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Section 115(1)—The limits of the jurisdiction of the High Court Division are well defined by a long course of judicial decisions; when the aid of the High Court Division is invoked on the revisional side is done because it is a superior Court and it can interfere for the purpose of rectifying error of the courts below which has occasioned a failure of justice. Section 115(1) circumscribes the limit of that jurisdiction. *(Per SK Sinha J, minority) Anwarul Huq vs Iqbal Ahmed (Civil)* 241

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Article 103(3)—It should be remembered that Article 103(3) does not confer a right of appeal upon a party but merely vests a discretion in this Division to interfere in exceptional cases. The apex Court should interfere with finding of fact with great caution and circumspection. *(Per SK Sinha J, minority) Anwarul Huq vs Iqbal Ahmed (Civil)* 241

Article 104—It is a fit case to invoke the power conferred upon this Court under article 104 of the Constitution to do complete justice in a case by allowing the prayer for amendment of the plaint made before this Court without entering into the niceties of law as to the amendment. *(Per MA Wahhab Miah J, majority) Anwarul Huq vs Iqbal Ahmed (Civil)* 241

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tant correspondences that took place between relevant branches of the Government and the United Nations Compensation Commission (UNCC) and that some of the relevant correspondences have been incorporated in the additional paper book and that this correspondences clearly established that complainant's brother Md. Alam Hasnat Md. Golam Rabbani was sanctioned only an amount of US $ 2,500 according to the categorization made by the UNCC and, as such, the impugned judgment should be set-aside. He further submits that from the correspondences made with the UNCC by the relevant branches of the Government, it appears that the complainant's imaginary claim of US$ 100,000 was not true and that these correspondences could not be produced before the High Court Division as no notice was served upon the present appellants and, as such, the impugned judgment should be set-aside.

7. Mr Khurshid Alam Khan, learned Advocate, appearing on behalf of respondent No.1, on the other hand, supports the impugned judgment delivered by the High Court Division.

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

9. Before addressing the grounds, on which, leave was granted and the submissions made by the learned Advocate for the appellant, it would be proper to go through the grounds, on which, leave was granted which are as under:

> "The learned Judges of the High Court Division erred in law in misinterpreting and misconstruing provisions of section 6(5) of the Criminal Law Amendment Act, 1958 overlooking the main purpose and spirit of the provision of sanction provided in the said section; that the reason behind according sanction is to protect public officers from frivolous and vexatious prosecution and unnecessary harassment and that being so 'Sanction' does not mean just a formal paper transaction; that a duty has been cast upon the concerned sanction giving authority to examine the allegation and this necessarily involves investigation, which may take a couple of days to complete or it may take couple of months, according to the varying circumstances of each case, but the learned Judges of the High Court Division overlooked this aspect of the case and put erroneous construction on the deeming clause of 60 days, thinking, as if, the concerned authority was 'sleeping' over the learned Special Judge's letter dated 24-8-2003 received on 27-8-2003, which is far from the actual situation and that having regard to the facts and circumstances of the instant case viz-a-viz, the huge amount claimed by the complainant Kayser Parvez, it became incumbent upon the concerned sanction giving authority to hold an investigation as to the veracity of the claim and this was actually done and as a matter of fact the authority by its letter dated 31-8-2003 informed the court that the matter was under consideration of the Government and the decision would be intimated soon; that this vital fact makes all difference and distinguishes the present case from all other cases; that the learned Judges' decision overlooking this vital aspect has vitiated the decision as a whole and the petitioners have been gravely prejudiced thereby. No notice of the Criminal Revision No. 244 of 2005 was served upon the present petitioners, consequently they could not contest the case and could not place the full facts including the investigation report and important correspondence that took

place between the relevant branches of the Government and the United Nations Compensation Commission (UNCC): some of the relevant correspondence have been incorporated in an additional paper book with an application sworn on 30-3-2006; that these correspondence clearly establish that the complaint's brother Hasnat Golam Rabbani was sanctioned only an amount of US $ 2,500 only and not a penny more, according to the categorization made by the UNCC and thus the documents disproved the complainant Kaisar Pervez's imaginary claim that United Nations allowed 1,00,000 US$ and equal amount was given by the Iraq Government as compensation for his deceased brother. The deeming Clause of 60 days is to be interpreted taking into consideration of the factual aspects, but this was not been done in the present case resulting in miscarriage of justice and harassment."

10. On 31-7-2003, respondent No.1 Md Kayser Parvej (Milon) filed a petition of complaint before the Metropolitan Special Judge, Dhaka against the present appellants and another under sections 406/409/420/460 and 469 of the Penal Code read with section 5(2) Prevention of Corruption Act, 1947 stating that his brother Md Alam Hasnat Md Golam Rabbani died in Gulf war in 1991. He alleged that the UNCC allocated a sum of US $ 100,000 but only US.$ 2500 was paid and the remaining US $ 97500 was misappropriated by the appellants and another. On 31-7-2003, learned Special Judge, passed an order to write a letter to accord sanction from proper authority and fixed the next date on 24-8-2003 for sanction. On 24-8-2003 the said letter seeking sanction was issued. On 27-8-2003, the Prime Minister's Secretariat received the said letter. On 31-8-2003, the Prime Minister's Secretariat by a memo informed the Court that the matter relating to granting sanction was under consideration and the decision would soon be communicated. On 3-11-2003, the Prime Minister's Secretariat by a memo informed the Court that the Government decided not to accord sanction against the appellants. On 26-1-2005, the learned Special Judge ordered the case to be filed since no sanction was accorded by the Government.

11. Challenging the order dated 26-1-2005 passed by the learned Special Judge, the respondent No.1 filed a revisional application under section 439 of the Code of Criminal Procedure before the High Court Division and obtained the Rule in Criminal Revision No. 244 of 2005.

12. Relying upon the proviso to section 6(5) of the Criminal Amendment Act, 1958 (Act XL of 1958), the High Court Division came to a finding that since the decision of the Government not to accord sanction against the appellants was not given within 60 days, it would be deemed that sanction had been accorded.

13. It is contended that the Government's decision not to accord sanction was given within 56 working days of the receipt of the letter by the Secretariat of the Prime Minister.

14. Having gone through the materials on record, we find that on 27-8-2003, the letter seeking sanction was obtained by the Prime Minister's Secretariat. On 3-11-2003, the Prime Minister's Secretariat by a memo informed the Court that the Government decided not to accord sanction against the appellants. From 27-8-2003 to 3-11-2003 more than 60 days had elapsed. The words "working days" have not been mentioned in the proviso to section 6(5) of the Criminal Law Amendment Act, 1958. Therefore, the High Court Division was justified in holding that

since the Government's decision not to accord sanction against the appellants was intimated beyond 60 days, it would be deemed that sanction had been accorded according to the proviso to section 6(5) of the Criminal Law Amendment Act,1958.

15. The decision arrived at by the High Court Division is based on proper appreciation of law.

16. It is contended that the appellants could not produce the correspondences between the relevant branches of the Government and the UNCC before the High Court Division as no notice was served upon appellants.

17. Had those correspondences been produced before the High Court Division, the High Court Division would not have relied on those correspondences and come to a finding that there were no sufficient materials on record to proceed against the appellants because those correspondence could only be used by way of defence and not for showing that there were no materials of accusation against the appellants.

18. Only this Division has been invested with the power of doing complete justice under Article 104 of the Constitution, not the High Court Division. This power of doing complete justice should be invoked very sparingly.

19. We have gone through the investigation report and the important correspondences that took place between the different branches of the Government and UNCC. Some of the correspondences were incorporated in the additional paper book. The correspondences clearly establish that the complainant's brother Alam Hasant Md. Golam Rabbani was sanctioned only an amount of U.S.$ 2500 and not a cent more according to the categorization made by the UNCC. The complainant Kayser Parvej's imaginary claim that United Nations allowed US $ 100,000 and equal amount was given by the Iraq Government as compensation for his deceased brother is not true.

20. In this connection, we would like to quote a portion of the correspondence made by the United Nations Compensation Committee of the United Nations Security Council dated 20-7-1999 which is as under:

> "The Permanent Mission is hereby advised that, the claim of Mr. Rabbani, which has been filed with the UNCC by Mr Kayser Parves (UNCC claim number 1582117) for the death of his brother, Mr. Rabbani, has been approved by the category "C" Panel or Commissioners in the seventh installment of such claims. Pursuant to the Panel's recommendations, Mr Perves was awarded US $ 2500 by the Commission's Governing Council in its decision 70 [S/AC 26/Dec.70 (1999)] of 24 June 1999."

21. Having gone through entire letter in general, and the quoted portion in particular, we are of the opinion that the complainant's brother was awarded US $ 2,500 by Commission's Governing Council in its decision dated 24-9-1999. Given all the correspondences and the correspondences dated 3-8-1999 and 20-7-1999, in particular, we are of the view that the allegations imputed by the complainant against the appellants are not at all tenable.

22. In many cases including the cases of *Abdul Momen Bhuiyan vs District Judge, Dhaka 19 BLC (AD) 98 and Metro Makers and Developers Limited vs Bangladesh Environmental Lawyers Association (BELA) 65 DLR (AD) 181,* this Division previously exercised the power of doing complete justice under Article 104 of the Constitution. The subject matter of the instant case not only presents an

occasion to but also demands exercise of this power by this Division for the avowed purpose of protecting the appellants from the unnecessary hassle of criminal proceeding as there was no material to prosecute them.

23. In view of the findings made before, we are inclined to set-aside the judgment passed by the High Court Division in exercise of our power under Article 104 of the Constitution and that the proceeding against the appellants including others, if any, shall be deemed to have been quashed.

Accordingly, the appeal is allowed.

Ed.

Appellate Division
(Civil)

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

Judgment
February 2nd, 2014.

Government of Bangladesh and others.....Petitioners

vs

Md Abu Hasan Raju .....Respondent*

Constitution of Bangladesh, 1972
Article 102(2)

Writ-Petitioner has obtained a decree declaring his title in the suit land from a competent court of law and that decree still stands. The government though filed a suit challenging the decree but that suit has already been dismissed. In the circumstances, so long the decree declaring the plaintiff's title in the land in question stands the writ-respondents are bound to mutate the land in question in the name of the writ-petitioner and also to accept rent from him. .....(8)

Rajik-al-Jalil, Deputy Attorney-General instructed by Shamsul Alam, Advocate-on-Record—For the Petitioners.

Abdul Haque, Advocate instructed by Madhumalati Chowdhury Barua, Advocate-on-Record—For the Respondent.

*Civil Petition for Leave to Appeal No. 862 of 2010.

(From the judgment and order dated 4-1-2010 passed by the High Court Division in Writ Petition No.6117 of 2009.)

Judgment

Nazmun Ara Sultana J: This civil petition for leave to Appeal, at the instance of the government, is directed against the judgment and order dated 4-1-2010 passed by a Division Bench of the High Court Division in writ petition No.6117 of 2009 making the rule absolute.

2. The respondent herein filed the above mentioned writ petition seeking direction to the respondents to receive rents from him by opening a separate khatian in his name for the land described in the schedule to the writ petition.

3. The case of the writ-petitioner (respondent herein) in the above mentioned writ-petition, in short, was that he was the owner of 0.0080 acre of land as described in the schedule to the writ-petition and had been possessing the said land by constructing a shop thereon and by doing business there. That the then Zaminder gave that land along with some other lands to Mymensingh Bhramma Samaj Committee. In the year 1947, Mymensingh Bhramma Samaj Committee gave settlement of that land to Umed Ali and another after promulgation of the State Acquisition and Tenancy Act, became the owner of the said land under the government and in the records of right Umed Ali's name was duly recorded. That while Umed Ali thus was owner and possessor of that land he let out the same to monthly tenant Md Mohsin Uddin. The said tenant became defaulter and Umed Ali then filed Small Causes Case No. 3 of 1979 in the Court of Subordinate

Judge, 1st Court, Mymensingh and the suit was decreed on 11-7-1982. On the basis of that decree Execution Case No.4 of 1982 was instituted and the said tenant was ultimately evicted from that land through court. Umed Ali opened separate holding No.1/B, CK Ghose Road, Mymensingh in his name and he was paying municipal taxes. Umed Ali subsequently died in the year 1983 leaving 5 sons and 6 daughters. By amicable partition among the said heirs of Umed Ali his son HEM Afzal Ali got this land in his share. HEM Afzal Ali, while being in possession of the said land transferred the same to Mst. Monwara Khatun by deed of exchange dated 29-8-1991. While Mst. Monwara Khatun was owning and possessing this land she transferred the said 0.0080 acre of land to the writ petitioner by a registered hebabil-ewaz deed dated 8-6-1995 and also delivered possession of the said land to the writ-petitioner. Since then the writ-petitioner has been possessing the said land by doing his business therein the name "Pias Electronics". In the BRS record the ROR Plot No. 6389 was transferred to BRS Plot No. 7362 and the BRS record of land has been published in the name of the writ-petitioner under DP Khatian No. 943, Bujarat Khatian No.7349. That while HEM Afzal Ali, being the owner of the property was in possession of the property, one Nirmal Kumar Chandra claiming himself Secretary of the Bhramma Samaj Committee, Mymensingh filed Other Class Suit No. 308 of 1987 against HEM Afzal Ali in the Court of Senior Assistant Judge, Sadar, Mymensingh for eviction. The said suit was transferred to the Court of Senior Assistant Judge, Additional Court, Mymensingh and was renumbered as Other Class Suit No. 52 of 1989 and the suit was then dismissed on contest on 11-10-1989. The plaintiff of that suit then filed other Class Appeal No.1 of 1990 in the Court of District Judge, Mymensingh and the said appeal was transferred to the Court of Subordinate Judge, 1st Court, Mymensingh, who after hearing both the parties, allowed that appeal and decreed the Other Class Suit No. 52 of 1989 by the judgment and order dated 28-3-2000. The writ petitioner (the respondent herein) having come to know about that decree filed Other Class Suit No.49 of 2000 in the Court of Subordinate Judge, 1st Court, Mymensingh for declaration of his title upon the suit property and for further declaration that the decree passed in Other Class Appeal No. 1 of 1990 was not binding upon him. Ultimately that suit was decreed on compromise by the judgment and decree dated 3-2-2008. That after passing of the aforesaid decree the writ petitioner filed an application before the Assistant Commissioner (Land) Sadar, Mymensingh for mutation of the land in his name, but the Assistant Commissioner (Land) Sadar, Mymensingh did not mutate the land in the name of the petitioner. The writ-petitioner then filed an application before the Additional Deputy Commissioner (Revenue), Mymensingh also for mutation of this land in his name, but did not get any result and thus the writ petitioner was constrained to file the writ petition and obtained rule.

4. The present leave-petitioners though were made respondents in the above writ petition, but did not oppose the rule. However, a Division Bench of the High Court Division, after hearing the learned Counsel for the writ-petitioner and examining the writ petition and the annexures thereto made the Rule absolute and directed the respondents to receive rents from the petitioner for the land measuring 0.0080 acre as described in schedule to the writ petition by opening a separate khatian in the name of the petitioner upon mutating the petitioner's name by the impugned judgment and order.

5. Mr Rajik-al-Jalil, the learned Deputy Attorney-General on behalf of the leave petitioners has made submissions assailing the impugned judgment. The Deputy Attorney-General has submitted to the effect that the suit land is actually enemy and now vested proper-

ty and that the writ-petitioner suppressing this fact filed the above mentioned title suit and obtained decree collusively and fraudulently; that since the government or the enemy property authority were not made parties in that suit they could not know about that suit and the compromise decree passed therein and as soon as they could know about that decree they filed Other Class Suit No.93 of 2010 before the Senior Assistant Judge, Sadar, Mymensingh for a declaration that the judgment and decree dated 3-2-2006 passed by the learned Joint District Judge, 1st Court, Mymensingh in other Class Suit No. 49 of 2000 was illegal, fraudulent, collusive and not binding upon the plaintiffs and that the said suit is still pending. The learned Deputy Attorney-General has argued that in the circumstances the High Court Division was not justified at all to pass the impugned judgment giving directions to the leave-petitioners to mutate the land in question in the name of the writ-petitioner-respondent and to accept rent from him for that land.

6. Mr Abdul Haque, the learned Advocate for the writ-petitioner-respondent has made submissions to the effect that Other Class Suit No. 93 of 2010 filed by these leave-petitioners challenging the judgment and decree passed in Other Class Suit No. 49 of 2000 has already been dismissed by the court. In support of this submission the learned Advocate has filed the certified copy of the decree of Other Class Suit No.93 of 2010 by an additional paper book.

7. We have considered the submissions of the learned Advocates of both the sides and the facts and circumstances. In this leave petition the leave-petitioners though has stated that the land in question has been enlisted as enemy and vested property, but in support of this case no scrap of paper has been produced before us. It has already been pointed out above that in the writ petition though all these leave-petitioners were made parties, but none of them appeared and made any statements opposing the rule. Moreover, from the case of the writ-petitioner respondent, as narrated above, it appears that the suit property rather has been recorded in the name of one Umed Ali and a separate holding also was opened in the name of Umed Ali. From the stated case of the writ-petitioner-respondent it also appears that previously also some other litigations were initiated in respect of this land and in all those litigations the civil courts examined the respective cases of the contesting parties and adjudicated the disputes between the parties. In none of those civil litigations it was ever alleged from any quarter that the land in question was enlisted as enemy and vested property.

8. However, the legal position stands now is that this writ-petitioner-respondent has obtained a decree declaring his title in the suit land from a competent court of law and that decree still stands. The government leave-petitioners though filed a suit challenging the said decree but that suit has already been dismissed. In the circumstances so long the decree declaring the plaintiff's title in the land in question stands the writ-respondents are bound to mutate the land in question in the name of the writ-petitioner and also to accept rent from him. If these leave-petitioners ultimately succeed in getting the decree declaring the plaintiff's title in the suit land declared collusive, fraudulent etc. by the appellate court or the higher courts they will be able to cancel the mutation of the land in question in the name of the writ-petitioner.

9. From the above discussion it is evident that there has been no illegality or impropriety in the impugned judgment in order of the High Court Division.

In the circumstances this civil petition for leave to appeal is dismissed.

Ed.

Appellate Division
(Criminal)

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

Judgment
May 26th, 2014.

Anti Corruption Commission.....
.....Petitioner

vs

Aman Ullah Aman and others
.....Respondents*

Anti-Corruption Commission Act (V of 2004)
Section 27(1)

Criminal Law Amendment Act (XL of 1958)
Section 10

Notice issued under section 26(1) by the Secretary of the Commission was without jurisdiction. But, for this reason the High Court Division cannot set-aside the conviction of the accused in respect of an offence under section 27(1) of the Ain High Court Division acted illegally in setting aside the conviction of the accused in respect of offence under section 27(1) of the Ain. The judgment and order of the High Court Division so far as it relates to setting aside the conviction and sentence under section 27(1) of the Ain, is set-aside. The matter is remanded to the High Court Division to dispose of the appeal on merit afresh. .....(4, 5 & 6)

Anti-Corruption Commission vs Iqbal Hasan Mahmood,66 DLR (AD) 185 ref.

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

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

*Criminal Petition For Leave to Appeal No.428 of 2013.

(From the judgment and order dated 16-8-2010 passed by the High Court Division in Criminal Appeal No.3990 of 2007.)

Judgment

Hasan Foez Siddique J: Delay is condoned.

This petition, at the instance of Anti-Corruption Commission, is directed against the judgment and order dated 16-8-2010 passed by the High Court Division in Criminal Appeal No. 3990 of 2007 allowing the appeal and setting-aside the judgment and order dated 21-7-2007 passed by the Special Judge No. 1, Dhaka, in Special Case No. 1 of 2007.

2. We have heard the learned Advocates of both the parties, perused the judgments of the High Court Division and Special Court. The learned Special Judge convicted the respondent No. 1 under section 26(2) of the Durnity Daman Commission Ain, 2004 (the Ain) read with Rule 15(Gha)(5) of the Durnity Daman Commission Bidhimala, 2007 (the Bidhimala) and sentenced him to suffer rigorous imprisonment for three years and also convicted him under section 27 (1) of the Ain read with section 5(2) of Act II of 1947 and sentenced him to suffer rigorous imprisonment for 10 (ten) years and to pay fine of Taka 10,00,000, in default, to suffer rigorous imprisonment for l(one) year more with a direction to run the sentence consecutively. The respondent No. 2 was convicted under section 27(1) of the Ain, 2004 read with section 109 of the Penal Code and sentenced to suffer rigorous imprisonment for three years. The Special Judge directed to confiscate properties of the respondents. Against the said order of conviction and sentence the respondents preferred the aforesaid appeal.

3. The High Court Division by the impugned judgment and order allowed the appeal and set-aside the judgment and order of conviction and sentences as well as the order of confiscation of the properties passed by the trial Court mainly on the reasoning that commission

was not properly constituted in accordance with law from 7th February 2007 to 25th February 2007 and in view of non-constitution of the Commission the notice issued and served upon the respondents on 18-2-2007 under the signature of the Secretary of the Commission to submit wealth statement was without jurisdiction. The High Court Division relied upon the decision of this Division passed in Criminal Petition for Leave to Appeal No.398 of 2009 and Civil Petition for Leave to Appeal Nos.1658 and 1659 of 2008.

4. The learned Counsel appearing on behalf of the petitioner, submits that besides section 26 of the Ain, the respondents were also convicted under section 27(1) of the Ain as well, which is an independent penal provision having no nexus with section 26 of the Ain and therefore the High Court Division erred in law in setting aside the judgment and order of conviction under section 27(1) of the Ain read with section 5(2) of the Act II of 1947. The learned Advocate for the petitioner relied on the latest decision of this Division in Criminal Petition for Leave to Appeal No. 537 of 2011 *(Anti-Corruption Commission vs Iqbal Hasan Mahmood alias Iqbal Hasan Mahmood Tuku and another* reported in *66 DLR (AD) 185.* In the cited case, this Division, in an identical circumstance, has observed:

> "On perusal of the impugned judgment we noticed that the High Court Division did not at all enter into the merit of the matter and set-aside the conviction mainly on the ground that no Commission was properly constituted when the accused-respondent was served with the notice to submit his wealth statement. Section 26(1) empowers the Commission to issue notice upon any person who appears to have acquired property which are beyond his known source of income and if the statement submitted by him is found to be false, he will be liable to conviction. Section 27 is an independent provision and for initiation of a proceeding against any person under the said provision, no notice is required to be served. If the prosecution can establish that any person has acquired or amassed wealth which is beyond his known source of income, he may be prosecuted and convicted under section 27(1).
>
> In this case, the accused-respondent was also convicted under section 27(1) of the Ain on the reasonings that he had acquired properties which were beyond his known source of income, and said properties were also confiscated by the learned Special Judge. True, during the relevant time, the Commission was not properly constituted. So, the notice issued upon him under section 26(1) by the Secretary of the Commission was without jurisdiction. But, for this reason the High Court Division cannot set-aside the conviction of the accused-respondent in respect of an offence under section 27 (1) of the Ain read with section 5(2) of Act II of 1947. And in doing so, it has not at all discussed the evidence on record. The learned Special Judge on a thorough assessment of the evidence on record found the accused guilty under section 27 (1) of the Ain read with section 5(2) of Act 11 of 1947 for possession of wealth which were said to have been beyond his known source of income. In view of the above, the High Court Division acted illegally in setting aside the conviction of the accused-respondent in respect of offence under section 27(1) of the Durnity Daman Commission Ain read with section 5(2) of Act II of 1947. The impugned judgment is not legally sustainable in law and the same is liable to be interfered with."

5. In view of the decision of this Division in identical circumstances, the judgment and order of the High Court Division so far as it relates to setting aside the conviction and sen-

tence of the respondents under section 21(1) of the Durnity Daman Commission Ain, 2004 read with section 5(2) of the Ain II of 1947 is set-aside

6. The matter is remanded to the High Court Division to dispose of the appeal on merit afresh. This petition is accordingly disposed of.

Ed.

Appellate Division
(Civil)

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

Judgment
November 8th, 2012.

Anwarul Huq....
.....Appellant

vs

Iqbal Ahmed and others.....
.....Respondents*

Constitution of Bangladesh, 1972
Article 104

It is a fit case to invoke the power conferred upon this Court under article 104 of the Constitution to do complete justice in a case by allowing the prayer for amendment of the plaint made before this Court without entering into the niceties of law as to the amendment. *(Per MA Wahhab Miah J, majority)* .....(138)

Article 104

It is the fundamental principle of law that statutory provisions of law cannot override the constitutional provisions. If a valuable right is accrued to the other side this fact should not be ignored in invoking power of complete justice.

Generally, no court has competence issue in an order or direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. An order which this Division can make in order to do complete justice between the parties, must not only be consisted with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the statutory laws. This Division also cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. *(Per SK Sinha J, minority)* .....(41)

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

We record our strong disapproval and dismay at the failure of the High Court Division in not giving any consideration on the question of possession of the suit plot which was a very fundamental issue in a suit for declaratory decree concerning an immovable property and particularly when the appellate Court gave finding that the plaintiffs were not in possession of the suit plot. *(Per MA Wahhab Miah J, majority)* .....(112)

Section 115(1)

The limits of the jurisdiction of the High Court Division are well defined by a long course of judicial decisions; when the aid of the High Court Division is invoked on the revisional side is done because it is a superior Court and it can interfere for the purpose of

*Civil Appeal No. 132 of 2006

(From the judgment and order dated the 19th day of April, 2005 passed by the High Court Division in Civil Revision No. 1910 of 2003)

rectifying error of the courts below which has occasioned a failure of justice. Section 115(1) circumscribes the limit of that jurisdiction. *(Per SK Sinha J, minority)* .....(48)

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

Order VII, rule 3 of the Code has clearly mandated that where the subject matter of the suit is immovable property, the plaint shall contain a description the property sufficient to identify it and in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers. *(Per MA Wahhab Miah J, majority)* .....(125)

Lease Deed

A clause of a lease deed has to be read as a whole and not in the divisive manner and cannot just be given a too mechanical or too technical meaning or interpretation. The lessor being a statutory body cannot be given the latitude to take the benefit of a part of a term of a clause which benefits it at the woes of the lessee without complying or fulfilling with the other part of the clause. *(Per MA Wahhab Miah J, majority)* .....(129)

Constitution of Bangladesh, 1972
Article 104

Complete Justice—Power of doing complete justice is not to be exercised frequently but sparingly. One should not lose sight of the fact that doing complete justice does not contemplate doing justice to one party by ignoring statutory provision and thereby doing complete injustice to the other party by depriving him the benefit of law. *(Per SK Sinha J, minority)* .....(40)

Article 111

Though a decision of this Division on section, or on any question of law will bind all court including the High Court Division, there is nothing which prevents this Division from departing from a previous decision if it is convinced of its error and its baneful effect on the general interests of the public. The use of precedent as an indispensable foundation upon which to decide what is the law on the point under consideration. *(Per SK Sinha J, minority)* .....(55)

Fairness

Law requires that authority exercising action of cancellation of lease deed and transfer permission must always act with fairness. *(Per MA Wahhab Miah J, majority)* .....(101)

Limitation Act (IX of 1908)
Section 91

Article 91 of Act provides the limitation of 3 years for cancellation or setting aside an instrument from the date of knowledge. Such amendment would certainly cause serious prejudice to the defendant because the claim is barred.

The Court does not possess uncontrolled and unlimited power in considering an application for amendment of pleadings at any stage of the proceedings and the powers are circumscribed by certain limitations. The Court should not allow amendment only because it is relevant for the purpose of determining the real question in controversy. This is probably because, even if the prayer is lawful, if the party seeking amendment sat over his rights, his rights

will be extinguished by lapse of time if the relief is not sought within the period of limitation prescribed by law. *(Per SK Sinha J, minority)* .....(33)

Constitution of Bangladesh, 1972
Article 103(3)

It should be remembered that Article 103(3) does not confer a right of appeal upon a party but merely vests a discretion in this Division to interfere in exceptional cases. The apex Court should interfere with finding of fact with great caution and circumspection. *(Per SK Sinha J, minority)* .....(47)

Stare decisis

***Stare decisis* is a legal principle by which Judges are obliged to respect precedents established by prior decisions. Courts should generally abide by precedent and not disturb settled matters. This is necessary for the administration of justice otherwise the lower courts and the High Court Division will be confused in determining any particular issue in a suit or a matter. There should be consistency in the opinion of this Division on any particular issue. Stare decisis is one of the fundamental doctrines of common law systems. This doctrine is also referred to as the doctrine of precedent. Stare decisis requires Judges to follow precedent and apply the law as they find it or to justify their deviation from the established rule. In majority of cases, there will be no justification for divergence; the Judge will be obliged to apply the law as it is. This is why stare decisis is the foundation of the judicial obligation to apply occasional law.** *(Per SK Sinha J, minority)* .....(52, 53 & 54)

Specific Relief Act (I of 1877)
Sections 39 and 42

Distinction between suit for declaration and cancellation—The distinction between a suit for declaration that the instrument is not binding on the plaintiff and a suit for cancellation of an instrument is that when the plaintiff seeks to establish a title to himself and cannot establish that title without removing an obstruction such as, a decree or a deed to which he has been a party, then he must get that decree or deed cancelled or declared void. If the deed in respect of the suit plot stands even though the plaintiff is not a party, the defendant's title does not extinguish and in that case the plaintiff's title to in the suit plot will be clouded. *(Per SK Sinha J, minority)* .....(35)

Code of Civil Procedure (V of 1908)
Order VI, rule 17

Prayer for amendment cannot be allowed after more than twelve years of knowledge. *(Per SK Sinha J, minority)* .....(23)

Abdus Sattar vs Mohiuddin, 38 DLR (AD) 97; Privy Council in Durga Choudhrain vs Jawhir Singh, 17 IA 122; Shamser Ali Md vs Mosammat Kafizan Bibi, 44 DLR (AD) 231; Ramappa vs Bajjappa, AIR 1963 SC 1633; Rupjahan Begum vs Lutfay Ali Chowdhury, 17 BLD (AD) 66= 49 DLR (AD) 73; Haji Nurul Alam vs Alhaj Abdus Sobhan Wakf Estate, 45 DLR (AD) 168; Hussain Ahmed Chowdhury vs Nurul Ali, 47 DLR (AD) 162; Bangladesh vs Chand Mia, 44 DLR (AD) 98; Keramat Ali vs Md Younus, 15 DLR (SC) 120; Md Zahoor Ali Khan vs Thakooraneen Ruttar Koer, 11 MIA 458; Charan Das vs Amir Khan, AIR 1921 PC 50; Nurun Nahar vs Md Fazlur Rahman 1979 BSCR 135; PA Ahmed Ibrahim vs Food Corporation of India, AIR 1999 SC 3033; Radhika

Devi vs Bajrangi Singh, AIR 1996 SC 2358; Muni Lal vs Oriental Fire & General Insurance Company Ltd., 1995 AIR SCW 4656; K. Raheja Constructions Ltd. vs Alliance Ministries, AIR 1995 SC, 1768; S. Kumar vs Institute of C & P studies, AIR 1984 SC 59; Gulam Hafiz vs Khadem Ali Mia, CA No.26 of 1975; Sufia Khanam vs Faizun Nessa, 39 DLR (AD) 46; Debaki Lal vs Iqbal Ahmed, 17 DLR 119 (FB); State of Punjab vs Renuka Singla, (1994) 1 SCC 175; State of UPV Harish Chandra, (1996) 9 SCC 309; Union of India vs Kirloskar Pneumatic Co. Ltd, (1996) 4 SCC 453; University of Allahbad vs Dr. Anand Prakash Mishra, (1997) 10 SCC 264; Karnataka SRTC vs Ashrafulla Khan, AIR 2002 SC 629; Prem Chand Grag vs Excise Commissioner, MR 1963 SC 996; Supreme Court Bar Association Union of India, AIR 1998 SC 1895; State of Karnataka vs Ameerbi, (2007) 11 SCC 681; Union of India vs Shardindu, R 2007 SC 2204; Raziul Hasan vs Badiuzzaman Khan, 1996 BLD (AD) 253= 1 BLC (AD) 35; AFM Nasiruddin vs Mrs. Hamida Banu 45 DLR (AD) 38; Arizona vs Rumsey, 467 US 203, 212, 104 S.ct.2305; Bourne vs Keane 1919 AC 815 (874); Brownsea Haven Properties vs Poole Corporation, 1958 Ch 574 (CA); Md Sheikh Farid vs Abdul Wadud Sikder, 12 MLR (AD) 201 = 58 DLR (AD) 248; Erfan Ali vs Joynal Abedin Mia, 35 DLR (AD) 216; Enjaheruddin Mia vs Mohammad Hossain, 50 DLR (AD) 84; Mansur Ali Mallik vs Md Nurul Haque Mallik, BCR 1986 (AD) 56; Government of Bangladesh vs Lutfunnesa, 4XP (AD) 94; Md Serajuddin Ahmed vs AKM Saiful Alam, 9 MLR (AD) 201= 56 DLR (AD) 41; Abdul Wadud vs Abdul Wahed, 14 MLR (AD) 106; Abu Naser Mohammad Wahedunnabi vs Balai Wahedunnabi Roy, 10 MLR (AD) 19=10 BLC (AD) 58; Abdur Rabban (Md) vs Aminul Hoque Sowdagar, 43 DLR (AD) 19; Nurun Nahar vs Mohd. Fazlur Rahman, Bangladesh Supreme Court Reports, 1979, 135; Raj Kumar vs Dipender Kaur Sethi, (2005) 9 SCC, 304; M/s Gannysons Ltd vs Sonali Bank, 37 DLR (AD) 43; Bangladesh Steel and Engineering Corporation vs Md Masood Reza, 30 DLR (SC) 169 and Bangladesh Sugar and Food Industries Corporation vs Md Kashem, 55 DLR 350 ref.

