 17 of 2004 and the Adalat ordered to deposit 25% of the decretal amount (as the law then was) under section 32(2) of the Ain. But the petitioners did not deposit the same as a result the Miscellaneous Case was rejected by the Adalat for non-deposition of the legal amount under law (Annexure-F).

4. None appears on behalf of the petitioners though this matter appeared in the cause list on several occasions. On perusal of the petition we have found that, the thrust of argument of the petitioners is that section 32(2) of Ain made the provision of deposit of 25% of the decretal amount which is ultra vires the fundamental right as guaranteed under Articles 27, 31 and 42 of the Constitution of the Peoples Republic of Bangladesh.

5. Mr Md Kamruzzaman, the learned counsel for the respondent-bank, on the other hand by filing affidavit-in-opposition opposes the Rule. In paragraph 15 he has stated that in compliance of the provision of sections 32(2) and 33(3) the respondent-bank published the auction notice. It came in the Daily Newspapers fixing 10-5-2004 for date of auction sale of the mortgaged property for recovery of outstanding dues in the Money Execution Case No.89 of 2003. Therefore, the learned counsel for the respondent-bank assertively submits that

deposit of 25% of the decretal amount is condition precedent for making an application by any 3rd party in any proceeding of Artha Jari Case. There is no escape from this provision which is a mandatory one. He further submits that section 26 of the Ain is not in conflict with section 32(2) of the Ain in any manner. It could be found from the petition that section 32(2) of the Ain has been offending the provision of section 26 of the same.

6. That being the position the question that needs to be addressed in this petition whether the provision of section 32(2) under the facts and circumstances of the present case is unconstitutional and consequently the order impugned against has been passed without any lawful authority having no legal effect.

7. Heard the learned counsel for the respondent-bank and considered his submissions. We have perused the petition, impugned order and other materials on record carefully. At the very outset we want to make it clear that Artha Rin Adalat Ain is a special law which has made special provisions for realization of outstanding dues of financial institution. First of all let us see what section 26 of the Ain focuses on the issue.

8. It enjoins:—

"দেওয়ানী কার্যবিধি আইনের প্রয়োগ— The Code of Civil Procedure, 1908. এর অধীন মানি ডিক্রি সংক্রান্ত বিধানাবলী, এই আইনের বিধানাবলীর সহিত অসংগতিপূর্ণ না হওয়া সাপেক্ষে, এই আইনের অধীন ডিক্রি জারীর ক্ষেত্রে প্রযোজ্য হইবে।"

9. Therefore, on a plain reading of the said section we find that the procedure of money execution proceeding as laid down in Code of Civil Procedure shall equally apply in case of provision of Ain (execution). On the other hand, section 32(1)(2) is a positive special law under the Ain. In clear terms the law postulates:

"অর্থ ঋণ আদালতের ডিক্রি বা আদেশ হইতে উদ্ভুত জারী মামলায় কোন তৃতীয় পক্ষ দেওয়ানী কার্যবিধি আইনের বিধান মতে দাবী পেশ করিলে, আদালত প্রাথমিক বিবেচনায় উক্ত দাবী সরাসরি খারিজ না করিলে, ডিক্রিদার অনুর্ধ্ব ৩০(ত্রিশ) দিবসের মধ্যে উহার বিরুদ্ধে লিখিত আপত্তি দায়ের করিয়া শুনানী দাবী করিতে পারিবেন। (২) উপরোক্ত মতে দাবী পেশ করিবার ক্ষেত্রে, দরখাস্তকারী ডিক্রিকৃত অর্থের; অথবা ডিক্রিকৃত অর্থের আংশিক ইতিমধ্যে আদায় হইয়া অনাদায়ী অংশর ২৫% এর সমপরিমান জামানত বা বন্ড দাখিল করিবে এবং অনুরুপ জামানত বা বন্ড দাখিল না করিলে উক্ত দাবী অগ্রাহ্য হইবে।"

10. The law itself is absolutely clear without any ambiguity. It has made provision for deposition of 25% of the decretal amount where any 3rd party wants to join in execution proceeding to ventilate grievances. Since the Artha Rin Adalat Ain is special law it will override any other law if there is no inconsistency in the special law itself. As we remarked already that there is no conflict or inconsistency in respect of the relevant law so to say in any manner even with the Code of Civil Procedure far less to talk about any other law. Then how can it be thought that this provision of special law has infringed or has been passed in violation of any fundamental right as enshrined in the Constitution we do not understand. There is no dearth of law in our armoury but often we come across that on a flimsy ground as it has happened in the present case effort being made by bringing some un-call for arguments to establish a case on the ground of violation of fundamental rights of the Constitution. Artha Rin Adalat Ain is a special law making a special provision for recovery of outstanding dues of the financial institution which we have already mentioned. We hold that none of the laws under the Artha Rin Ain is in conflict with any of the fundamental rights guaranteed by the Constitution. *(underlined by me to put emphasis)*

11. Section 32(2) is a positive law that mandates deposit of 25% (as the law then was) of the decreetal amount for filing a miscellaneous

case. The petitioner without depositing the same filed miscellaneous case and the Adalat in absolute keeping with the provision rejected the miscellaneous case which is immuned from interference by this Division. In the decision of *Jalaluddin Ahmed vs Md Selim Hossain* reported in *7 ADC 291* his Lordship Justice SK Sinha in clear terms observed:

> "In view of section 32(1) of Artha Rin Adalat Ain, 2003 the petitioners were required to deposit 25% of the decreetal amount while making an application for restoration of possession and in that view of the matter, the learned Judges of the High Court Division had committed no error in law in interfering with the judgment of the learned District Judge. Since the petitioners are not claiming title through the judgment debtors, this judgment will no stand on the way if they file a fresh suit, for recovery of the suit property. This leave petition is dismissed with the above observations.

12. Fortified with the decision which is binding on us we are of the view that impugned order has been passed without any lawful authority having no legal effect. We also hold that the section 32(2) has not violated any provision of the Constitution of Bangladesh in any manner.

13. In the result, the Rule is discharged with cost. The order of stay granted earlier at the time issuing Rule is hereby recalled and vacated.

Communicate this order at once.

Ed.

High Court Division
(Civil Appellate Jurisdiction)

Sharif Uddin Chaklader J
ATM Saifur Rahman J

Judgment
March 9th, 2014.

Monir Hossain, Globe Metal Industries.....
.....Plaintiff-Appellant

vs

Rupali Insurance Company Ltd and another.....
Defendant-Respondents*

Insurance Act (IV of 1938)
Section 47B(1)(2)

Interest under sub-section (1) shall be payable for the period during which the failure continues and shall be calculated at monthly rates at the rate of five percent higher than the prevailing bank rate. .....(20)

Md Oziullah with Sk. Md Reazul Hoque, Advocates—For the Appellant in FA No.472 of 2012.

Shah Md Munir Sharif with AKM Nurul Alam, Advocates—For the Respondents in FA No.472 of 2012.

Shah Md Munir Sharif with AKM Nurul Alam, Advocates—For the Appellants in FA No.385 of 2012.

Md Oziullah Advocate with Sk. Reazul Hoque, Advocates—For the Respondent No.l in FA No. 385 of 2012.

Judgment

Sharif Uddin Chaklader J: These two appeals arising out of same suit as well as same judgment, this judgment would govern both these appeals.

2. Facts are not so disputed. Plaintiff took fire as well as cyclone insurance under policy No. RIC/MB/CYCLONE/C, dated 1-2-2002 and RIC/MB/FC dated 12-2-2002. On 5-4-2003 fire broke out in the factory of the plaintiff, damaged the factory substantially, plaintiff

*First Appeal Nos.472 & 385 of 2012.

informed but defendant Insurance Company on 6-4-2003 orally and on 7-4-2003 in writing denied to indemnify the damage or loss.

3. Fire brigade came at 1-35 PM and managed to control the fire almost labouring for $2^1/_2$ hours. Plaintiff sustained damages substantially and claimed money as per policy on 9-9-2003 of which defendant Insurance Company did not pay any heed. Plaintiff thereafter, sent a legal notice on 4-7-2004 and lastly filed the suit.

4. Defendants appeared and filed written statement. It is their case that there was no fire and damage was caused not by accidental fire but through the petrol contained in the premises of the plaintiff and plaintiff was irregular in depositing fire policy premium.

5. In the suit, plaintiff examined 4 witnesses and filed the documents marked as exhibits 1-6. Defendants also examined 4 witnesses and filed documents as exhibits Ka to Kha. Learned Judge found the defendants case totally not sustainable in law and decreed the suit to the tune of Taka 1,50,000,00 which in the incidental value of the policy.

6. Mr Md Oziullah, learned Advocate, appearing for the appellant of FA No.472 of 2012, submits that as per section 47B of the Insurance Act, 1938 learned Judge ought to award interest over the decretal amount. Learned Advocate further submits that his client did not challenge the judgment but since according to law plaintiff entitled to interest as per section 47B of the Insurance Act, 1938 learned Judge ought to decree the suit with interest.

7. Mr Shah Md Munir Sharif, learned Advocate, appearing for the appellant of FA.No.385 of 2012, on the other hand submits that, judgment as passed was passed not centerround with the Insurance Act. Learned Advocate further submits that judgment passed by the learned Judge is not sustainable in law on the ground learned judge took claim of the plaintiff on the basis of commercial transaction not as insurance policy. Learned Advocate further submits that impugned judgment did not reflect the surveyor's report and policy. Learned Judge failed to consider that insurance policy is depended ultimately on utmost good faith which the plaintiff conceal as the factory ought to be made on brick not on wooden plant, no fire materials like patrol ought to be stored in the factory but these having been done in violation of insurance policy, its stand cancelled from the time when the plaintiff constructed the factory with wooden plant containing petrol inside the factory. Learned Advocate also submits that principle of insurance contract is only guided as per policy.

8. Learned Advocate Mr. Sharif also eights us that there are 7 basic general insurance policy which are understanding principles of insurance,

1. Principle of *Uberrimaefidei* (Utmost Good Faith).
2. Principle of Insurable Interest,
3. Principle of Indemnity,
4. Principle of Contribution,
5. Principle of Subrogation,
6. Principle of Loss Minimization, and
7. Principle of *CausaProxima* (Nearest Cause).