Rafique-ul-Huq, Senior Advocate with Abdul Wadud Bhuiyan, Senior Advocate with Shah Monjurul Hoque, Advocate instructed by Khursheed Jahan, Advocate-on-Record—For the Appellant.

Mahmudul Islam, Senior Advocate with Fida M. Kamal, Senior Advocate instructed by Sufia Khatun, Advocate-on-Record—For the Respondents.

None represented—For Respondent No. 7.

Judgment

Md Muzammel Hossain CJ: I have gone through the judgments proposed to be delivered by my brothers, Surendra Kumar Sinha, J. and Md Abdul Wahhab Miah, J. I agree with the reasoning and findings given by Md Abdul Wahhab Miah, J.

Surendra Kumar Sinha J: The precise questions that arise in this appeal are firstly, whether the High Court Division in exercise of its revisional power can interfere with the findings of fact arrived at by the lower appellate Court and secondly, whether in view of the specific findings of the court of appeal below that the defendant-appellant having got a registed lease deed in respect of the suit plot after the cancellation of the allotment of the plaintiffs-respondents' predecessor and possession of the said plot, the suit without seeking cancellation of the registered lease deed and recovery of khas possession is maintainable.

3. Short facts relevant for the disposal of these points are as under. Respondents instituted the suit in question seeking declaration of leasehold right in respect of plot No. 41 of

Sector No.13, Uttara Residential Model Town, measuring an area of 612 sq. yards 6 fts more or less 3 kathas of land and a further declaration that the cancellation of their predecessor's lease is illegal. The plot in question was allotted to one Mrs. Khaleda Rahman, who having got possession of the same on 12th February, 1970, executed a lease deed with the Rajdhani Unnayan Kartipakha (RAJUK) on 12th January, 1970. Subsequently with prior permission of RAJUK she transferred the said plot in favour of late Md Aman Ullah, the predecessor-in-interest of the plaintiffs. Thereafter, the Chairman, RAJUK cancelled the allotment of the suit plot. Respondent No. 1 (defendant) Anwarul Haque contested the suit. The substance of his claim is that he got allotment and delivery of possession of the suit plot along with other lands measuring an area of 7 kathas 10 chataks 23 sq. ft. and thereupon RAJUK executed a registered lease deed in his favour on 23rd September, 1996. The suit without seeking cancellation of his registered lease deed and recovery of khas possession is not maintainable and therefore, the suit is barred under sections 39 and 42 of the Specific Relief Act.

4. The trial Court dismissed the suit and on appeal by the plaintiffs, the Court of appeal below affirmed the said judgment. The plaintiffs then took a revision petition in the High Court Division which made the rule absolute and decreed the suit. The High Court Division without repelling the findings of the courts below, particularly those of the appellate court on the question of possession and the maintainability of the suit, interfered with the judgments. The point that falls for determination is whether the High Court Division was guided in its approach to correct legal principles in the circumstances of the case.

5. There is no dispute that Khaleda Rahman sold a portion of the suit plot with prior permission of RAJUK without making any construction. RAJUK accorded permission on 24th January, 1988 and the deed of sale was also executed and registered on 30th December, 1990. The Courts below concurrently held that RAJUK accorded permission for transfer of the plot attaching condition that the purchaser would have to file the sale deed within 4(four) months from 26th June, 1988 and that as the plaintiffs predecessor filed the deed after two years although he was required to file the same within four months of according permission, the allotment was cancelled for violation of the terms. The trial court held that admittedly Khaleda did not make any constructions within the stipulated time as per terms of the lease deed; that Amanullah did not mutate his name with RAJUK; that he did not take any step for mutation of his name even after issuance of Exhibit C; that as RAJUK did not recognize him as leasee, it is not required to issue any notice upon him before cancellation of the lease deed of Khaleda and that RAJUK allotted the suit plot in favour of the defendant after following legal formalities. The court of appeal below held that the documentary evidence appeared that RAJUK rescinded the allotment of the original allotee after complying legal formalities and then the plot was allotted in favour of the defendant; that PW 1 admitted in course of cross-examination that allottee Khaleda did not make any constructions on the suit plot; that he could not say when his father got possession from Khaleda; that the evidence on record revealed that a boundary wall of the plot had been constructed around the suit plot but that he could not say who had constructed the same; and that as the plaintiffs are not claiming that they have constructed the said boundary wall, it is apparent that the plaintiffs are not in possession of the suit plot.

6. The High Court Division held that the cancellation of the transfer permission was not communicated to Khaleda Rahman and Amanullah as evident from the fact that it was not available with the record and that the same

was not exhibited. The High Court Division further held that this cancellation without affording a hearing to Amanullah is violative of the principles of natural justice. On the other breath, it held that 'Except the time limit, other requirements were fulfilled by the predecessor of the petitioners within time'. This finding is inconsistent with the earlier finding and this finding proved that the plaintiffs predecessor Amanullah had knowledge about the time limit of transfer within 4 months. The High Court Division did not disturb any of the findings arrived at by the courts below, particularly the findings of possession and the maintainability of the suit.

7. It is now settled that the rule as to finding of fact is not so rigid that it might not be departed from if such a state of things existed as facts appearing from some undisputed document or evidence which are completely destructive of the finding of fact by the courts below. But, without repelling the finding of fact the High Court Division has no power to reverse the judgments of the courts below. Though leave was granted to consider this point, my learned brother expressing the majority opinion is totally silent on this question. The High Court Division has not at all assigned any reasons as to whether the findings of the court of appeal below constitute error apparent on the face of the record which have occasioned failure of justice. The revisional power can be invoked only when there is misreading or non-consideration of the material evidence which has occasioned a failure of justice. In *Abdus Sattar vs Mohiuddin, 38 DLR (AD) 97,* the point in controversy was whether the respondent Mohiuddin was appellant Abdus Sattar's tenant by holding over or that his father, Kala Mia had been a tenant under the appellant. On behalf of the appellant it was urged that the evidence of the respondent, showed that he had got possession of the land by purchase and that his father was not a tenant of the appellant; that he did not inherit it on his father's death and that as such, there was no question of holding over. This Division in the context of these disputed fact held that these questions had been decided finally by the appellate court and they could not be reopened and re-agitated in revision unless it is shown that the findings had not been made on due consideration of all material evidence according to the established principles of assessment of evidence.

8. On the question of finding of fact, the views taken by the Judicial Committee of the *Privy Council in Durga Choudhrain vs Jawhir Singh, 17 lA 122* have been approved by the Supreme Courts of India and Pakistan and this Division. In that case, it was observed, there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however, qross or inexcusable the error may seen to be and it added a note of warning that no court in India has power to add or enlarge the grounds specified in section 100 of the Code of Civil Procedure. In *Ramappa vs Bajjappa, AIR 1963 SC 1633,* it also cautioned that. If in reaching its decision in second appeals, the High Court contravenes the express provisions of section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is an approach which judicial process must constantly and scrupulously endeavour to avoid'.

9. The Pakistan Supreme Court repeatedly reminded the High Courts the scope of section 100 and 115 and observed that section 115 is attracted in the case of jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it and that section 115 is not directed against conclusion of law or fact in which the question of jurisdiction is not involved. Of course, the language used in section 115 is a bit of distinct from the earlier provision. Even under the present provisions of section 115, in *Shamser Ali Md vs Mosammat*

Kafizan Bibi, 44 DLR (AD) 231, this Division interfered with the judgment of the High Court Division when it found that the High Court Division disturbed the findings of the lower appellate court on reappraisal of the evidence and held that the High Court Division committed error of law when there was no misreading of evidence and misconstruction of the document.

10. In *Rupjahan Begum vs Lutfay Ali Chowdhury, 17 BLD (AD) 66 = 49 DLR (AD) 73,* the question was whether the defendant No.1 was the benamder of the plaintiff in respect of the suit land. The lower courts concurrently found that the transaction in respect of the suit land was not benami. The High Court Division sent the matter back on remand by setting aside the concurrent findings. This Division was of the view that the finding as to the benami being essentially a finding of fact is immune from interference unless it is found that the finding is based on gross misreading of evidence or non-consideration of material evidence or it has been founded on misconception of law occasioning failure of justice. In that case the courts below disbelieved the plaintiffs possession. In view of the above, this Division held that "the first two court's below concurrently found that the plaintiff had no possession in the suit lands and that without a prayer for recovery of khas possession the suit as framed was not maintainable, but the learned Judge of the High Court Division did not reverse the said findings and thus committed an error of law in passing the judgment".

11. In *Haji Nurul Alam vs Alhaj Abdus Sobhan Wakf Estate, 45 DLR(AD)168,* the prayer for temporary injunction was refused by the courts below on the grounds that it could not be established by two reports of the Advocate Commissioner that there was any vacant space in between two plots which was the sheet-anchor of the plaintiffs case. The High Court Division without repelling that finding allowed the prayer for temporary injunction. This Division, in the premises, held "In disturbing the concurrent judgment of two courts below, it was imperative on the part of the learned Single Judge of the High Court Division to reverse the said concurrent findings and hold that the respondent had made out a *prima-facie* case for temporary injunction".

12. In *Hussain Ahmed Chowdhury vs Nurul Ali, 47 DLR (AD)162,* the High Court Division remanded the suit of the trial Court by setting aside the concurrent findings after reassessment of the evidence. This Division interfered with the judgment on the reasoning that 'It is to be stated here that if there is misreading of evidence or non-consideration of same material evidence then it was incumbent on the revisional Court to consider the same and to arrive at a proper finding on the material evidence on record and to finally dispose of the case.' In *Bangladesh vs Chand Mia, 44 DLR (AD) 98,* the question was whether summons of the suit was served upon the defendant No.2. The court of appeal on consideration of the materials on record found that there was no service of summons upon the defendant. The High Court Division sitting on revision interfered with the said finding. This Division held "It was no function of the High Court Division to sit in appeal over that finding of the lower appellate court in the revisional jurisdiction. The High Court Division was only concerned with the question as to whether the lower court in giving that finding committed an error of law resulting in an error in the decision occasioning failure of justice".

13. It needs no elaboration that it has authoritatively been settled that a finding of fact is immune from interference by exercising revisional jurisdiction unless it is shown that the finding is based on gross misreading or of non-consideration of material evidence or it has been founded on misconception or misapplication of law or on misconstruction of any mate-

rial document. The expression "error apparent on the face of the record" clearly shows that the error must be such which can be detected or noticed without any lengthy argument, that is to say, a conclusion which no one acting judicially could have arrived at from the evidence, in which case it constitutes an error of law, or the Court, in arriving at that finding, has been influenced by inadmissible evidence or has refused to admit admissible evidence.

14. Rule as to finding of fact is that in disposing a revision petition, the revisional court will not constitute itself into a third court of fact and re-weigh the evidence which has impressed the courts of facts. In exceptional cases the High Court Division interferes with findings of fact, where the finding is based on no evidence or is against the weight of evidence or is vitiated by any legal error or any unreasonable interference is justified. When there is no misreading or non-consideration of evidence or no misconstruction of documentary evidence, the High Court Division cannot sit over the facts finding court as a court of appeal. This settled law has totally been ignored by the High Court Division.

15. The High Court Division has given emphasis on the letter dated 26th June, 1988, observing that the defendant could not show that the letter was served upon Amanullah, the plaintiffs predecessor. In the majority opinion also it was observed that his letter was not filed and exhibited in the suit as found by the trial court. As a matter of fact the trial court has not made such observation. Admittedly Amanullah neither intimated RAJUK about the deed executed by Khaleda nor mutated his name after the execution of the deed. So he was not recognised as lessee by RAJUK. Even after the execution of the deed, Khaleda remained as lessee with RAJUK's record. This fact was totally ignored. It may be noted that the reference of this letter dated 26th June, 1988 has been made in Exhibit 9-D (through oversight it was mentioned as Exhibit D), which is the minutes of the resolution of RAJUK, in which, it was directed that Amanullah should submit the certified copy of the transfer deed, agreement and the deed of undertaking for mutation of his name within 4(four) months from the date of its issuance but he submitted the same after two years. Admittedly, on the prayer of the original allotee Khaleda Rahman on 10th April, 1987, RAJUK accorded permission to transfer the plot in favour of Amanullah Mia. It was a resolution of the Board of RAJUK would be evident from the deposition of A Mannan Sarkar, (DW 3) deposed on behalf of RAJUK, who stated in chief that in the sale permission letter it was mentioned that 'নাঃ জমিটি রেজিস্ট্রি করে ৪ মাসের মধ্যে নাম খারিজের জন্য রাজউকের নিকট দাখিল করিতে হবে হলফনামা ও অঙ্গিকার নামা তৈরী করে।" The minutes of the meeting of RAJUK show that the notice was served upon Khaleda Rahman. So, there is positive evidence that after the registration of the deed, it should be submitted along with the affidavit and undertaking within four months for mutation. He then stated that he filed Khaleda's allotment letter, Exhibit 9-A, the minutes of RAJUK's Board decision relating to the cancellation of the disputed plot dated 26th September, 1995, Exhibit 9-B, the decision of the Board dated 21st May, 1995 Exhibit 9-D and Khaleda's sale permission letter, Exhibit 9-E.

16. This witness has reproduced the relevant portion of the RAJUK's Board's resolution in verbatim. The plaintiffs side did not challenge this statement of the witness in course of cross-examination. The plaintiffs also did not give any suggestion to this witness that no such decision was taken in the Boards meeting or that it was not served upon Khaleda. So, there are uncontroverted evidence on record that the transfer permission order was a conditional one that the purchaser must submit the deed of transfer with other documents within 4(four) months for mutation. Therefore, it is not sound to accept that the plaintiffs predecessor had no

knowledge about the conditional order of permission for transfer. In Exhibit 9-D it was pointed out that as there was violation of the terms of permission, a show cause notice was issued on 29th September, 1991 within 15 days but no reply was given.

17. It is evident from Exhibit 9-D that despite service of notices the recipient did not respond to the notices. Then the Board decided to cancel the permission in its meeting and in pursuance of the resolution No. 4/95 dated 21st May 1995, the lease was cancelled and recalled the decision taken on 26th September, 1995. The resolutions of the Board were taken for transacting the business of RAJUK in accordance with law. It is a statutory organization. The court may presume that in the common course of business, RAJUK has conducted its business in accordance with law and in course of such transaction it cancelled the allotment of the disputed plot since the recipient did not act in accordance with the direction. When the common course of business of RAJUK has been proved by production of the minutes of the Board, the court may under illustration (f) of section 114 of the Evidence Act presumed that the cancellation of the allotment of the plot was made after following the legal formalities.

18. While section 114 of the Evidence Act states general maxim that all acts are presumed to have been rightly and regularly done, illustration (e) of section 114 draws attention to a special application of the maxim with particular reference to judicial and official acts. As regards the cancellation of allotment the consistent findings of the courts below are that Amanullah was not recognized as lessee by RAJUK as he did not intimate it regarding the transfer of the plot within the stipulated time and therefore, he was not entitled to receive a notice of cancellation. This finding is based on proper appreciation of the materials on record and the High Court Division ignoring this finding made out a third case.

19. Apart from what is stated above, the High Court Division failed to notice that it is the responsibility of the plaintiffs to prove their case. It was positively asserted by evidence that such letter was issued. It is none of the business of the defendants to produce the plaintiffs' document. If the plaintiffs' predecessor did not receive the letter as it was not allegedly served upon him, they ought to have called for the same from RAJUK for ascertaining the truth of their claim. The initial onus to prove about the fact of non-existence of the letters dated 26th June, 1988 and 29th September, 1991 or any other document is upon the plaintiffs. Where there is a presumption as to existence of a fact, the burden of proving the non-existence of that fact is on the party who asserts its non-existence. The High Court Division made observations on the basis of the submissions of the plaintiffs' lawyer. The plaintiffs' witness Iqbal Ahmed (PW 1) did not say that Khaleda Rahman did not receive the said notice. He simply stated that without service of notice upon them regarding the cancellation, of the allotment, the allotment of the plot was given in favour of the defendant. So, the High Court Division made out a third case as regards the non-service of notice. Besides, DW 3 specifically mentioned the contents of the first notice in his evidence but the plaintiffs did not challenge his claim. Therefore, the finding that the plaintiffs were not aware of the direction of RAJUK is based upon misreading and/or non application of judicial mind.

20. The order of cancellation of plot was communicated to Khaleda Rahman under memo dated 9th November, 1995, page 149 of the supplementary paper book dated 1st August, 2010. The cancellation was made on the ground that she could not make construction as per terms of the lease deed. So, the finding of the High Court Division that this letter was not communicated to Khaleda Rahman is also based on non-consideration of this letter. It

failed to notice that Khaleda Rahman being the recipient of the letter, it is only Khaleda who could prove this fact of non-service of the notice but the plaintiffs have not examined her.

21. As regards the maintainability of the suit, the High Court Division has over looked the findings of possession made by the fact finding Court. This finding of possession is final and binding upon the High Court Division unless it is reversed on the ground of misreading or non-consideration of the material evidence. Where the plaintiff is able to seek further relief than a mere declaration and omits to do so, the Court shall not grant declaratory decree. The plaintiffs are therefore, required to seek some consequential relief directly flowing from the right in respect of which they seek relief and if they do not, they are not permitted by law to a mere declaration without asking for consequential relief. In a suit if other side pleads the bar under the proviso, the Court cannot pass a decree without coming to a finding on the question.

22. Another fundamental error committed by High Court Division is that without application of its judicial mind it has held that the plaintiffs have prayed for cancellation of the defendant's deed, but as a matter of fact, they have not sought for cancellation of the defendant's lease deed. Keeping a registered instrument outstanding in the name of the defendant relating to the suit plot, the plaintiffs are not entitled to a decree in the suit. Therefore, this finding of maintainability of the suit is perverse and was made without application of judicial mind. Right to sue is dependent on the cause of action and cause of action arises when one's right is violated. In order to have that relief the person claiming a right has to seek appropriate relief and in the absence of appropriate relief the action is not entertainable. Having realized the defeat and the finding of the High Court Division on the question of cancellation of the deed, the plaintiffs filed an application in this Division on 8th July, 2010, for amendment of the plaint for addition of a relief to the effect that "the registered lease deed dated 23-6-1996 executed by RAJUK in favour of defendant No. 1 is illegal and not binding upon the plaintiffs". This time also, the plaintiffs did not seek consequential, relief for recovery of khas possession.

23. Now. the question is whether this amendment can be allowed at this belated stage even if it is found that this amendment is relevant for the purpose of determining the real question in controversy, and secondly, whether the plaintiffs" are entitled to a decree in the suit without a prayer for recovery of khas possession or in the alternative, without any finding that as the plaintiffs are in possession, they need not seek consequential relief. It should be noted that in the written statement which was filed on 3rd March, 1998, the defendant specifically pleaded that after getting allotment of the suit plot, a registered lease deed was executed on 23rd September, 1996 and that the delivery of possession of the plot was also given on that date. In view of this positive statement, the plaintiffs cannot say that they have no knowledge about the lease deed and the delivery of possession. The natural presumption flowing from the pleadings is that the plaintiffs had knowledge about the defendant's lease deed and the delivery of possession at least in March, 1998. Under such circumstances, this prayer for amendment cannot be allowed after more than twelve years of knowledge.

24. Following the opinion of the Judicial Committee of the Privy Council, the Supreme Court of Pakistan in *Keramat Ali vs Md Younus, 15 DLR (SC) 120,* held that amendment of pleading should not be allowed ignoring the plea of limitation. In that case, the auction purchasers filed a suit in 1945 claiming that they were the auction purchasers of the property and not benamder of the decree holder. They did not claim for recovery of khas possession although the judgment debtors in pursuance of

the award in their favour had actually restored possession of the land and claimed in their written statement that the suit was barred under section 42 of the Specific Relief Act in the absence of consequential relief. The plaintiffs then came up with an application for amendment of the plaint. The Supreme Court following the cases of *Md Zahoor Ali Khan vs Thakooraneen Ruttar Koer, 11 MIA 458* and *Charan Das vs Amir Khan, AIR 1921 PC 50* held that "in exercising this power, (amendment) no doubt, this court would be reluctant to allow an amendment which would have the effect of totally altering the nature of the suit or of taking away a valuable right accrued by lapse of time, but where the circumstances of a particular case it would be plainly inequitable to receive such a relief this court will not hesitate to do what the Judicial Committee did *(Emphasis added)*.

25. In *Nurun Nahar vs Md Fazlur Rahman 1979 BSCR 135, K Hossain, J.* speaking for this Division reiterated the language used by the Judicial Committee of the Privy Council and the Supreme Court of Pakistan observing that the question of delay is always considered as an important consideration in allowing or refusing amendment of pleadings. K Hossain, J. then answered the question of limitation in paragraph 9 observing that the question of limitation would arise in two ways; first, whether the claim to be included was barred on the date of institution of the suit and secondly, whether the claim is barred on the date of prayer for amendment. On the first, it is observed, 'the prayer for amendment cannot be allowed as it was barred on the date of the suit. On the second, however, the prayer could be allowed subject to fulfillment of certain conditions' *(Emphasis Added)*, that is to say, the prayer could not be allowed, even if it was not barred on the date of institution of the suit, if the other side had accrued a valuable right by lapse of time.

26. In *PA Ahmed Ibrahim vs Food Corporation of India, AIR 1999 SC 3033,* by an amendment the plaintiff sought to introduce totally a different case which is inconsistent with the prayer made in the application. In the amendment the plaintiff realizing that the suit was barred, prayed for addition of a relief to refer the dispute to arbitration. This was sought 11 years after the cause of action had arisen. The prayer was refused on the reasoning that "such amendment would cause serious prejudice to the contention of the appellant that the claim of the respondent to recover the alleged amount was barred by the period of limitation as it was pointed out the cause of action for recovery of the same amount arose in the year 1975 and the amendment application was filed on 30-3-1986".

27. In *Radhika Devi vs Bajrangi Singh, AIR 1996 SC 2358,* in a partition suit, the defendant in written statement specifically pleaded about gift deed made in his favour regarding property in dispute. Amendment of plaint seeking declaration that gift-deed was obtained fraudulently was filed beyond the period of limitation. Amendment was refused on the reasoning that the defendant acquired right by bar of limitation, observing "The ratio therein *(AIR 1964 SC 11)* applies to a fact situation where the party acquires right by bar of limitation and if the same is sought to be taken away by amendment of pleading, amendment in such circumstances would be refused". In *Muni Lal vs The Oriental Fire & general Insurance Company ltd., 1995 AIR SCW 4656,* a truck owner, on not returning of truck merely prayed for declaration that he is entitled to payment for loss of truck but not seeking consequential relief of payment of quantified amount. Truck owner sought permission in appeal to amend plaint to include unsought for relief. It was held that the plaintiff cannot be permitted to amend the plaint alter suit for relief in question was barred by time during pendency of proceeding.

28. In *K. Raheja Constructions Ltd. vs*

Alliance Ministries, AIR 1995 SC, 1768, the suit was for permanent injunction. Subsequently the plaintiff prayed for amendment for relief of specific performance of contract on the plea that the amendment was necessary in view of subsequent knowledge about permission granted by the Commissioner. The Supreme Court rejected the prayer on the reasoning that the plaintiff had admitted in plaint that the defendant had refused to abide by the terms of contract and that the relief for specific performance having been made after seven years, the amendment would defeat the valuable right of limitation accrued to the defendant. Similar views have been expressed in *Pirgonda Hongonda Patial vs Kalgonda Shid Gonda Patial, AIR 1957 SC 363.*

29. In *S. Kumar vs The Institute of C & P Studies, AIR 1984 SC 59,* the plaintiff instituted a suit for declaration and injunction. The trial court dismissed the suit holding that his remedy lay in damages. The appellate Court held the same view. In a second appeal, the plaintiff prayed for amendment of the plaint which prayer was rejected. The Supreme Court in the context held "we are constrained to reject it inasmuch as it is for the first time through out this protracted proceeding commencing with the institution of the suit in 1975 that the appellant is now seeking to include the relief although he had been dismissed: No circumstance has been shown explaining why the appellant should be permitted at this stage to amend the plaint. It has also not been established by the appellant that if a suit is filed now against the order of dismissal it would be within the period of limitation".

30. Thus we find consistent views of Judicial Committee, the Supreme Court of Pakistan, India and this Division that the question of limitation should be kept in mind while considering the prayer for amendment of pleadings and that if the prayer is barred by limitation, the question of acquiring right on the other side would arise and under such circumstance, no amendment should be allowed affecting the right of the opponent side. This is evident from the language used by this Division in Nurun Nahar that instead of using the expression 'should be' it used the words 'could be' that is, if the prayer is barred by limitation, the Court cannot allow the prayer. In that case, the prayer for amendment which was allowed by the High Court Division was maintained by this Division mainly on the reasonings that "in the plaint all facts were mentioned at the time the suit was instituted. The question of delay is not very material, as it is more a case of rearranging the facts and making a suitable prayer, than bringing new fact and praying for it for the first time by way of amendment. It is to be remembered that the appellant had notice of all facts from the inception of the suit, and it cannot be said that she was taken by surprise when the amendment was prayed for". These observations are self-explanatory and need no further elaboration on the question of limitation.

31. This Division not only approved the views taken in Keramat Ali (supra), but also approved its earlier unreported case in *Gulam Hafiz vs Khadem Ali Mia, CA No.26 of 1975,* in which, on the question of limitation it was observed that the High Court Division was not justified in rejecting the prayer for amendment overlooking the fact that 'obviously the prayer was made at a time when *prima- facie* the other side might not have acquired any right by lapse of time', *(emphasis supplied).* Therefore, this Division kept in mind the question of limitation. The consistent views of the apex Courts are that the courts should not he oblivious about the question of accrual of right on the other side by the law of limitation while allowing or rejecting a prayer for amendment of pleadings. So the question of limitation is obviously a vital point to be looked into while considering a prayer for amendment of the plaint. If the delay is a mate-

rial point for determining the controversy, that is, if the other side has acquired a right in the meantime, the court has no power to allow the amendment even if the proposed amendment is relevant for the purpose of determining all the issues in controversy between the parties.

32. It has been specifically pleaded in the, written statement regarding the registration of the lease deed and thus, the plaintiffs cannot say that they are taken by surprise by the disclosure about the registration of the deed. It is not the case the plaintiffs that they had no knowledge about the instrument in question earlier. They did not explain any reason why they made the prayer after 12 years of the date of disclosure. The only ground mentioned in the petition was that this relief, is necessary for determining the real question in controversy between the parties. True, it is one of the main dispute in controversy between the parties but this is not alone a ground for allowing amendment for the limitation is a law which is designed to impose of quietus on legal remedies with due diligence. It is intended to put an end to litigation and it requires that a litigant must come to Court and take recourse of legal remedies with due diligence otherwise it guillotines cases which seek relief at a point of time which is beyond the period specified thereunder. Principle of justice and fairplay do not help those who are negligent in asserting their right and despite becoming aware about alleged void deed adverse to their interest remain in deep slumber. The facility regarding amendment of pleadings cannot be legitimately stretched to any length of unreasonable period at the whims, choices or sweet will of the affected party. When a person presumes that a deed is a nullity or totally devoid of lawful authority and ignores it beyond the period specified by the law of limitation, he does so at his own risk.

33. It is evident from the above authoritative pronouncements the Court does not possess uncontrolled and unlimited power in considering an application for amendment of pleadings at any stage of the proceedings and the powers are circumscribed by certain limitations. The Court should not allow amendment only because it is relevant for the purpose of determining the real question in controversy. This is probably because, even if the prayer is lawful, if the party seeking amendment sat over his rights, his rights will be extinguished by lapse of time if the relief is not sought within the period, of limitation prescribed by law. Article 91 of Limitation Act provides the limitation of 3 years for cancellation or setting-aside an instrument from the date of Knowledge. Such amendment would certainly cause serious prejudice to the defendant because the claim is barred.

34. The plaintiffs sat over their right and in the mean time, the defendant had acquired a right in the suit plot on the strength of this deed and if this right is taken away by amendment of pleading, amendment in such circumstances would be refused. Secondly, the plaintiffs were left with two options for getting full relief(s) in the suit. They can seek for cancellation of the deed under section 39 or a declaration that the deed is void. The plaintiffs in their application stated that since they were not parties to the deed, they need not seek for cancellation of the deed and that a declaration that the deed is illegal and not binding upon them would serve the purpose. This is based on misconception of law.

35. The remedy available under section 39 of the Specific Relief Act is open to persons who are not parties to the instrument because even in respect of void instrument, there is reasonable apprehension that if the instrument is left outstanding may cause serious injury to the aggrieved party. Section 39 is founded on the administration of a protective justice for fear either that the instrument may be vexatiously or injuriously used against the plaintiff, whether he is a party to it or not, when the evidence to impeach it may be lost or that it may

throw a cloud or suspicion over his title or interest. The distinction between a suit for declaration that the instrument is not binding on the plaintiff and a suit for cancellation of an instrument is that when the plaintiff seeks to establish a title to himself and cannot establish that Title without removing an obstruction such as, a decree or a deed to which he has been a party, then he must get that decree or deed cancelled or declared void. If the deed in respect of the suit plot stands even though the plaintiff is not a party, the defendant's title does not extinguish and in that case the plaintiff's title to in the suit plot will be clouded.

36. Therefore, the plaintiffs are required to seek either for cancellation of deed under section 39 or in the alternative, to seek a relief declaring the deed void under section 42. Reference in this connection may be made in *Sufia Khanam vs Faizun Nessa, 39 DLR (AD) 46.* In that case this Division approved the views taken by the Full Bench is *Debaki Lal vs Iqbal Ahmed, 17 DLR 119 (FB)* and observed that "section 42 docs not specifically provide for declaration of nullity of any written instrument; nevertheless, a decree for nullity of any instrument comes in under this section in view of the general provision therein as to declaration of any legal character as expressed in the words "any person entitled to any legal character". If, by an instrument a person's right and title is clouded or threatened, he may seek a declaration under this section to the effect that by the instrument his right and title has not been affected or that any other person who denies his title or claims title in himself has not acquired any right or title thereby.

37. It was further observed:

> "If the suit is filed for a declaration that a written instrument, whether it is a sale deed or a court's decree, "is void", it clearly comes under section 39, since it is covered by the expression "any person against whom a written instrument is void or voidable....may sue to have it adjudged void or voidable. But if a further prayer is included in the suit that by the void instrument the plaintiffs right has not been affected, then this prayer comes straight under section 42; similarly, if this prayer is framed in a different form, that is, the defendant acquired no right or interest thereby, it will make no difference, for this prayer is also covered by section 42. If his suit includes the reliefs that the instrument in question is void and his right has not been affected thereby and, or, the defendant acquired no right thereby, then the reliefs are covered by both sections 39 and 42. In such cases provisions of sections 39 and 42 will overlap."