9. Learned Advocate on the utmost good faith submits that since plaintiffs attitude totally demolishes utmost good faith, plaintiff is not entitled to any money on this score.

10. Before we proceed with our judgment let us go through a short background on the insurance policy which is as follows:

The earliest form of insurance is probably marine insurance, although forms of mutuality (group self-insurance) existed before that,

Marine insurance originated with the merchants of the Hanseatic league and the financiers of Lombardy in the 12th and 13th centuries, recorded in the name of Lombard Street in the City of London, the oldest trading insurance market. In those early days, insurance was intrinsically coupled with the expansion of mercantilism and exploration (and exploitation) of new sources of gold, silver, spices, furs and other precious goods-including slaves-from the New World. The expansion of English maritime trade made London the centre of an insurance market that, by the 18th century, was the largest in the world. Underwriters sat in bars, or newly fashionable coffee-shops such as that run by Edward Lloyed on Lombard Street, considering the details of proposed mercantile "adventures" and indicating the extent to which they would share upon the risks entailed by writing their "scratch" or signature upon the documents shown to them.

11. At the same time, eighteenth-century judge William Murray, Lord Mansfield, was developing the substantive law of insurance to an extent where it has largely remained unchanged to the present day at least insofar as concerns commercial, non-consumer business in the common-law jurisdictions. Mansfield drew from "foreign authorities" and "intelligent merchants". "Those leading principles which may be considered the common law of the sea, and the common law of merchants, which he found prevailing across the commercial world, and to which every question of insurance was easily referrable. Hence the great celebrity of his judgments, and hence the respect they command in foreign countries.

12. We at first take up the case of *Rupali Insurance Company* i.e. First Appeal No. 385 of 2012 and Appeal From Original Decree No. 472 of 2012 of the plaintiff entirely rests on the decision of this appeal.

13. The facts as aforesaid have not been denied. But it fact whether fire broke out in the factory of the plaintiff was intentional or actual, let us go through the evidence of the witnesses.

14. PW 1, Md Monir Hossain, in deposition stated as:

২০০১/২ সালে আমার কারখানার বিপরীতে রুপালী ইন্সুরেন্স হইতে ১.৫০ কোটি টাকার সাইক্লোন ও অগ্নিবীমা লই। পলিসির কাগজাত আমার কাছে আছে। ****সিভ ডিফেন্সে ১.১২ কোটি টাকার ক্ষতি হয় মর্মে সনদ দেয় এবং ১০ হাজার টাকার মাল উদ্ধার করে।****

DW 1, AM Sadek, in his deposition stated as:

এটা উক্ত ফরম প্রদত্ত (খ)। পলিসি গ্রহনের সময় শর্ত ছিল বাদীর ফ্যাক্টরী (অস্পষ্ট) করা যাইবে।***** ৫০ ফুটের মধ্যে কাঁচা ঘর রাখা যাইবে না। ফ্যাক্টরীর মধ্যে পেট্রোল তথা জ্বালানী তেল শুকনা কাঠ ও দাহ্য বস্তু রাখা যাইবে না। ৫-৪-২০০৩ ইং তাং বাদী পত্র দিয়া জানায় অগ্নি কান্ড হয়। এটা উক্ত পত্র প্রদত্ত (গ) ***** ৬-৪-২০০৩ ইং তাং মর্ডান সাভেয়ারকে তদন্ত করিতে বলি ও নিয়োগ দেই। এটা উক্ত পত্র প্রদত্ত (ঘ)।

বাকী ৭-৪-২০০৩ ইং তাং ক্ষয়ক্ষতির বিবরণসহ পত্র দেয়। এটা উক্ত পত্র প্রদত্ত (ঙ)।

৮-৪-২০০৩ ইং তাং কারখানা চালুর জন্য পত্র দেয়। এটা উক্ত পত্র প্রদত্ত (চ)। ***** ১৫-৪-২০০৩ ইং তাং পুনঃ তাগিদ দেয়। এটা উক্ত পত্র প্রদত্ত (ছ) ***** উক্ত দাগাদার প্রেক্ষিতে আমরা মর্ডান সার্ভেকে ১৫-৪-২০০৩ ইং তাং পত্র দেই ওয়ার্ক অর্ডার দেয়া যায় কিনা এটা উক্ত পত্র প্রদত্ত (জ)। ***** ৯-৯-২০০৩ ইং তাং সার্ভেয়ারের মতামতের ভিত্তিতে বাদীর দাবী নাকোচ করিয়া আমরা পত্র দেই। এটা উক্ত পত্র প্রদত্ত (প)। ***** আমরা বাদীকে বীমা দাবী সার্ভেয়ার রিপোর্ট ব্যতিত পরিশোধ করিতে পারি না। বাদীর অসন্তুষ্টি থাকিলে চীপ কন্ট্রোলার এর কাছে দাবী করিতে পারে। ***** ফরম পুরন করিয়া দিলে আমরা বীমা দেই। আমরা সরেজমিনে কারখানায় যাই না। বাদীর পলিসি সময় ও যাই নাই। বাদীর কারখানার কাগজাত দেখিয়াছি। বাদীর কারখানায় কি ছিল না ছিল দেখি নাই। বাদীর ঘোষনা পত্র দেখি। বাদীর কারখানায় কত কোটি টাকার মাল মজুদ থাকিত সরজমিনে জানি না। ***** বাদীর কারখানা আগুনে পোড়া যায়। আমি তদন্তে যাই। আমার রিপোর্টের দায়িত্বে নাই তাই রিপোর্ট করি নাই। আমি দায়িত্ব প্রাপ্ত কর্মকর্তা। ***** আগুন লাগার পর ঐখানকার লোকজনকে বলিলে বলে পেট্রোল ছিল এই কথা ম্যানেজারকে জিজ্ঞাসা করি। ***** অগ্রনী ও

মধুমতি সার্ভেয়ার ৪০,১৪,১০০ টাকা ক্ষতি নির্ধারন করে এবং বাদীর দাবী নাকোচ। ***** মর্ডান ও অন্যান্য সার্ভেয়ার ৬৪,৫৬,৬০৮ টাকা ক্ষতিপুরণ নির্ধারণ করে কিনা রিপোর্টে আছে। ফায়ার ব্রিগেড ক্ষতির পরিমান কত দেয় উহা তাহাদের নিজস্ব বিষয়। ***** শর্ট সার্কিট হইতে অগ্নিকান্ড হয়। কিভাবে কোথায় দুর্ঘটনা হয় এই মর্মে তদন্তের জন্য সার্ভেয়ারদের লাইসেন্স আছে। সেই লাইসেন্স দেই নাই। সার্ভেয়ার দিয়া স্বাক্ষ্য দিব কিনা কর্তৃপক্ষ জানে। ***** আমাদের সার্ভেয়ার লেখার মধ্যে পার্থক্য ছিল। রিপোর্টে সব আছে। আমার জানা নাই। কি কি ভস্মিভুত হয় এটা সার্ভে রিপোর্টে আছে। ***** বাদী বীমা গ্রহিতা। তাহার কারখানা আংশিক পোড়া যায় ক্ষয়ক্ষতি হয়। বাদী আমাদের কাছে বীমার টাকা দাবী করে। আমরা বীমার টাকা দেই নাই। সার্ভে রিপোর্ট দাবী নাকোচ করে।

15. DW 2, Imtiaz Mahmud, in his deposition stated as:

***** আমরা দুর্ঘটনার দিন ৫-৪-২০০৩ ইং তাং ঘটনা জানি। ঐ তাং আমাদের কে সার্ভেয়ার হিসাবে নিয়োগ দেয়া হয়। ঘটনার দিন যাই। পরে আরো ৪/৫ দিন ঘটনা স্থল পরিদর্শন করে। ***** বৈদ্যুতিক গোলযোগ হইতে আগুন লাগে সিলিং ফ্যান হইতে। ***** আমরা জানি দূর্ঘটনার সময় ৫০ লিঃ পেট্রোল ছিল এটা বীমা কোং লোকজনসহ হইতে জানি। ***** ২৫-৮-২০০৩ ইং তাং রিপোর্ট দেই এটা বাদীকে জানাই। রিপোর্টে নেই এসসমেন্ট করি ৬৪,৫৬,৬৭৮.৮৭ টাকা। ***** পত্র পাওয়ার পূর্বেই তদন্তে যাই। আমি তদন্তে নিজে যাই নাই। ঐ টিমের আমি সদস্য নই। আমি রেকর্ড দেখিয়া সব বলি। ***** বীমা অফিস হইতে আমাদের অফিস আধা মাইল দুরে। বীমা করার জন্য অনেক কোং আছে। ***** শর্ট সার্কিট হইতে আগুন লাগে।

16. DW 3, Md Aktar Hossain, in his deposition stated as:

***** আমি জানি সেইটি সেকশনে রং ছিল এবং পেট্রোল ছিল। প্রডাকশন ম্যানেজার আওয়াল সাহেব এটা বানায়। ***** আওয়াল সাহেব বলে পেট্রোল ছিল। সে জবানবন্দি দেয়। উহা জমা দেই নাই। আওয়াল সাহেব জবানবন্দিতে অনা একজন সই দেয়। আমি জবানবন্দি লিখি।

17. DW 4, Md Asadul Islam, in his deposition stated as:

***** আমি সরজমিনে সার্ভে করি নাই। চীফ সার্ভেয়ার করে। রেকর্ড দেখিয়া সব বলি। ***** ঘটনার ১ মাস পরে যাই তখন ৫০ নং পুনঃ নির্মান হয়। ***** সরজমিনে যাই নাই। আমাদের তদন্ত চলা কালে ৫০ টন পুনঃ নির্মানাধীন। তখন পোড়া মাল সাজানো হয়। কি কি মাল আছে বীমা গ্রহিতা জানে, সে লিষ্ট দেয়। সেই লিষ্ট নাই। ***** আমাদের স্বাক্ষরসহ রিপোর্ট সাধারন বীমায় পাঠাই। আমাদের রিপোর্টে ক্ষতি ৫৫,৪২,৭৯৫ টাকা।