38. So, a registered instrument cannot be avoided unless it is declared void or cancelled by a court of law. The plaintiffs having knowledge about the registered deed and on the strength of the said deed, the defendant has got possession of the suit plot; mutated his name, paid rent to the Government, and thereby he has acquired a valuable right in respect of the suit plot which right cannot be taken away by way of amendment when such claim is barred by law. Save in exceptional cases; leave to amend pleadings will ordinarily be refused when the effect of the amendment would be to take away from a party a legal right which had accrued to him by lapse of time.

39. More so, this amendment cannot be legally allowed because the plaintiffs are claiming right on the suit plot on the strength of Khaleda Rahman's lease and the deed of sale executed by her in favour of their predecessor, Exhibits 4 and 4 (a). Khaleda Rahman was allotted 612 sq. yards 6 sft. land equivalent to 3 kathas of land and in her deed the said area was mentioned which she sold to Amanullah. Thus, the plaintiffs cannot claim any right in excess of 3 kathas of land in the suit plot but they are now seeking nullity of the lease deed of the defendant in respect of an area of 7 Kathas 10

Chattaks 23 sft, which is more than 4 kathas of land and this will be evident from the said deeds and the letter of RAJUK dated 17th April, 1996, after the measurement of the plot, page 83 of the supplementary paper book dated 1st August, 2010. The defendant paid for the excess land and got delivery of possession. The plaintiffs are also not claiming any right in respect of this excess 4(Four) kathas of land and therefore, they cannot legally seek a relief in respect of a subject matter over which they have no right or interest. Further, they did not give any boundary of their 3 kathas of land. Thus, in the absence of specific boundary of their 3 kathas of land, if the prayer for amendment is allowed the suit land would be vague and indefinite, and the suit would be liable to be dismissed on this ground alone.

40. Now the question is whether this Division can allow the prayer for amendment for doing complete justice. In the majority opinion, though it was noticed that the prayer for amendment was legally rejected, allowed the prayer by invoking Article 104 of the Constitution. I am unable to agree with the applicability or Article 104 in the facts of the given case. In appropriate cases, this Division can disturb the findings of fact for doing complete justice but this power is meant to supplement the existing legal frame work to do complete justice between the parties and not to supplement it. It is conceived to meet a situation which cannot be effectively and appropriately tackled by the existing provisions of law. The Court cannot do anything for doing justice to one party which affects substantive rights of the other party. The power to do complete justice has been given to this Division and on no one else, is itself an assurance that it will be used with due restraint and circumspection, keeping in view the ultimate object of doing justice between the parties. This power of doing complete justice is not to be exercised frequently but sparingly. One should not lose sight of the fact that doing complete justice does not contemplate doing justice to one party by ignoring statutory provision and thereby doing complete injustice to the other party by depriving him the benefit of law.

41. It is the fundamental principles of law that statutory provisions of law cannot override the constitutional provisions. If a valuable right is accrued to the other side this fact should not be ignored in invoking power of complete justice. Generally, no court has competence issue an order or direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. An order which this Division can make in order to do complete justice between the parties, must not only be consisted with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the statutory laws. This Division also cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. References in this connection are the cases of *State of Punjab vs Renuka Singla, (1994) 1 SCC 175, State of UPV Harish Chandra, (1996) 9 SCC 309, Union of India vs Kirloskar Pneumatic Co. Ltd, (1996) 4 SCC 453, University of Allahabad vs Dr. Anand Prakash Mishra, (1997) 10 SCC 264, Karnataka SRTC vs Ashrafulla Khan, AIR 2002 SC 629, Prem Chand Grag vs Excise Commissioner, AIR 1963 SC 996, Supreme Court Bar Association Union of India, AIR 1998 SC 1895, State of Karnataka vs Ameerbi, (2007) 11 SCC 681, Union of India vs Shardindu, AIR 2007 SC 2204 Raziul Hasan vs Badiuzzaman Khan, 1996 BLD (AD) 253 =1 BLC (AD) 35 and AFM Nasiruddin vs Mrs. Hamida Banu, 45 DLR (AD) 38.*

42. On the question of possession, the appellate Court as observed above, on assessment of the evidence on record particularly the

evidence of PW 1 who could not say when his father got possession of the plot from Khaleda Rahman and also admitted that a boundary wall round the suit plot is in existence, but could not say when and who constructed the said wall, held that the plaintiffs failed to prove possession in the suit plot; that the defendant has been able to prove his possession and that suit without seeking recovery of khas possession is not maintainable. The High Court Division without reversing these findings decreed the suit on extraneous grounds observing that since RAJUK accorded permission for transfer, it waived the terms of the lease deed; that it could have cancelled the lease for non-construction but it had cancelled the allotment without affording the plaintiffs' predecessor any opportunity of being heard; that while mutation procedings was pending before RAJUK, the plot was allotted in favour of third person and thereby, it had violated section 101 of the Town Improvement Act, 1992; that the original allottee did not violate any terms of the lease deed and that the Court of appeal below was wrong in holding that the suit is not maintainable.

43. Mr Mahmudul Islam, learned counsel contended that the finding of possession is based on improper appreciation of evidence on record and that although there is no finding regarding possession by the High Court Division, since the plaintiffs are in possession of the suit land and their possession has not been taken over by RAJUK, the High Court Division is perfectly justified in interfering with the judgment of the courts below. I find fallacy in his contention for, keeping these findings of possession, no court can pass a decree in a simple suit for declaration in respect of immovable property. This finding is being based on correct assessment of the evidence, the same is not open to scrutiny by a court exercising revisional power. The High Court Division did not say that those findings were perverse as not based on evidence on record. Without arriving at such finding, the High Court Division cannot pass a decree as a final Court of fact. If we accept the contention of Mr Mahmudul Islam, learned counsel, there will be left with no demarcation between the exercise of appellate and revisional powers and the High Court Division will be at its wisdom to interfere with judgments whenever it feels necessary to do so and in doing so, this power will be transformed into an appellate power. It should not be ignored that the Court of revision is a Court of law, not a court of fact and there should be a demarcating line in the exercise of powers of appeal and revision. If this latitude is given to a Court of revision, there will be no difference between a Court exercising appellate power and a court exercising revisional power. The characteristic attribute of a judicial act or decision is that it binds, whether it be a right or an error. An error of law or fact committed by a judicial body cannot, in general be impeached otherwise than on appeal unless erroneous determination relating to a matter on which jurisdiction of the body depends.

44. The court of appeal below held that plaintiffs are not in possession of the suit plot and that the defendant has been able to prove his possession by raising boundary wall. This finding having not been disturbed, and keeping this finding intact, the High Court Division cannot pass a decree. This finding is binding on the High Court Division. The court of appeal is, therefore, perfectly justified in holding that the suit is barred under section 42 of the Specific Relief Act.

45. The High Court Division did not assail the finding the appellate court about the maintainability of the suit. In the majority opinion it was pointed out that in the written statement the defendant did not mention the exact date of taking possession and thus the reception of evidence of DW1 in this regard is barred under Order VI, rule 7. It was further observed that RAJUK did not state by filing written statement

that it took over possession from Khaleda Rahman and that Exhibit A not being a letter of delivery of possession, Aman Ullah or the plaintiffs may be deemed to be in possession. On the question of existence of boundary wall, it was observed that as Khaleda Rahman did not deliver possession to RAJUK, 'the question of construction of boundary walls in the suit property by defendant No.1 does not arise. In arriving at such conclusion my learned brother has reassessed the evidence on record as if he were deciding a first appeal. The question is whether the plaintiffs suit is maintainable in the absence of their possession.

46. What's more, in paragraph 4 of the written statement, it was specifically asserted that the suit is not maintainable under section 42 of the Specific relief Act since the plaintiffs have no possession in the suit plot and in paragraph 12, it was stated that the registered lease deed was registered on 16th October, 1996 in his favour and that the delivery of possession was given to him. Order VI, Rule 2 lays down the guiding principles of system of pleading that pleadings should be statements in a concise form, and should state only material facts relied on and not the evidence by which they are to be proved. This rule further provides what are and what are not material facts to be pleaded; (a) when the pleadings the effect or purport of a document on conversation; (b) when presumptions of law arise; and (c) when conditions precedent exist. An analysis of these terms throws the basic principles of pleading should state (i) material fact, not law; (ii) matarial facts, not evidence; (iii) all material facts only and (d) in a summary form. The statement that the defendant was given delivery of possession after the execution of the lease deed is sufficient under the rules of pleading to lead evidence in support of his claim. Allegations in anticipation of the opponent's answer, should not be made. Therefore, it is rule 2, not rule 7, is applicable in this case.

47. Learned counsel for the respondent has drawn our attention to the evidence of Faruk Ahmed (PW 2) and Nur Mohammad Khan (PW 3) and submits that these witnesses prove the plaintiff's possession. He further submits that in view of the findings of the court of appeal below, there is no scope for this Division to reassess the evidence afresh. I fully agree with the learned counsel. In the absence of any finding by the High Court Division, there is no scope for this Division to reopen the issue of possession. In view of the above, if we accept the contention of the learned counsel for the respondent, this Division will be sprouted with huge number of cases which were never entertained by it earlier from the inception of Privy Council. If we reassess the evidence for deciding a point even if the High Court Division decides the matter ignoring the point of law argued by the last court of fact, the language used in Article 103(3) of the Constitution would be rendered nugatory. In granting leave to appeal, this Division imposes limitations upon the subject matter of appeal or the materials to be used at the hearing. The circumstance that an appeal has been admitted by leave does not entitle the appellant or respondent to open out the whole case and contest all findings of facts and raise every point which could be raised in the High Court Division. At the final hearing only those points can be urged which are fit to be urged when the leave to appeal is asked for. It should be remembered that Article 103(3) does not confer a right of appeal upon a party but merely vests a discretion in this Division to interfere in exceptional cases. The Apex Court should interfere with finding of fact with great caution and circumspection.

48. It should be remembered that in exercise of its revisional jurisdiction, the High Court Division is not entitled to reexamine or reassess the evidence on record and substitute its own finding on facts for those of the subordinate Courts and we are exercising power from the

judgment of the High Court Division exercising its revisional jurisdiction. Apart from the language used in section 115(1) of the Code of Civil Procedure, the limits of the jurisdiction of the High Court Division under this section are well defined by a long course of judicial decisions; when the aid of the High Court Division is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying error of the courts below which has occasioned a failure of justice. Section 115(1) circumscribes the limit of that jurisdiction. Over and above, the patent illegality the High Court Division has committed in this case is that it decreed the suit without disturbing the finding of possession in a simple suit for declarations which is unheard of. Thus there is no doubt that the High Court Division has exceeded its jurisdiction in interfering with the judgment of the court of appeal below.

49. It is the positive case of the defendant that after purchase he has constructed the boundary wall through Jahid Hossain (DW 2). A Mannan Sarker (DW 3) an employee of RAJUK corroborated him. He stated that Khaleda was served with a notice in 1988 for her failure to make construction; that the plot was handed over to Anwarul Huq after allotment and that allotment of Khaleda was cancelled for violation of the terms of lease. From the above evidence, it cannot be said that the findings of possession of the suit plot found the Court of appeal is perverse or is based on non-consideration of material evidence. As regards the submission that RAJUK did not legally take possession from Aman Ullah, the Courts below made positive findings that both Khaleda Rahman and Aman Ullah violated the terms of lease and the letter of permission for transfer respectively and that RAJUK in exercise of its inherent power assumed possession and then handed over it to the defendant. In the lease deed, Exhibit 1, there was a deeming clause of automatic vesting of possession of the suit plot if there is violation of any terms of the lease deed. More so, there are documentary evidence of handing of possession by RAJUK in favour of the defendant on 17th April, 1996, Page 83 of the supplementary paper book and PW 3 has proved the same. The courts below took into consideration of the same and arrived at the findings. On the contrary, apart from the inconsistent evidence of PWs. 1, 2 & 3, the plaintiffs failed to show any scrap of paper showing delivery of possession in their favour.

50. DW 1 stated in chief that on 17th April, 1996, RAJUK made over physical possession to him and that after taking possession, he raised boundary wall and installed an iron gate. Though the plaintiffs gave suggestion to him in cross-examination that he did not construct the boundary wall, they did not challenge the statement of the installation of iron gate. Coupled with these statements, the letter of delivery of possession is also dated 17th April, 1996, which corroborate his statement. In this letter it was pointed out that the area of plot as found was 7 kathas 10 Chhataks. This letter was issued in pursuance of the defendant's letter dated 12th February, 1996 praying for making over possession of the plot, page 78 of the additional paper book dated 1st August, 2010. In the schedule of the lease deed, 7 kathas and odd area of land was mentioned. Moreso, the plaintiffs did not state in the plaint that their father or Khaleda Rahman constructed boundary wall around the plot. In his evidence, PW 1 admitted that a boundary wall is in existence around the plot but he could not say who constructed the same. Where there is in fact existence of a boundary wall, which is not a disputed fact, there is any scope to say non-existence of the same. When one party claims to have the constructed the said wall and the other party has expressed his ignorance about its construction, the presumption that can be drawn is that it was constructed by the party which claimed to

have constructed it. The plot, in question is a residential plot and not horticultural or agricultural one. So, in the absence of any building, the claim of the defendant that he is in possession of the plot by constructing boundary wall is established beyond doubt. The court of appeal below, in the premises, is perfectly justified in believing the defendant's claim of possession.

51. One fundamental principle of law which was totally ignored by my learned brother while expressing the majority opinion is that in this appeal, one of the questions on which leave was granted to consider was whether the High Court Division was justified in decreeing the suit without prayer for recovery of possession of the suit land since the appellate court found possession of the defendant. Admittedly the High Court Division did not at all consider the issue of possession. The plaintiffs have accepted the judgment of the High Court Division despite the fact that the judgment is perverse as it passed the decree in the suit ignoring the findings of possession by the appellate court. So, the finding of possession recorded by the appellate court is final. None of the courts including the High Court Division found possession in favour of the plaintiffs. Therefore, the decision on the question of law on which leave was granted by this Division must be either in positive or in negative. There is no scope on the part of this Division to examine the question of possession afresh ignoring the question of law formulated in the leave granting order. It can decide the question of possession if there are conflicting findings by the courts. So, the Division cannot embark upon an inquiry into the legality of the finding of possession upon assessment of the evidence on record afresh ignoring the question on which leave was granted. If this process is demonstrated, it would lead to judicial extravagance, which might defeat the ends of justice. It will not also be healthy for the administration of justice. In that case, there will be no need for granting leave by this Division on any question of law. If we support this sort of judgment, the High Court Division will also be let free to interfere with the lower courts judgments ignoring the findings of the last court of fact, and this Division will be converted into a court of appeal.

52. It should not be ignored that in common law legal systems, a precedent or authority is a principle or rule established in a previous legal case that is either binding on or persuasive for a court when deciding subsequent cases with similar issues. *Stare decisis* is a legal principle by which Judges are obliged to respect precedents established by prior decisions. Courts should generally abide by precedent and not disturb settled matters. This is necessary for the administration of justice otherwise the lower courts and the High Court Division will be confused in determining any particular issue in a suit or a matter. There should be consistency in the opinion of this Division on any particular issue.

53. It is not disputed that Judges have a fundamental obligation to apply the law. We accept this judicial obligation as so basic to our legal system and to our conception of the judicial function that we rarely consider the obligation's origin. *Stare decisis* is one of the fundamental doctrines of common law systems. This doctrine is also referred to as the doctrine of precedent. Precedent influences all common law Judges, to varying degrees, Rupert Cross and JW Harris on their Precedent in English Law, 4th Edn explain:

> 'Precedent rules confer authority/on they rations decidendi of various courts; but they derive their authority not from such rations, but from a more widely defused judicial practice which transcends the outcome of particular cases. To the extent that this practice is settled, they are conceived of as imposing obligations which are as peremptory as any other legal obligations, and in that sense they constitutes rules of law. However, the dwell at a high-

er level than ordinary rules of substantive case law whose authenticity they control'.

54. Precedent can be either persuasive or binding. A court may refer to or rely on persuasive precedent, but it is not obliged to do so. A court is presented with binding precedent, it is required, by common law method and reasoning, either to follow the precedent or to justify its deviation. So *stare decisis* requires Judges to follow precedent and apply the law as they find it or to justify their deviation from the established rule. In majority of cases, there will be no justification for divergence; the Judge will be obliged to apply the law as it is. This is why *stare decisis* is the foundation of the judicial obligation to apply decisional law. The injunction to treat like cases alike or not to unsettle things which are established requires courts to follow precedent. As this injunction has evolved within common law method, any departure from the doctrine of *stare decisis* demands special justification. See *Arizona vs Rumsey, 467 US 203, 212, 104 S.ct.2305)*

55. In general the rules of precedent apply to discussions on construction of statutes or on the principles of law being followed by the courts. Though a decision of this Division on the meaning of a section, or on any question of law will bind all court including the High Court Division, there is nothing which prevents this Division from departing from a previous decision if it is convinced of its error and its baneful effect on the general interests of the public. The use of precedent as an indispensable foundation upon which to decide what is the law on the point under consideration. It has been held in *Bourne vs Keane 1919 AC 815(874)* that a construction of a statute of doubtful meaning once laid down and accepted for a long period ought not to be altered unless it was wrong and inconvenient. Evershed, MR in *Brownsea Haven Properties vs Poole Corporation, 1958 Ch 574(CA)* observed. 'There is well-established authority for the view that a decision of long standing, on the basis of which many persons will, in the course of time, have arranged their affairs, should not lightly be disturbed by a superior court not strictly bound itself by the decision'. In the majority opinion the established principles and norms have been totally ignored.

56. In view of the above, the High Court Division acted in excess of power in interfering with the judgments of Courts below. The Court of appeal was correct in holding that the suit is barred under section 42 of the Specific Relief Act. The appeal is allowed.

Md Abdul Wahhab Miah J: This appeal by leave, has arisen from the judgment and order dated 19-4-2005 passed by the High Court Division in Civil Revision No.1910 of 2003 making the Rule absolute.

58. Facts giving rise to this appeal are as follows:

59. Respondent Nos. 1-6 as plaintiffs filed Title Suit No. 252-of 1979 in the Court of Assistant Judge, Second Court, Dhaka for declaration that they were the sixteen annas owners of the suit plot on the averments, *inter-alia*, that plot No. 41 of Road No. 15, section 13(old) New-3 of the Layout Plan of Uttara Residential Model Town measuring 612 square yards and 6 square feet (hereinafter referred to as the suit plot) of the then DIT, at present RAJUK, was allotted to one Mrs. Khaleda Rahman, wife of Md Mujibur Rahman and a standard lease agreement was executed on 12-1-1970 and registered on 12-2-1970 on payment of full premium amounting to Taka 19,029.94 and possession was handed over to the allottee along with a sketch map showing the location of the suit a plot. The aforesaid allottee, after getting delivery of possession enjoyed the suit plot from 12-12-1970 to 24-10-1998 by exercising all acts of possession through her caretaker and being in urgent need of cash money, obtained income tax clearance certificate vide TP Certificate No. 139/87-88 dated 1-6-1988 from the Deputy

Commissioner of Taxes Circle-"P" and transferred the suit plot to the predecessor of the plaintiffs, namely: Amanullah on payment of transfer fee and service charges amounting to Taka 1,72,313 and Taka 886 respectively after obtaining necessary permission from RAJUK vide their letter No RAJUK U-PA(A) 173-Stha dated 24-1-1988. The transaction was complete between the vendor and the vendee in presence of defendant No. 2 and nothing was left to be done from their part as per the Transfer of Property Act, 1882. After purchase of suit plot from the original allottee, the predecessor of the plaintiffs had to stay in the United States of America and in the European Countries for quite a long tune for the purpose of business as well as for treatment and kept the suit plot under the custody of his caretaker. In the meantime, defendant No.1 brought some bricks and sand to make some construction therein and while the plaintiffs' predecessor protested defendant No. 1 fled away and did never come forward. Thereafter, the plaintiffs' predecessor fell seriously sick and ultimately died leaving behind them to inherit his property. Getting knowledge of the death of the true owner of the suit plot, defendant No. 1 again "stepped in the scene and tried to start making construction" in the suit plot and when the plaintiffs lodged heavy protest, defendant No. 1 stated that he got allotment from defendant No. 2 (in the plaint, it has wrongly been written as defendant No. 1). Getting scent of allotment, the plaintiffs sent a letter to defendant No. 2 on 29-4-1997 which was received by him by putting original seal and signature, but he did not give any reply. Neither defendant No. 1 got any right and title in the suit plot nor defendant No.2 got any, right to retransfer the same to anybody including defendant No. 1. No notice was served either upon the plaintiffs or their predecessor or on the original allottee "so far in respect of the suit land stating violation of the terms of lease agreement" and, as such, if anything was done beyond the knowledge of the plaintiffs or their predecessor that will be simply illegal, *ultra vires* and against the principle of equity and good conscience. The cause of action for the suit first arose on 25-7-1997 and again on 15 -8-1997 when defendant No. 1 verbally stated about getting allotment of the suit plot from defendant No. 2 within Police Station-Gulshan and under the jurisdiction of the Court.

60. After filing the suit, the prayer was amended deleting the word "owner" by replacing the words "Lease hold right holder" and further prayer was added to the effect "and cancellation of lease if any in respect of the suit plot is illegal, malafide and not binding upon the plaintiffs."

61. The suit was contested by the defendants by filing separate set of written statements. In the written statement filed by defendant No 1, it was contended, *inter alia*, that he was allotted Plot No. 79 at Road No. 18, Sector-7, in Uttara Model Town, Dhaka by DIT, in 1984. The said plot was a small one being more or less than 3(three) kathas of land. The defendant having a large family, the said plot was considered to be not suitable for his purpose and, as such, he applied to the Chairman, RAJUK for a bigger plot preferably in its Baridhara Project and in the said application, all relevant facts including the allotment of the aforesaid Uttara plot to him were disclosed vividly. Then RAJUK allotted a five kathas plot to him at Baridhara on 1-1-1986. Subsequently, by a letter dated 26-8-1986, RAJUK cancelled the allotment of Baridhara plot. In the said circumstances, the defendant filed Writ Petition No.241 of 1991 before the High Court Division "which was accepted" and operation of the order of cancellation of Baridhara plot was stayed. Thereafter, on 12-12-1995, the defendant filed an application to defendant No. 2 for allotment of a bigger plot above 7(seven) kathas in Uttara Model Town in exchange of the earlier 3(three) kathas plot. In reply, RAJUK by its let-

ter dated 6-1-1996 informed the defendant that his prayer for allotment of a bigger plot at Uttara Model Town could not be considered till disposal of the said writ petition. The defendant, therefore, filed an application before the High Court Division for withdrawal of the said writ petition and the application for withdrawal was allowed on 24-1-1996. The defendant filed an application to defendant No.2 on 4-2-1996 with the certified copy of the order dated 24-1-1996 passed by the High Court Division praying for expeditious allotment of a bigger plot in Uttara Model Town. On the prayer of the defendant, defendant No.2 allotted the suit plot comprising an area of 7(seven) kathas, 10 Chhatacks and 23 square feet on completion of all legal formalities and a standard lease deed was executed on 23-9-1996. Originally, the suit plot was shown measuring an area of 3(three) kathas, but subsequently, by measurement, it was found that actually, the area of land was 7(seven) kathas, 10 chhatack and 23 square feet equivalent to 5513 square feet and therefore, an excess of 4(four) kathas, 10 chhatacks and 23 square feet was there in the plot. Accordingly, the price of the said excess land of 4(four) kathas, 10 chhatacks and 23 square feet was fixed at Taka 2,72,556 and the defendant was directed by RAJUK under cover of letter dated 9-6-1996 to deposit the said amount as price of the excess land by 20-7-1996. The defendant, accordingly, deposited the said amount in Sonali Bank, RAJUK, Bhaban Branch, Dhaka by voucher No. 6186 dated 23-6-1996. The defendant got his name mutated and paid rents from 1390 BS up to 1403 BS. The possession of the suit 'plot was duly delivered to the defendant by RAJUK and since then he has been in possession thereof by demarcation and specification as a bona fide lessee under RAJUK without any notice of the alleged right of the plaintiffs or their predecessor as claimed by them.

62. After amendment of the plaint, defendant No. 1 also filed an additional written statement stating, *inter alia,* that the plaintiffs are neither owners nor they have any lease hold right in the suit plot. The original allottee, Mrs Khaleda Rahman, having failed to transfer the suit plot within 4(four) months in favour of Amanullah Mia, predecessor of the plaintiffs and not having deposited the certified copy of the "Deed purported to be executed by her in the office of RAJUK" as directed in RAJUK's letter dated 26-6-1988, the transfer permission stood cancelled. The lease of the suit plot in the name of original allottee, Mrs Khaleda Rahman, on the basis of the standard lease agreement dated 12-1-1970 registered on 12-2-1970 having been cancelled by RAJUK long before the filing of the instant suit and the suit plot having been allotted to the defendant and the lease deed having been executed in his favour on 23-9-1996 for valuable consideration then registered by RAJUK before institution of the suit, the amended prayer of the plaintiffs was not entertainable. The lease having been cancelled due to the failure of the original allottee to make construction on the suit plot within the specified time, she ought to have challenged the cancellation of lease. The plaintiffs had no legal right and authority to challenge the cancellation.

63. Defendant No. 2 in his written statement contended, *inter alia,* that the plaintiffs did not file any agreement, affidavit and certified copy of the registered document within the stipulated time of 4(four) months from 26-6-88 and as 'a result, RAJUK cancelled the allotment of the original lease on 22-5-1995. After cancellation of the original lease, the suit plot was allotted to defendant No.1 observing all formalities.

64. Eventually, the suit was transferred to the Court of Sixth Additional Assistant Judge, Dhaka and was renumbered as Title Suit No.129 of 1999. At the hearing of the suit, the plaintiffs examined three witnesses including plaintiff No, 1 and filed documents which were marked as exhibits. On behalf of defendant No. 1, two witnesses including defendant No. 1

himself and on behalf of defendant No. 2, superintendent of RAJUK was examined as DW 3. The learned Assistant Judge by his judgment and decree dated 12-7-1999 dismissed the suit.

65. Being aggrieved by and dissatisfied with the judgment and decree of the trial Court, the plaintiff-respondents filed Title Appeal No.520 of 1999 before the District Judge, Dhaka. The learned Additional District Judge, Second Court, Dhaka by his judgment and decree dated 8-2-2003 dismissed the appeal and affirmed those of the trial, Court. Against the said judgment and decree of affirmance, the plaintiffs filed Civil Revision No.1910 of 2003 before the High Court Division. A learned Judge of the Single Bench hearing the revision by the impugned judgment and order made the Rule absolute setting aside those of the Courts below and directed RAJUK to mutate the suit plot in the name of the petitioners after persual of the documents filed by them before it and to cancel the subsequent allotment of the suit plot to opposite party No.1 (defendant No.1). Against the judgment and order of the High Court Division, defendant No.1 filed Civil Petition for Leave to Appeal No. 884 of 2005 before this Division and leave was granted on 16-8-2006 to consider the submissions of the learned Counsel for the appellant as follows:

> "Mr Khandaker Mahbubuddin Ahmed, the learned Senior Counsel, appearing for the petitioner, placed before us the impugned judgment of the High Court Division and contended that the plaintiff-respondents made averment in the plaint to the effect that the defendant No.l (petitioner) got allotment 'of the plot from RAJUK (defendant No. 2) and the petitioner having stated in the written statement that the defendant No.1 (petitioner) obtained lease from defendant No. 2, the High Court Division committed an error of law in misreading the prayer in the suit because of the fact that there was no prayer in the suit for cancellation of the registered lease deed of the petitioner affecting interest of the plaintiff-respondents under section 39 of the Specific Relief Act and this has resulted in an error in the decision causing failure of justice. It has been further contended that the High Court Division committed an error of law in interfering with the findings and decisions concluded by concurrent finding of fact arrived at by the Courts below without referring to any finding of facts which are not based on any evidence on record and, as such, the High Court Division arrived at an erroneous factual finding affecting merit of the suit on the question of extension of time for construction on the suit land and in such view of the matter, the findings and decisions arrived at by the High Court Division are liable to be set-aside.
>
> Mr Khandaker lastly contended that both the trial Court and the lower appellate Court having found the plaintiff 'out of possession and the plaintiff did not seek any decree for recovery of possession' and, as such, the appellate Court rightly held the suit to be not maintainable, High Court Division having misdirected himself in holding the suit to be maintainable committed an error of law resulting in an error in the decision causing failure of justice."

66. Mr Abdul Wadud Bhuiyan, learned Counsel, appearing for the appellant, has reiterated the submissions on which leave was granted with reference to the pleading of the respective party and the evidence adduced. 'He has submitted that the Appellate Court being the last Court of fact, gave specific finding that it was not proved that the plaintiffs were in possession, in the suit plot and the evidence and the documents proved possession of defendant No.1 therein, but the High Court Division while setting-aside the concurrent findings of facts

did not reverse the said finding of possession of the Appellate Court and thus erred in law in passing the impugned judgment and order. In support of his contention that the Appellate Court rightly found possession of defendant No. 1 in the suit plot, Mr Bhuiyan referred to Exhibit 'R' dated 17-4-1996, Exhibit 'T' series, the mutation khatian in the name of defendant No.1 by RAJUK and rent receipts showing payment of rent. Mr Bhuiyan has further submitted that since the plaintiffs failed to prove their possession in the suit plot, 'their suit for a declaratory decree without prayer for consequent relief by way of recovery of khas possession was not maintainable in law, but the High Court Division failed to consider this apparent legal aspect of the case while making the Rule absolute. In support of his contention, Mr Bhuiyan has referred to the cases of *Md Sheikh Farid vs Abdul Wadud Sikder, 12 MLR (AD) 201 = 58 DLR (AD) 248; Erfan Ali vs Joynal Abedin Mia (late)* represented by his legal heirs: *Golenur, 35 DLR (AD) 216; Enjaheruddin Mia alias Md Enjaheruddin Mia vsMohammad Hossain, 50 DLR (AD) 84; Mansur Ali Mallik vs Md Nurul Haque Mallik, BCR 1986(AD) 56; Government of Bangladesh vs Lutfunnesa, 4 XP (AD) 94* and the case of *Md Serajuddin Ahmed vs AKM Saiful Alam, 9 MLR (AD) 201= 56 DLR (AD) 41.*

67. Mr Bhuiyan has further submitted that the application filed by the plaintiff-respondents before this Division for amendment of the plaint by adding a prayer that registered lease deed dated 23-6-1996 (correct date is 23-9-1996) executed by RAJUK 'in favour of defendant No.1 is illegal and not binding upon them, if allowed, the defendant will be prejudiced. Mr Bhuiyan has seriously opposed the prayer by submitting that the plaintiffs filed the application for amendment of the plaint before this Division only on 8-7-2010 long after the expiry of the period of limitation and therefore, the same cannot be allowed and in support of his contention, Mr Bhuiyan has referred to the cases of *Abdul Wadud vs Abdul Wahed, 14 MLR (AD) 106; Abu Naser Mohammad Wahedunnabi vs Balai Wahedunnabi Roy, 10 MLR (AD) 19=10 BLC (AD) 58; Abdur Rabban (Md) vs Aminul Hoque Sowdagar, 43 DLR (AD) 19; Nurun Nahar vs Mohd. Fazlur Rahman, Bangladesh Supreme Court Reports, 1979, 135 and Raj Kumar-vs-Dipender Kaur Sethi, (2005)9 SCC, 304.*

68. Mr Mahmudul Islam, learned Counsel, appearing for the plaintiff- respondents, on the other hand, has submitted that the trial Court as well as the Appellate Court approached the case from a wrong stand point and failed to consider the case of the plaintiffs that before the cancellation of the lease of their vendor, the original lessee, Khaleda Rahman and also cancelling the permission given to her to transfer the suit plot in favour of Amanullah, the plaintiffs' predecessor, neither the plaintiffs nor their vendor was given any notice or any chance of hearing and thus, erred in law in dismissing the suit, the High Court Division rightly considered those relevant and pertinent facts and interferred with the judgments and decrees of the Courts below. He has further submitted that though the High Court Division did not reverse the finding of possession of the Appellate Court, this Division can consider the evidence on record and decide the fact of possession. He has further submitted that admittedly the vendor of the plaintiffs' father, the original lessee was put into the possession of the suit plot and only after termination of the lease, the lessee shall surrender the lease hold property to the lessor forthwith subject to other conditions as mentioned in clause 5 of the standard lease agreement (hereinafter referred to as the lease deed) executed between lessee, Mrs. Khaleda Rahman and RAJUK and, then only the right, title and possession of the lease hold property shall be deemed to have automatically vested with the lessor who shall have the right to enter physically and remove any obstruction that might be found and dispose of the same in its discretion, but in the instant case, nothing happened, i.e. neither termination of lease of the

suit plot was intimated to the lessee, Mrs. Khaleda Rahman nor she surrendered her possession of the suit plot nor the lessor refunded her money which she paid, so the story of delivery of possession thereof to defendant No.1 is nothing but a got up story, but the Appellate Court totally failed to consider the said factual aspect of the case. He has further submitted that the very fact that in the written statement filed by defendant No. 1 no specific date as to the delivery of possession of the suit plot to him was mentioned *prima facie* shows that had the actual delivery of possession of the suit plot been given to him, he would have definitely mentioned the date of such delivery. And this is enough to construe that possession of the suit plot was not delivered to defendant No. 1. In this regard, he has also referred to the testimonies of PWs 1, 2 and 3 who specifically stated about the plaintiffs' possession in the suit plot. He has further submitted that the finding of possession of the' Appellate Court' is based on misreading and non-consideration of the evidence on record and, as such, the same is not sustainable in law. Mr Islam by referring to clause 23 of the lease deed has lastly submitted that the lessor (RAJUK) permitted the lessee, Mrs. Khaleda Rahman to sell the suit plot to the plaintiffs' father, Md Amanullah and accordingly, transfer fee and other charges were deposited to the lessor and thus the condition that if the lessee fails to complete the building of such house and appurtenances within the period as referred to in clause 4 of the lease deed, the lease shall be liable to be terminated by the lessor as stipulated in clause 5 of the deed was waived, cancellation of the lease granted in favour of lessee, Khaleda Rahman on the ground of non-construction of the building on the suit plot was absolutely arbitrary and malafide, the High Court Division rightly interfered with 'the judgments and decrees of the Courts below. And therefore, no interference is called for with the impugned judgment and order and the appeal be dismissed.