***** মর্ডান সার্ভে লিঃ ও অন্যান্য ইনসপেকশন কোং এবং মধুমতি সার্ভেয়ার ও অগ্রনী ইনসপেকশন কোম্পানীদ্বয়ের মাধ্যমে কারখানাটি সরেজমিনে তদন্ত করাইয়া ৯-৯-২০০৩ ইং তারিখে বাদীকে জানান যে বাদীর সহিত বীমা চুক্তি বৈধ থাকা সত্বেও বাদী দাবী পরিশোধ করা সম্ভব না। ***** ৫০ লিটার পেট্রোল মওজুদ ও কারখানা ৪র্থ শ্রেনীর হওয়ায় এবং সার্ভেয়ারের সুপারিশের কারণে বীমাকৃত দাবী প্রদানে অস্বীকার করেন। ***** পৃথকসার্ভে রিপোর্টে বাদী পক্ষ ক্ষতিপুরণ পাওয়ার অধিকারী না মর্মে রিপোর্ট প্রদান করা হয়েছে। ***** বাদী প্রতিষ্ঠানকে বীমা পলিসি প্রদান করে তারা বাদীর প্রতিষ্ঠানটি সরেজমিনে পরিদর্শন করেন নাই। বীমা চুক্তিতে লেখা নাই যে, সার্ভেয়ারের রিপোর্টের ভিত্তিতে ক্ষতিপুরণ দেওয়া হবে। তিনি জেরাতে সুস্পষ্টভাবে স্বীকার করেন যে, সার্ভে রিপোর্টে শর্ট সার্কিট হতে আগ্নিকান্ড সংঘটিত হয়েছিল মর্মে উল্লেখ আছে।* ***** পি, ডব্লিউ-২ ইমতিয়াজ মাহমুদ তার জবানবন্দিতে স্বীকার করে যে, বৈদ্যুতিক গোলযোগ হতে আগুন লাগে। দুর্ঘটনার সময় কোম্পানীতে ৫০ লিটার থাকার কথা তারা বীমা কোম্পানীর লোকজনের নিকট হতে জানতে পেরেছিলেন। সার্ভে টিম পেট্রোলের জার উদ্ধার করে। জারের তেল পুড়িয়া যায়। বিবাদী পক্ষের এই সাক্ষীর জেরা জবানবন্দির বক্তব্য মতে সার্ভে টিম সার্ভে কার্য সম্পাদনকালে বাদী প্রতিষ্ঠানের ভিতরে কোন পেট্রোল প্রাপ্ত হন নাই। পেট্রোলের জার উদ্ধার বিষয়ে বিবাদী পক্ষের এই সাক্ষীর বক্তব্য আদৌ বিশ্বাসযোগ্য নয়। কারন কোন একটি পাত্রে পেট্রোল সংরক্ষিত থাকলে আগুনে পেট্রোল পুড়ে যাওয়ার পর কোনভাবেই জারটি অস্তিত্ব বিদ্যমান থাকে না। পেট্রোল পুড়ে যাওয়ার সাথে সাথে জারটিও পুড়ে বিনষ্ট হয়। পি, ডব্লিউ-৩ আক্তার হোসেন জবাবের সমর্থনে ম্যানেজার আউয়াল সাহেব কারখানাতে পেট্রোল থাকার বিষয়ে তাকে বলেছিলেন। পেট্রোল থাকার সমর্থনে আউয়াল সাহেবের জবানবন্দি অন্য একজন স্বাক্ষর করেন। তিনি আউয়াল সাহেবের জবানবন্দী লিপিবদ্ধ করেন। আউয়াল সাহেবের জবানবন্দি হিসেবে বিবেচনায় নেওয়ার কোন আইনগত সুযোগ নাই। তাই বিবাদী পক্ষের এই সাক্ষীর অগ্নিকান্ড সংঘটনকালে বাদীর কারখানার পেট্রোল থাকার বিষয়ের বক্তব্য বিশ্বাসযোগ্য নয়। বিজ্ঞ ডব্লিউ-৪ আসাদুল ইসলাম সার্ভে রিপোর্ট প্রস্তুতের সাথে সম্পৃক্ত একজন সাক্ষী। তিনি

অগ্নিকান্ডের ঘটনা প্রত্যক্ষ করেন নাই বা ঘটনাস্থলেও যান নাই। অগ্নি এবং পানি দ্বারা ক্ষতিগ্রস্ত সম্পত্তির বিবরণ প্রায় ২৫,০০০ বর্গফুট বিশিষ্ট সেমী পাকা ভবনটি আগুনে সম্পূর্নরুপে ভষ্মিভূত হইয়াছে। উক্ত ভবনের দ্বিতীয়তালা ও নীচতলায় মজুত রাখা কাঁচামাল রং তৈরী (হারিকেন ও ষ্টোভচুলার) কার্টুন, বিভিন্ন আকারের মেশিন পত্র, জেনারেটর ও বৈদ্যুতিক সরঞ্জামাদি আগুনে ও পানিতে ক্ষতিগ্রস্থ হয়। ***** আনুমানিক ক্ষতির পরিমান ১,১২,০৮,০০০ (এক কোটি বার লক্ষ আট হাজার টাকা মাত্র) আনুমানিক উদ্ধারকৃত সম্পত্তির মুল্য ১৪,১০,০০০ (চৌদ্দ লক্ষ দশ হাজার) টাকা মাত্র। ***** বীমা চুক্তি পরে সকল শর্তাবলী যথাযথভাবে পালন করা হইয়াছে কিনা? হ্যাঁ ***** অগ্নীকান্ডে আকস্মিক দুর্ঘটনাজনিত কারণে বিনষ্ট হইয়াছে বা ক্ষতিগ্রহস্ত হইয়াছে যাহাতে আমার/ আমাদের কোন অভিসন্ধি বা হাত ছিল না এবং যাহার পরিমান মুল্য এই সংগে সংশ্লিষ্ট করা গেল। অতএব আমি/ আমরা ঐ ক্ষতির অংক স্বরুপ রুপালী ইন্সুরেন্স কোম্পানী লিমিটেডের নিকট টাকা ১,৪০,৩৪,৪৪৩ দাবী করিলাম।

18. Mr Shah Md Munir Sharif, learned Advocate relied entirely on the two survey reports and according to him these survey reports are his basic foundation. In the written statement in paragraph 15 this defendant-appellant stated that defendant No.l, Managing Director, *Rupali Insurance Company* appointed two surveyors namely Morden Surveyor Limited and Ananya Inspection Co. Plaintiffs very much doubted over the reports as these reports submitted on 25-8-2003 i.e. more than four months after fire broke out in the factory. In the survey report surveyors stated that they visited the place of occurrence 45 days after the fire broke in the factory. The ease of the defendant-appellant is that fire as broken, may be from electric short circuit but due to the 50 litre petrol in the factory and also that the factory constructed on wooden plant by which two separate stairs have been made, fire radily engulfed the entire factory. Although Mr Munir Sharif stated that utmost good faith is require to have a fire insurance but it is our consider view that in Bangladesh or in Indian subcontinent such type of utmost good faith ought to be tested by investigation/inspection before policy was given. As soon as policy signed by both the parties, it is taken to be done with utmost good faith. It appears that after fire broken plaintiff through letters informed the matter to defendants but defendants rise from slumber after 45 days of the occurrence. Plaintiff doubted about the report of two sets of surveyors and according to the plaintiff those surveyors without giving any notice to the plaintiff, sitting in their office prepare the report. Conduct of the surveyors suggested so. Survey of the matter after long 45 days without visiting or inspecting the place of occurrence, make the reports totally unreliable. The reports submitted by the surveyors after conducting survey after long time of the occurrence and that too, without notifying the plaintiff stands as totally unreliable. Here we may consider and take up as genuine the report submitted by Fire Brigade which they submitted in no time after controlling the fire, as per fire brigade rules, exhibit-8, they found damage to the tune of Taka 1,12,08.000 and from this, subrogate deduction it stands at Taka 98 lakhs and odd, and this is fact. We relied on the report of fire brigade who being a neutral one, its report to be taken as legal.

19. The decree passed by the learned Judge is modified to the tune of Taka 1,12,08.000 deducting subrogated amount at Taka 14,10,000 Taka 97,98,000. Upon which as per section 47B of the Insurance Act, 1938 i.e. if there be any decree passed, Court shall impose pendentillite interest at the rate of five percent (5%) higher than the prevailing bank rate.

20. Section 47B (2) provides that interest under sub-section (1) shall be payable for the period during which the failure continues and shall be calculated at monthly rates at the rate of five percent higher than the prevailing bank rate. Decree passed by the learned Judge is modified to the tune of Taka 97,98,000 with interest shall be paid monthly at the rate of five percent higher than the prevailing bank rate from the date of receipt of this order.

21. In the result, First Appeal No. 472 of 2012 is allowed in part with modification of decree as aforesaid and First Appeal No.385 of 2012 is dismissed.

Communicate this order at once.

Send down the lower Court records at once.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Syed Md Ziaul Karim J
Ashish Ranjan Das J

Judgment
February 25th, 2014.

Rokeya Begum.....
....Convict- Appellant

vs

State.....Respondent*

Evidence Act (I of 1872)
Section 114(g)

There cannot be conviction for trafficking narcotics on mere suspicion or presumption.

The case is absolutely a case of no evidence but the Court below without any legal evidence convicted the accused in moral view. Legal evidence, in a criminal trial, is the evidence of the incriminating facts and circumstances of involvement of the accused in the commission of the offence inevitably pointing them guilty as the perpetrators which is incompatible with the plea of their innocence. Moral conviction should not be substituted in place of the legal evidence. .....(33 & 34)

Kawsarun Nessa vs State, 15 BLD 21; Anaddi alias Ayenuddin vs State, 6 BLC 310; Abdul Haq vs State, 14 BLT 485; Fazu alias Fazlur Rahman vs State, 1 BLC 558, Rekatfullah vs State 13 DLR 750 and Safder Ali vs Crown 5 DLR (FC) 107 ref.

Mohammad Ali Azam,—For the convict-appellant

Sakila Rowshan, DAG with Sharmina Haque, AAG and Md Showardhi, AAG—For the State Respondent.

* Criminal Appeal No. 5499 of 2007

Judgment

Syed Md Ziaul Karim J: By this appeal, the convict-appellant has challenged the legality and propriety of the judgment and order of conviction and sentence dated 6-9-2007 passed by learned Special Sessions Judge and Paribesh Appeal Adalat, Dhaka, in Metro Session Case no. 166 of 2001 convicting the appellant under Clause l (Kha) of the Table of section 19(1) of the Narcotics Control Act, 1990 (briefly as Clause of Act, 1990) and sentencing her to suffer imprisonment for life.

2. The prosecution as projected in the first information report and unfurled at trial are that on 28-10-2000 SI Md Monir-ul-Islam (PW4) along with other police personnel namely SI Abul Khayer, C-Tofail Ahmed, C-Lutfor Rahman (PW1) were in duty in plain dress as appolo-12. Then at 21-05 hrs. they found two persons were moving suspiciously. On interrogation they identified themselves as Rokeya Begum and Md Momtaz Ali; they told that they came to that place for trafficking heroine. Later, on search one packet heroine measuring hundred gram amounting to Taka 30,000 was recovered from accused Rokeya Begum. Then he prepared seizure list in presence of Md Mukul and Md Abdur Rahim. He arrested the accused and handed over them with seized heroine to the Police Station. Then the prosecution was launched by lodging a first information report by him as informant with the local police station wherein it was recorded as Mohammadpur Police Station Case No. 90(10) 2000.

3. The Police after investigation submitted charge-sheet under Clause 1 (Kha) of the Table of section 19(1) of the Narcotics Control Act, 1990 accusing the appellant and another namely Md Momtaz Ali.

4. Eventually, the accused were called upon to answer the charge under the said Clause of Act, 1990 and the accused on dock pleaded not guilty and claimed to be tried.

5. In course of trial the prosecution in all examined five witnesses, out of eleven charge-sheeted witnesses and defence examine none.

6. After closure of the prosecution case the accused on dock were again examined under section 342 of the Code of Criminal Procedure again they repeated their innocence but led no evidence in defence.

7. The defence case as it appears from the trend of cross-examination are that of innocence and false implication. It was divulged in defence that due to internal feud between the parties they have been falsely implicated in this case.

8. After trial the learned Judge convicted the accused as aforesaid holding:

i The prosecution succeeded to prove the charge by corroborative evidence;

ii. The incriminating heroine was recovered from the exclusive control and possession of accused Most. Rokeya Begum.

9. The learned Advocate appearing for the appellant seeks to impeach the impugned judgment and order of conviction and sentence on three fold arguments:

Firstly: The prosecution failed to prove the manner of occurrence in this case inasmuchas the seizure list witnesses and the lady who searched the convict were not produced by the prosecution at the time of trial.

10. In support of his contentions he refers the case of *Kawsarun Nessa vs State 15 BLD 21* held:

> "The burden of proving the manner of the incident as alleged by the prosecution lies squarely on the prosecution and it never shifts. If the manner of the incident is not proved, the prosecution must necessarily fail, no matter, whether the defence version of the case has not been proved either."

Secondly: The prosecution failed to examine any independent witness in this case. So charge was not proved by any corroborative evidence. In support of his contention he refers the case of *Anaddi alias Ayenuddin vs State 6 BLC 310* held:

> "Failure to examine any independent witnesses out of 100/200 men who allegedly assembled after the occurrence in the place of occurrence hut has made the entire prosecution case unworthy to believe and the non-production of any independent evidence with the possibility of false implication of the accused who are admittedly inimical cannot be denied. Non-examination of relevant witnesses as mentioned in the first information report as well as independent witnesses, particularly some of neighbours, raises a presumption against the prosecution to the effect that had they been examined in the case they would not have supported the prosecution case and the benefit of this defect will go to the accused persons."

Third and lastly: The judgment and order of conviction and sentence based on misreading and non-consideration of the evidence on record. So the same cannot be sustained in the eye of law.

11. The learned Deputy Attorney-General appearing for the State-respondent opposes the appeal and submits that the incriminating heroine was recovered from the exclusive control and possession of the appellant and heroine

was confirmed by chemical examination report. So the learned Judge rightly convicted the accused which calls for no interference by this Court.

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

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

14. PW1 C-Lutfor Rahman was with the informant at the time of recovery of the alleged heroine. He deposed that on 28-10-2000 since morning at 8'0 Clock he was in duty with the informant when they were in duty at Gandirbosti of Agargaon they found two persons were moving suspiciously. On interrogation, one Momtaz, who was with accused Rokeya informed them that they came there for trafficking heroine. He did not see any heroine but heard it.

15. In cross-examination he stated that he did not see the recovery of heroine.

16. PW2 C-Abdul Hafez, he was also with the informant at the time of recovery of heroine. He deposed that they were in duty at Agargaon area and found "একজন মহিলা"(a woman) and a man were moving suspiciously and they arrested them and on search some heroine were recovered from a lady.

17. He identified the accused on dock.

18. In cross-examination, he denied the suggestion that he did not see the recovery and he could not remember the name of that lady and deposing falsely.

19. PW 3 SI Md. Fazlul Kabir. He deposed that on 28-10-2000 he was attached with Mohammadpur Police Station, he recorded the FIR and filled up its form. He proved the same as Exhbt.1 and his signature on it as 1/1.

20. In cross-examination he denied the suggestion that he did not fill up the form attentively.

21. PW 4 SI Md Monirul Islam was the informant of the case. He deposed that on 28-10-2000 he was in duty along with other police personnel at Agargaon Gandirbosti wherein they found two persons were moving suspiciously, one of them was lady named Rokeya Begum. On search they recovered one packet heroine amounting to 100 grams. He seized the said heroine and prepared seizure list in presence of locals. He proved the seizure list as Exhbt 3 and his signature on as 3/1. Thereafter, he handed over the accused with alleged heroine to the Police Station. He identified the accused on dock.

22. In cross-examination he stated that there were five Police personnel with him at the time of raiding. He had no knowledge about that lady who searched the accused Rokeya and even he did not cite her as witness. He prepared seizure list in presence of two locals namely Abdur Rahaman and Mukul. He denied the suggestion that accused Rokeya Begum was not searched by any lady and he was deposing falsely.

23. PW 5 AKM Mohsin-uz-Zaman Khan. He was the Investigating Officer of the case. He deposed that on 28-10-2000 he was attached with Mohammadpur Police Station and the case was entrusted to him for investigation. He visited the place of occurrence, prepared sketch map with index, which he proved it as Exhbt 4 and his signature on it as Exhbt 4/1 and he recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure. Then he referred ten grams of heroine for chemical examination. After obtaining report he became sure about heroine. He proved the report as Exhbt 5. After concluding investigation he submitted charge-sheet under Clause 1 (Kha) of the table of section 19(1) of the

Narcotics Control Act, 1990. He identified the accused on dock.

24. In cross-examination he stated that at the place of occurrence he recorded the statements of witnesses Abdur Rahman and Md Mukul. He denied the suggestion that by perfunctory investigation he submitted the report and deposing falsely.

25. These are all of the evidence on record adduced by the prosecution to support the charge.

26. It is the definite case of the prosecution that one hundred grams of heroine was recovered from the exclusive control and possession of accused Rokeya Begum but the defence disowned such recovery.

27. On going to the materials on record it transpires that the prosecution in all examined five witnesses out of eleven charge-sheet witnesses. All the witnesses are the Police personnel. Of them PW 4 is the informant and PW 5 is the investigating Officer and the rest three witnesses were with the informant at the time of recovery.

28. From the evidence on record we find that the prosecution case absolutely rests upon the evidence of Police personnel. PW 4 is the informant who categorically stated that when he, along with other police personnel were in duty in plain dress they found two persons one of them was a lady were moving suspiciously at Gandirbosti Agargaon area. On interrogation they identified themselves a Rokeya Begum and Md Momtaz Ali, they told that they came there for trafficking heroine. On search by another lady, she recovered 100 grams heroine from accused Rokeya Begum. PWs 1 and 2 were examined to corroborate the evidence of PW 4, they merely mentioned the name of accused Rokeya Begum, of them PW 2 merely stated that there was one "মহিলা"lady but he could not specifically mention the name of the accused. We find that save and except PW 4, there is no other evidence in respect of recovery of heroine from accused Rokeya Begum. Evidently three important witnesses, of them two seizure list witnesses namely Md Mukul and Md Abdur Rahim and other lady who searched and recovered heroine from accused Rokeya were not examined by the prosecution, which cast a serious doubt upon the prosecution story. So we find that PW 4 is the only witness of recovery of heroine, even such recovery was not corroborated by any other Police personnel. Therefore, we hold that where the evidence of Police personnel forms the only witness on which the Court has to act upon. It is absolutely necessary for the interest of justice that at least their statements must be in conformity with the probability and in a case like this the evidence of solitary witness calls for corroboration as a rule of prudence.

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

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

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

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

d) There must be clear and unequivocal

proof of the *corpus delicit.*

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

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

31. Moreover, it is the definite case of the prosecution that heroine was recovered from accused Rokeya by a local lady in presence of two local seizure list witnesses, they were the most vital and natural witnesses, but they were not examined, only Police personnel were examined who also did not provide corroborative evidence. So we find that when further natural and independent witnesses were not produced, it is unsafe to rely on the evidence of only Police personnel to make a nexus between the accused and the crime. So we hold that there is no cogent, convincing and unimpeachable evidence on record to prove the complicity of the accused with the crime of trafficking heroine. Prosecution utterly failed to bring home guilt to the accused beyond reasonable doubt.