69. Mr Islam in support of his contentions has referred to the cases of *Gannysons Ltd vs Sonali Bank, 37 DLR (AD) 43, Chairman, Bangldesh Steel Mills Corporation, now Bangladesh Steel and Engineering Corporation vs Md Masood Reza, 30 DLR (SC) 169* and the case of *Bangladesh Sugar and Food Industries Corporation vs Md Kashem, 55 DLR 350.*

70. From the judgment and decree of the trial Court, it appears that it did not give any finding as to the possession of the suit plot in favour of either of the parties *(emphasis supplied)*. The trial Court gave the following findings:

(a) cancellation of the lease of Mrs. Khaleda Rahman was "legal and valid" as she did not "make or construct any building in the suit land" as per condition of the lease agreement.

(b) the name of Amanullah was not mutated in the office of RAJUK and he did not take any action against Exhibit 'C'. Amanullah did not take any action to mutate his name in the office of RAJUK even after the issuance of Exhibit 'C.'

(c) the conditions of Exhibit-l (exhibil-1 is the lease deed) were binding between the parties and as the original allottee transferred her interest in the suit plot to Amanullah, the conditions of Exhibit 1 were also binding upon him; as Amanullah did not register and mutate his name in the office of the lessor and thus violated the conditions laid down in clause 24 of the lease deed, RAJUK had the right not to accept or recognize him as lessee of the suit plot, "so there was no need to give any notice to Mr Amanullah before cancellation of the lease agreement of Mrs. Khaleda" *(emphasis supplied)*, the plaintiffs had no lease hold right in the suit plot.

(d) RAJUK allotted the suit plot to defendant No.l observing all necessary formalities. "So the lease deed executed between the defendants is not illegal, void or voidable."

71. The Appellate Court as the last Court of fact dismissed the appeal with the following findings:

(a) No valid (সঠিক) paper about the transfer of the suit plot by the original allottee, Mrs. Khaleda Rahman to the plaintiffs' predecessor, Amanullah was filed within four months from 26-6-1988 as fixed by RAJUK, but was filed after two years which was a violation of the terms of agreement for which the allotment of the plaintiffs' predecessor was cancelled and then defendant No.2 gave fresh allotment to defendant No.l.

(b) from the papers filed (no reference to any particular paper or document or Exhibit) it appeared that RAJUK gave notice to the original allottee to file documents.

(c) from the papers (no reference to any particular document or paper or exhibit and the evidence of any DWs) filed by the defendants and their evidence it appeared that the allotment of the suit plot was cancelled and allotted to defendant No. 1 following all the rules as per terms of the contract.

(d) PW 1, Iqbal Ahmed (plaintiff No.l) admitted "in his cross-examination that Mrs. Khaleda Rahman did not make any construction on the suit plot.

(e) PW l in his cross-examination admitted that he could not remember when Khaleda Rahman got possession of the suit plot, his father got possession from Khaleda Rahman in 1988, but he could not remember the date. As per the own admission of the plaintiffs, there are boundary walls on the suit plot; neither the plaintiffs made any claim that they or their predecessor constructed the wall nor any evidence was adduced on behalf of the plaintiffs in that respect, rather PW1 admitted that he did not know by whom and when the , boundary walls were constructed on the suit plot and these proved that the plaintiffs were not in possession of the suit plot; from the evidence and the documents (no evidence referred), it was proved that defendant No.l was in possession of the suit plot.

(f) since the plaintiffs failed to prove their possession in the suit plot and they did not pray for any consequential relief by way of recovery of khas possession suit for declaratory decree was not maintainable under section 42 of the Specific Relief Act.

(g) the suit was also barred under section 42 of the Specific Relief Act for not praying for any relief against the lease deed executed in favour of defendant No.1.

72. The High Court Division made the Rule absolute on the findings:

(a) the letter dated 26-6-1988 was of much importance because on the basis of this letter transfer permission was cancelled in the meeting of RAJUK held on 26-9-1995. The allegation of the plaintiffs that they did not receive the letter dated 26-6-88 gets support from the contention of RAJUK that it did not recognize father of the plaintiffs as a lessee of RAJUK for the suit plot, so the RAJUK did not consider it necessary to give any notice to Amanullah before cancellation of the lease agreement of the original lessee, Khaleda Rahman. There was nothing in

the record that the petitioners (the plaintiffs) received the letter dated 26-6-1988 and willfully violated any term and direction of the letter.

(b) Khaleda Rahman was granted extension of time for construction and during that period she was granted permission by RAJUK to transfer the suit plot to Amanullah which shows RAJUK was very much aware that no construction was made on the suit plot, thus the condition in the lease deed for making construction before transfer was waived by RAJUK itself.

(c) Without hearing the original lessee or the petitioners (the plaintiffs) and without issuing any notice upon them, the transfer permission was cancelled, "which cancellation order was not even communicated to Khaleda Rahman or the plaintiff petitioners." The petitioners (the plaintiffs) were not aware of the directions which they were to comply and before taking any action against them by way of cancellation of the transfer permission, they should have been given an opportunity to explain their position in the matter, except the time limit, other requirements were fulfilled by the predecessor of the petitioners within time.

(d) While the plaintiffs were awaiting mutation, the lease deed of the original allottee was cancelled and permission for transfer was also cancelled and thereafter the suit plot was allotted to a 3rd person violating the mandatory provisions of section 101 of the Town Improvement Act wherein it is, prescribed that a notice by advertisement in the newspaper shall be given by RAJUK before giving out a property on lease.

(e) In the present case, the original allottee did not violate any conditions of the lease deed because she got "time extension" from RAJUK for construction and also for permission to transfer the suit plot without construction and subsequently, transferred the same in favour of Amanullah in compliance with the requirements of RAJUK, deposited transfer fee, service charges and the relevant documents with RAJUK for mutation, but as he was not aware of the prescribed time limit of such submissions directed by the letter dated 26-6-88, he submitted those at a belated stage. The opposite parties (the defendants in the suit) could not show anything before the Courts below that the letter dated 26-6-88 was received by Amanullah or by the petitioners.

(f) The Courts below failed to consider that before cancelling the transfer permission, notice ought to have been issued to the 'prospective transferee who filed the required documents before RAJUK and was awaiting for mutation; law requires that the authority exercising action of cancellation of the lease deed and the transfer permission must always act with fairness.

(g) the suit was maintainable as from the record it appeared that the plaintiffs also prayed for cancellation of the lease deed executed by RAJUK in favour of opposite party No. 1; the trial Court rightly held that the suit was maintainable.

Let us consider the submissions on which leave was granted. We shall consider submission No.2 first.

73. It needs no reference to any decision for the well settled legal proposition that the High Court Division while exercising power under

section 115(1) of the Code of Civil Procedure (the Code) can interfere with a finding of fact of the Appellate Court when such finding is based on misreading or non-consideration of the material evidence on record and that decision on any issue in the suit flown from misconception of law as well. We are also very much conscious that this Court is not a Court of fact that it shall reassess the evidence on record and give its own finding on facts by substituting the finding of the Courts below or the High Court Division. But, in view of the nature of the leave given on the point and the further fact that the trial Court in giving finding that cancellation of the lease of Mrs. Khaleda Rahman (the original lessee) was "legal and valid" as she did not "make or construct any building in the suit land" as per condition of the lease deed, did not consider a very material piece of evidence, namely, Exhibit '2' (the letter dated 24-1-1988 by which RAJUK permitted Mrs Khaleda Rahman to transfer the suit plot to the plaintiffs predecessor) and that the Appellate Court did not give any finding whatsoever on the point. The finding "on the question of extension of time for construction on the suit land" can, in no way, be said concurrent, but while granting leave on the point, it was erroneously stated that the finding on the question of "extension of time for construction on the suit land" was concurrent *(emphasis supplied).* The High Court Division, on consideration of Exhibit '2' and other admitted fact and evidence on record, gave clear finding that Mrs Khaleda Rahman (the original allottee) was granted extension of time by RAJUK for construction on the suit plot and during that period, she was granted permission to transfer the suit plot to Amanullah which shows that RAJUK was very much aware that no construction was made on the suit plot, thus the condition in the lease deed for making construction before transfer was waived by RAJUK itself. The High Court Division gave further finding that the original allottee did not violate any conditions of the lease deed, because she got "time extension" from RAJUK for construction and also for permission to transfer the suit plot without construction and thus reversed the finding of the trial Court, we find no other alternative but to look into the evidence to see whether the High Court Division was correct in giving the said findings.

74. It is necessary to state that the defendants in their written statements took two specific defence: (i) though permission was given to original lessee, Khaleda Rahman on 24-1-1986 (Exhibit-'2') to sell the suit plot to Amanullah, the predecessor of the plaintiffs, the same was cancelled as they failed to file the agreement, the affidavit and the certified copy of the registered document within the stipulated time of 4(four) months from 26-6-1988, (ii) RAJUK cancelled the allotment of the original lessee (Khaleda Rahman) as she failed to make construction on the suit plot as per terms of the lease deed. So, in considering the finding of the High Court Division on the submission, now we are dealing with the propriety of the decision of RAJUK in cancelling the permission to transfer the suit plot to Amanullah would naturally come in. In fact, the question of cancellation of the permission to sell, the suit plot is inextricably mixed and interlinked with the question of cancellation of allotment/lease of the original lessee and the facts on both the questions are also overlapping. Therefore, in seeing the correctness of the finding of the trial Court and the High Court Division on the point, the propriety of cancellation of permission to sell the suit plot has also be considered.

75. In paragraph 9 of the plaint, it was asserted that:

> "no notice was served upon the plaintiffs, nor his predecessor nor to the original allottee so far. In respect of the suit land stating violation of the terms of lease agreement and, as such, if anything is done beyond the knowledge of the plaintiffs or

his predecessors that will be simply illegal, *ultra vires* and against the principles of equity and good conscience."

76. As against this defendant No.l (defendant No.l is the appellant herein) in paragraph 21 of his written statement stated as follows:

"21 .That it is not known to this defendant as stated in paragraph 9 of the plaint and alleged by the plaintiffs about non-service of notice upon the plaintiffs or their predecessor or to the original allotte. It is also not known to this defendant whether service of any seen (sic) notice was a necessity. This defendant asserts that the cancellation of allotment in the name of the plaintiffs' predecessor was done by the defendant No.2 lawfully and there had been no violation of the terms of lease Agreement. It is absolutely false that the cancellation was beyond the knowledge of the plaintiffs and their predecessor."

77. In the written statement of defendant No.2 nothing was stated as to whether any notice was served upon the plaintiffs or their predecessor, Amanullah or the original lessee, Khaleda Rahman alleging violation of the terms of the lease deed before cancellation of her lease.

78. Thus from the respective written statement of the defendants, it is clear that they did not, at all, deny the plaintiffs' assertion that no notice was served either upon them or upon their predecessor or on the original lessee in respect of the suit plot stating violation of the terms of lease agreement before cancellation of the lease. Not only that the defendants in their written statements also did not specifically assert the fact that notice alleging violation of any terms of the lease deed was served upon the plaintiffs or their predecessor or the original lessee. Defendant No.l in paragraph 15 of his written statement stated that "RAJUK by its letter No. RAJUK/Estae1669 dated 26-6-1988 directed the said Janab Amanullah Mia to get the deed executed and registered and with the certified copy of the said Deed along with a deed of Agreement and a Deed of undertaking (অঙ্গীকারনামা) were required of him to be filed within 4 months of the issuance of the aforesaid letter for mutation of his name", but Amanullah had failed to follow the direction within the said period of time. After long last on 13-11-1990, Amanullah filed those papers before RAJUK after a lapse of two years. The defendant further stated that he gathered the above information on inquiry in the office of defendant No.2 prior to his instruction to his learned Advocate for drafting the written statement. Similar statements were made in the written statement filed by defendant No.2 and it was further added that because of the failure to file the said documents the lease of the allottee was cancelled on 21-5-1995 and the same was allotted to defendant No.l by following all the rules. In none of the written statements, it was stated how the said letter (dated 26-6-88) was sent to the lessee or Amanullah, plaintiffs 'predecessor, i.e. by post or by courier service or through peon book and when they received the same.

79. Plaintiff No.l as PW 1 categorically stated that Khaleda Rahman wanted to sell the suit plot allotted to her for her financial constrain and they took permission from RAJUK for such sale. The Deputy Director (Estate), RAJUK by a letter dated 24-1-1988 informed that the suit plot would be transferred to them if they deposited transfer fees of Taka 1,72,313 and service charges of Taka 886 and accordingly, pursuant to the direction of RAJUK, they deposited the transfer fees and the service charges on 22-2-1988 and 24-2-1988 respectively with Janata Bank Limited, DIT Branch and thereafter, Khaleda Rahman executed and registered the sale ,deed on 22-10-1988 being deed No.13282. The permission letter dated 24-1-1988 was filed and proved as Exhibit '2', the original bank receipts showing deposit of transfer fees and service charges with the Janata Bank, the then DIT Branch were filed and

proved as Exhibits-3 and 3(Ka). PW 1 further stated that they claimed the suit plot on the basis of the kabala executed and registered by Khaleda Rahman. After purchase, Khaleda Rahman handed over possession of the suit plot to them, they are in possession thereof. After getting possession of the suit plot they did not receive any notice from RAJUK either written or verbal, RAJUK also did not give any notice written or verbal in respect of giving re-allotment of the suit plot to defendant No. 1. Since the plaintiffs are in possession of the suit plot they have 16(sixteen) annas right and title therein and if the lease had been cancelled that was done illegally. The sale deed executed and registered by Khaleda Rahman was filed and proved as exhibit 4 and her signature therein as Exhibit 4(Ka).

80. Defendant No.1 who examined himself as DW 1 in his deposition did not say a word as to the issuance of the alleged letter dated 26-6-1988 by RAJUK, either to the lessee, Khaleda Rahman or to the plaintiffs' predecessor, Amanullah and the receipts thereof by them asking either of them to submit the registered deed executed by the lessee and the other documents, such as; the agreement and the affidavit within 4(four) months from the date of issuance thereof and the issuance of any other notice or any other letter alleging violation of any terms of the lease deed prior to the cancellation of the lease of the original lessee, Khaleda Rahman and even did not deny the assertions made in the plaint that no notice was served upon the plaintiffs, their predecessor-Amanullah and the original lessee in respect of the suit plot stating violation of the terms of lease agreement *(emphasis supplied)*. DW 3 who was examined on behalf of RAJUK stated in his Examination-in-Chief that in clause 4 of the permission letter to sell the suit plot, it was mentioned that after registration of the deed that has to be filed to RAJUK within 4(four) months along with 'Halafnama' and 'Angikarnama' for mutation of name, but the purchaser failed to file those documents within long two years as per terms of the said clause of the permission letter. In his deposition, the DW even did not mention the date of the permission letter in which such condition was incorporated and whether the same was sent to the original lessee or the purchaser Amanullah and they received the same.

81. DW 3 further stated that in 1988, (no date mentioned) a notice was issued to Khaleda to show cause within 15 (fifteen) days as to why allotment given to her in respect of the suit plot shall not been cancelled for not making construction thereon and then as per, Board's decision the lease was cancelled in 1995(again no specific date was mentioned) and then the same was allotted to defendant No. 1 in 1996. But none of those documents were either filed or proved as exhibit. The DW did not at all state how those alleged letters were issued to Khaleda, i.e. by registered post, courier service or by peon book. When the defendants, particularly, defendant No.2 took the specific plea that a letter was issued to Khaleda on 26-6-1988 asking her to get the deed executed and registered and to file the certified copy thereof with a deed of agreement and an angikarnama (hereinafter referred to as the documents) within 4 (four) months from the issuance of the letter and in fact, the permission to sell the suit plot was cancelled for her failure to file the said documents within the said period the onus was squarely upon RAJUK to file the said letter and prove the same as per the rules of evidence and al least to prove the fact that the said letter (26-6-1988) was sent either to the lessee or to Amanullah, but admittedly no such letter was filed and proved *(emphasis supplied)* and thus it failed to discharge its onus.

82. From the judgment of the trial Court as well as the Appellate Court, it appears that both the Courts below decided the fate of the suit taking it for guaranteed that by the letter dated 26-6-1988 the plaintiffs' father, Amanullah was

given 4 months time to file the documents, but he filed those after two years in violation of the terms of the transfer permission, but unfortunately admitted fact is that the said letter was not filed by the defendants *(emphasis supplied)*. The trial Court gave another apparent wrong finding that the plaintiffs and the defendants did not file the original and final permission letter by which permission was given to transfer the suit plot on certain conditions, as the plaintiff filed the permission letter and the same was proved and marked as Exhibit '2'.

83. Both the Courts below failed to consider that the onus was upon the defendants to file the letter dated 26-6-1988 and prove the same, as they asserted the fact of issuance of the said letter to Amanullah or the lessee and thus made a fundamental error in forming an adverse opinion against the plaintiffs for non-filing of the same. We failed to understand how the Courts below could refer to and rely on a document which never saw the day of the light. The trial Court by referring to the contents of the letter dated 29-11-95(91)/29-1-91 (the trial Court has described the letter as Exhibit 'C. We shall discuss about the document later on) to the effect:

> "..... রাজউকের স্বারক নং-রাজউক/এস্টেট/১৬৬৯ স্বাঃ তারিখ ২৬-৬-৮৮ ইং এর মাধ্যমে উক্ত স্বারক ইস্যুর তারিখ হইতে ৪ (চার) মাসের মধ্যে বিক্রয় দলিল রেজিস্ট্রি করতঃ উহার সার্টিফাইড দলিলের কপি চুক্তিপত্র ও অংগীকার নামা দলিল করিতে বলা হয়েছিল কিন্তু (আপনি) উহা ৪(চার) মাসের পরিবর্তে ২(দুই) বৎসরের অধিক কাল পরে দাখিল করা হইয়াছে যাহা হস্তান্তরের অনুমতির শর্তে চরম লংঘণ।
>
> অতএব, হস্তান্তরের অনুমতি পত্রের শর্তের উল্লিখিত লংঘনের দায়ে কেন প্রদত্ত হস্তান্তরের অনুমতি বাতিল বলিয়া গণ্য হইবে না এই মর্মে অত্র পত্র প্রাপ্তির ১৫ দিনের মধ্যে যথার্থ কারণ দর্শাণোর জন্য আপনাকে অনুরোধ করা যাইতেছে। ব্যর্থতায় আপনার আবেদনপত্র বিবেচনা করা সম্ভব নয়।" gave the finding that "this letter was issued on 29-1-1991 to Mrs. Khaleda and a copy of the same was forwarded to Mr Amanullah, but they did not respond to this letter. Ultimately the allotment of Mrs. Khaleda was cancelled on 21-5-1995 due to non-making of any construction on the suit plot as per condition of the lease agreement." Though it was the specific case of the plaintiffs that they did not receive any such letter; DW 3 did not also say anything in his Examination-in-Chief about the issuance of such letter. The trial Court found fault with the plaintiffs' predecessor Amanullah for not taking any action against the said letter (Exhibit 'C as described by the trial Court) and also for not taking any step to mutate his name in the office of RAJUK, after issuance of the letter, completely ignoring and forgetting the plaintiffs' case that they never received any such letter and RAJUK failed to produce any proof that such letter was addressed to the original lessee, the plaintiffs or their predecessor Amanullah and they received the same. The trial Court finally concluded that "For the violation of clause 24 RAJUK i.e. Lessor has the right not to accept or recognize any person as Lessee of the demised property in place of the transferor. RAJUK did not recognise the father of the plaintiff as a Lessee of RAJUK for the suit land. So there is no need to give any notice to Mr Amanullah before cancellation of the lease agreement of Mrs. Khaleda." The above finding in effect, *prima-facie* prove the assertions made in paragraph 9 of the plaint as quoted hereinbefore.

84. The Appellate Court also without making reference to any document or exhibit in a vague way gave finding that "দাখিলকৃত কাগজপত্র পর্যালোচনা করা হইল। ইহাতে প্রতীয়মান হয় যে, রাজউক কর্তৃক বাধিয়া দেওয়া ২৬-৬-৮৮ ইং তারিখ হইতে ৪ মাসের মধ্যে হস্তান্তরের সঠিক কোন কাগজপত্র দাখিল করা হয় নাই। বরং ৪ মাসের পরিবর্তে ৪ বছর পরে দাখিল করা হয়। উক্ত রূপে চুক্তির শর্ত ভংগ করার ফলে রাজউক কর্তৃপক্ষ বাদীর পূর্ববর্তীর বরাদ্দপত্র বাতিল করেন এবং ২নং বিবাদী ১নং বিবাদীকে নতুন করিয়া বরাদ্দ দেন।" further appears that the Appellate Court in similar way without referring to any exhibit or document, whatsoever, gave further finding that "দাখিলী

কাগজপত্র পর্যালোচনা প্রতীয়মান হয় রাজউক মূল বরাদ্দপত্র গ্রাহিতার কাগজপত্র দাখিলের জন্য নোটিশ প্রদান করেন।" Thus, the finding of the Appellate Court, though the last Court of fact, cannot be accepted as a finding of fact based on proper consideration of the evidence on record within the meaning of Order XLI, rule 31 of the Code.

85. In the context, we consider it very pertinent and relevant to quote Exhibit '2' i.e. the letter issued by RAJUK on 24-1-1988 to the lessee, Khaleda Rahman permitting her to sell the suit plot which is as follows:

"রাজধানী উন্নয়ন কর্তৃপক্ষ
রাজউক ভবন, ঢাক-২।

স্বারক নং-রাজউক/উঃপঃ (এ)/১৭৩ স্বাঃ তারিখঃ ২৪-১-৮৮ ইং।

প্রেরকঃ এ, আর, ভূঞা
উপ-পরিচালক (এস্টেটস),
রাজধানী উন্নয়ন কর্তৃপক্ষ,
ঢাকা।

প্রাপকঃ মিসেস খালেদা রহমান
বি-৩৪৪, খিলগাঁও পূর্নবাসন এলাকা,
তালতলা, ঢাকা-১৯।

বিষয়ঃ উত্তরা আবাসিক এলাকার ৩নং সেক্টরের ১৫নং রাস্তার ৪১নং প্লটের হস্তান্তর প্রসঙ্গে।

আপনার বিগত ১০-৫-৮৭ ইং তারিখের আবেদনপত্র মোতাবেক নিম্নস্বাক্ষরকারী আর্দিষ্ট হয়ে জানাইতেছি যে, উপরোল্লিখিত খালি প্লট জনাব আমানুল্লাহ মিয়া, পিতা মৃত-কাজী রোশন আলী, ৩৩৮, তেজগাঁও শিল্প এলাকা, ঢাকা এর নিকট হস্তান্তর বিবেচনা স্বাপেক্ষে হস্তান্তর ফিস বাবদ টাকা ১,৭২,৩১৩ (টাকা এক লক্ষ বাহাত্তর হাজার তিনশন তের) মাত্র এবং ১-৭-১৯৭০ ইং তারিখ হইতে ৩১-১২-৮৮ তারিখ পর্যন্ত সার্ভিস চার্জ বাবদ টাকা ৮৬৮ (টাকা আটশত ছিয়াশি) মাত্র জনতা ব্যাংক, রাজউক ঢাকায় ২৯-২-৮৮ ইং তারিখের মধ্যে জমা দিয়া জমাকৃত টাকার ব্যাংক রশিদ প্রয়োজনীয় কার্য্যকর ব্যবস্থ গ্রহণের জন্য নিম্নস্বাক্ষরকারীর নিকট দাখিল করিতে হইবে। উল্লেখিত তারিখের মধ্যে টাকা দিতে ব্যর্থ হইলে কোন প্রকার নোটিশ ব্যতিরেকেই উক্ত আদেশ বাতিল বলিয়া গণ্য হইবে।

উপ-পরিচালক (এস্টেটস),
রাজধানী উন্নয়ন কর্তৃপক্ষ, ঢাকা।
তারিখ ২৮-১-৮৮ ইং। স
স্বারক নং-রাজউক/উঃপঃ (এ)/

অবগতি ও প্রয়োজনীয় ব্যবস্থা গ্রহণের অনুলিপি প্রেরণ করা হইল।

১। ব্যবস্থাপক
জনতা ব্যাংক,
রাজউক শাখা
ঢাকা।

উপ-পরিচালক (এস্টেটস),
রাজধানী উন্নয়ন কর্তৃপক্ষ, ঢাকা।"

86. A mere reading of Exhibit '2' shows that permission was given to the lessee, Khaleda Rahman to sell the suit plot to Amanullah Mia subject to condition that she shall have to pay a sum of Taka 1,72,313 as transfer fee and a sum of Taka 886 as service charges with Janata Bank, RAJUK Branch, Dhaka by 29-2-1988 and then deposit the bank receipts with the author of the letter,, the Deputy Director (Estate) RAJUK, Dhaka, the only penultimate line written in the permission letter was that উল্লেখিত তারিখের মধ্যে টাকা দিতে ব্যর্থ হইলে কোন প্রকার নোটিশ ব্যাতিরেকেই উক্ত আদেশ বাতিল বলিয়া গণ্য হইবে" *(emphasis supplied).* From Exhibits 3 and 3(Ka), it is *prima-facie* proved that the transfer fee and the service charges as mentioned in the permission letter (Exhibit-'2') were deposited on 22-2-1988 and 24-2-1988 respectively, i.e. well before 29-2-1988 and these facts have never been denied by RAJUK, rather admitted by it. From the permission letter (Exhibit 2), it is apparent that there was no condition to file the documents mentioned in the so called letter dated 26-6-1988 either by the lessee, Khaleda Rahman or the prospective purchaser, Amanullah within certain specific time. And if after deposit of the transfer fee and the service charges, some new conditions were put by issuing the letter dated 26-6-1988 as claimed by the defendants and also mentioned in the office note of RAJUK (the office note will be discussed later on) that required to be intimated/

dent No. 9 has not connection with the interpretation of any clause of the agreement and since the curtailment of work area of the writ petitioner cannot be treated as "বা কোন বিষয়" as provided in clause 21 of the servicing agency agreement the provision of arbitration cannot be involved. Accordingly to the learned Advocate, the dispute which arose in between the parties only relates to an action of the respondent No. 9 which is admittedly exercisable under the provision of Clause 2 of the servicing agency agreement, but as the respondent No. 9 was liable to such exercise of the power in a reasonable and fair manner and since the respondent No. 9 has acted in unreasonable manner, their action under this clause can be challenged in the court of law and the arbitration clause is not applicable as the cause of action of this writ petition neither has any relevance with the interpretation of any of the clause of servicing agency agreement nor did the same has got any relevance with the phrase "বা কোন বিষয়" of the agreement.

We find substance in the submission of the learned senior Advocate Mr K.S. Nabi. The dispute that has arisen in between the parties is regarding an exercise of power which is available within clause 2 of the agreement Annexure-C(l). There is nothing apparent on this dispute that any interpretation of any of the clause of the agreement, Annexure-C(l), is required to be made to come to a solution of the dispute, nor the dispute although arisen from the relationship with the respondent No. 9, can be treated as arisen from the wrong interpretation of any of the clause of the servicing agency agreement. Therefore, this court finds that the provision for arbitration, prior to resorting to the court of law, is not applicable in this dispute as has been brought by the writ petitioner before this court.

49. The aforesaid proposition as to maintainability of writ petition, despite the arbitration clause remaining in the contract agreement dated 21-10-2011, is equally applicable in the instant case.

50. Before entering into the question of non-liability of the writ-petitioner to pay Advance Income Tax (AIT), meaning thereby payment of income tax upon the payment connected with the importation of the permanent equipments and materials, the relevant provision in the contract Agreement dated 21-10-2011, the relevant clauses of GCC and SCC are required to be examined. The rule Nisi indicates that the only question involved in this proceeding is to resolve the question whether the deduction of 5% Advance Income Tax (AIT) from the bills paid to the writ-petitioner connected with importation of permanent equipments, is lawful or not.

51. Clause No. 14 of the General Condition of Contract deals in with the provision of payment of Taxes and duties which runs as follows;

"Clause-14: Taxes and Duties

14.1 Except as otherwise specifically provided in the Contract, the Contractor shall bear, and pay all taxes, duties, levies and charges assessed on the Contractor, its Subcontractors or their employees by all municipal, state or national government authorities in connection with the Facilities in and outside of the country where the Site is located.

14.2 Notwithstanding GCC Sub-Clause 14.1 above, the Employer shall bear and promptly pay all customs and import duties as well as other local taxes like, e.g., a value added tax (VAT), imposed by the law of the country where the Site is located on the plant specified in price schedule No. 1 and that are to be incorporated into the Facilities.

14.3 If any tax exemptions, allowances

or privileges may be available to the Contractor in the country where the Site is located, the Employer shall use its best endeavors to enable the Contractor to benefit from any such tax savings to the maximum allowable extent.

14.4 For the purpose of the contract, it is agreed that the Contract Price specified in Article 2 (Contract Price and Terms of Payment) of the Contract Agreement is based on the taxes, duties, levies and charges prevailing at the date twenty-eight (28) days prior to the date of bid submission in the country where the Site is located (hereinafter called "Tax" in this GCC Subclause 14.4). If any rates of Tax are increased or decreased, a new Tax is introduced, an existing Tax is abolished, or any change in interpretation or application of any Tax occurs in the course of the performance of Contract, which was or will be assessed on the Contractor, Subcontractors or their employees in connection with performance of the Contract, an equitable adjustment of the contract price shall be made to fully take into account any such change by addition to the Contract price or deduction therefrom, as the case may be in accordance with GCC Clause 36 hereof.

52. Clause 14 of the special condition of contract (SCC) has modified the provision of Clause 14 of the GCC in the opposite direction, which runs as follows;

Taxes and Duties.