32. It is pertinent to point out that the learned Judge convicted one accused and acquitted other over the selfsame of evidence on record. There is no mis-match or distinction between the acquitted accused and the convict so far as the ocular testimony is concern. The eye-witnesses having been disbelieved against one accused should not be believed against other without any independent corroboration.

33. It is true that crime like trafficking narcotics is shocking in nature and also, revolting. The crime is against Society and humanity, but the prosecution convicted the accused merely on suspicion that the accused committed such offence. There cannot be conviction for trafficking narcotics on mere suspicion or presumption. The commission of such offence must be proved. The presumption cannot take the place of positive evidence, *(1970 P Crl LJ 166).*

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

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

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

> "In a criminal case, it is the duty of the Court to review the entire evidence that has been produced by the prosecution and the defence. If, after an examination of the whole evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, it is clear that such a view reacts on

the whole prosecution case. In these circumstances, the accused is entitled to benefit of doubt, not as a matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt.

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

38. Moreover, the impugned judgment and order of conviction and sentence in its entirety is not well founded in the facts and circumstances of the case. So, the submissions advanced by the learned Counsel for the defence prevails and appears to have a good deal of force. On the contrary the submissions advanced by the learned Deputy Attorney-General are not the correct exposition of law. So we are unable to accept her submissions.

39. In the light of discussions made above and the preponderant judicial views emerging out of the authorities referred to above, we are of the view that the impugned judgment and order of conviction and sentence suffers from legal infirmities which calls for interference by this Court. Thus the appeal having merit succeeds.

40. In the result the appeal is allowed. The impugned judgment and order of conviction and sentence dated 6-9-2007 passed by the learned Special Sessions Judge, and Paribesh Appeal Adalat, in Metro Session Case No. 166 of 2001 Dhaka, is hereby set-aside and the convict appellant is acquitted from the charge.

41. Let the appellant Most. Rokeya Begum be set at liberty if not detained in any other case.

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

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Moyeenul Islam Chowdhury J
Md Shawkat Hossain J

Judgment
January 10th, 2013.

Masumur Rahman @ Masum @ Ahmed..... Condemned-appellant

vs

State.....Respondent*

Cognizance

Unless cognizance is taken of the offence against him, his subsequent trial, if any, canot be sustainable in law inasmuch as the learned Tribunal Judge did not *prima-facie* hold that there was commission of any offence by him. In such a situation, the trial of the accused shall stand vitiated. .....(148)

Code of Criminal Procedure (V of 1898) Section 374

Long pendency of the Death Reference *per se* is not a ground for commutation of the death sentence of Masum to life-term imprisonment. There must be other circumstances of a compelling nature. .....(154)

State vs Jahangir Mallik, 15 BLC 67; State vs Abdul Karim alias Gonesh, 8 BLC 264; State vs Md Shahjahan, 7 BLC 602; State vs Yeasin Khan Palash , 12 BLC 631; State vs Saidul, 13 BLC 739; State vs Silbestar Roy alias Tito alias Noorzzaman, 13 BLC 287; State vs Md Monir Mridha, 14 BLC 532; State vs Anowar Hossain Pinto alias Anowar Hossain, 16 DLR (AD) 108; Stale vs Md Shamim alias Shamim Sikder, 53 DLR 439; Abdullah Shah vs State, PLD 1962 (WP) Karachi 633 (paragraph 4); Abdul Khaleque Mir vs State, 2 BLT (AD) 172; Islamuddin @

*Criminal Appeal Nos. 902 , 7820 of 2007 and Death Reference No. 72 of 2006.

Din Islam vs State, 13 BLC (AD) 81; Habibur Rahman @ Habib vs State, 8 BLD 210; Zaheda Bewa vs State, 1985 BLD 9 = 37 DLR 66; Nazir Ahmed vs King Emperor, AIR 1936 PC 253; Abul Hossain vs State, 13 BLD 311; Nurul Haque vs State, 20 DLR 780; Ali Asgar vs State 1986 BLD 436 ; State vs Punardhar Joydhar alias Kudu and Shefali, 31 DLR 312; Hazrat Ali vs State, 1990 BLD 38 = 42 DLR 177; Bakul Chandra Sarkar vs State, 45 DLR 260; Iftekhar Hasan (Md) @ Al Mamun vs State, 59 DLR (AD) 36; Crown vs Pirdhan Rautamall & Co. represented by Matilal Mulgulia, 2 DLR 304; Abul Khair vs State, 44 DLR (AD) 225; State vs Rokeya Begum, 13 BLT 377 = 10 BLC 687; Islamuddin (Md) @ Din Islam vs State, 13 BLC (AD) 81; Chowla vs State of Haryana, AIR 1974 (SC) 1039 and Madan Gopal Kakkad vs Naval Dubey, 3 SCC (1992) 204, paragraph 58 ref.

Syed Mizanur Rahman, with Md Rezaul Islam, Advocates—For the Condemned-Appellant. In Criminal Appeal No. 902 of 2007.

Junayed Ahmed Chowdhury with Md Anisur Rahman Hatem, Sajeda Farisa Kabir and Romel Chowdhury, Advocates—For the Condemned-Appellant. In Criminal Appeal No. 7820 of 2012.

Md Khurshedul Alam, DAG with Delowar Hossain Somadder, AAG and Mahmuda Parveen, AAG—For the State in Criminal Appeal No. 902 of 2007, Criminal Appeal No. 7820 of 2012 and Death Reference No. 72 of 2006.

Judgment

Moyeenul Islam Chowdhury J: The Criminal Appeal No. 902 of 2007 and the Criminal Appeal No. 7820 of 2012, at the instance of the condemned-prisoners, are directed against the judgment and order of conviction and sentence dated 15-8-2006 passed by the Special Tribunal No.1, Lakshmipur in Special Tribunal Case No. 19 of 2005 arising out of GR Case No. 501 of 2005 corresponding to Lakshmipur Police Station Case No. 01 dated 3-10-2005. By the impugned judgment and order, the Special Tribunal No. 1 convicted the accused-appellant Masumur Rahman @ Masum @ Ahmed under section 3 of the Explosive Substances Act, 1908 and sentenced him thereunder to death and to pay a fine of Taka 1,00,000 and also convicted him under section 4(b) of the said Act and sentenced him thereunder to suffer rigorous imprisonment for 20 years and further convicted the accused-appellant Amzad Ali @ Mohammad Hossain @ Babu under sections 3/6 of the said Act and sentenced him thereunder to death and to pay a fine of Taka 1,00,000 and also convicted him under sections 4(b)/6 of the Act and sentenced him thereunder to suffer rigorous imprisonment for 20 years.

2. The Special Tribunal No. 1, Lakshmipur also made a Reference to the High Court Division under Sub-section (2) of section 30 of the Special Powers Act, 1974 for confirmation of the death sentence imposed upon them.

3. Both the appeals and the Death Reference have been heard together and are disposed of by this consolidated judgment.

4. The prosecution version of the case, in short, is as follows:

On 3-10-2005, Mr MA Sufian, Joint District Judge, 1st Court, Lakshmipur was hearing cases in open Court and the Court room was crammed with Advocates, clerks, witnesses, Court support-staff and litigant people. Anyway, at one stage of the Court proceedings, Mr MA Sufian, the Presiding Judge of the Court, noticed a tall young man with a yellow shirt on having a DLR-like book in his hand sitting on a chair amongst the Advocates. As time rolled by, at about 12-00 noon, Mr MA Sufian further noticed that the said young man with the DLR-like book in his hand stood up from the chair, advanced one or two steps forward towards the rostrum of the Court and in the twinkling of an

eye, he hurled the DLR like book aiming at Mr MA Sufian. The DLR like book missed the target, hit the table on the rostrum and a bomb concealed in the DLR like book exploded with a bang scattering splinters all around and injuring many people including the Presiding Judge Mr MA Sufian and damaging the furniture of the Court-room. One Mozibul Haque, a defendant of Title Suit No. 793 of 1981, sustained grievous injuries on his person resulting in ejaculation of his brain-matter as a result of the detonation of the bomb. Eventually Mozibul Haque succumbed to his bomb injuries. However, the man who hurled the bomb came out of the Court-room in order to make good his escape. The police personnel and people chased him and succeeded in catching hold of him in front of the building of Lakshmipur District Bar Association. On being apprehended, he disclosed his name as Masum-ur Rahman @ Masum @ Ahmed. Professedly, he is a member of the suicide squad of the militant outfit Jamayatul Muzahedin Bangladesh (JMB). He was assigned with the mission of killing the Judge (Mr MA Sufian) as a part of their blue print to establish Islamic Rule in Bangladesh. Be that as it may, while the accused Masum was fleeing away from the Court-room, another bomb exploded on the verandah in order to facilitate his escape out of the clutches of the people and police personnel. At the directive of the condemned-prisoner Ataur Rahman @ Sunny (since executed), the condemned-prisoner Amzad Ali @ Mohammad Hossain @ Babu supplied the bomb to the condemned-prisoner Masumur Rahman @ Masum @ Ahmed with a view to killing the Judge concerned by exploding the same so as to fulfill their mission. However, Mr Md Bazlur Rahman, Nazir of Lakshmipur Judgeship, lodged an ejahar with Lakshmipur Police Station, Lakshmipur narrating the occurrence.

5. The Investigating Officers of the case are Sub-Inspector Md Abdus Salam (PW 45) and Inspector Belal Uddin Chowdhury (PW 46). They investigated the case by visiting the place of occurrence. During investigation, a sketch-map of the place of occurrence along with a separate index was prepared and witnesses were examined and their statements were recorded under section 161 of the Code of Criminal Procedure. Besides, all the condemned prisoners made self-inculpatory confessional statements and necessary alamats were seized as per seizure-lists and a copy of the autopsy-report of the deceased Mozibul Haque was obtained. Having found a prima facie case, the second Investigating Officer, that is to say, Inspector Belal Uddin Chowdhury (PW 46) submitted charge-sheet No. 221 dated 20-10-2005 against the condemned-prisoner Masumur Rahman under sections 3/4 of the Explosive Substances Act, 1908. Subsequently, the police submitted the relevant supplementary charge-sheet against the remaining two condemned-prisoners, namely, Amzad Ali and Ataur Rahman.