14.1 Replace GCC 14.2 as follows:

Notwithstanding GCC Sub-clause 14.1

a) Custom & import duties, VAT and other taxes, if any, levied by the Employers' country at the port of entry on permanent materials/goods imported, from outside the Employer's Country for permanent installation except materials for Civil Works shall be paid by the Employer. Customs & import duties, VAT, business taxes, income and other taxes that may be levied in accordance with the laws and regulations of the Employer 's country at the port of entry on consumable/items imported from outside the Employers' country, on the Contractor's equipment, plant, materials including consumables required for the purpose of carrying out the Works shall be paid by the Contractor;

b) The Employer shall deduct the Taxes including withholding Tax and VAT from the total contract price (from all currencies) as per Government of Bangladesh (GOB) Rules and prescribed rates imposed by National Board of Revenue (NBR) from time to time and shall deposit the same to the GOB in the credit of the Contractor. The evidence of the deposit will be provided to the Contractor. Tax and VA T deducted from foreign currency(ies) will be converted to local currency at the exchange rate as on current date and will be deducted from the local currency portion of the Contract Price is not sufficient the balance Tax and VAT shall be deducted from foreign currency(ies);

c) Custom/Import duties, and other charges for import/export of personal effects of the contractor's employees shall be paid by the Contractor, if any;

d) Contractor shall pay any and all personal income taxes levied by the Employer's country on expatriate employees and agents of contractor;

e) If any plant be imported/transported by air-freight without the prior written approval of the Employer the Contractor shall be responsible for, and bear the cost of all import and customs duties, etc., for the air-freight consignment.

(Emphasis supplied for better appreciations)

53. Clause 14.1 (a) of the SCC imposed the liability of payment of customs and import duties, VAT and other taxes levied by Bangladesh at the port of entry on the shoulder of the employer, the GTCL which may be seen from the highlighted portion in the provision.

54. It appears that the permanent equipments and materials were imported mainly from the writ petitioner-company situated in Korea and other countries by way of import. Annexures-7, 8, 9 and 10 appended to the affidavit-in-opposition, filed by the respondent No. 8 are the copy of L/C's opened by the Basic bank Limited at the instance of the employer the GTCL, for the importation of permanent equipments and materials which have been claimed by the learned Advocate Mr Hasan Arif, appearing on behalf of GTCL as not to be L/C's rather import permits, and also in the affidavit-in-opposition submitted by the respondent No. 8, which not being a true fact, being found after pursuing the provision of Article-2.2 of the Contract Agreement dated 21-10-2011, which apparently directed the employer to open letters of credit for the importation of permanent equipments and materials. Therefore the assertion cannot be taken into consideration that the respondent No. 8 has not opened L/C for importation of the permanent equipments and materials for the two Gas Compressor Stations. This question has got a material implication on the question as to Point of Sell (POS) of the permanent equipments and materials upon which the question of legality of deduction of 5% AIT in Bangladesh rests.

55. It appears that the consideration for the permanent equipments and materials were paid through the process known as 'International Documentary Credit' and the relevant payment was effected in foreign country and not within Bangladesh. Admittedly, the employer GTCL effected release of the permanent equipments and materials from the Chittagong Port upon paying all necessary customs duties, including the Advance Income Tax @ 5%, apparently on the basis of the provision of Clause-14.1 of the Special Condition of Contract (SCC). Now it appears that the GTCL, by deducting the said amount of AIT from the further bills of the writ-petitioner company, as due for the installation part of the contract agreement, attempting to adjust the said payment, shifting the liability to the shoulder of the contractor to pay Advance Income Tax, thereby compelling the writ petitioner company to pay income tax on the income of such selling of permanent equipments & materials, claiming that the liability of payment of such AIT lies on the shoulder of the writ-petitioner company. This court is unable to accept the contention for two distinct reason.

56. First being related to the provision of Clause 14.1 (a) of the SCC, which categorically imposed the liability of payment of taxes, meaning as includes the AIT, upon the shoulder of the GTCL. From the facts and circumstances it appears that the GTCL has discharged its duties accordingly and paid the said AIT at the source when releasing the permanent equipments and materials. This payment of AIT has been argued by the GTCL, as payment made on behalf of the contractor writ petitioner to be adjusted with the bills to be paid to the contractor writ petitioner. But the question lies whether the contractor writ petitioner is at all liable to pay any AIT, i.e, any income tax, is inter connected with the 2nd reason as proposed to be expressed by this court at the commencement of the instant judgment.

57. Article-2.1 of the contract agreement dated 21-10-2011 deals with the contract price, which practically splitted the total amount to be paid to the contractor into two parts and accordingly the payments were made in two distinct aspects, one being made in the foreign currency as consideration of the permanent

equipments and materials and the other being or has to be made in the Bangladeshi currency paid for the job to be done in respect of installation and commissioning of the Gas Compressor Station. Such of the stipulation has been made in the following term in article 2.1 of the Contract Agreement dated 21-10-2011:

> Contract Price (Reference GCC Clause-11)
>
> The Employer hereby agrees to pay to the Contractor the Contract Price in consideration of the performance by the Contractor of its obligations hereunder. The Contract Price shall be the aggregate of; GBP 14,621,400 (Great Britain Pounds fourteen million, six hundred and twenty-one thousand and four hundred) plus EUR 13,827,033 (EURO thirteen million, eight hundred and twenty-seven thousand and thirty-three) plus USD 24,867,276 (United States Dollars twenty-four million, eight hundred and sixty-seven thousand, two hundred and seventy-six) plus KRW 29,482,197,251 (Korean Won twenty nine billion, four hundred and eighty-two million, one hundred and ninety seven thousand, two hundred and fifty one) plus BDT 2, 234,455,901 (Bangladesh Taka two billion, two hundred and thirty four million, four hundred and fifty five thousand, nine hundred and one) as specified in Price Schedule No. 5c Grand Summary of Case (i): Lot-1 (Ashuganj) and Lot-2 (Elenga) and as corrected and modified in accordance with the instructions to Bidders or such other sums as may be determined in accordance with the terms and conditions of the Contract.

58. From the aforementioned provision, it appears that so far the permanent equipments and materials are concerned, few of those have been sold by the writ-petitioner company in Korea and others are arranged to be imported by them from different parts of the world and accordingly the payment which has been stipulated in the contract agreement dated 21-10-2011 allowed to be paid in Great Britain Pound, US Dollar, Euro and Korean KRW. Therefore this court finds that even the method of payments of contract price indicates that permanent equipments and materials were purchased from the contractor in Korea and from other foreign countries and the payment by way of L/C's were made in Korea which accrues as income to the contractor in Korea and not in Bangladesh.

59. It appears that the government of Bangladesh and the Republic of Korea entered into a treaty (convention) for the purpose of 'Avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income' which was gazette notified on 3-10-1984 and became a binding convention in Bangladesh the provision of which shall prevail over the provision of any municipal law. This aspect as to prevalence of the said treaty (Convention) was decided by this court in the referred case of *Standard Chartered Bank vs The Commissioner of Taxes* in Income Tax Reference Application No. 345 of 2008 heard with Income Tax Reference Application No. 190 of 2009 wherein one of us is the author judge, wherein it has been held;

> Chapter XVII of the Income Tax Ordinance 1984 containing the provision of section 144 and 145 of the Income Tax Ordinance 1984, as examined elsewhere in this judgment, deals with the affair "Double Taxation Relief". The provision of section 144(1) of the Income Tax Ordinance 1984 provides for executing agreement to avoid double taxation. The provision of section 144(2), containing the Non-obstantive clause, provides that where such agreement was entered into, the provision of such agreement shall have prevalence against any other law prevailing in Bangladesh.
>
> The same 'Non-obstantive clause' was also contained in the earlier provision of

section 49 AA of the Income Tax Act 1922 and therefore the provision of section 49AA of the Income Tax Act 1922 had the applicability as against any other law prevailing at the relevant period and therefore it is crystal clear that the provision of the Article of the convention has a higher status over the provision of any other law of the country including the other provisions of the Income Tax Ordinance 1984. The convention, dated 8th August 1979, as has been Gazette notified on 8th July 1980, has been made through the gateway of the provision of section 144 of the Income Tax Ordinance 1984 (previously 49AA of the Income Tax Act 1922) and, as such, the same has acquired the force of law operating as against the other provision of the Income Tax Act 1922 or the Income Tax Ordinance 1984 in such respect. Therefore, this court finds that the provision of Article-7(3) of the Convention dated 8th August 1979, as annexed with the Gazette notification dated 8th July 1980 has given a privilege to the Assessee-applicant, being covered by the said convention, to get an allowance of the entire administrative expenses of its Permanent Establishment in Bangladesh as an allowable deduction from its profit, under the provision of section 29(xxvii) of the Income Tax Ordinance 1984.

60. Admittedly the writ-petitioner company is a Korean company and it has opened the branch office in Bangladesh. Article-5 of the said treaty (Convention) deals in the matter of permanent establishment, with runs as follows;

Article-5

PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

   (a) A place of management;

   (b) A branch; *(emphasis supplied)*

   (c) An office;

   (d) A factory;

   (e) A workshop;

   (f) A warehouse, in relation to a person providing storage facilities for others; and

   (g) A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. A building site or construction, installation or assembly project constitutes a permanent establishment only if it lasts more than 183 days.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include: *(emphasis supplied)*

   (a) The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;

   (b) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;

   (c) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

   (d) The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

(e) The maintenance of a fixed place or business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise: *(emphasis supplied)*

(f) The maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (c), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include the use of facilities or maintenance of a stock of goods or merchandise belonging to the enterprise for the purpose of occasional delivery of such goods or merchandise.

6. Notwithstanding the provisions of paragraphs 1 and 2, where a person, other than an agent of an independent status to whom paragraph 7 applies is acting in a contracting state on behalf of an enterprise of the other contracting state, that enterprise shall be deemed to have a permanent establishment in the first-mentioned contracting state in respect of any activities which that person undertakes for the enterprise, if such a person;

(a) Has and habitually exercises in that state an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or

(b) Has on such authority, but habitually maintains in the first-mentioned-state a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.

7. An enterprise shall not be deemed to have a permanent establishment in a contracting state merely because it carries on business in that state through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

8. The fact that a company which is a resident of a contracting state controls or is controlled by a company which is a resident of the other contracting state, or which carries on business in that other state (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

61. It has been claimed by the respondents that as the writ-petitioner is operating its business in Bangladesh by opening a Branch, the provision of Article-7 of the Convention mandates it to pay income tax in Bangladesh. This arguments was successfully refuted by the learned Advocate Mr Kamal-ul-Alam appearing on behalf of writ-petitioner with the facts that the writ petitioner since comes under the exclusion Clause provided in Article 5(4)(e) of the Convention, so far of the income it made by sell and supply of the permanent equipments and materials are concerned, are not taxable in Bangladesh.

62. Clause-2 of the Article 5 of the afore-

mentioned treaty (Convention) made the 'Branch' a permanent establishment with the exclusion made in clause-4, out of which sub-clause-(e) is relevant and applicable to the case of the writ-petitioner company. The activity of the Branch office, which has been opened in Bangladesh by the writ-petitioner, has been categorically limited by the Board of Investment (BOI) in the permission it has accorded to the writ-petitioner as "not to enter into any other business other than the business as obtained in the contract agreement dated 21-10-2011" and no allegation has been raised by the respondents that the writ-petitioner company is engaged in any other business then the contract agreement business.

63. The Board of Investment granted permission to the contractor writ petitioner to open a Branch under certain condition. The said permission letter is reproduced below;

Country Manager,
Hyundai Engineering Co., Ltd.
7-9, Karwan Bazar, Dhaka.

Sub: Permission for opening of Branch Office.

Dear Sir,

With reference to your letter dated 9-2-2012 and 5-3-2012 on the above subject, this is to inform you that according to the decision of 113th Inter-ministerial Committee meeting, Board of Investment of Bangladesh has been pleased to allow you to open branch office in Dhaka for a period of 3 (three) years w.e.f. 29-2-2012 on the following terms and conditions;

1. The activities of your branch office shall remain confined to consultancy on Engineering, procurement and construction services initially for Ashugonj and Elenga natural gas pipeline and 150 MWCCPP project;
2. Your shall have to obtain extension of permission from Bangladesh Bank under section 18(B)of the Foreign Exchange Regulation Act, 1947
3. You shall have to follow the foreign exchange regulations of the government.
4. In case you intend to continue your office beyond the period approved in this order, you shall have to apply for necessary renewal in the prescribed from at least 2 (two) months before expiry of present term.
5. If you intend to employ any foreign national(s) in your office, prior government approval should be obtained from this Board. In this context, you are to ensure appointment of 5(five) local people at your office preferably in executive position under appropriate pay structure against 1 (one) foreign national.
6. While operating your business programme in this country, you shall have to abide by the rules, regulations, orders and instructions issued by the Government of Bangladesh from time to time.
7. All operational, functional and establishment costs including salaries of the expatriates and local employees in your office will be met on receipt of remittance from parent office.
8. No outward remittance of any kind from Bangladesh sources will be allowed.
9. If your office earns profit locally and wants to meet the necessary expenditure of the company in Bangladesh with that profit, you can apply to this Board with proper justification and sufficient supporting documents for exemption of condition- 7 & 8.

10. You shall have to open an account with scheduled Bank of Bangladesh for receipt of remittance to meet the expenses mentioned in condition-7 and 8 above.
11. Quarterly return of income and expenditure out of remittance receipt from abroad shall have to be submitted to this Board, Deputy Commissioner of Taxes, Companies Circle-17 or circle-59 (as applicable) and Bangladesh Bank
12. Any change of your present address should be intimated to this Board for necessary action before the change is actuated.
13. The permission issued under this order does not exempt you from the responsibility for obtaining clearance from any other Govt. agency if required under the existing Laws/Rules of the country.
14. You are not entitled to open any other business establishment beyond what has been sanctioned under the coverage of this order. If you intend to open any business establishment other than this, you have to apply separately.
15. Income tax shall have to be deducted at source while paying house rent, salaries, bills for supply of goods, services and contract work and subsequently to be deposited to the government accounts as per provisions of Income Tax Ordinance 1984.
16. Ministry of Home will issue security clearance in favour of your office after verification.
17. The permission issued under this order may be revoked, suspended and altered either in part or whole and new condition be added at any time without assigning any reason thereof.
18. The company shall have to bring inward remittance of at least US$ 50,000 within 2 (two) months from the date of issue of permission letter as establishment cost and 6 months operational expenses failing which the company shall have to remit 5% additional amount for each month.

Yours faithfully,
(Nabhas Chandra Mandal)
Executive Member

64. The responsibility of the aforementioned Branch office, as has been informed by the learned Advocate Mr Kamal-ul-Alam, is only to gather information and to pass on the same to the Korean head office and to facilitate the smooth installation and commissioning job of the Gas Compressor Stations in Bangladesh. This Branch office was established in accordance with the strict compliance of the permission accorded by the BOI. This cannot be treated as a 'Permanent Establishment' in derogation to the exclusion clause as has been made in Article-5(4)(e) of the treaty. In this respect the referred case in Writ Petition No. 3730 of 2005 has got relevance wherein their lordship in a Division Bench of this court categorically came to the decision upon considering the cases reported in *47 DLR (1995) 178* that a "Branch office opened for the purpose of gathering information and to pass on the same to its principal company does not come under the definition of permanent establishment". Therefore, this court finds that the writ-petitioner company has got no 'Permanent Establishment' in Bangladesh.

65. In the case of *India Tharmait Corporation Limited vs Commissioner of Taxes*, reported in *6 BLC 563* their lordship while considering the similar question held as under;

> "There is no business connection of the Indian Company in Bangladesh so far it relates to the sale and supply of welding materials. The transaction between the

Indian Company and the Bangladesh Railway was one between principal and principal. In one composite contract it was agreed upon by the parties that the petitioners will supply the necessary welding materials and will also do welding of Railway joints in Bangladesh yet the two parts of the contract are distinct and divisible. One is independent of the other. The supply of materials has nothing to do with the rending of the services to the Bangladesh Railway. The income earned by the petitioners through service charges actually accrued in Bangladesh out of its business operation in Bangladesh and that is why the assesses accepted the order of the DCT in that regard without any question. The petitioner being a non-resident company, the income earned by it outside taxable territories on sale of welding materials to Bangladesh Railway cannot be considered as income of the petitioner under section 17 and 18 of the Ordinance.

A business connection of a non-resident involves operations of business carried on partly in Bangladesh and partly abroad. On such cases, the non-resident may only be charged in respect of that amount of profit which accrued or arises to him in Bangladesh. In earlier years also the Bangladesh Railway similarly purchased welding materials from the Head Office of the petitioner company in India but no income was computed on supply of such income welding to the Bangladesh Railway by the petitioner company which has totally been ignored both by the DCT and the Appellate Tribunal in estimating net profit @ 12% on supplies of Railway welding materials for such years in question. Both the DCT and the Appellate Tribunal taking an erroneous view of law and facts have most illegally held that earning of income from supply of welding materials are chargeable to income tax when admittedly no business operation took place in Bangladesh so far it relates to supply of goods by the petitioner.

66. Now the question comes whether the writ petitioner company is liable to pay income tax in Bangladesh.

67. The treaty (convention) as aforementioned was concluded for the purpose of avoidance of double taxation as its prime aim. Article 7 of the treaty provides the method of calculating the business profit of the business enterprise operating in the other contracting state. The provision of Article-7 of the said Convention runs as follows;

Article-7

BUSINESS PROFITS

1. The profits of an enterprise of a contracting state shall be taxable only in that state unless the enterprise carries on business in the other contracting state through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other state but only so much of them as is attributable to that permanent establishment.
2. Subject to the provisions of paragraph 3, where an enterprise of a contracting state carries on business in the other contracting state through a permanent establishment situated therein, there shall in each contracting state be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred whether in the state in which the permanent establishment is situated or elsewhere.

4. No profits shall be attributed to a permanent establishment by reason of the mere purchases by that permanent establishment of goods or merchandise for the enterprise.

5. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the country.

6. Where profits include items of income which are dealt with separately in other Articles of this convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

68. From Clause-1 it appears that the business enterprise of the contracting states, meaning thereby in the instant case, the business enterprise of Korea, if taxable in Korea shall not be taxed in any manner in Bangladesh. The income, that has been accrued to the writ-petitioner company from the sell of permanent equipments and materials to the employer GTCL, cannot be termed as accrued in Bangladesh since the point of sale (POS) of those permanent equipments and materials was not occurred in Bangladesh, rather abroad. Since the payment relating to the sell is being made by way of international documentary credit, commonly made through Bank Letter of credit, this method of sell implies that the moment the permanent equipments and materials were boarded the vessel in Korea the conclusion of sell transaction occurs and the responsibility of the seller ended on that point. In the instant case the installation and commissioning of the those permanent equipments and materials cannot be connected with the sell of those materials for the purpose of imposing income tax liabilities upon the seller, although the writ-petitioner company is liable to maintain the installation of those permanent equipments and materials for a period of 730 (seven hundred and thirty) days in Bangladesh, which must be treated as different transaction other than sale of those materials. Admittedly the writ-petitioner company has obtained the consideration price of those permanent equipments and materials within the periphery of Korea by way of receiving payment from their bank pursuant to the L/C opened by the employer GTCL. As the payment was made in Korea as consideration of the permanent equipments and materials, that cannot be treated as have been made in Bangladesh, although the liability for sell of Permanent equipments and materials was made within the purview of the contract agreement dated 21-10-2011.

69. Apart from the aforesaid reasoning another aspect of this case is also required to be considered. The writ petitioner company is admittedly a non-resident company which admittedly obtained TIN for the purpose of payment of income tax upon the income which accrues in Bangladesh. The provision of section 18 of the Income Tax Ordinance 1984 defined the deemed income of an assessee accrues in Bangladesh. Sub-section (5) of section 18 of the Income Tax Ordinance 1984 liable the writ petitioner company to pay income tax on the income arising out of the technical service related to the installation of Permanent equipments and materials, it renders to GTCL in Bangladesh, which reads as follows;

Income Tax Ordinance 1984

Section 18... (5): Income deemed to accrue

or arise in Bangladesh.—

The following income shall be deemed to accrue or arise in Bangladesh, namely:—

(1)-(4).....

(5) any income by way of fees for technical services payable—

(a) by the Government; or

(b) by a person who is a resident, except where such fees are payable in respect of services utilized in a business or profession carried on by any such person outside Bangladesh or for the purposes of making or earning any income from any source outside Bangladesh; or

(c) by a person who is a non-resident where such fees are payable in respect of services utilized in a business or profession carried on by such person in Bangladesh or for the purposes of making or earning any income from any source in Bangladesh.

70. Despite the aforesaid provision, section 17 of the Income Tax Ordinance 1984 deals in with the subject 'scope of total income' which exempted the non-resident from computing its total income less accrued out of Bangladesh. Such provisions are reads as follows;

Income Tax Ordinance 1984

Section 17(b): Scope of the total income.—

(1) Subject to the provisions of this Ordinance, the total income of any income year of any person includes-

(a).....

(b) in relation to a person who is a non-resident, all income from whatever source derived, which-

(i) is received or deemed to be received in Bangladesh by or on behalf of such person in such year; or

(ii) accrues or arises, or is deemed to accrue or arise, to him in Bangladesh during that year.

(2).....

71. This provision has also exempted a non-resident company from calculating its total income only with the Bangladesh part and not to include the off shore part of the income. Therefore, no question arises at all as to income tax liability upon the income accrues outside Bangladesh.

72. Under all these aspects of the case the writ-petitioner company is not liable to pay any tax in Bangladesh including Advance Income Tax, so far the sell and supply of the permanent equipments and materials are concerned. The binding treaty, as made in between these to sovereign state, Bangladesh and Korea since exempted its business enterprise from payment of income tax in the other contracting state, the contractor writ petitioner has, correctly raised objection against the deduction of 5% AIT from the contract price for the sell of permanent equipments and materials.

73. In this connection the referred decision made in the case of *'Hyundai Corporation vs Deputy Commissioner of Taxes*, reported in *51 DLR 333* may be profitably examined, wherein the Para No. 7 their lordship held as under;

"The case of the petitioner is that their interest is protected under the convention Annexure-B to the petitioner. We have gone through the available materials, particularly the convention and the permission Annexure-A and it appears that the petitioner corporation has been allowed to open a liaison office in Bangladesh and their activities were confined to collection of data and information and to submit report for making investment from Korea

and under the convention they have not been permitted to do any business in Bangladesh. From the order of the Deputy Commissioner of Taxes, Company Circle-11, Dhaka (East) Zone, Dhaka who assessed the tax it is very clear that the assessment was made on the basis of estimated Clause, world sales and also actual sales made to Bangladesh and also estimated net world profit and it also appears that the Deputy Commissioner of Taxes found that most of the work has been performed by the Head Office of the assessed petitioner and considering the quantum of trade the company made in its Head Office the assessment was made at one-third of the income which is attributed to Bangladesh. In the entire order there is nothing to show that the assessee did any business inside Bangladesh. The word "to Bangladesh" is very significant. This use of the words indicates that the taxing officer was aware that the petitioner did not do business in Bangladesh. The principal office in Korea might have sent their products to Bangladesh for business purpose to different persons through opening of LCs. The Korean products or the products of this corporation may have been marketed but that does not mean that those were marketed through the petitioner. From the judgment of the Appellate Joint Commissioner of Taxes it appears that the petitioner feed back their principal in Korea certain materials for participating in international tenders floated from Bangladesh and it further appears that the principal sent certain goods to Bangladesh and they received payment direct from the aid giving countries and organizations. This clearly indicate that the petitioner has no business in Bangladesh and principal office has at best exported certain goods on receiving payment from the aid giving countries and organizations and also through LCs opened by individual persons.

So, from the perusal of this judgment passed by the Appellate Joint Commissioner of Taxes it is abundantly clear that the petitioner did no business in Bangladesh. We have also gone through the judgment of the Taxes Appellate Tribunal and it appears that in their judgment they have not at all discussed or considered the points at issue. They have simply stated the parties case and then dismissed the appeal. This judgment cannot be construed as a proper and legal judgment. They have shirked their responsibilities and they have not considered the points at issue. The only points at issue is whether the petitioner can be assessed income tax which the Tribunal has not considered in all terms".

74. Relying upon the aforesaid decision it can be firmly said that the writ petitioner company is not liable to pay any income tax or Advance Income Tax (AIT) so far its income arising out of sell of permanent equipments and materials are concerned.

75. But it appears that the Employer GTCL has already deducted the money from the Bill of the writ petitioner company on the plea that it is mandated under section 52 of the Income Tax Ordinance 1984 to deduct such AIT or to face the consequence of its failure to such deduction. But since the contractor writ petitioner is exempted from payment of income tax, the payment which were made by the GTCL as AIT at source was not payable at all and accordingly refundable to GTCL and, as such, no question of deducting the same from the bills of contractor writ petitioner arises at all. Therefore any such deducted amount is also refundable to the contractor-writ-petitioner as the contractor writ petitioner is not liable to pay the same.

76. Under the reasoning and discussion as above, this court finds merit in the rule Nisi since the deduction of the Advance Income Tax (AIT) @ 5% by the employer GTCL company

from the bills of the writ-petitioner company, as has been evidenced by Annexure-17 appended to affidavit-in-reply filed by the respondent No. 8 has been made without any lawful authority and therefore this rule nisi is required to be made absolute.

77. In the result, the rule nisi is made absolute.

78. The deduction of money @ 5% as Advance Income Tax (AIT) at source from the contract price/bills of the writ-petitioner company against contract agreement No. GTCL/CSP/EPC/002 dated 21-10-201 (Annexure-B) so far as it relates to the transaction took place outside the taxable territory of Bangladesh i.e. in Korea for selling and supply of the plant, mandatory spare parts, equipments and the other materials to the respondent No. 8 in Bangladesh is hereby declared to have made without any lawful authority and is of no legal effect.

79. All the respondents are directed to refund back the money amounting to Taka 19,51,56,447.59 to the petitioner deducted as 5% Advance Income Tax (AIT) at source from the foreign currency portion of the contract price/bills of the writ-petitioner company as shown in Serial Nos. I and II in the table as mentioned in Paragraph No. 7 in the writ petition against contract agreement No. GTCL/CSP/EPC/002 dated 21-10-2011 (Annexure-B) within 45 (forty five) days from the date of receipt of the certified copy of this judgment.

80. It is further observed that the respondent No. 8, GTCL is also entitled to refund of the amount, it paid as AIT at source for the importation of permanent equipments and materials.

81. Let the instant proceeding be treated as a continuous *mandamus* and the respondents are directed to file affidavit of compliance within 15(fifteen) days after the actual payment made to the writ-petitioner.

Let this matter appear in the list on 6-5-2014 as for order.

However, there shall be no order as to costs.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Sheikh Abdul Awal J

Judgment
April 24th, 2014.

Harun-ur Rashid (Md) ..Pre-emptee-Petitioner

vs

Rashed Harun and others.....Pre-emptor-Opposite Parties*

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

Both the parties separated their joma by mutating their names in respect of the case land and, as such, the pre-emptor lost his right for pre-emption. .....(28)

Moudud Ahmed and Samiran Das Gopta and Mohammad Motahar Hossain, Advocates—For the Petitioner.

Syed Shahidur Rahman and Md Jahangir Alam, Advocates—For the Opposite Party No.1.

Judgment

This Rule was issued calling upon the opposite party No.1 to show cause as to why the judgment and order dated 13-2-2013 passed by the learned Joint District Judge, 2nd Court, Chittagong in Misc. (Pre-emption) Appeal No. 56 of 2010 allowing the appeal and setting-aside the judgment and order dated 24-2-2010 passed by the learned Senior Assistant Judge, 1st Court, Patiya, Chittagong in Pre-emption Misc. Case No. 76 of 2005 disallowing the pre-emp-

*Civil Revision No.1066 of 2013.

tion should not be set-aside.

2. Relevant facts, in short, are that the opposite party No.1 as pre-emptor filed Pre-emption Case No.76 of 2005 in the Court of the Senior Assistant Judge, 1st Court, Patiya, Chittagong for pre-empting the case land as described in the schedule of the application.

3. The case of the pre-emptor-opposite party No.1, in-short, is that the pre-emptor-opposite party No.1 is a co-sharer to the case jote.

4. The vendor-opposite party No.2, Kanchan Miah alias Motahar Meah without serving any notice upon him transferred the case land to the pre-emptee-opposite party No.1 (present petitioner), who is stranger to the case jote. Hence, the case.

5. The pre-emptee-petitioner resisted the pre-emption application by filing written statement denying most of the allegations of the pre-emption application contending, *inter-alia*; that the case land originally belonged to Samad Miah, Thanda Miah, Sydur Haque and others; Samad Miah and Thanda Miah transferred their share to Ezahar Meah by registered patta dated 14-6-1940 and Sydul Haque also transferred his share to Ezahar Meah by registered patta dated 2-6-1934 and after the death of Ezahar Meah his son Kanchan Miah alias Motahar Meah inherited the entire land and accordingly, his name finally published in BS Khatian. Thereafter, Kanchan Miah transferred the case land to the pre-emptee-petitioner on 6-7-2005 by registered deed with the full knowledge of the pre-emptor and other co-sharers and after purchasing the property the pre-emptee-purchaser mutated his name by opening mutation Khatian No. 2645. The pre-emptee purchaser has many lands surrounding the case land and that he is not a stranger to the case land. It has been also stated that the pre-emptor-opposite party is not a co-sharer at all and, as such, the case is liable to be dismissed.

6. At the trial pre-emptor-opposite party No.1 (present opposite party No.1) examined in all 3 PWs and the pre-emptee purchaser (present petitioner) examined in all 2 OPWs and also exhibited the documents to prove their respective cases.

7. The trial Court after closing of the evidence and hearing argument of both the parties by his judgment and order dated 24-2-2010 disallowed the pre-emption on the ground that the pre-emptor could not prove that he is a co-sharer to the case jote.

8. The unsuccessful pre-emptor, thereupon, preferred Misc. Appeal No.56 of 2010 before the learned District Judge, Chittagong, which was eventually heard and disposed of Joint District Judge, 2nd Court, Chittagong, who by the impugned judgment and order dated 13-2-2013 allowed the appeal and set-aside the judgment passed by the learned Senior Assistant Judge, 1st Court, Patiya, Chittagong on the finding that in the facts and circumstance of the case the trial Court below committed illegality in holding that the pre-emptor is not a co-sharer to the case jote and the instant Revision application is directed against that judgment.

9. Mr Moudud Ahmed, the learned Advocate appearing for the pre-emptee-petitioner after placing the impugned order as well as the judgment of the trial Court below submits that the impugned order is not at all a proper judgment of reversal inasmuch the Court of appeal below without adverting the findings of the trial Court below abruptly arrived at a finding that the trial Court below committed illegality in holding that the pre-emptor is not a co-sharer to the case jote. Mr Moudud Ahmed further upon referring the evidence of OPWs submits that the pre-emptee purchaser himself was examined as OPW-1, who in his evidence categorically stated that the pre-emptor is not a co-sharer to the case land

and the pre-emptee purchaser is a co-sharer to the case jote and he has more land surrounding the case land but the Court of appeal below as last Court of fact without considering the evidence of OPWs and without adverting the material finding of the trial Court below most illegally set-aside the judgment of the trial Court below which resulted in the failure of justice. Finally, Mr Moudud Ahmed submits that as per mutation Khatian No.2962 the co-sharer ship of the pre-emptor-opposite party No.1 has been ceased and since the pre-emptor lost his co-sharer ship by separating his joma through Mutation Case No.7396 of 2011 he cannot apply for pre-emption.

10. Drawing support of his submission, the learned Advocate has relied on a decision reported in *55 DLR 214.*

11. Mr Syed Shahidur Rahman, the learned Advocate appearing for the pre-emptor-opposite party No.1, on the other hand, supports the impugned judgment and order which was according to him just, correct and proper. Mr Shahidur Rahman in the course of his argument upon placing judgments of two Courts below, deposition of witnesses submits that the pre-emptor in his deposition as well as pre-emption application categorically stated that he become a co-sharer to the case land by inheritance and thus, the Court of appeal below committed no illegality in holding that the trial Court committed wrong in arriving at a finding that the pre-emptor is not a co-sharer to the case land. The learned Advocate further submits that PW-1, PW-2 and PW-3 categorically stated in their respective testimony that the pre-emptor-purchaser is stranger to the case jote and the claim of the pre-emptee-opposite party that he is a co-sharer to the case jote is false and without any legal basis. Finally, Mr Shahidur Rahman, relied on the decisions reported in *35 DLR (AD) 54* and *34 DLR 180, and* submits that the findings of the Court of appeal below are well founded in law and facts that the pre- emptor-opposite party No.1 is a co-sharer to the case jote and he is entitled to pre-empt the land, is well founded in law and fact and the same should not be disturbed.