6. At the commencement of the trial of the case, the learned trial Judge charged the condemned-prisoner Masumur Rahman under sections 3/4 of the Explosive Substances Act, 1908 and the other two condemned-prisoners, namely, Amzad Ali and Ataur Rahman under sections 3/4/6 of the Explosive Substances Act, 1908. The charge was read over and explained to them in the dock; but they pleaded not guilty thereto and claimed to be tried as per law.

7. The defence version of the case, as it appears from the trend of cross-examination of the prosecution witnesses and the statements made by the condemned-prisoners Masumur Rahman and Amzad Ali at the time of their examination under section 342 of the Code of Criminal Procedure, is that they are innocent and have been falsely implicated in the case and their alleged confessional statements are products of police torture, oppression and maltreatment.

8. After hearing both the prosecution and the defence and on an appraisal of the evidence and materials on record and having regard to the attending circumstances of the case, the Tribunal below came to the finding that the prosecution brought the charge home against the condemned-prisoners and accordingly, it convicted and sentenced them by the impugned judgment and order as aforesaid.

9. Being aggrieved at and dissatisfied with the impugned judgment and order, Masumur Rahman and Amzad Ali have preferred the instant appeals. As already observed, the learned trial Judge has also made a statutory reference to the High Court Division for confirmation of the death sentence imposed upon them.

10. At this stage, it may be pointed out that the condemned-prisoner Ataur Rahman was executed on 29-3-2007 in connection with Sessions Case No. 28 of 2006 arising out of Jhalakathi GR Case No. 253 of 2005 as is apparent from the order dated 10-6-2012 recorded by this Court. Against this backdrop, the Death Reference so far as it relates to the condemned-prisoner Ataur Rahman has become infructuous as a matter of course.

11. The only point for determination in the appeals and the Death Reference is whether the impugned judgment and order dated 15-8-2006 is sustainable in law or not?

12. Mr Syed Mizanur Rahman, learned Advocate appearing on behalf of the condemned-appellant Masum, submits that his alleged self- inculpatory confessional statement dated 13-10-2005 (Exhibit-15) is a product of police torture and oppression, but the Tribunal failed to properly appreciate this dimension of the case resulting in a miscarriage of justice.

13. Mr. Syed Mizanur Rahman also submits that since the accused Masum has been convicted under section 302 of the Penal Code and sentenced thereunder to death, his conviction and sentence under section 3 of the Explosive Substances Act arising out of the self-same transaction is hit by section 26 of the General Clauses Act, 1897 and that being so, there is no scope for his prosecution under section 3 of the Explosive Substances Act; but the learned Tribunal Judge failed to consider this aspect of the case resulting in grave prejudice to the accused Masum.

14. Mr Syed Mizanur Rahman next submits that virtually he has nothing to say about the ocular evidence of the prosecution witnesses concerned; but he makes a prayer to this Court to commute the death sentence of Masum to imprisonment for life on the ground of his tender age and long pendency of the Death Reference in the High Court Division in view of the decisions in the cases of *State vs Jahangir Mallik, 15 BLC 67; State vs Abdul Karim alias Gonesh, 8 BLC 264; State vs Md Shahjahan alias Babu, 7 BLC 602; State vs Yeasin Khan Palash and 4 others, 12 BLC 631; State vs Saidul, 13 BLC 739; State vs Silbestar Roy alias Tito alias Noorzzaman, 13 BLC 287; State vs Md Monir Mridha, 14 BLC 532; State vs Anowar Hossain Pinto alias Anowar Hossain, 16 DLR (AD) 108 and State vs Md Shamim alias Shamim Sikder, 53 DLR 439.*

15. Mr Junayed Ahmed Chowdhury, learned Advocate appearing on behalf of Advocate Mr Md Anisur Rahman Hatem for the condemned-appellant Amzad Ali, submits that there is nothing on record to show that cognizance of the offence was taken against Amzad Ali by the concerned Special Tribunal Judge under section 27 of the Special Powers Act on the basis of the supplementary charge-sheet No. 86 dated 14-5-2006 and as no cognizance was taken against Amzad, the entire trial as against him stands vitiated.

16. Mr Junayed Ahmed Chowdhury further submits that the non-taking of cognizance

against Amzad is not curable by section 537 of the Code of Criminal Procedure and in this view of the matter, the learned trial Judge erred in law in convicting and sentencing the condemned-appellant Amzad.

17. In support of the above submission, Mr Junayed Ahmed Chowdhury relies upon the decision in the case of *Abdullah Shah vs State* reported in *PLD 1962 (WP) Karachi 633 (paragraph 4).*

18. On the other hand, Mr Md Khurshedul Alam, learned Deputy Attorney-General appearing on behalf of the State-respondent and in support of the Death Reference, submits that the evidence of the eye-witnesses, namely, the PW 1 Md Bazlur Rahman, PW 3 Advocate Md Nur Nabi, PW 5 Md Shafiq Ullah (Bench Assistant), PW 6 Advocate Azgar Hossain Mahmud, PW 7 Advocate Saibal Kanti Saha, PW 10 Advocate Zahidul Islam, PW 11 Advocate Ratan Lal Bhowmik, PW 12 Advocate Makhan Lai Saha, PW 13 Shahid Ali Rarri (defendant No. 21 of Title Suit No.793 of 1981), PW 15 Delwar Hossain Patwary, PW 16 IdrisAli, PW 23 Md. Monzil Hossain (Constable on duty), PW 26 Advocate Md Shahid Hossain, PW 28 Advocate Tasaddek Uddin Ahmed Chowdhury, PW 30 Peon Nur Nabi, PW 31 Mr MA. Sufian (Presiding Judge of the Court), PW 33 Sub-Inspector Parimal Chandra Das, PW 39 Constable No. 598 Md Alamgir Hossain, PW 40 Md. Anowar Hossain and PW 44 Constable No. 134 Md Abdul Alim coupled with the medical evidence on record have proved the prosecution version of the case to the hilt and viewed from this standpoint, it is crystal clear that the learned trial Judge rightly convicted and sentenced the condemned-appellant Masum.

19. Mr Md Khurshedul Alam next submits that the offences punishable under section 302 of the Penal Code and under section 3 of the Explosive Substances Act are distinct and separate offences and in such view of the matter, the provisions of section 26 of the General Clauses Act can not be invoked.

20. Mr Md Khurshedul Alam also submits that the self-inculpatory confessional statements of Masum and Amzad are not the products of police torture or oppression or maltreatment; rather they made the confessions spontaneously under section 164 of the Code of Criminal Procedure and the confessions having been found to be true and voluntary, the trial Court rightly relied upon them in conjunction with the ocular evidence on record.

21. Mr Md Khurshedul Alam, however, finds it difficult to assail the submission of Mr Junayed Ahmed Chowdhury that the trial of the case so far as it relates to the condemned prisoner Amzad stands vitiated for not taking cognizance of the offence on the basis of the supplementary charge-sheet No. 86 dated 14-5-2006; but he says that this was an inadvertent mistake committed by the learned Tribunal Judge.

22. Mr Md Khurshedul Alam next submits that the offence committed by the condemned-prisoner Masum is very heinous and brutal and it was perpetrated not against any particular individual, but against the State, social structure and the Judiciary and in that view of the matter, there is no scope for commutation of the death sentence of Masum to life-term imprisonment. In this regard, Mr Md Khurshedul Alam draws our attention to the decisions in the cases of *Abdul Khaleque Mir vs State, 2 BLT (AD) 172 and Islamuddin (Md) @ Din Islam vs State, 13 BLC (AD) 81.*

23. We have heard the submissions of the learned Advocates Mr Syed Mizanur Rahman and Mr Junayed Ahmed Chowdhury and the counter-submissions of the learned Deputy Attorney-General Mr Md Khurshedul Alam.

24. With a view to arriving at a correct decision in the appeals as well as in the Death

Reference, we are to advert to and scrutinize the relevant evidence and attending circumstances by way of juxtaposing both the prosecution and the defence versions of the case.

25. At the trial, the prosecution has examined 46 (forty-six) witnesses in all on its side. But the defence has examined none.

26. Anyway, the informant Md. Bazlur Rahman has examined himself as PW 1 in the case. He deposes that he has been posted as Nazir of Lakshmipur Judgeship, Lakshmipur and on 3-10-2005 at 12-00 noon, Mr MA Sufian, Presiding Judge of the 1st Court of Joint District Judge, Lakshmipur along with his Bench Assistant Md Shafiq Ullah and others was injured in bomb explosion at the time of Court proceedings and when the bomb-thrower started running away from the place of occurrence, the police personnel and people apprehended him and one of the injured persons was declared dead when he was taken to Lakshmipur Sadar Hospital for treatment.

27. The PW 1 Md Bazlur Rahman further deposes that he himself saw the young man throwing the bomb and the name of the apprehended man is Masum.

28. The PW 1 Md Bazlur Rahman next deposes that at the relevant time, he was present at the Court-room in connection with a case and he lodged an ejahar with the Officer-in-Charge of Lakshmipur Police Station (Exhibit-1).

29. The PW 1 Md Bazlur Rahman identifies the accused Masum in the dock.

30. In his cross-examination, the PW 1 Md Bazlur Rahman denies a defence suggestion that he was not present at the ejlash at the time of throwing of the bomb.

31. The PW 2 is Md Shahjahan Miah. He testifies that on 3-10-2005, he was on duty as Officer-in-Charge of Lakshmipur Police Station and on that day at about 17-05 hours, he registered Lakshmipur Police Station Case No. 1 dated 3-10-2005 on the basis of a written ejahar from the informant and at the time of lodgment of the ejahar, the accused Masum was handed over to the Police Station.

32. In his cross-examination, the PW 2 Md Shahjahan Miah states that he received the news of bomb explosion at the place of occurrence through wireless and thereafter he rushed there, sent the injured persons to the hospital, cordoned off the place of occurrence and found the accused Masum in apprehended condition.