12. Heard the learned Advocates for both the sides and perused the revision application, deposition of witnesses, judgments of two Courts below and other materials on record.

13. The main point for consideration is as already noticed whether the Court of appeal below was justified in holding that the trial Court below committed wrong in arriving at a finding that the pre-emptor could not prove that he is a co-sharer to the case jote.

14. It appears that in this case pre-emptor himself was examined as PW-1, who in his cross-examination stated that:- বি, এস, ২১৩৩ ও ২১৩৯ নং খতিয়ানে আমার নাম নাই। বি,এস, রেকর্ডীয় মুস্তাফিজুর রহমান মারা যায়। তাদের ওয়ারিশ কয়জন জানিনা। কাঞ্চন মিয়াকে পক্ষ করেছি। বি,এস,রেকর্ডীয় মরিয়ম খাতুন কে চিনি না। নালিশী ভূমি বি, এস, ২১৩৩ ও ২১৩৯ খতিয়ানের ভূমি। ১নং প্রতিপক্ষের দাখিলী। জবাব পড়ি নাই। ১নং প্রতিপক্ষের নামে নালিশী জমি সম্পর্কে বি,এস, ৬৪৫ নং নামজারী খতিয়ান হয়েছে কিনা জানিনা।

15. Pre-emptee-purchaser himself was examined as OPW-1, who in his deposition stated that:- নালিশী ভূমির চর্তুদিকে আমার জমি। ঐ ভূমি ২৩-১১-২০০২ ইং তারিখের ৭০২২ নং কবলা মুলে খরিদ করি। This witness also stated that:- নামজারী খতিয়ান মুলে জমা ভাগ করেছি। প্রার্থীক আমার হোল্ডিং এ শরীক নহে।

16. OPW-2, Md Ali stated in his deposition that:- আমি প্রার্থীক ১নং প্রতিপক্ষকে চিনি। নালিশী ভূমির আশে পাশে সকল জমি ১নং প্রতিপক্ষের। নাঃ জমি ১নং প্রতিপক্ষের জন্য আবশীকীয়।

17. It appears from the "Exhibit No. Kha" that the pre-emptee-purchaser after purchasing the case land mutated his name.

18. From the above quoted evidence, it appears that both the parties are claiming that they are co-sharer to the case jote.

19. On going through the pre-emption application and written objection, it appears

that the case land originally belonged to Samad Miah, Thanda Miah, Sydur Haque and others; Samad Miah and Thanda Miah transferred their share to Ezahar Meah by registered patta dated 14-6-1940 and Sydul Haque also transferred his share to Ezahar Meah by registered patta dated 2-6-1934 and after the death of Ezahar Meah his son Kanchan Miah alias Motahar Meah inherited the entire land and accordingly, his name finally published in B.S. Khatian, who sold out the case land to the pre-emptee-petitioner on 6-7-2005 by registered deeds and father of the pre-emptor named Alhaj Mvi. Md Harun Islamabadi purchased the land from the brother of Motahar (brother of Kanchan Miah) from the case holding by registered deeds dated 9-10-1997, 19-6-1997, 21-1-1998, 5-8-1997 and 13-4-1997 and in this way the father of the pre-emptor became co-sharer to the case holding in the year 1997 and the pre-emptee purchaser became co-sharer to the case holding in the year 2005. It further appears that both the parties after purchasing the land from parent joma mutated their names.

20. On considering all these aspects of the case together with the findings of the trial Court below, I do not find any reason that pre-emptor purchaser is a stranger to the case jote and the pre-emptor opposite party is a co-sharer to the case jote and he is entitled to preempt the case land.

21. In this connection, I must quote a passage from the judgment of the trial Court, which reads as follows:

"পর্যালোচনায় দেখা যায় প্রার্থীর অগ্রক্রয় আবেদনে তার পূর্ববর্তী মাওলানা হারুন ইসলামামাদী আর,এস, রেকর্ডীয় স্বত্ববান ব্যক্তিগণ হতে না তাদের ওয়ারিশ হতে খরিদ পুর্বক স্বত্ববান ও দখলকার ছিলেন তা সুস্পষ্টভাবে উল্লেখ করেননি। আর,এস, রেকর্ডীয় স্বত্ববান ব্যক্তিগণ কোন কোন ব্যক্তিকে স্বত্ববান ওয়ারিশ রেখে মৃত্যুবরণ করেন। উক্ত বিষয়েও সুস্পষ্ট বর্ণনা প্রার্থীর অগ্রক্রয় আবেদনে উল্লেখ নাই। নালিশী আশিয়া মৌজাসহ অত্র এলাকায় হাল বি, এস, জরীপে বি, এস, খতিয়ান চুড়ান্ত ভাবে প্রচারিত হয়ে পৃথক জোত জমার সৃষ্টি হয়েছে। আইনের বিধান মতে অগ্রক্রয় আবেদন হাল জোত জমার উপর নির্ভরশীল। নালিশী মোজায় নালিশী আর, এস, ১৪৪৩, আর এস ১৪২০ এবং আর, এস, ১৪৯০ নং খতিয়ানের ভুমি বাবদ কত নম্বর হাল বি, এস, খতিয়ান চুড়ান্ত ভাবে প্রস্তুত ও প্রচারিত হয়েছে তা প্রার্থীর আবেদনে উল্লেখ করা হয়নি। হাল বি, এস, জরীপে কোন কোন ব্যক্তি শরীক প্রজা এবং প্রার্থী হাল বি, এস, খতিয়ানে ভুমিতে শরীক প্রজা কিনা ইত্যাদি বক্তব্য প্রার্থীর আগ্রক্রয় আবেদনে সুস্পাষ্ট ভাবে উল্লেখ নাই। প্রার্থী কতিপয় দলিল দাখিল করে নালিশী জোতের ভুমিতে শরীক প্রজা দাবী করলেও তার অগ্রক্রয় আবেদন হাল জোত জমা এবং উক্তজোত জমার শরীকান সম্পর্কে উপযুক্ত বর্ণনা সংযোজন না করায় প্রার্থী নালিশী কবলার ভুমিতে শরীক প্রজা দাতার বিষয়ে স্পষ্ট ও খরচ ধারনা পাওয়া গেল না। প্রার্থীর অগ্রক্রয় আবেদিনের বক্তব্য অস্পষ্ট এবং দ্বার্থক মর্মে সাব্যস্ত হল"।

22. This being a purely a finding of fact based on assessment of the evidence on record that the pre-emptor could not establish a clear case that he is a co-sharer to the case jote. Therefore, in the facts and circumstance of the case, I am led to hold that the court of appeal below committed illegality in rejecting the finding of the trial Court on the point that the pre-emptor is not a co-sharer.

23. Another bone of contention raised in this revision that the impugned judgment is not a proper judgment of reversal.

24. On a reading of the impugned judgment together with the judgment of the trial Court, it appears that the Judge of the appellate court without adverting the proper material finding of the trial Court below arrived at a finding that:- বিজ্ঞ নিম্ন আদালতে প্রার্থীর শরিকদার না হওয়া সম্পর্কে যে সমস্ত বিষয়ে বিজ্ঞ নিম্ন আদালত ত্রুটি বিচ্যুতির তথ্য উল্লেখ করিয়াছেন তাহা গ্রহনযোগ্য নহে। নিম্ন আদালতে দায়েরকৃত আরজী জবাবের এই সমস্ত ভুল ত্রুটি মামলার গভীরে প্রবেশ করিলে উপেক্ষিত হইতে পারে।

25. This finding of the trial Court indicates that the Court of appeal below without applying its judicial mind into the facts and circumstance of the case mechanically set-aside the judgment of the trial Court below.

26. Further at the trial thereupon, referring Ext. B and mutation case No. 7396 of 2011 Mr

Moudud Ahmed argues that the pre-emptor losses his co-sharer ship in the tenancy or holding by separating his joma through a mutation and thus, he cannot get his right of pre-emption this important question was not raised before the Courts below.

27. On perusal of the record, I find nothing on the record to suggest that important question was raised before the Courts below by any of the parties.

28. On a perusal of the Ext.B and mutation being Mutation Case No.7396 of 2011, it appears that both the parties separated their joma by mutating their names in respect of the case land and, as such, I find good deal of substance in the contention raised by Mr Moudud Ahmed that the pre-emptor lost his right for pre-emption and accepted the same.

29. Here, it may further be mentioned that the decisions referred by the learned Advocate for the opposite party No.1 have no manner of application as the facts of the present case are quite distinguishable from the facts of those cases.

30. For the reasons stated above, I am inclined to hold that the learned Joint District Judge without applying its judicial mind into the facts and circumstance of the case and law bearing on the subject most illegally set-aside the judgment of the trial Court below, which resulted in the failure of justice.

31. The Rule is, therefore, made absolute. The impugned judgment and order dated 13-2-2013 passed by the learned Joint District Judge, 2nd Court, Chittagong in Misc. (Pre-emption) Appeal No. 56 of 2010 is set-aside. The order of stay granted earlier by this Court stands vacated.

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

Ed.

High Court Division
(Civil Revisional Jurisdiction)

FRM Nazmul Ahasan J } Manik Mia and another.....Petitioners

vs

Judgment
January 12th, 2014. } Azimuddin and others .....Opposite-Parties*

Code of Civil Procedure (V of 1908)
Section 151

Where a mistake of a Court or Court's officer causes injustice to a particular party, the power under section 151 of the Court can be exercised for the purpose of giving necessary relief even though there is an alternative remedy for doing the same. .....(20)

Makbul Ahmed vs Mohammedullah, 22 BLD 120= 54 DLR 399; Muzaffor Hossain vs Md Shahidullah, 51 DLR P400 and Ismailullah vs Sukumar Chandra Das, 1986 BLD (AD) 251= 38 DLR (AD) 125 ref.

Md Ibrahim Mollah with Mostafa Ahamed Md Alamgir Hossain, Advocates—For the Petitioners.

Md Humayun Kabir Bhuiyan, Advocate—For the Opposite-Parties.

Judgment

This rule was issued calling upon the Opposite party No.1 to show cause as to why the impugned Judgment and order dated 2-7-2009 passed by the Additional District Judge, 2nd Court Dhaka in Civil Revision No.156 of 2005 affirming those dated 10-3-2005 passed by the Special Joint District Judge and Paribesh Adalat, Dhaka in Title Suit No.01 of 2003 should not be set-aside.

2. Short facts for disposal of the rule are

*Civil Revision No. 3434 of 2009.

that the opposite party No.2 as plaintiff instituted the Title Suit No.77 of 1979 in the Subordinate Judge (now Joint District Judge) 5th Court Dhaka for partition and the suit was decreed in preliminary from 31-3-1981. After preliminary decree one Habibur Rahman was appointed as Advocate Commissioner for ascertaining in the share of each party and their possession. The Commissioner held a commission accordingly and submitted his report, wherein some irregularities were detected for which the report of the commissioner was rejected on 4-6-2000 in presence of all the party. Thereafter one Abdus Satter Howlader was appointed as Advocate Commissioner who submitted his report before the court, against which the plaintiff No. 1 and the defendant No. 19(a)-19(c) filed written objection which was heard by the trial court and it was rejected. Then Mr Shah Alam was appointed as Advocate Commissioner and his report was accepted. At the time of hearing, the defendant No.35 filed an application for a compact saham as the Advocate Commissioner allotted him 0.845 aujutangsha from separate plot being plot Nos. 651,652,667 (chita map No. 9,19,36). The defendant No.35 wanted to get the said saham from chita plot No. 10 as compact Saham. The trial court rejected the petition on 30-11-2004. The defendant No.19(kha) was allotted 5.06 decimals in chita plot No. 10 (plot No.651). The said defendant has been residing therein for about 50 years constructing sami pucca structure connecting electricity, gas, water line connection. The defendant No. 19(Ka) was allotted 6.17 decimal from plot No. 652 (chita Plot No. 11,12,13,16) who has been residing therein by constructing a 2 storied building. Both the defendant No. 19(Ka) and (Kha) were allotted 10 decimals from the plot No. 666(chita plot No.31). Thus the defendant No. 19(Ka) and 19(Kha) has been allotted 21.48 decimals of land which is accepted by the court on 30-11-2004. The defendant Nos.19(ka)-19(ga) got a saham of 24 decimals of land in preliminary decree dated 31-3-1981. Thereafter the defendant No.35 again filed an application under section 151 of the Code of Civil Procedure before the trial court on 10-2-2005 praying for getting compact saham. After hearing, trial Court allowed the application filed by the defendant No. 35, being aggrieved and dissatisfied with the aforesaid order petitioner preferred the Civil Revision before the District Judge under section 115(2) of the Code of Civil Procedure which was heard by the Additional District Judge 2nd Court Dhaka who affirmed the order passed by the trial Court.

3. Being aggrieved by and dissatisfied with the aforesaid judgment and order dated 2-7-2009 passed by the Additional District Judge 2nd Court Dhaka, defendant petitioner preferred this revisional application under section 115(4) of the Code of Civil Procedure before this Court and obtained the present rule.

4. Mr Md Ibrahim Mollah, the learned Advocate appeared on behalf of the petitioners while Mr Md Humayun Kabir Bhuiyan, the learned Advocate appeared on behalf of the opposite parties.

5. Mr Md Ibrahim Mollah, the learned Advocate appearing on behalf of the petitioner submits that the court below committed an error of law in rejecting the revisional application and affirming the order dated 10-3-2005 passed by the trial court bellow in allowing the application for compact saham which was rejected earlier by the trial court.

6. He next submits that the defendant No.35 without challenging the aforesaid order of rejection before the higher court again filed an application under section 151 of the Code of Civil Procedure which is not at all maintainable. He also submits that the courts below committed an error of law in not considering that there was no scope to compact Saham to the opposite party No.1 (defendant No.35). Thus the learned Additional District judge

committed an error of law in allowing the petition under section 151 of the Code of Civil Procedure resulting in an error occasioning failure of justice.

7. On the other hand Mr Md Humayun Kabir Bhuiyan, the learned Advocate appearing on behalf of the opposite party contended that the revisional court below committed no error of law in passing the impugned judgment and order affirming the order passed by the trial Court.

8. He next submits that the defendant No.35 was a purchaser under plot Nos. 651, 652 from defendant No.19 but he was allotted 8.45 decimal of land under plot Nos. 651,652,667, the commissioner allotted plot No. 667 which is not his puschased plot, for the reason the defendant No. 35 prayed for a compact saham which was not allowed on 30-11-2004. Thereafter, defendant No. 35 filed the petition under section 151 of the Code of Civil Procedure for a compact saham which was rightly allowed by the trial court.

9. Mr Md Humayun Kabir Bhuiyan, the learned Advocate also submits that the revisional court below after proper discussion of the documents on record affirmed the order of the trial court and rejected the revisional application filed by the petitioner. Thus the rule is liable to be discharged.

10. I have heard the learned Advocate for both the parties, perused the revisional application and the impugned judgment and order passed by the courts below and the documents annexed with the revisional application.

11. It appears from the record that both the defendant No.35 and defendant Nos. 19(Ka)-19(ga) got a saham in preliminary decree dated 31-3-1981, at the time of hearing of the commission report the defendant No.35 prayed for a compact saham under the plot No.651, 652 contending that the commissioner allotted him a Saham under plot No. 667 which is not his purchased plot, the Joint District judge rejected the application filed by the defendant No. 35 on 31/11/2004. Thereafter another application was filed under section 151 of the Code of Civil Procedure and it was allowed.

12. The learned Joint District Judge while allowing the application under section 151 of the Code of Civil Procedure considered that the defendant No.35 was not a purchaser under the plot No. 677 and the commissioner violated the preliminary decree passed by the court for the reason the Joint District Judge reviewed his own order dated 31-11-2004 and allowed a compact saham in favour of defendant No. 35 by allotting the chita plot Nos. 9 and 10 and by allotting chita plot No.19/36 instead of chita plot No.10 in favour of the defendant No. l0(a), 19(ga). Being aggrieved by the aforesaid order passed by the trial court petitioner preferred revisional application under section 115(2) of the Code of Civil Procedure which was rejected by the Additional District Judge. On the ground that the Joint District Judge found that the commissioner did not act in accordance with the preliminary decree and by virtue of his inherent power the trial court reviewed its own order dated 30-11-2004 to bring the preliminary decree in conformity with the judgment.

13. Now the question raised by the learned Advocate for the petitioner whether the trial court has inherent power to review his order under section 151 of the Code of Civil Procedure.

14. It appears that the defendant No. 35 prayed for a compact saham under the plot No. 651, 652 contending that commissioner allotted him a saham of 364 under plot No. 667 is not his purchased land. This matter is absolutely a matter of fact which was decided by the trial court to bring the preliminary decree in conformity with the judgment.

15. It appears from the record that the

defendant No.35 did not challenge the aforesaid order passed by the trial court in an appropriate form and without doing so, he filed an application under section 151 of the Code of Civil Procedure before the trial court, which was allowed.

16. In the case of *Muzaffor Hossain petitioner vs Md Shahidullah and other opposite party* reported in *51 DLR P 400* where it is held:

> "Decision recorded by a court can be set-aside or reversed not by the same Court but by the Superior Court. The same Court cannot sit on appeal on its own decision".

17. On the other hand Mr Md Humayun Kabir Bhuiyan the learned Advocate for the opposite party referred to the case of *Makbul Ahmed, being dead, his heirs, and others vs Mohammedullah* reported in *22 BLD 120= 54 DLR 399* where it is held:

> "Section 151 codifies the well established legal principle that every court has inherent power to act exdebite justice to that real and substantial justice for which alone the court exists, or to prevent abuse of the process of the court. The courts are to act upon the principle that every procedure furthering the cause of justice is to be understood as permissible till it is shown to be prohibited by law. The inherent powers referred to in section 151 are such as are used to secure the ends of justice or to prevent the abuse of the process of the court."

18. Although no revisional application was filed before this court against an order that was not appealable or an order passed by an application under section 151, following the above principle this court can interfere and correct the error committed by the learned sub ordinate judge".

19. In the case of *Ismailullah & ors vs Sukumar Chandra Das* reported in *1986 BLD (AD) 251= 38 DLR (AD) 125* where it is held:

> "Amendment of decree-When it can done-The Court can always amend the decree if there is a mistake that had crept in for bringing the decree in conformity with the judgment-Code of Civil Procedure".

20. It is a settled principle that where a mistake of a Court or Court's officer causes injustice to a particular party, the power under section 151 of the Code can be exercised for the purpose of giving necessary relief even though there is an alternative remedy for doing the same.

21. In the case of *Mujafar Hossain and other vs Shahidullah* his lordship Mr Justice Abdul Mannan and Mr Justice AK Badrul Huq after considering the application, "the lying of the subsequent application for amendment of the plaint by the appellant opposite party appears to afford us to get the amendment controversy reopened even though the Court decided the matter finally refusing the amendment. Finally it must attach to a decision rendered by a Court and the decision recorded by the said Court can be set-aside or reversed not by the said Court as it cannot sit on appeal on its own decision.

22. In the present application before us, the application is under section 151 of the Code of Civil Procedure for review of the earlier order passed the same court. The defendant No.35 did not prefer any application in any forum before the higher court, without doing so, filed the 2nd application with the similar prayer under section 151 of the Code of Civil Procedure.

23. From the discussion made above it appears that the decision reported in *51 DLR 400* in the case *Muzaffor Hossain vs Sahabuddin* is applicable in the present case and the decisions referred to by the learned Advocate for the opposite party are not applicable in the facts and circumstances of the present case. The judgment and order passed by the revisional Court affirming the order of the trial court are

set-aside, but the defendant No.35, if desire be, may prefer application before the appropriate higher court against the order dated 31-11-2004 passed by the trial court.

24. In the result, the Rule is made absolute. The judgment and order passed by the court's below are set-aside.

25. The order of stay granted earlier by this Court is vacated.

Send down the order of judgment to the trial court at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Sheikh Hassan Arif J
Mustafa Zaman Islam J

Judgment
February 18th, 2014.

Mofizul Islam (Md).....
.....Petitioner

vs

Secretary, Ministry of Law, Justice and Parliamentary Affairs and others.....
.....Respondents*

Evidence Act (I of 1872)
Section 115

Even if the petitioner, like other share-holders, enjoyed benefits from such illegality, he, or other share-holders, cannot be estopped from taking recourse to the writ petition as the doctrine of estoppel does not apply against statute. .....(14)

Bangladesh Commerce and Investment Limited (Reconstruction) Act (XII of 1997)
Sections 3(3) and 20(2)

When the legislature has enacted a law and provisions therein in clear words without any ambiguity, the long standing practice of the higher judiciary of this subcontinent is that the Court will not go beyond those clear words. The legislature has expressed no doubt as to the special status of the provisions of the BCIL Act, 1997.

The words used under sub-section (3) of section 3 which even went to the extent of providing that the provisions of the Bank Companies Act, 1991, the Act under which Bangladesh Bank exercises its regulatory powers over all scheduled banks, and the provisions of the Bangladesh Bank Order, 1972, by which Bangladesh Bank itself was created, will be made applicable subject to the provisions of the BCIL Act, 1997. .....(11)

Section 20(2)

When the legislature even dictates the government to place any order issued within the first 5 years of the establishment of the BCBL before the Parliament as early as possible, this means, at least for the period of the first five years, the BCBL would be under direct supervision of the Parliament. .....(11)

Section 19

Powers under section 19, to be exercised by the Bangladesh Bank in consultation with the government, can only be so exercised in respect of matters which are not included in the provisions of the BCIL Act, 1997 though they were required to be included therein. The clear reading of the provisions under section 19 takes us to only one conclusion that the power can only be exercised in respect of mat-

*Writ Petition No. 72 of 2014.

ters which are not included in the provisions of the Act. .....(12)

Nurul Haque vs Bangladesh, 51 DLR (AD) 140; Bangladesh vs Mahbubuddin, 50 DLR (AD) 154; Juanandra Chandra vs Dhirendra, 8 DLR 170, Bangladesh vs Md Aftabuddin, 30 DLR (AD) and Khandker Delwar vs Italian Manble Works, 62 DLR (AD) 298 ref.

Shafique Ahmed with Mahbub Shafique, Mizanur Rahman, Advocates—For the Petitioner.

AF Hassan Arif, Shamim Khaled Ahmed, Advocates—For the Respondent No. 6.

ABM Siddiqur Rahman, Advocate—For the Respondent No. 2.

Judgment

Sheikh Hassan Arif J: Rule was issued calling upon the respondents to show cause as to why the notices published in "The Daily Ittefaq" on 22-11-2013 and 22-12-2013 for issuance of right shares of the respondent No. 5 (Annexures-D and D-1) for increasing its "Paid up and Reserve capital" as per BRPD Circular No. 11 dated 14-8-2008 issued under section 13 (2) of the ব্যাংক-কোম্পানী আইন, ১৯৯১ by the respondent No. 2 in violation of section 5 of the বাংলাদেশ কমার্স এ্যান্ড ইনভেস্টমেন্ট লিমিটেড (পূনর্গঠন) আইন, ১৯৯৭ should not be declared to have been issued without lawful authority and are of no legal effect.

2. Short facts, relevant for the disposal of the Rule, are that the petitioner is a share-holder of the Bangladesh Commerce Bank Limited (BCBL) (respondent No. 5) holding 113 (one hundred and thirteen) shares thereof numbering from 2966066-2966115 and 18315877-18315939, having face value of Taka 100 each. BCBL was established by a statute, namely Bangladesh Commerce and Investment Limited (Reconstruction) Act, 1997 (Act No. 12 of 1997) (herein after called "the BCIL Act, 1997") with certain objects after dissolving Bangladesh Commerce and Investment Limited, a non-banking financial institution. Section 5 of the said BCIL Act, 1997 provided that the BCBL would have authorized capital of Taka 200 crore and paid up capital for an amount of Taka 92 crore, to be taken up and allotted to different classes of share-holders mentioned therein. BCBL, accordingly, was established pursuant to the provisions under section 3 of the BCIL Act, 1997 and continued its operation. However, Bangladesh Bank (respondent No. 2) issued BRPB Circular No. 11 dated 14-8-2008 in exercise of its power under section 13(2) of the Bank Companies Act, 1991 directing all the scheduled banks in Bangladesh to increase the minimum paid-up and reserved capital upto 400 crore, wherein the minimum paid-up capital would be Taka 200 crore and the same to be increased within a period of three years. Accordingly, pursuant to the said notice, the BCBL Board of Directors adopted resolution on 26-5-2011 in its 189th meeting to increase the paid up capital of the BCBL through Initial Public Offering (IPO) and, accordingly, notice was published to hold the said AGM on 20-8-2011. Challenging the said decision of issuance of shares through IPO, one of the share holders of the BCBL filed Title Suit No. 189 of 2011 and obtained an injunction against holding of the said AGM, but the plaint of the said Suit was subsequently returned on 25-4-2012. In the meantime, the statutory period for holding AGM having already expired, another share-holder of BCBL filed Company Matter No. 39 of 2012 before the Company Bench of the High Court Division under section 81(2) read with section 85(3) of the Companies Act, 1994 for condonation of delay in holding the said 13th AGM. The Company Bench, accordingly, allowed the same condoning the said delay and further directing to issue right shares in favour

of the existing share holders instead of IPO. Civil Petition for Leave to Appeal No. 3008 of 2012 preferred by the BCBL against the said order of the Company Bench also ended up in dismissal for non-prosecution allowing the BCBL to hold the said 13th AGM within two months. Thus, on 7-10-2013, the 13th AGM of the BCBL was finally held and special resolution was adopted to increase the paid up capital of BCBL through issuance of right shares. Consequently, notices were published in the daily news papers inviting subscriptions from the members in this regard followed by the impugned notices in the same manner, though extending the last date for subscription. At this stage, the petitioner moved this Court against those actions of the BCBL and obtained the aforesaid Rule. At the time of issuance of the Rule, this Court, by order dated 13-1-2014, stayed operation of the impugned notices as published in the "Daily Ittefaq" on 22-11-2013 and 22-12-2013.

3. The main contention of the petitioner is that since the BCBL was established by a special law, namely BCIL Act, 1997, before any increase of share capital beyond the amount specifically mentioned therein, the relevant provisions of the said Act have to be amended first. Without such amendment, any increase of authorized and paid up capital by the BCBL will be a clear violation of the provisions of the BCIL Act 1997 and, as such, the said actions should be knocked down by this Court.

4. The Rule is opposed by the Bangladesh Bank and the BCBL itself, respondent No. 2 and 5 respectively, though only BCBL filed affidavit-in-opposition. The main contention of the contesting respondents is that the BCBL having been established upon dissolving Bangladesh Commerce and Investment Limited, a non-banking entity, for certain reasons mentioned in the said Act with certain objects, the entire object of establishing the BCBL would be frustrated unless its capital is not increased pursuant to the BRPD circular issued by the Bangladesh Bank, which is mandatory on a bank like BCBL. Their further contention is that the amount mentioned under section 5 of the BCIL Act, 1997 being initial amount of capital, there is no bar under any law to increase the same.

5. Mr Shafique Ahmed, learned senior counsel, along with Mr Shafique Mahbub and Mr Mizanur Rahman, learned advocates, appearing for the petitioner, drawing our attention to the relevant provisions of the BCIL Act, 1997, in particular sections 3 and 5, submits that in view of sub-section (3) of section 3, the provisions of the BCIL Act, 1997 have been given special status over-riding the provisions of the Bank Companies Act, 1991 and the Bangladesh Bank Order 1972. This being so, he submits, the BRPD circular, issued in exercise of power under section 13 of the Bank Companies Act, 1991, can never undermine the effect and strength of the provisions of the BCIL Act, 1997. Mr Ahmed points out that since the BRPD circular in question has been issued on the strength of section 13 of the Bank Companies Act, 1991, any instructions or directions given through that circular cannot make any provisions of the BCIL Act, 1997 redundant. Mr Ahmed further argues that whenever there is a conflict between a particular provision of a special law like BCIL Act, 1997 and a direction issued under another special law, namely the Bank Companies Act 1991, the specific provision of special law will over-ride the effect of any power exercised under the provision of another special law, and, as such, according to him, the impugned actions of BCBL followed by the impugned notices should be declared to be without lawful authority.

6. Mr AF Hasan Ariff, learned Senior Counsel appearing for the BCBL, on the other hand, submits that the petitioner is estopped from moving this Writ Petition in view of the fact that he himself was the beneficiary of the

earlier share capital increase by the BCBL in violation of section 5 and was the party in Company Matter No. 39 of 2012 as added respondent. Mr Ariff argues that since the BCBL has taken initiatives to issue right shares pursuant to the specific direction given by the Company Bench of this Court in the said Company Matter as upheld by the Appellate Division, this Court should not interfere into the said process at the instance of a person who himself was benefited from that process. Mr Ariff then submits that apart from the issue of *locus standi* of the petitioner, the specific provisions of the BCIL Act, 1997 even have given protection to the impugned actions as, according to him, section 19 of the BCIL Act, 1997 is the answer to section 5 and the impugned actions of the BCBL for increasing the share capital of the same. Referring to the said provision of section 19, Mr. Ariff further argues that since the Bangladesh Bank has been given the authority by the said provision to fill up any vacuum in the BCIL Act, 1997, the Bangladesh Bank issued the BRPD circular in question for filling-up of such vacuum and, as such, no illegality has been committed either by the Bangladesh Bank or by the BCBL. Adopting the submissions of Mr Ariff, Mr Shamim Khaled Ahmed, other senior Counsel appearing for the BCBL, submits that the BCBL has no option but to comply with the direction given by the Bangladesh Bank in the said BRPD circular in view of the fact that the said circular was issued under section 13 of the Bank Companies Act, 1991. He submits that in view of sub-section (2) of section 13 as amended in 2013, unless such direction given by the Bangladesh Bank is complied with by the BCBL, it will not be able even to run its business. Therefore, he submits, this Court should, in such circumstances consider the objects for which BCBL was established and accordingly try to reach a harmonious interpretation if any conflict is found between the provisions of BCIL Act, 1997 and that of Bank Companies Act, 1991 so that the BCBL can function smoothly. Mr ABM, Siddique, learned Advocate appearing for the Bangladesh Bank (respondent No. 2), opposing the Rule, submits that since sub-section (3) of section 3 of the BCIL Act, 1997 has not mentioned anything over-riding the provisions of the Companies Act, 1994, the Directors of the BCBL lawfully took the decision to increase the share capital of the BCBL under the power given to them by the relevant provisions of the Companies Act, 1994 and, as such, no illegality has been committed if the impugned actions are seen from that angle. Adopting the submissions as to the *locus standi* of the petitioner as raised by Mr Ariff, he refers to two decisions of this Court, namely *Nurul Haque vs Bangladesh, 51 DLR (AD) 140* and *Bangladesh vs Mahbubuddin, 50 DLR (AD) 154.* In reply, Mr Mahbub Safiq, the learned Advocate for the petitioner, submits that there cannot be any estoppel against statute and, in support, he also refers to some decisions of this Court, namely *Juanandra Chandra vs Dhirendra, 8 DLR 170, Bangladesh vs Md Aftabuddin, 30 DLR (AD) and Khandker Delwar vs Italian Manble Works, 62 DLR (AD) 298.*

7. The BCIL Act, 1997 itself narrated the objects of establishment of the BCBL through its elaborate preamble. The said preamble describes as to why the activities of the then Bangladesh Commerce and Investment Limited, a non-Banking entity, had to be suspended by the Bangladesh Bank and what was the object of establishing the BCBL upon reconstruction of the said non-banking entity. One of the main objects of such establishment, as narrated by the said preamble, is to save the depositors of the then Bangladesh Commerce and Investment Limited, which had conducted banking business without permission from the Bangladesh Bank and thereby defrauded its depositors.

8. Since learned Advocates from both sides concentrated their arguments mainly on three provisions of the BCIL Act, 1997, namely

sections 3, 5 and 19, it will be convenient to quote those sections for ready reference:

৩। **বাংলাদেশ কমার্স ব্যাংক প্রতিষ্ঠা, ইত্যাদি।**—(১) এই আইনের উদ্দেশ্য পূরণকল্পে এবং এই আইনের বিধান অনুযায়ী বাংলাদেশ কমার্স ব্যাংক লিমিটেড নামে একটি ব্যাংক প্রতিষ্ঠা করা হইবে।

(২) কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন) এর অধীন ব্যাংক একটি পাবলিক লিমিটেড কোম্পানী হিসাবে নিবন্ধিত হইবে।

(৩) ব্যাংক কোম্পানী আইন, ১৯৯১ (১৯৯১ সনের ১৪নং আইন), অতঃপর ব্যাংক কোম্পানী আইন বলিয়া উল্লিখিত, এবং Bangladesh Bank Order 1972 (PO No. 127 of 1972) এর বিধানবলি, এই আইনের বিধান সাপেক্ষে, ব্যাংকের ক্ষেত্রে প্রযোজ্য হইবে।

৫। **মূলধনঃ**—(১) ব্যাংকের অনুমোদিত মূলধন হইবে ২০০ কোটি টাকা এবং তাহার পরিশোধিত মূলধন হইবে ৯২ কোটি টাকা।

(২) বিভিন্ন শ্রেণীর শেয়ারহোল্ডার নিম্নবর্ণিত হারে ব্যাংকের শেয়ার ক্রয় করিবেন, যথাঃ—

(ক) ব্যাংকের উদ্যোক্তাগণ, অতঃপর "ক" শ্রেণীর শেয়ারহোল্ডার বলিয়া উল্লেখিত, ২০ কোটি টাকার শেয়ার;

(খ) তপসিলী ব্যাংকের ও আর্থিক প্রতিষ্ঠান, অতঃপর "খ" শ্রেণীর শেয়ারহোল্ডার বলিয়া উল্লেখিত, ২০ কোটি টাকার শেয়ার;

(গ) আমানতকারী, অতঃপর "গ" শ্রেণীর শেয়ারহোল্ডার বলিয়া উল্লেখিত, ৫২ কোটি টাকার শেয়ার।

(৩) যদি "খ" এবং "গ" শ্রেণীর শেয়ারহোল্ডার উপ-ধারা (২) এ উল্লেখিত সম্পুর্ন শেয়ার ক্রয় না করেন, তাহা হইলে উক্ত অবিক্রীত শেয়ার "ক" শ্রেণীর শেয়ারহোল্ডার এর নিকট বিক্রয় করা হইবে অথবা সরকার কর্তৃক নির্ধারিত পরিমাণে উক্ত শ্রেণীর শেয়ারহোল্ডার এবং জনসাধারনের নিকট বিক্রয় করা হইবে।

(৪) যদি "খ" এবং "গ" শ্রেণীর শেয়ারহোল্ডার তাহাদের জন্য নির্ধারিত অংশ হইতে অধিকতর শেয়ারের জন্য আবেদন করেন, তাহা হইলে "ক" শ্রেণীর জন্য নির্ধারিত অংশের শেয়ারের পরিমান হ্রাস করিয়া "খ" এবং "গ" শ্রেণীর শেয়ার বৃদ্ধি করিতে পারিবে।

১৯। **আইনের অন্তর্ভুক্ত হয় নাই এমন কোন বিষয়ঃ**—এই আইনের অর্ন্তভুক্ত নাই অথচ ইহার উদ্দেশ্য পুরনকল্পে অন্তর্ভুক্ত হওয়ার প্রয়োজন ছিল বিসিআই অথবা ব্যাংক সম্পর্কিত এমন যে কোন বিষয়ে বাংলাদেশ ব্যাংক, সরকারের সহিত পরামর্শক্রমে, প্রয়োজনীয় নির্দেশ প্রদান করিবে এবং এইরুপ নির্দেশ এই আইনের বিধান হিসাবে গণ্য হইবে।

(Under supplied to give emphasis)

9. It appears from sub-section (3) of the above quoted section 3 that the provisions under BCIL Act, 1997 have been given over-riding effect over the provisions of the Bank Companies Act, 1991 and the Bangladesh Bank Order, 1972 by providing that the provisions of the said two legislations will be applicable subject to the provisions of the BCIL Act, 1997 ("এই আইনের বিধান সাপেক্ষে"). Section 4 provided as to who would be the sponsors of the Bank. Section 5 provided, amongst others, that the authorized capital of the Bank would be Taka 200 crore and the paid up capital would be Taka 92 crore. Sub-section (2) of section 5 divided the share-holding of the said shares into three categories, namely 'Ka' Class, 'Kha' Class and 'Ga' Class share holders, and made provisions for allotment of shares among them out of the said paid-up capital of Taka 92 crore, thereby providing that 'Ka' Class share-holders would contribute to the paid-up capital for an amount of Taka 20 crore, 'Kha' Class shareholders for an amount of Taka 20 crore and 'Ga' Class shareholders for an amount of Taka 52 crore etc. Sections 6, 7, 8, 9 and 10 dealt with some other aspects of the BCBL, namely the procedures of payment of share money, formation of the Board of Directors etc., and section 11 elaborated the processes as to how the liabilities of the Bank towards its depositors would be adjusted. Sub-section (3) of section 16 of the said Act provided that the provisions of Limitation Act, 1908 would not be applicable to the said Bank in respect of realization of liability towards the

said Bank, thereby confirming the special and distinct nature of the said legislation. Section 19, however, provided for the power of Bangladesh Bank to issue directions in consultation with the government in respect of matters which were not included in the BCIL Act, 1997, though they were required to be included therein, and such, directions to be issued by the Bangladesh Bank would be regarded as the provisions of the BCIL Act, 1997. Apart from above provisions, section 20 of the said Act has given a power on the government to clear any ambiguity in the implementation of the provisions of the said Act by issuing orders within five years after establishment of the said Bank. However, sub-section (2) of section 20 provided that such orders of the government had to be placed before the Parliament as early as possible.

10. Upon analyzing the entire text of the BCIL Act, 1997, it appears that the said Act was enacted by the Parliament for some particular purposes as mentioned in the preamble of the said Act, and some limitations of power of the Bank, its shareholders, Bangladesh Bank and the government, to be exercised in respect of the said Bank, have been mentioned. There is no doubt that the BCIL Act, 1997 is a special law enacted for special purpose. It has been given rather special over-riding status by providing the words "এই আইনের বিধান সাপেক্ষে" ("subject to the provision of this Act") as incorporated under sub-section (3) of section 3, thereby out-playing the effects of the provisions under the Bank Companies Act, 1991 and the Bangladesh Bank Order, 1972, two other special legislations. Therefore, this BCIL Act, 1997 has been enacted for establishment of a special bank and almost all vital matters have been mentioned in the said Act for the purpose of such establishment and running of the business of the said bank. Though the Government has been given some supervisory powers under several provisions of the BCBL Act, 1997 to intervene, sub-section (2) of section 20 restricts such power by providing that if any order is issued by it during a period of first five (5) years, that order has to be placed before the Parliament as early as possible. This sub-section (2) of section 20 expresses in clear terms the anxiety of our Legislature in establishing the BCBL.

11. Thus, while some powers were given to the Bangladesh Bank and the government by specific provisions in the said Act, the Parliament had in mind that the authorities might play foul in respect of the said Bank. Therefore, this Bank seems to have been created by our Legislature to resolve a huge crisies and frustration among the depositors of the then Bangladesh Commerce and Investment Limited, and to resolve such crisies, some stringent provisions have been made therein. That intention of the Legislature is further clear when we see the words used under sub-section (3) of section 3 which even went to the extent of providing that the provisions of the Bank Companies Act, 1991, the Act under which Bangladesh Bank exercises its regulatory powers over all scheduled banks, and the provisions of the Bangladesh Bank Order, 1972, by which Bangladesh Bank itself was created, will be made applicable subject to the provisions of the BCIL Act, 1997. Therefore, we do not find any substance in the submissions made by the learned senior counsels representing the BCBL that the said provisions under sub-section (3) of section 3, giving special status to the provisions of the BCIL Act, 1997, will not be applicable to the provisions of section 5. When the Legislature has enacted a law and provisions therein in clear words without any ambiguity, the long standing practice of the higher judiciary of this sub-continent is that the Court will not go beyond those clear words. Therefore, our considered view is that the Legislature has expressed no doubt as to the special status of the provisions of the BCIL Act, 1997, and to make further clear that special status, the words "এই আইনের বিধান সাপেক্ষে" (Subject to the provisions

of this Act) have been inserted under sub-section (3) of section 3. As stated above, the special status of this BCIL Act, 1997 and the BCIL is further clear from sub-section (2) of section 20, when the Legislature even dictates the government to place any order issued within the first 5 years of the establishment of the BCBL before the Parliament as early as possible. This means, at least for the period of the first five years, the BCBL would be under direct supervision of the Parliament.

12. Now, let us address the submissions made by the learned advocates for the respondent-bank as to the applicability of the provisions under section 19 as quoted above. Section 19 starts with the words "এই আইনের অন্তর্ভূক্ত নাই অথচ ইহার উদ্দেশ্য পুরনকল্পে অন্তর্ভূক্ত হওয়ার প্রয়োজন ছিল". This means, powers under section 19, to be exercised by the Bangladesh Bank in consultation with the government, can only be so exercised in respect of matters which are not included in the provisions of the BCIL Act, 1997 though they were required to be included therein. The clear reading of the provisions under section 19 takes us to only one conclusion that the power under this section can only be exercised in respect of matters which are not included in the provisions of the BCIL Act, 1997. The words of section 19 is so clear that the Legislature has left no ambiguity. Thus, since the matter relating to the authorized capital and paid-up capital have already been included in the said BCIL Act, 1997 under section 5, we do not see any reason as to why the provisions under section 19 will be attracted and will answer at all the impugned actions, as submitted by Mr Ariff. On the other hand, BRPD circular dated 14-8-2008, being a general circular applicable to all banks, does not even say a single word that it was issued under section 19 to fill up such vacuums as suggested by the learned advocate for the BCBL.

13. The BCBL was established in 1997 under section 3 of the BCIL Act, 1997. Since the inception of the Bank, the management of the same must have faced several difficulties or ambiguities in respect of the implementation of the provisions of the said Act. However, the bank seems to have never approached the Bangladesh Bank or the government for clearance of any such ambiguity or difficulties, though provisions of the BCIL Act, 1997 have always kept such options open to the BCBL management. We do not also find anything on record or in the submissions of the learned advocates of the Bank that the bank ever approached those authorities to clear any difficulty as to the implementation of the provisions under section 5 of BCIL Act, 1997, given the fact, as submitted by the learned Advocates for the Bank, that with this small amount of authorized and paid-up capital, a Bank like BCBL would not be able to run its business competitively with other scheduled banks. This submission of learned Advocates is reasonable. Banking business now a days has flourished a lot. Taka 200 crore authorized capital or Taka 92 crore paid-up capital are very small for a bank which is doing business in Bangladesh. Thus, we are surprised to see as to how the management of the BCBL has never felt that problem in running its business and have never approached the concerned authorities, namely the Bangladesh Bank and the government, to clear such difficulties in particularly when sections 19, 20 and 22 of the BCIL Act, 1997 have always kept such options open to the BCBL. Now, if the Bank says that given the competitive nature of the banking business, it had to increase its paid-up and authorized capital to cope with the changing and expanding business nature, and that is why this Court should give a so called harmonious interpretation of section 5 to allow such illegal acts committed by them, we cannot agree, unfortunately. Illegality committed under compulsion or whatever circumstances, is illegality. When such illegality is brought

before a Court, in particular the High Court Division, we cannot shun away ourselves. Again, when learned advocates for the BCBL submits that since the increase of the capital was done before and, as such, it can be done now, our answer is simple-one illegality cannot justify another illegality. Therefore, we cannot but hold that the impugned actions of the BCBL, in so far as it relates to the increase of share capital beyond the amount specifically mentioned under section 5, were acts without sanction of law and should be declared to have been done without lawful authority.

14. For the same reasons, even if the petitioner, like other share-holders, enjoyed benefits from such illegality, he, or other share-holders, cannot be estopped from taking recourse to the writ petition as the doctrine of estoppel does not apply against statute. On the other hand, since the issue of illegality in increasing the amount of capital beyond the limit mandated by section 5 was not raised or considered in the said Company Matter No. 39 of 2012, the decision or order passed in the same does not have any bearing on the issues as raised and considered in the instant writ petition.

15. Regard being had to the above discussions of the law and facts, we are of the view that the Rule has substance and, as such, the same should succeed.

16. In the result, the Rule is made absolute. Accordingly, the notices published in "The Daily Ittefaq" on 22-11-2013 and 22-12-2013 for issuance of right shares of the respondent No. 5 (Annexures-D and D-1) for increasing its "paid up and reserve capital" are declared to be without lawful authority and are of no legal effect.

Communicate this order.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Sheikh Abdul Awal J
Mahmudul Hoque J } NAM Abdur Razzaque .....Petitioner

vs

Judgment } Uttara Bank Ltd and others.....
June 30th, 2014. } .....Opposite Parties*

Code of Civil Procedure (V of 1908)
Section 151

Section 151 of the Code simply confirms the Courts inherent power and this power cannot be exercised where alternative remedies by way of appeal, revision or review are available. .....(14)

NA M Abdur Razzaque, Advocate—In Person.

Fahad Mahmood Khan, Advocate—For the Opposite Party No.2.

Judgment

Sheikh Abdul Awal J: This Rule was issued calling upon the defendant-opposite party No.1 to show cause as to why the Order No.41 dated 25-7-2012 passed by the learned Joint District Judge, 5th Court, Dhaka in Title Suit No.195 of 2005 rejecting the application under section 151 of the Code of Civil Procedure for setting aside the dismissal order for default dated 21-4-2011 should not be set-aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. Short facts necessary for the purpose of disposal of this Rule are that the petitioner, as plaintiff, instituted a suit being Title Suit No. 195 of 2005 in the Court of Joint District Judge, 5th Court, Dhaka praying a decree declaring that the plaintiff is entitled to get an amount of Taka 1,01,77,175.40 (Taka one crore one lakh

*Civil Revision No. 3768 of 2012.

seventy seven thousand one hundred seventy five and paisa forty) with compensation at the bank rate of 16% till realization of the amount of Taka 1,0177,175.40. The plaintiffs case, in brief, is that the plaintiff is a member of legal profession in Bangladesh and is being enrolled as an Advocate on 3-2-1979 and became member of Bangladesh Supreme Court Bar since 1989 and has been rendering legal services towards his clients efficiently, diligently, honestly and without an iota of any grievances from any quarter since long 25 years of the length of his profession. The plaintiff is the Legal Adviser and Law consultant of local and foreign companies and firms and he is associated with many national and international organizations and internationally reputed person and that he earned good name and fame in Bangladesh and in abroad. The defendant No.1 Bank is a Banking Institution established under Bank companies Act and the defendant Nos. 9-14 are the branch in charge and the defendant Nos. 2-8 are the executives of the Bank and all their acts, subject to laws shall be the acts of the defendant No.1 and in case of misuse of power they shall be liable personally. The defendant No.1 considering the worthiness, efficiency and good will appointed the plaintiff as their panel lawyer of the Bank vide appointment letter No.HO/CD/LAWYER/91/1528/1372 dated 31-8-1991 enclosing the prescribed schedule of fees of Bank's circular No.468 dated 19-2-1991 for conducting legal matters, suits and appeal in the Judge's court as well as in the High Court Division in its original, appellate jurisdiction of the Supreme Court of Bangladesh. The plaintiff appeared in and conducted several cases on behalf of the defendant Bank since 31-8-1991 as Panel Lawyer and legal adviser on approved rate of the case for appearing and conducting suits and cases till disposal, and for other legal matters. The defendant No.9 vide their letter No. UBL/LO/SD/2O05/33 dated 19-1-2005 instructed the plaintiff to file both Title Suit and Criminal case against M/s Southern Beverage Industries Ltd. (CC A/C No. 557) for realization of bank's dues. The assignment was given to the plaintiff offering special fees beyond the prescribed rate of fees provided in circular No. 468 dated 19-2-1991. The defendant No. 9 Paid Taka 10,000 as advance to the plaintiff vide payment order dated 27-1-2005 and thereafter the plaintiff prepared the plaint and sent the same to the bank for verification of facts along with a bill dated 29-1-2005 for Taka 1,01,000 and it was received by the bank on 1-2-2005 under their seal and signature, subsequently the plaint was not returned to the plaintiff for filing in court and contractual fees was not paid even demands made by the plaintiff. The withholding of the plaintiffs long outstanding bills without assigning any reason whatsoever has caused heavy loss and damages, injury to the plaintiff.

3. While on 21-4-2011 the case was fixed for service of summons as well as taking steps and on that fixed date the plaintiff-petitioner filed an application for time.

4. The trial Court by its order dated 21-4-2011 dismissed the case for default.

5. The plaintiff, thereupon, on 22-5-2011 filed an application under section 151 of the Code of Civil Procedure for setting aside the default order dated 21-4-2011.

6. The learned Judge of the trial Court after hearing rejected the application by his order dated 25-7-2012 on the finding that the application filed under section 151 of the Code of Civil Procedure for setting aside the dismissal order for default is misconceived and not tenable in law.

7. Being aggrieved thereby the present petitioner has come before this Court and obtained the present Rule.

8. Mr NAM Abdur Razzaque, Advocate in person appears before this court and con-

tends that the learned Joint District Judge seriously erred in law in rejecting the application under section 151 of the Code of Civil Procedure for setting aside the dismissal order for default dated 21-4-2011 without properly considering the facts of the case and the case made out by the petitioner and the same has occasioned failure of justice. Finally, Mr Abdur Razzaque submits that if the dismissal order for default is set-aside in that event he will pay an amount of Taka 5,000 as cost in favour of the opposite party, Bank.

9. Mr Fahad Mahmood Khan, the learned Advocate, on the other hand, appearing for the opposite party No. 2 supports the impugned order and contends that the learned Joint District Judge was perfectly justified in refusing the petitioner's application under section 151 of the Code of Civil Procedure for setting aside the dismissal order for default dated 21-4-2011 on the clear finding that it was not at all tenable in law.

10. We have considered the submission of the learned Advocates for both the sides and perused the Revision application along with other materials on record.

11. It appears that on the date fixed for service of summons as well as taking steps the petitioner filed an application for time. The learned Joint District Judge by its order dated 21-4-2011 after rejecting the application for time dismissed the case for default stating as follows: অদ্য বিবাদীর প্রতি সমনজারী বিষয়ে তদ্বীর গ্রহনের জন্য ধার্য্য আছে। বাদী দরখাস্ত দিয়া সময়ের প্রার্থনা করেন। ডাক মতে বাদী অনুপস্থিত। সময়ের দরখাস্ত না-মনজুর করা হইল। (VOP) এখন সময় ৪-২৫। বার বার উচ্চ স্বরে ডাকা স্বত্বেও বাদীপক্ষ বা নিযুক্তিয় আইনজীবিকে পাওয়া গেল না। মোকদ্দমাটি খারিজ এর সিদ্ধান্ত গৃহীত হইল। The petitioner, thereafter, on 22-5-2011 filed an application under section 151 of the Code of Civil Procedure for setting aside the dismissal order for default dated 21-4-2011.

12. In the instant case the petitioner himself as an Advocate having knowledge of the limitation although the reasons best known to him as to why without sufficient cause slept over the matter over a period of one month and then filed an application under section 151 of the Code of Civil Procedure for setting-aside the default order without availing the alternative remedy is open to him.

13. The trial Court in its discretion rejected the application inasmuch as the application was not filed according to the provisions of law. In the facts and circumstance of the case and law bearing on the subject, we do not think that the trial judge committed any illegality in rejecting the application under section 151 of the Code of Civil Procedure for setting aside the dismissal order for default.

14. Section 151 of the Code of Civil Procedure simply confirms the Courts inherent power and this power cannot be exercised where alternative remedies by way of appeal, revision or review are available. An application under section 151 CPC in such a case is not maintainable. Therefore, we do not find any possible reason to differ with the view taken by the trial Court below.

15. Moreover, on going through the contents of the plaint together with the conduct of the plaintiff- Advocate in this case since 2005 to till today, we are not at all inclined to give him a chance to proceed with the matter further whatsoever. In the facts of the present case, we are constrained to observe that it is also a part of professional misconduct if an Advocate in order to get undue benefit filed a case against his client claiming huge amount as fees and deliberately hanged case years together. This Court discourages this type of conduct of an Advocate of this court.

16. In this case the learned Joint District Judge clearly found that the application under section 151 of the Code of Civil Procedure for setting aside the dismissal order default was not tenable in law and rejected the same on

sound and good reasons. We are satisfied that the learned Joint District Judge duly applied his judicial mind into the facts and circumstances of the case and the law bearing on the subject and passed the impugned order on sound reasons. The impugned order is found to be well-reasoned and well-supported by both law and facts. We, therefore, do not find any illegality or legal infirmity in the impugned order occasioning failure of justice so as to justify interference by this Court exercising revisional power under section 115(1) of the Code of Civil Procedure.

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

Let a copy of this order be communicated to the Court concerned at once.

Ed.

High Court Division
(Statutory Original Jurisdiction)

Md Rezaul Hasan J } Golden Horizn Limited ..... Petitioner
vs
Judgment } Bangladesh Commerce
March 3rd, 2014. } Bank Limited and others .....Respondents*

Bangladesh Commerce and Investment Limited (Reconstruction) Act (XII of 1997)
Section 7(5)

Board resolution is in conflict with the provisions of sub-section (5) of section 7 of BCBL Act, 2007 as well as it conflicts with the provisions of Article 101 of the Articles of Association of Bank. Board resolution is quite illegal, *ultra vires*, based on misconception of law and the same that extent, hereby struck down hereby. .....(9)

Mohammad Hossain, Advocate with Md Omar Farouq, Advocate—For the Petitioner

Shamim Khaled Ahmed, Advocate with M. Mohiuddin Yousuf, Advocate—For the Respondent No.1.

Judgment

Md Rezaul Hasan J: This is an application filed under section 85(3) of the Companies Act, 1994 (the Act) read with Rules 8 of the Company Rules, 2009 (the Rules).

2. In the application it has been stated, amongst other, that the petitioner is a share-holder of the Respondent No.1 company (Bank) and holds 3,47,962 shares in the company, having folio No.02-004647; that Respondent No.1 Company is a public limited company established by way of reconstruction under Bangladesh Commerce and Investment Limited (Reconstruction) Act 1997 (Act XII of 1997) and is incorporated under the Companies Act 1994 as a company limited by shares; that the Respondent bank could not hold its 13th Annual General Meeting in due time, therefore a share holder of the respondent bank filed company matter No. 39 of 2012 for condonation of delay and for permission to hold the 13th AGM. By a judgment and order dated 30-10-2012 this Court was pleased to allow the application and directed the respondent Bank company to hold the 13th AGM by 30-10-2012. Challenging the said judgment dated 2-10-2012 the respondent company filed Civil Petition for leave to Appeal No.3008 of 2012 within December 2012 and subsequently filed an application for dismissal of the Leave Petition for non-prosecution. Thereupon by an order dated 3-9-2013 the Hon'ble Judge in Chamber disposed of the leave Petition allowing the respondent company to call, hold and conduct its 13th AGM as per order of the High Court Division, within 2 months. Accordingly on 3-10-2013 the 13th AGM was held on 7-10-2013. By this time the 14th AGM felt due on 31-12-

*Company Matter No. 33 of 2014.

2012 and therefore one Mr Md Akhter Hossain, a share holder of the company filed company matter No.219 of 2013 under section 81(2) read with section 85(3) of the Companies Act for permission to hold 14th and 15th AGM for the respondent Company. By a judgment and order dated 18-11-2013 this Court has allowed the petition and permitted the respondent Bank to hold 14th and 15th AGMs within 3 months; that under section 7 of the Bangladesh Commerce and Investment Limited (Punargathan) Ain, 1997 (hereinafter referred to as "the Ain") and articles 96 and 101 of the Articles of Association 4 Directors of group-C is to be elected by the share holders of the said group. At present 3 (three) posts of directors of group-C are vacant. But on 26-12-2013 the Managing Director of the respondent Bank has issued a Memo, bearing number 285/2013, to the directors of the company stating that 3 retiring directors will be deemed to have been re-elected on the 14th and 15th AGMs, which is scheduled to be held on 1st February, 2014; that the respondent Bank has designed to deprive the other eligible share holders from their right and opportunity to be elected as director of the respondent company with *a malafide* intention to run the company by their own circle. The petitioner holds qualifying share in the company and intends to participate in the election for the post of director of group-C. If the company is allowed to hold the AGMs without conducting any election of the director of group-C the petitioner and other members of the company intending to contest the election will be deprived of their legal right; that the share holders of the Bank has statutory rights to elect/select their directors by using their voting rights at the time of AGM or schedule time for vote which cannot be curtailed by sweet will of any one else; that the respondents cannot flout the provisions of any statute by a resolution. But in the instant case Section 7(5) of the Bangladesh Commerce and Investment Limited (Punargathan) Ain, 1997 and Clause 101 of the Article of Association clearly states that except the directors elected/selected by the Government rest of the directors will be elected by the vote of share holders of the respective group. But the respondent company is going to re-elect 3(three) directors, namely Mr Anis Ahmed, Mr Monwar Hossain and Mr Abbas Uddin, without holding any election, which is clear violation of the Act and Article 101 of the Article of Association; that the petitioner is holding 3.5 lakh shares and it has the right to elect directors or to be elected as director by applying their voting rights which cannot be curtailed by a mere resolution. Hence this petition has been filed with the prayer that the respondent No.1 company be directed to hold its 14th and 15th Annual General Meetings keeping agenda for election of 3 directors from group-C, by direct vote of C-group share-holders.

3. The respondent No.1, i.e. Bangladesh Commerce Bank Limited (the Bank) has filed an affidavit-in-opposition denying the facts alleged in the petition. However, at paragraph No.11 of the affidavit-in-opposition, it has been stated that the instant matter may be disposed of with directions upon the respondent Bank to hold election for the post of Director concerned at the 14th and 15th AGMs falling vacant at those AGMs and with further direction upon the respondent Bank to call, hold and conduct the 14th AGM within a convenient time of about 4(four) clear weeks and then to allow further 4(four) weeks to call, hold and conduct the 15th AGM taking into consideration that such period is necessary to complete all the formalities for holding of election to the vacant post of the Directors retiring at the said both AGMs.

4. The learned Advocate Mr Md Omar Farouq, appearing for the petitioner and having placed the petition and drawing my attention to the statements made in the petition as well as to the documents annexed, submits that the respondent No.1 namely Bangladesh Commerce Bank Limited has been re-constructed

under the provisions of Bangladesh Commerce and Investment Limited (Re-construction) Act, 1997. The learned Advocate, next, having drawing my attention to sub-section (5) of section 7 of the said Act, submits that except the share holders of the all classes and the share-holders not falling into any class (if any) shall be elected by the direct vote of the share holders of respective group. But, the Board of Directors of the respondent-Bank has adopted a resolution dated 26-12-2013 (Annexure-C) by which they have decided that 3(three) retiring directors, named the said resolution, shall be deemed to have been re-elected without in fact holding any election in the 14th and 15th Annual General Meetings that were scheduled to be held on 1-2-2014. The learned Advocate for the petitioner also submits that this decision of the Board of directors is quite in conflict within the specific provisions of sub-section (5) of section 7 of BCBL Act, 1997 as well as provisions of Article 101 of the Articles of Association of the Bank. He further submits that all the retiring directors, named the aforesaid resolution dated 26-12-2013 (Annexure C), belong to group Ga (গ) and, as such, according to the provisions of sub-section (5) of section 7 of the BCBL Act read with Article 101 of the Articles of the Association of the Bank, they should be elected directly by the votes of 'Ga' group share-holders (group-C share-holders). Otherwise, their election and holding office-in the board of directors will be totally unlawful and *ultra vires* and this will deprive the other eligible candidates to be elected to the Office of the directors. Accordingly he has prayed that this petition may be allowed and the relief as prayed for in the petition may be granted.

5. The learned Advocate Mr Shamim Khaled Ahmed, appearing alongwith the learned Advocate Mr M. Mohiuddin Yousuf, having appeared on behalf of the Bank mainly submits that the Bank shall hold the election according to the provisions of law and Article of Association. However, in order to complete the formalities, as will be required to hold the 14th and 15th AGM, the learned Advocate submits that at least 4 (four) clear weeks time may be allowed for holding each Annual General Meeting one after another.

6. I have heard the learned Advocates appearing on both sides, perused the petition alongwith the documents annexed and the affidavit-in-opposition filed by the Bank. It appears that the respondent No.1, namely Bangladesh Commerce Bank Limited (the Bank) has been re-constructed under Bangladesh Commerce and Investment Limited (Re-construction) Act, 1997, herein after referred as the BCBL Act, 1997, sub-section (5) of section 7 of the said Act provides as follows:—

"সরকার কর্তৃক মনোনীত পরিচালক ব্যতীত সকল শ্রেনীভূক্ত শেয়ার হোল্ডার এবং শ্রেনী বহির্ভূত শেয়ার হোল্ডার, যদি থাকে, স্ব-স্ব গ্রুপের শেয়ার হোল্ডারদের ভোটে নির্বাচিত হবেন।"

7. Besides, It has been provided in Article 101 of the Articles of Association of the Bank that, "সরকার কর্তৃক মনোনীত পরিচালক ব্যতীত সকল শ্রেনীভূক্ত শেয়ার হোল্ডার এবং শ্রেনী বহির্ভূত শেয়ার হোল্ডার, যদি থাকে, স্ব-স্ব গ্রুপের শেয়ার হোল্ডারদের ভোটে নির্বাচিত হবেন। As such I find that Article 101 of the Bank is quite inconsonance with the provisions laid down sub-section (5) of section 7 of the BCBL Act, 1997.

8. In this legal back ground, I find that in a board resolution dated 26-12-2013 the board of directors of the Bank has resolved, amongst other, that:

"১৪তম ও ১৫তম বার্ষিক সাধারন সভায় পরিচালকগণের অবসর গ্রহণ ও তদস্থলে পরিচালক নির্বাচন কোম্পানী আইনের ৯১(২) ধারা, অত্র ব্যাংকের সংঘবিধি'র ১১২ অনুচ্ছেদ ও ইতোপূর্বে গৃহীত আইনগত মতামত অনুযায়ী ব্যাংকের ১৪তম ও ১৫তম বার্ষিক সাধারণ সভায় 'গ' শ্রেনীর সম্মানিত পরিচালকগনের মধ্যে থেকে এক তৃতীয়াংশ অবসর গ্রহন করার বিধান রয়েছে। মামলা জটিলতার কারনে বার্ষিক সাধারন সভা যথাসময়ে অনুষ্ঠিত না হওয়ায় তা সম্ভব হয়নি। বিগত সময়ে গৃহীত আইনগত মতামত পর্যালোচনা করে এতদবিষয়ে প্রতিয়মান হয় যে ১৪তম

বার্ষিক সাধারণ সভায় ২(দুই) জন এবং ১৫তম বার্ষিক সাধারন সভায় ১(এক) জন সম্মানীত পরিচালক অবসর গ্রহণ করবেন যা নিম্নোক্ত ছকে দেখানো হলোঃ

সাধার সভা নং	অবসর গ্রহনকারী পরিচালক সংখ্যা	জ্যেষ্ঠতম পরিচালক	মন্তব্য
১৪ তম	০২	(ক) জনাব আনিস আহমেদ (খ)জনাব মনোয়ার হোসেন (প্রতিনিধি সিটি জেনারেল ইন্সুরেন্স)।	জনাব আনিস আহমেদ ও জনাব মনোয়ার হোসেন অবসর গ্রহণ করবেন এবং পুনঃ নির্বাচিত বলে গণ্য হবেন।
১৫ তম	০১	জনাব আব্বাস উদ্দিন আহমেদ (প্রতিনিধি সান-ফ্লাওয়ার লাইফ ইন্সুরেন্স কোং লিঃ)	জনাব আব্বাস উদ্দিন আহমেদ অবসর গ্রহণ করবেন এবং পুনঃ নির্বাচিত বলে গণ্য হবেন।

9. As such it is evident that the board resolution dated 26-12-2013 (Annexure-C) is in conflict with the provisions sub-section (5) of section 7 of BCBL Act, 2007 as well as it conflicts with the provisions of Article 101 of the Articles of Association of Bank. I, therefore, hold that the board resolution dated 26-12-2013 (Annexure-C) is quite illegal, *ultra vires*, based on misconception of law and the same is, to that extent, hereby struck down hereby.