33. The PW 3 is Advocate Md. Nur Nabi. He states in his evidence that he is an ex-President of Lakshmipur District Bar Association and on 3-10-2005 a little before 12-00 noon, he was present at the ejlash of the 1st Court of Joint District Judge, Lakshmipur and was engaged in hearing a petition in connection with Title Suit No. 793 of 1981 and the Presiding Judge Mr MA Sufian was hearing the petition and at that point of time, the learned GP Saibal Kanti Saha, Advocate Azgar Hossain Mahmud, Advocate Makhan Lal Saha along with other Advocates, clerks and clients were present at the ejlash.

34. The PW 3 Advocate Md Nur Nabi also states in his evidence that when he was making his submission from the front row, a DLR-like book was thrown aiming at the Joint District Judge from behind and the Joint District Judge tilted as a result of which the DLR like book containing a bomb inside hit the paper-tray on the table of the Judge, fell down on the dais beside the Judicial Chair and exploded with a bang and he (PW 3) stood motionless in a state of bewilderment for a few seconds at the suddenness of the occurrence.

35. The PW 3 Advocate Md Nur Nabi next states in his evidence that one of the clients was seriously injured in consequence of the explosion and the doctor declared him dead when he

was taken to the hospital and the Joint District Judge along with his Bench Assistant and others was also injured and after a while, he (PW 3) heard the sound of another explosion on the verandah of the Court and at this, people started running helter-skelter.

36. The PW 3 Advocate Md Nur Nabi next states in his evidence that the Joint District Judge (Mr MA Sufian) got down from the ejlash and assisted the police and the people in catching hold of the accused Masum (bomb-thrower). In his cross-examination, the PW 3 Advocate Md. Nur Nabi states:

"বইটি নিক্ষিপ্ত অবস্থায় আমি দেখি। ঐ সময় পেছন থেকে নিক্ষেপ করায় আমি নিক্ষেপকারীকে দেখতে পারি নাই। দেখা সম্ভব নয়। তবে জজ সাহেব দেখেছিলেন।"

37. The PW 4 is Advocate HM Tarek Uddin Mahmud Chowdhury. He claims in his evidence that he is an ex-President of Lakshmipur District Bar Association and on 3-10-2005, he was present at the ejlash of the 1st Court of Joint District Judge of Lakshmipur and was the engaged Advocate on behalf of the plaintiffs and Advocate Makhan Lal Saha was the engaged Advocate on behalf of the defendants of Title Suit No. 793 of 1981 and the person who succumbed to bomb injuries was a defendant of that suit.

38. The PW 4 Advocate HM Tarek Uddin Mahmud Chowdhury also claims in his evidence when Advocate Md. Nur Nabi was moving his petition, he (PW 4) went out of the ejlash of the 1st Court of Joint District Judge for some time and while he was on his way to the ejlash of the 2nd Court of Joint District Judge, he heard the sound of explosion of a bomb and while he was proceeding towards the Bar Library, the police and people apprehended a person and the Joint District Judge Mr MA. Sufian identified him.

39. In his cross-examination, the PW 4 Advocate HM Tarek Uddin Mahmud Chowdhury denies a defence suggestion that the accused Masum was apprehended on mere suspicion.

40. The PW 5 is Md Shafiq Ullah. He discloses in his evidence that he is the Bench Assistant of the 1st Court of Joint District Judge of Lakshmipur and on 3-10-2005, he was seated in the ejlash as such and when the Joint District Judge Abu Sufian was hearing a petition, a DLR like book containing a bomb inside was thrown aiming at the Joint District Judge from behind and the book hit the table on the rostrum as a result of which it exploded and he (PW 5) and Sufian Shaheb were injured and one of the litigants succumbed to bomb injuries and the ejlash, records and furniture were also damaged and he along with the Joint District Judge and others succeeded in catching hold of the bomb-thrower and the bomb-thrower disclosed his name as Masum.

41. The PW 5 Md Shafiq Ullah also discloses in his evidence that immediately after the occurrence, cordoned off the area, seized a portion of the thrown book (wherein the bomb was concealed), a broken portion of a light, a narrow iron-rod, broken pieces of table glass, a plastic basket, a pen- stand, a steel book-shelf, sand, cement, broken pieces of plaster, a pair of bloodstained sandals and other articles as per seizure-list (Exhibit-3) and he signed it as a witness.

42. The PW 5 Md Shafiq Ullah next discloses in his evidence that on that day at 12-50 PM., the police seized a hard diary cover, some pages of the diary containing smell of gun powder, one battery and other articles as per seizure-list (Exhibit-4) and he signed the same as a witness.

43. The PW 5 Md Shafiq Ullah also discloses in his evidence that they along with the Joint District Judge were treated at Lakshmipur Sadar Hospital.

44. The PW 5 Md Shafiq Ullah next disclos-

es in his evidence that on 3-10-2005 at 14-05 hours, the police seized one shirt, a pair of sandals and a wrist-watch from the courtyard of Lakshmipur Judgeship as per seizure-list (Exhibit-5) and he signed it as a witness.

45. The PW 5 Md Shafiq Ullah also discloses in his evidence that the accused Masum wore a shirt and while he was fleeing away, he took it off and threw it away lest he should be identified and the wrist-watch and the pair of sandals belonged to Masum and he exploded the bomb by looking at the wrist-watch.

The PW 5 Md Shafiq Ullah identifies the accused Masum in the dock.

In his cross-examination, the PW 5 Md Shafiq Ullah denies a defence suggestion that the accused Masum was apprehended on mere suspicion.

46. The PW 6 is Advocate Azgar Hossain Mahmud. He gives out in his evidence that on 3-10-2005, he was present at the 1st Court of Joint District Judge, Lakshmipur and at about 12-00 noon, the accused Masum hurled a DLR like book aiming at the Joint District Judge MA Sufian and at that time, Masum wore a yellow full-shirt and the DLR like book hit the table, fell down on the rostrum and exploded with a bang and Mr MA Sufian narrowly escaped death, but Mr MA Sufian, Bench Assistant, Advocates and litigant people were injured as a result of bomb explosion and one of the litigants succumbed to bomb injuries.

47. The PW 6 Advocate Azgar Hossain Mahmud also gives out in his evidence that in consequence of bomb explosion, records and furniture were damaged and Advocate Md Nur Nabi, Advocate Tarek Uddin Mahmud Chowdhury, Advocate Ratan Lal Bhowmik, Advocate Makhan Lal Saha and many others were present at the ejlash and some litigants were also present there at that time and immediately after the first explosion in the Court-room, another bomb was exploded on the verandah and they (PW 6 and others) came out of the ejlash and saw the bomb-thrower running away and while he was running away, he took off his shirt and threw it away and the police personnel and people apprehended him in front of the Bar Association Building and the apprehended person disclosed his name as Masum.

48. The PW 6 Advocate Azgar Hossain Mahmud identifies the accused Masum in the dock.

49. In his cross-examination, the PW 6 Advocate Azgar Hossain Mahmud states that the distance between the ejlash and the place where Masum was hunted down is about 150 cubits.

50. The PW 7 is Advocate Saibal Kanti Saha. He asserts in his evidence that on 3-10-2005, he was present at the concerned ejlash and on that day, he was the engaged Advocate on behalf of the defendants of Title Suit No. 793 of 1981 and at about 12-00 noon, a petition was being heard and at that point of time, a person threw away a DLR-like book aiming at the Judge and the book hit the table, fell down on the dais and exploded with a bang.

51. The PW 7 Advocate Saibal Kanti Saha next asserts in his evidence:

> "বোমা নিক্ষেপকারীকে বই বোমা নিক্ষেপ করতে আমি দেখেছি। বোমার আঘাতে আসবাবপত্রসহ এজলাশ কক্ষ ক্ষতিগ্রস্থ হয়। বোমার আঘাতে আমি নিজে আহত হই। আমার মুখ ও পায়ে আঘাত পাই।"

52. The PW 7 Advocate Saibal Kanti Saha also asserts in his evidence that the Joint District Judge Sufian Shaheb, Bench Assistant and some litigant people were also injured during bomb explosion and the bomb-thrower was aged about 20/21 years and he (PW 7) saw the bomb-thrower running away from the ejlash and after a while, another bomb was exploded

on the verandah and ultimately the police personnel and people caught hold of him in front of the building of the Bar Association; but before his apprehension, the bomb-thrower took off his shirt, threw it away and the police seized the shirt and one Mozibul Haque succumbed to bomb injuries.

53. The PW 7 Advocate Saibal Kanti Saha identifies the bomb-thrower (Masum) in the dock.

In his cross-examination, the PW 7 Advocate Saibal Kanti Saha denies a defence suggestion that the accused Masum did not throw away the bomb.

54. The PW 8 is Dr Md Nizam Uddin. He states in his evidence that on 3-10-2005, he was on duty as Resident Medical Officer (RMO) at Lakshmipur Sadar Hospital, Lakshmipur and on that day, he examined the injured Mozibul Haque and found the following injury on his person:

"One penetrating injury on the left eye, loss of eyeball, coming out of brain matter through the injury caused by splinter due to bomb blast.

Nature of injury- Grievous."

55. The PW 8 Dr Md Nizam Uddin also states in his evidence that on 3-10-2005, he also examined the injured Constable Abdul Alim and found the following injuries on his person:

"1. One lacerated wound on the middle of anterior chest wall measuring 1" × 1" × 12".

2. One lacerated wound on the anterior aspect of right side of lower chest measuring 112" × 1" × 12"

Both the injuries were caused by splinters due to bomb blast.

Nature of injuries-Simple."

56. The PW 8 Dr Md Nizam Uddin further states in his evidence that on that day, he also examined one Delowar Hossain Patwary and found the following injuries on him:

"1. Multiple splinter injuries on the anterior, posterior and lateral aspect of right leg following bomb blast.

2. Multiple splinter injuries on the anterior, posterior and lateral aspect of left leg following bomb blast.

Nature of injuries-Grievous."

57. The PW 8 Dr Md Nizam Uddin next states in his evidence that on that day, he examined one Idris Ali as well and found the following injuries on his person:

"1. Multiple splinter-injuries on the anterior, posterior and lateral aspects of right leg caused by bomb blast.

2. Multiple splinter-injuries on the left foot caused by bomb blast.

Nature of injuries-Grievous."

58. The PW 8 Dr Md Nizam Uddin further states in his evidence that on that day, he examined Mr MA Sufian too and found:

"As per history of the victim, shortness of hearing present following bomb blast.

Nature of injury-Grievous."

59. The PW 8 Dr Md Nizam Uddin also states in his evidence that the critically injured Mozibul Haque was virtually clinically dead at the time of his examination.

60. In his cross-examination, the PW 8 Dr. Md Nizam Uddin denies a defence suggestion that he did not properly provide medical treatment to the injured Mozibul Haque.

61. The PW 9 is Dr Md Salauddin Sharif. He deposes that on 3-10-2005, he was on duty as Medical Officer at Lakshmipur Sadar Hospital and on that day, he held on autopsy on the dead of Mozibul Haque and during autopsy, he found the following injuries thereon:

"I. Injury on left eyeball with loss of eye.

2. Right eye-swollen.

3. Haematoma on the back of head on the left side."

62. The PW 9 Dr. Md Salauddin Sharif further deposes that in his opinion, the cause of death of Mozibul Haque was due to haemorrhagic shock because of splinter injury on account of bomb blast which was ante-mortem and homicidal in nature.

63. In his cross-examination, the PW 9 Dr. Md Salauddin Sharif denies a defence suggestion that he gave his opinion at his sweet will.

64. The PW 10 is Advocate Zahidul Islam. He testifies that on 3-10-2005 at about 12-00 noon, he was present at the ejlash of the 1st Court of Joint District Judge, Lakshmipur as the engaged Advocate of the defendants of Title Suit No. 793 of 1981 and at that time, he saw that a young man, aged about 21/22 years, threw away a DLR like book aiming at the Joint District Judge MA Sufian and the book hit the table, fell down on the dais and a bomb concealed inside the book detonated with a bang.

65. The PW 10 Advocate Zahidul Islam also deposes that many people including the Joint District Judge were injured as a result of bomb denotation and one of the seriously injured persons Mozibul Haque was taken to Lakshmipur Sadar Hospital, Lakshmipur where the doctor declared him dead.

66. The PW 10 Advocate Zahidul Islam further deposes that immediately after the first explosion at the ejlash, there was another bomb explosion on the verandah of the Court and the police personnel and people apprehended the bomb-thrower in front of the Bar Library.

The PW 10 Advocate Zahidul Islam identifies the bomb-thrower in the dock.

67. In his cross-examination, the PW 10 Advocate Zahidul Islam denies a defence suggestion that the identified young man did not hurl any bomb.

68. The PW 11 is Advocate Ratan Lal Bhowmik. He states in his evidence that on 3-10-2005 at about 12-00 noon, he was present at the ejlash of Mr MA Sufian, Joint District Judge, 1st Court of Lakshmipur and Advocate Zahidul Islam was on his left and there were some litigants on the left side of Zahidul Islam and one youth standing by the left side of Zahidul Islam threw away a DLR like book at the Judge MA Sufian all of an sudden and it hit the table and exploded with a bang and the whole ejlash was covered with smoke, sand, broken pieces of glass and torn pieces of paper and the Judge, Bench Assistant and litigants were injured in the bomb explosion and he (PW 11) also sustained a minor injury on his hands.

69. The PW 11 Advocate Ratan Lal Bhowmik also states in his evidence that as soon as he came out of the ejlash, another bomb was detonated and the police and people caught hold of the bomb-thrower youth and the injured Mozibul Haque succumbed to bomb injuries.

70. The PW 11 Advocate Ratan Lal Bhowmik identifies the bomb-thrower in the dock.

71. In his cross-examination, the PW 11 Advocate Ratan Lal Bhowmik denies a defence suggestion that the bomb-thrower (Masum) was apprehended on mere suspicion.

72. The PW 12 is Advocate Makhan Lal Saha. He claims in his evidence that on 3-10-2005 at about 12-00 noon, he was present at the ejlash of the 1st Court of Joint District Judge, Lakshmipur as the engaged Advocate of the defendants of Title Suit No. 793 of 1981 and the defendant no. 42 Mozibul Haque was present at the ejlash too and at that point of time, he saw that a youth threw away a DLR like book at the Judge and it hit the table, fell down on the ros-

High Court Division

Abandoned Buildings (Supplementary Provision) Ordinance (LIV of 1985)

Section 5—Condition precedent for listing in the impugned gazette, is the issuance of notice for surrendering or taking possession of the abandoned building, failure of which, renders the listing in the official gazette illegal. *Belal Uddin vs Bangladesh (Spl Original)* 543

Artha Rin Adalat Ain (VIII of 2003)

Section 13(3)—In order to pass judgment and decree under the provision the Adalat has to be satisfied that there is an admission by the defendant concern over the claim so made by the plaintiff bank and to that effect the Bank is required to make an application. The legislature having used the word "এবং" after the words "বাদীর আরজির বক্তব্য স্বীকৃত হইয়া থাকিলে" and "উক্তরূপ স্বীকৃতির ভিত্তিতে যেরূপ রায় বা আদেশ পাইতে বাদী অধিকারী" made those two requirements conjunctive. *Tajuddin (Md) vs Bangladesh and others (Spl Original)* 526

Section 26—It has made provision for depositing of 25% of the decretal amount where any 3rd party wants to join in execution proceeding to ventilate grievances. Since the Artha Rin Adalat Ain is a special law it will override any other law if there is no inconsistency in the special law itself. *Rafia Ashraf Polly vs Government of Bangladesh (Spl Original)* 546

Sections 38, 45, 49 & 57—The Adalat almost in every case is reluctant to extend its hands to help the litigants taking recourse to the sections of the Ain making them virtually ineffective. *AB Mannaf Sheikh (Md) vs 1st Joint District Judge Court and Artha Rin Adalat (Spl Original)* 493

Code of Civil Procedure (V of 1908)

Section 9

Order VII, rule 11—Ouster of jurisdiction of civil court cannot be readily inferred unless expressly taken away and "impliedly barred" means barred by general principles of law or equity of public policy. *Nargis Aktar vs Md Jalaluddin and others (Civil)* 505

Section 9—A person can enforce his substantive right, even though time barred, it there are other legal remedies available for the enforcement of the same. *Nargis Aktar vs Md Jalaluddin and others (Civil)* ... 505

Code of Criminal Procedure (V of 1898)

Section 374—Long pendency of the Death Reference per se is not a ground for commutation of the death sentence of Masum to life-term imprisonment. There must be other circumstances of a compelling nature. *Masumur Rahman @ Masum @ Ahmed vs State (Criminal)* 559

Constitution of Bangladesh, 1972

Article 102—Doctrine of reasonableness is based upon a rationale which cannot be undermined by avoiding responsibility entrusted with the respondents. All these days the petitioners were moving from pillar to post to settle their reasonable and legitimate expectations that they would be absorbed in the revenue budget of the Dhaka City Corporation failing which they have come before this Court. *Firoza Begum and 87 others vs People's Republic of Bangladesh and 8 others (Spl Original)* 509

Article 102—Petitioners deserve the same treatment on the ground of their reasonable and legitimate expectation to consider their case on the same way according to the settled principle and proposition of law governing the subject. *Firoza Begum vs People's Republic of Bangladesh and (Spl Original)* ... 509

Article 102 —The petitioners with the passage of time has developed in their mind a legitimate and reasonable expectation that their fate will find out a positive way ie they would be absorbed in the revenue budget of the Dhaka City Corporation. *Firoza Begum vs People's Republic of Bangladesh and (Spl Original) (Spl Original)* 509

Article 102(2)—Judicial review—When a tribunal with limited Jurisdiction reaches a wrong conclusion as to the width of its powers then this Court sitting in judicial review must be able to correct that situation. *Airtel Bangladesh Ltd and others vs Chairman, First Labour Court, Dhaka (Spl Original)* 517

Evidence Act (I of 1872)

Section 114(g)—Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. This doubt is not an imaginary doubt. Benefit of doubt to the accused would be available provided there is supportive evidence on record. For creating doubt or granting benefit of doubt, the evidence is to be such which may lead to such doubt. The law would fail to protect the community, the society, if fanciful possibilities is admitted, thus, deflecting the course of justice." *Aku Gazi and another vs State and another (Criminal)* ... 529

Section 114(g)—There cannot be conviction for trafficking narcotics on mere suspicion or presumption. *Rokeya Begum vs State (Criminal)* 554

Gas Marketing Regulations, 2004

Clause 17—Neither vires of a statute nor a statutory provision has been challenged. Without exhausting the alternative forum of arbitration, writ petition is not maintainable. *Sajid Washing and Dying Limited vs Government of Bangladesh and other (Spl Original)* 502

Insurance Act (IV of 1938)

Section 47B(1)(2)—Interest under sub-section (1) shall be payable for the period during which the failure continues and shall be calculated at monthly rates at the rate of five percent higher than the prevailing bank rate. *Monir Hossain, Globe Metal Industries vs Rupali Insurance Company Ltd (Civil)* 549

Narcotics Control Act (XX of 1990)

Section 19, Table 1(b)—The quantity of heroine was not at all ascertained. Without ascertaining the quantity of heroine the conviction is illegal and not sustainable. *Shahidur Rahman @ Shahid vs State (Criminal)* ... 514

Specific Relief Act (I of 1877)

Section 42—A person can enforce his substantive right, even though time barred, it there are other legal remedies available for the enforcement of the same. *Nargis Aktar vs Md Jalaluddin and others (Civil)* ... 505

Cognizance—Unless cognizance is taken of the offence against him, his subsequent trial, if any, canot be sustainable in law inasmuch as the learned Tribunal Judge did not prima-facie hold that there was commission of any offence by him. In such a situation, the trial of the accused shall stand vitiated. *Masumur Rahman @ Masum @ Ahmed vs State (Criminal)* 559

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