10. It is also to be recorded here that in another Company Matter No.219 of 2013, filed by one Mr Akhtar Hossain, under section 81(2) and section 85(3) of the Companies Act, by a judgment and order dated 18-11-2013, the Bank was permitted to hold its 14th and 15th Annual General Meetings and accordingly these two meetings were scheduled to be held on 1-2-2014. But after filing of this Company Matter No.43 of 2014 and following an interim order of injunction, granted in view of the facts and circumstances of the present petition, the said two AGMs were not held on 1-2-2014. Hence, the said judgment and order has been infructuous.

11. Hence, I find merit in this application and the petition shall be allowed, keeping in consideration the prayer of the Bank as made in paragraph No. 11 of their affidavit-in-opposition.

12. In view of the deliberation recorded above the petition is allowed. Accordingly, the entire period of delay that has taken place in holding the 14th and 15th Annual General Meeting of the Bank is hereby condoned.

13. The Bank is directed to hold the 14th Annual General Meeting within one months from the date of receiving certified copy of the judgment and order and to hold the 15th Annual General Meeting one month thereafter. The Bank is further directed to keep the agenda relating to election of directors to the post of 3(three) retiring directors from group-C. The election to be held in accordance with the provisions of sub-section (5) of section 7 of the BCBL Act, 1997. In other words, the directors retiring from 'C' or 'N' group must be elected by the share holder of the said group. The Bank is also directed to comply with the notifications and the directives of the regulatory bodies, as the case may be, in determining the competency or qualification of the candidates for the office of the directors. The candidates shall hold and/or acquire minimum shares as per conditions laid down by BSEC in the concerned notifications.

14. The judgment shall be effective subject to compliance of the order in respect of donation.

15. Cost will be borne by the parties respectively.

Let a copy of the order be sent to the Registrar of the Joint Stock Companies and Firms.

Ed.

High Court Division
(Special Original Jurisdiction)

Farah Mahbub J
AKM Zahirul Hoque J
} Amigo Bangladesh Ltd .....Petitioner

vs

Judgment
January 30th, 2014
} Bangladesh and others .....Respondent*

Bank Guarantee

Bank guarantee is a guarantee which the concerned financial institution gives ensuring payment on the failure of the incumbent bank concerned to make payment within the prescribed period of time. .....(51)

M Sayed Ahmed, Mohammad Imtiaz Farooq, Advocate with Sajed A. Sami, Advocate—For the Respondent.

Dr Rafiqur Rahman, Dr Nasima A. Rahman, Advocates—For the Petitioner:

Amatul Karim, DAG with Nusrat Jahan, AAG—For the Respondent Government.

Judgment

Farah Mahbub J: In this Rule, issued under Article 102 of the Constitution of the People's Republic of Bangladesh, the respondents have been called upon to show cause as to why the order dated 18-4-2011 passed by the respondent No. 1 under the signature of the respondent No. 2 directing the proforma respondent No. 4 not to mutate the schedule land in favour of anybody without prior written permission of the respondent No. 1 (Annexure-R) should not be declared to have been passed without any lawful authority and hence, of no legal effect and also as to why the respondent No. 1 should not be directed to give necessary explanation or clearance or no-objection or permission for mutating the schedule land in the name of the petitioner-company.

2. Facts, in brief, are that the petitioner, Amigo Bangladesh Ltd, is a private limited company duly incorporated under the Companies Act of 1994, having its registered office at 14, Purana Paltan, Dhaka-1000. However, in order to do business it had purchased 65 acres of land i.e. the case property situated at Gazipur, Dhaka, under RS Khatian No. 6 and Dag Nos. 1411, 1412, 1413, 1414, 1415 and 1416 from the recorded owner namely National Jute Mills Ltd. (hereinafter referred to as "NJM"), upon payment of full consideration (Annexure-A).

3. In this regard it has been stated that following the birth of Bangladesh in the year 1971, NJM was taken over by the respondent No. 1 in a nationalization bid on 26-3-1972 pursuant to PO No. 27 of 1972; consequently, all its shares and property are vested in the government. Subsequently, the respondent No. 1 had denationalized NJM pursuant to the "Denationalization Guidelines" published under gazette notification No. JD/IC/TS-1/82 dated 27-9-1982 by transferring shares to the sponsored share-holders of NJM (to the former Bangladeshi share holders) making them 51% owner of the mill. However, at the end of denationalization an agreement was also executed by the respondent No. 1 with the authorized Director of NJM on 23 6-1983 (Annexure-B) on the condition, *inter-alia*, that the sponsored shareholders would take over all the existing third party liabilities of NJM including all bank liabilities along with the liabilities owed to the respondent No. 1. However, post denationalization of NJM, the respondent No. 1 still retained 49% share in the company and, as per the agreed terms, all third party liabilities of NJM devolved on the new management comprising

*Writ Petition No. 10702 of 2011 .

the sponsored shareholders.

4. Subsequently, the respondent No. 1 vide Memo No. মপাম/শাঃবেঃবিঃ/পুজিঁ বাজার-০১/২০০৬/২০৯ dated 11-11-2007 (Annexure-C) had restricted transfer of any jute mill property in favour of a third party without its prior permission till the claim of the respondent government existed against the said jute mills. The contents of the said Memo runs as under:

"বর্তমানে প্রায়ই দেখা যায় যে, সরকার/বিজেএমসির সাথে সম্পাদিত চুক্তি খেলাপ করে মিল মালিকগন মিলের শেয়ার ও অন্যান্য স্থাবর অস্থাবর সম্পত্তি সরকারের পুর্বানুমোদন ব্যতীত তৃতীয় পক্ষের নিকট বিক্রয় ও হস্তান্তর করে যাচ্ছে এতে সরকারী/বিজেএমসির পাওনা আদায়ে প্রতিবন্ধকতা সৃষ্টি হচ্ছে।"

5. Meanwhile, the sponsored shareholders of NJM had transferred their respective shares to one Islam Group Ltd. Subsequently, said company Ltd. had transferred its shares to one Kazi Sayed-ul-Alam Babul and others.

6. In the meantime, one of the creditors of NJM, being Uttara Bank Limited instituted Artha Rin Suit before the concerned Artha Rin Adalat due to non-payment of loan claiming repayment of all accrued liabilities owned by NJM. However, being unable to run the business with huge liabilities, NJM had to lay off its employees and had ultimately closed down the factory. Thereafter, in order to settle the third party liabilities of NJM, the Board of Directors of the Company had resolved to sell some of the properties owned by it and make re-payment of the liabilities from the sale proceeds. Pursuant thereto the management of NJM had approached the petitioner-company for selling 65 acres of land subject to obtaining permission from the respondent No.l; the offer was duly accepted by the petitioner company.

7. Subsequently, the Managing Director of NJM, Kazi Syed-ul-Alam Babul, made an application to the respondent No.l on 8-9-2009 to purchase 49% share so held by the company which are 4,41,648 in number. In response to the said application the respondent No.l on 14-9-2009 had directed him to clear the payment of the then existing claim of the Government against NJM amounting to Taka 4,78,16,937 (Taka Four crore seventy eight lakh sixteen thousand nine hundred and thirty seven) along with 2% penal interest. In reply Kazi Syed-ul-Alam Babul vide letter dated 16-9-2009 (Annexure-D) stated, *inter-alia*,

"এমতাবস্থায় আমাদেরকে ২% পেনাল ইন্টারেস্ট মওকুফ করে আসল টাকা ৪,৭৮,১৬,৯৩৭ (চার কোটি আটাত্তর লক্ষ ষোল হাজার নয়শত সাইত্রিশ) টাকা পেমেন্ট দেয়ার অনুমতি প্রার্থনা করছি। অনুমতি পেলে উক্ত টাকা আগামী চার বৎসরের মধ্যে সুবিধাজনক সময়ে পেমেন্ট করার প্রস্তাব করছি। এই বিষয়ে আমরা উক্ত টাকার একটি ব্যাংক গ্যারান্টি দিতে প্রস্তুত আছি। এখানে বিশেষভাবে উল্লেখ্য এই সময়ের মধ্যে যদি সরকারের তরফ থেকে উক্ত পাওনা সম্পূর্ন অথবা আংশিক মওকুফের কোন ব্যবস্থা নেয়া হয় তাহলে আমাদেরকে উক্ত পরিমান (সম্পূর্ন অথবা আংশিক) ব্যাংক গ্যারান্টি ফেরত দেয়ার ব্যবস্থা রাখার অনুরোধ জানাচ্ছি।"

8. Said application for purchase of the shares of the respondent No.l in NJM was duly sanctioned by the respondent No. 2 being the Secretary of the Ministry of Textile and Jute, vide Memo No. BJMC/BOK/NATIONAL-29-9-339 dated 11-11-2009 stating, *inter-alia*,

"এমতাবস্থায়, চুক্তিনামার শর্ত মোতাবেক ২% দণ্ড সুদসহ ৩১-১০-২০০৯ তারিখ পর্যন্ত ন্যাশনাল জুট মিলের নিকট সরকারের পাওনা ৬৬৪.৪৭ লক্ষ টাকা আদায়ের লক্ষ্যে সরকার প্রয়োজনীয় পদক্ষেপ প্রহন করতে পারে এবং ৬নং অনুচ্ছেদে উল্লেখিত গেজেট নোটিফিকেশন এর ২নং ধারা অনুযায়ী সরকারের অবশিষ্ট শেয়ার ন্যাশনাল জুট মিলের মালিক ক্রয় করতে পারে।

9. The respondent No.l had also allowed Kazi Syed-ul-Alam Babul to submit bank guarantee against the government claim vide office letter dated 13-12-2009. However, vide the said

office letter the respondent No. 3 had intimated NJM that the permission to purchase shares owned by the respondent No. 1 was subject to the conditions as prescribed therein.

10. Complying the requirements as prescribed by the respondent No. 1, the NJM had furnished bank guarantee bearing No. LG-43/2010 dated 9-3-2010 to the respondent No. 1 for an aggregated amount of Taka 6,64,47,000 for a period of 4(four) years against all government claim owed by NJM (Annexure-G).

11. Having fulfilled all conditions so imposed by the respondent No. 1 vide Memo dated 13-12-2009, the said respondent vide Memo No. BOPAM/SHA:BE:BI:CEL- 29/96/55 dated 21-3-2010, issued under the signature of the respondent No. 4, had withdrawn the applicability of the restrictions so imposed under Memo dated 11-11-2007 upon NJM and had confirmed that the transfer of NJM shares held by the respondent No. 1 in favour of Kazi Syed-ul-Alam Babul was complete and, as such, prior permission from the respondent No. 1 need not be taken for starting a new business/transferring property of NJM (Annexure-H). Accordingly, stamp worth Taka 66,248 (Taka Sixty six thousand two hundred and forty eight) was also submitted to the respondent No. 1 on 25-3-2010 against the transfer of its 4,41,648 shares in favour of Kazi Syed-ul-Alam Babul and others through Bangladesh Bank Challan (Annexure-I).

12. Later, the respondent No. 1 vide Memo No.বাপাম/শাঃবেঃবিঃ/বিঃসেল-২৯/৯৬/৬৭ dated 28-3-2010 had confirmed the sale of NJM shares held by the respondent No. 1 to Kazi Syed-ul-Alam Babul on receipt of payment of Taka 44,16,480 as share price and bank guarantee of Taka 6,64,47,000 for 4(four) years against all government claim and had requested Bangladesh Jute Mills Corporation (BJMC) to handover the sold shares to Kazi Syed-ul-Alam Babul (Annexure-J).

13. Subsequently, BJMC vide Memo No. বিজেএমসি/বোক/ন্যাশনাল-২৯-১০-১৪৪ dated 2-6-2010 had directed to take necessary steps to handover the sold shares to Kazi Syed-ul-Alam Babul in the light of the memos so issued by the respondent No.1 on 18-3-2010, 25-3-2010 and 28-3-2010 respectively (Annexure-K).

14. Relying on the aforementioned memos issued by the respondent No. 1 and BJMC, NJM sold 65 acres of land situated at Kaliganj, Gazipur to the petitioner-company vide registered sale deed No. 2639 dated 25-3-2010 with possession thereof (Annexure-L).

15. After completion of transfer of land in favour of the petitioner company, the respondent No. 1 vide Memo No. BOPAM/ U:PO:9 (NIBEBI)2010/11, dated 23-5-2010 issued under the signature of the respondent No. 3 had revoked the earlier release order dated 21-3-2010 (Annexure-M).

16. On 2-9-2010 the respondent No. 1 vide Memo No. বপাস/শাঃবে/বি//বিঃসেল-২৯/৯৬(অং)/২১২ (Annexure-N) issued under the signature of the respondent No. 3 had withdrawn the earlier Memo dated 23-5-2010. Consequently, the revocation of the applicability of restrictions under memo dated 11-11-2007 upon NJM had been restored. In addition, vide this memo dated 2-9-2010 the respondent No. 1 had granted permission for mutating the relevant land belonging to NJM in the name of the "concerned mill".

17. On 6-3-2011 the petitioner-company made a representation to the Board of Investment requesting for recommendation to the appropriate authority for mutating the said purchased land in the name of the petitioner. In response thereof the Board of Investment (BOI) forwarded the same to the concerned authority for consideration (Annexure-O and O-1). In the meantime, the petitioner submitted an application to the proforma respondent No. 4 on 14-2-

2011 for mutating the said 65 acres of land in its own name. In response thereof, the said respondent sent an office letter to the respondent No. 1 requesting for directions with regard to disposing of the petitioner's application (Annexure-P).

18. On 18-4-2011 the respondent No. 1 vide Memo No. বপাম/বেঃবিঃ/হমি(পাট)-২৯-১১-৯৩ gave direction to taking necessary steps for encashment of the bank guarantee dated 9-3-2010 so furnished by Kazi Syed-ul-Alam Babul against all government claim owed by NJM by presenting the same to the Dhaka local office of Uttara Bank Ltd. (Annexure-Q).

19. On the same date the respondent No. 1 vide Memo No. বপাম/বেঃবিঃ/হমি(পাট)-২৯-১১-৯২ had stated that NJM had violated its covenants made to the respondent No. 1 during share transfer by failing to (i) clear its outstanding bank and other third party liabilities, and (ii) restart its factory within the prescribed period of time; hence, had directed the proforma respondent No. 4 to refrain from mutating said 65 acres of land in the name of the petitioner-company (Annexure-R). Consequent thereto the pro-forma respondent No. 4 had refused to mutate the said land in the name of the petitioner-company vide order dated 25-4-2011.

20. In the meantime the respondent No. 1 vide memos dated 24-4-2011 and 27-4-2011 respectively had directed to take necessary steps for expeditious encashment of the bank guarantee dated 9-3-2010 (Annexure-T and T-l).

21. In response thereof Uttara Bank Ltd. had requested the General Manager of Janata Bank vide office letter dated 10-5-2011 to encash the said bank guarantee dated 9-3-2011; accordingly, Janata Bank Ltd. had encashed the same on 12-5-2011 (Annexure-U and U-1).

22. Under the said pressing situation the petitioner had served a demand for justice notice on the respondents concern on 10-11-2011 through its lawyers requesting them to do the needful to withdraw the impugned order and to direct the pro-forma respondent No. 4 to mutate the property in question in favour of the petitioner-company. However, the respondents have paid no heed to the petitioner's request. Hence, the application.

23. Mr Mohammad Imtiaz Farooq, with Mr M Syed Ahmed, the learned Advocates appearing on behalf of the petitioner-company submits that the predecessor of the petitioner, being NJM, is still the owner of the land in question in which the jute mill is situated and that in its representation dated 5-7-2010 (Annexure-X) the predecessor of the petitioner had clearly informed the respondents concern that only the empty land of the said jute mill should be sold to the petitioner-company in order to go for full operation of the jute mill. He further submits that the respondents concern had duly accepted the bank guarantee which is valid until 8-3-2014 for a sum of BDT 6,64,47,000 (Annexure-G), which is the full liability owed by NJM to the respondent No. 1 and that the petitioner-company being a bona fide third party purchaser should not be penalized by the respondents for actions of the respondents themselves. He further submits that predecessor of the petitioner-company had submitted clearance certificates from both the lender banks (Annexure-X 1, X-2 and X-3 respectively) and being fully aware of their existence the respondents are now trying to stop mutation in the name of the petitioner-company with malafide intention.

24. In this regard he further submits that the Governor of East Pakistan had acquired the schedule property and after the independence of Bangladesh the scheduled property came within the jurisdiction of the Ministry of Textile and Jute who, by representing itself as having

the sole authority over the schedule property and in exercise of that authority, had released the same by denationalizing it subject to certain terms and conditions and upon fulfilling of those conditions the petitioner-company had purchased the said schedule property.

25. He also goes to contend that from the contents of the memos dated 6-7-2010 and 14-7-2010 respectively it is abundantly clear that prior to issuance of Memo dated 2-9-2011 (Annexure-N) by which withdrawal of the general restrictions to sell NJM's property was confirmed, the respondents were fully aware that the petitioner-company is buying the property in question of NJM. As such, the respondents are now estopped from denying that the predecessor of the petitioner-company had no right to sell the land in question. He also submits that the petitioner is a company registered under the Company Act, 1994 hence, is duly entitled to file the instant writ petition.

26. He lastly submits that basing on the representations of the Ministry of Textile and Jute by issuing Memo dated 11-11-2007 and relying upon the release letter issued by the same on 21-3-2010, which was confirmed vide memo dated 2-9-2010, the petitioner-company had purchased the schedule property and, as such, the Ministry of Textile and Jute should be stopped from re-acquiring the schedule property on the pretext that the further parallel permission from other government bodies is prerequisite for transfer of said property.

27. Dr. Rafiqur Rahman, the learned Senior Advocate appearing with Dr. Nasima A. Rahman, the leaned Advocate for the respondent Nos. 1 and 2 submits that in view of Article 42 of the Constitution the petitioner is not entitled to file and proceed with the writ petition for the Directors of the company are not Bangladeshi national and that their rights are subject to restriction imposed by law. Hence, the vendor had no right to sell the same to it without prior permission of the respondent government.

28. Ms. Amatul Karim, the learned Deputy Attorney-General with Ms. Nusrat Jahan, the learned Assistant Attorney-General appearing on behalf of the respondent-Government submits that in the light of the denationalization policy of the respondent government the ownership of National Jute Mills Ltd. has been transferred to its former owner on 23-6-1983 through bilateral and tripartite agreement vide gazette notification dated 27-9-1982. However, at the time of transfer the mills owed to the government and other Banks as follows:

(a) Bangladesh Shilpa Bank (31-5-1983)-4,23,48,026

(b) Bangladesh Shilpa Rin Sangstha (31-5-1983)-9,20,123

(c) 4.5 Commercial Bank Debenture (1-1-1983) 1,6,89,568

(d) Cash Credit Loan (31-5-1983)-21,77,286

(e) Customs and other debenture (31-5-1983)-4,95,625

(f) Government Instrument (31-5-1983)-4,78,16,937.

29. Accordingly, the dues of National Jute Mills stood at Taka 12,54,47,565.

30. She further submits that as per the conditions of the agreement the government dues stood at Taka 4,78,16,937 which was payable for 10 years i.e., 1985-86 to 1995-96 after two years moratorium at equity expenditure of the Government and the installments per year was Taka 47,81,694. However, she goes to contend that dues was not paid as per the schedule of the contract. As a result, the said dues of the government stood at Taka 664.47 including 2% penal interest as on 31-10-2009.

31. She also goes to argue that the Managing Director of the denationalized company i.e. NJM furnished an unconditional 4(four) years bank guarantee of Taka 664.47 including 2% penal interest as on 31-10-2009 in favour of the government pursuant to the buyer's application dated 16-9-2009 against 4,41,648 government shares of the National Jute Mills Ltd. as per the condition of the contract.

32. However, challenging the order of encashment of the said bank guarantee the mill authority filed writ petition No. 3821 of 2011 and had obtained an order of *status quo*. In compliance of that, she submits, order the bank guarantee was duly restored. Thereafter, the Mill authority applied to the Ministry of Finance for remitting the said dues through Ministry of Textile and Jute, but the Ministry of Finance did not approve their demand. Being aggrieved they filed another writ petition being No. 11988 of 2012.

33. Lastly, she submits that the land in question is a government property, which has been obtained by way of acquisition from the private owner for establishment of National Jute Mills. Moreover, as per the law of the country there is no scope to use the land other than the purpose for which the land was acquired, as well as there is no scope to sell, lease, mutual transfer etc. of the acquired land without prior permission of the Ministry of Land. As such, she submits that the so called sale of land of National Jute Mill to the petitioner-company was absolutely illegal. Considering these aspects of the case, the proforma respondent No. 4 has rightly kept the application of the petitioner-company for mutation with the record. Hence, she submits that no interference is called for.

34. Pursuant to the nationalization policy of the government vide notification dated 27-9-1992 a bilateral and tripartite agreement was entered into between the government represented by the Secretary, Ministry of Commerce and Industries, Jute Division and the Authorized Director, National Jute Mills Ltd. (in short, NJM) on 23-6-1983 (Annexure-B).

35. However, as per clause 14 of the bilateral agreement dated 23-6-1983 all liabilities of the company to the respondent government/ BJMC/financial institution shall continue to be the liabilities of the company. On examination of records (Annexure-E, not disputed by the petitioner company) till 31-5-1983 the company owed Taka 4,78,16,937 with 2% penal interest, as has been imposed pursuant to the condition of the agreement. As per the said condition of the agreement after 2 (two) years moratorium from 1985-86 the company was liable to pay Taka 4,78,16,937 to the government in 10(ten) years paying Taka 47,81,684 per year. However, the company having failed to comply the schedule it was liable to pay Taka 6,64,47,000 as on 31-10-2009 with 2% penal interest.

36. Meanwhile, the former Bangladeshi share holders who had been transferred 51% shares of the company had transferred those shares to one Islam Group Ltd. Subsequently, said company had transferred those shares to one Kazi Syed-ul-Alam Babul. However, it is pertinent to observe that vide clause (6) of the agreement dated 25-6-1983 (Annexure-E) the Bangladeshi share holders would not be entitled to sell those shares without prior approval of the government until such payment under the agreement were fully made and obligations arisen thereof were fully discharged. In this regard not a single scrap of paper is available before us to show that before transfer of the said shares, the former Bangladeshi share holders had duly paid all dues payable to the government and had taken prior permission of the respondent government. Rather, from Annexure- E, the letter dated 16-9-2004 issued

by Kazi Syed-ul-Alam Babul, the Managing Director of the Company, it is apparent that dues of Taka 4,78,16,977 of the government including 2% interest had not been paid as on that date, the amount which the company was praying to pay in 4(four) years along with purchase of government shares.

37. In spite of the fact that violating the condition of the contract the original Bangladeshi share holders had transferred shares to the 3rd parties the Ministry concern without raising objection whatsoever to the same rather had allowed the prayer so made on 8-9-2009 by the subsequent purchaser of shares vide Memo No. বপাম/শাঃবেঃবিঃ/বিঃ সেল-২৯-৯৬-২৬৯ dated 13-12-2009 (Annexure-F) stating, *inter-alia,*

"(ক) সরকারী ৪,৪১,৬৪৮টি শেয়ারের মূল্য (প্রতিটি ১০ হারে) সর্বমোট ৪৪,১৬,৪৮০ (চুয়াল্লিশ লক্ষ ষোল হাজার চারশত আশি) টাকা এককালীন সচিব, বস্ত্র ও পাট মন্ত্রনালয় এর হিসাব খাতে পে-অর্ডারের মাধ্যমে ১(এক) মাসের মধ্যে জমা প্রদান করবেন।

(খ) জিওবি খাতে পাওনা ২% দণ্ড সুদসহ ৬৬৪.৪৭ (ছয় কোটি চোষট্টি লক্ষ সাতচল্লিশ হাজার) টাকা (৩১-১০-২০০৯ তারিখ চোষট্টি লক্ষ সাতচল্লিশ হাজার) টাকা ৩১-১০-২০০৯ তারিখ পর্যন্ত) যে কোন রাষ্ট্রায়ত্ব তফসিলী ব্যাংক হতে ৪(চার) বৎসর মেয়াদী ব্যাংক গ্যারান্টির মাধ্যমে উক্ত টাকা ৩(তিন) মাসের মধ্যে সচিব, বস্ত্র ও পাট মন্ত্রনালয় বরাবর জমা দিবেন।

(গ) সরকারী গেজেট/চুক্তিনামা মোতাবেক অন্যান্য (ব্যাংক, বীমা কাস্টমস ইত্যাদি) সকল প্রকার দায় দেনা কোম্পানী বহন করবে।"

38. In response thereof the company submitted bank guarantee dated 9-3-2010 amounting to Taka 6,64,47,000 to remain in force till 8-3-2014, as well as had also paid the amount of purchase money of the government shares (Annexure-C) with prayer to waive the dues of the government. Accordingly, the Assistant Director, Ministry of Textile and Jute vide Memo No. বপাম/শাঃবেঃবিঃ/ সেল-২৯/৯৬/৫৫ dated 21-3-2010 Annexure-H) had withdrawn the restriction so imposed by the Ministry vide Memo No. বপাম/শাঃবেঃবিঃ/ পুঁজি বাজার-০১/২০০৬-২০৯ dated 11-11 -2007 (Annexure-C) stating, *inter-alia,*

"উপর্যুক্ত বিষয় ও সূত্রের আলোকে নির্দেশক্রমে জানানো যাচ্ছে যে, সাবেক মালিকদের নিকট হস্তান্তরিত মেসার্স ন্যাশনাল জুট মিলস্ লিঃ খলাপাড়া, কালীগঞ্জ, গাজীপুর এর সরকারী ৪,৪১,৬৪৮টি শেয়ারের মূল্য (প্রতিটি ১০ হারে) বাবদ ৪৪,১৬,৪৮০ (চুয়াল্লিশ লক্ষ ষোল হাজার চারশত আশি) টাকা পরিশোধ করায় এবং জিওবি খাতে পাওনা ২% দণ্ড সুদসহ ৬,৬৪,৪৭,০০০ (ছয় কোটি চৌষট্টি লক্ষ সাতচল্লিশ হাজার) টাকা ৪(চার) বৎসর মেয়াদী ব্যাংক গ্যারান্টির মাধ্যমে পরিশোধ করায় এর ব্যবস্থাপনা করায় এর ব্যবস্থাপনা পরিচালক জনাব কাজী ছাইয়েদুল আলম বাবুল এর অনুকলে শেয়ার বিক্রয়/হস্তান্তরের ফলে এ মন্ত্রনালয়ে কর্তৃক জারীকৃত ১১-১১-২০০৭ তারিখের বপাম/শাঃবেঃবিঃ/পুঁজি বাজার ১/২০০৬/২০৯ নং স্মারকের নিষেধাজ্ঞা ন্যাশনাল জুট মিলস লিঃ এর উপর থেকে প্রত্যাহার করা হলো সরকারী শেয়ার হস্তান্তরের ফলে নতুন করে শিল্প স্থাপন/হস্তান্তরের ক্ষেত্রে এই মিলের সরকারের কোন পূর্বানুমতি প্রয়োজন হবে না।"

39. At this juncture, it is pertinent to note that while the said clearance had been given by the Ministry concern, payment of Taka 6,64,47,000 to be made to the government was still unsettled. At the same time, the restriction as endorsed in clause (6) of the agreement dated 25-6-1983 (Annexure-B) was still in operation.

40. However, the respondent No. 3 vide Memo No. বপাম/শাঃবেঃবিঃ/ সেল-২৯/৯৬/৬৭ dated 28-3-2010 (Annexure-J) had requested the Chairman BJMC, who has not been made a party in the instant writ petition, to transfer government shares (4,41,648 in number) in favour of Kazi Syed-ul-Alam Babul. Pursuant thereto the Chairman of the Corporation had handed over the said number of shares to the Managing Director of the Company on 24-5-2010 (Annexure-K).

41. At this stage, when payment of Taka 6,64,47,000 to the government was still unsettled and that the bank guarantee, being in force for 4 (four) years, cannot be encashed before 8-3-2014, the Managing Director of the company Kazi Syed-ul Alam Babul on the plea of withdrawal of restriction of the government vide Memo No. বপাম/শাঃবেঃবিঃ/বিঃ সেল-২৯/৯৬/৫৫ dated 21-3-2010 (Annexure-H) had transferred 50.40 acres of land (including land and building) to the petitioner-company vide registered sale deed No. 2639 dated 29-3-2010 (Annexure-W to the supplementary affidavit) out of 65.39 acres of land with possession thereof.

42. At this juncture, the Deputy Secretary of respondent No. 1 had declared Memo No. বপাম/শাঃবেঃবিঃ/ সেল-২৯/৯৬/৫৫ dated 21-3-2010 (Annexure-H) invalid and upon issuing Memo No. বপাম/উঃসাঃ (নীরেধি)/২০১০ dated 23-5-2010 (Annexure-M) with copy to Kazi Syed-ul-Alam Babul, the Managing Director of the company stated, *inter-alia*,

> "উপর্যুক্ত বিষয়ে জারীকৃত সূত্রে বর্ণিত পত্রটি কর্তৃপক্ষের অগোচরে কর্তৃত্বহীন ও এখতিয়ার বর্হিভূতভাবে জারী করায় তা অকার্যকর ঘোষনা ক্রমে এতদ্বারা বাতিল করা হল।"

43. Later, the same Deputy Secretary of the respondent No. 1 vide Memo dated 2-9-2010 again had revoked Memo dated 11-11-2007 (imposing restriction of transfer without taking prior permission of the government) and also had revoked his own Memo dated 23-5-2010 (Annexure-M) giving permission to mutate the land of the company in its own name.

44. The relevant portion is quoted herein below:

> "(ক) বস্ত্র ও পাট মন্ত্রনালয় হতে জারীকৃত সার্কুলার নং বপাম/শাঃবেঃবিঃ/পুজি বাজার ১/২০০৬/২০৯ তারিখ ১১-১১-২০০৭ সংখ্যক পত্রটি ন্যাশনাল জুট মিলের ক্ষেত্রে প্রত্যাহার করা হলো।
>
> (খ) বস্ত্র ও পাট মন্ত্রনালয় হতে জারীকৃত পত্র নং বপাম/উঃসঃ(নীবেবি) ২০১০/১১. তারিখ ২৩-৫-২০১০ সংখ্যক পত্রটি প্রত্যাহারপূর্বক মিলের জমি সংশ্লিষ্ট মিলের নামে নামজারী করার অনুমতি দেয়া হলো; এবং
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> (গ) ভবিষ্যতে ন্যাশনাল জুট মিলস্ লিমিটেড এর ক্ষেত্রে সরকারী কোন পাওনা উদ্ভব হলে মিল কর্তৃপক্ষ কর্তৃক তা সরকারের অনুকুলে পরিশোধ করতে বাধ্য থাকবে।"

45. Accordingly, the petitioner-company made a prayer to the Assistant Commissioner of Land, Kaligonj, Gazipur, the proforma respondent No. 4 on 25-11- 2010 for mutation of the land in question. In reply, respondent No. 4 vide Memo No. উভূম/কালী/নামজারী-২১০/১০-১১ (জামালপুর)/১০৬ dated 14-2-2011 (Annexure-P) stated, *inter-alia*,

> "সার্বিক পর্যালোচনায় দেখা যায় যে, মেসার্স ন্যাশনাল জুট মিলস লিঃ এর আবেদনের প্রেক্ষিতে সরকারের পক্ষে বস্ত্র ও পাট মন্ত্রনালয় কর্তৃক শর্ত মোতাবেক শেয়ারসহ যাবতীয় পাওনা পরিশোধ করায় মিলের সম্পত্তিতে শ্লিপ স্থাপন, হস্তান্তর ও নামজারী ও জমাভাগ বিষয়ে ন্যাশনাল জুট মিলস্ লিঃ কর্তৃপক্ষকে নির্দেশনা দেয়া হয়েছে। উক্ত মিলের সম্পত্তি (জমি) অন্যত্র বিক্রয়ের বিষয়ে সুস্পষ্ট কোন নির্দেশনা পাওনা যায়নি।
>
> এমতাবস্থায়, শেয়ার ক্রয়মুলে মালিক দাবীদার কর্তৃক বিক্রিত দলিল মূলে মালিকানা দাবীদার এমগো লিঃ এর নামজারীর আবেদনটি চুড়ান্ত নিষ্পত্তির লক্ষ্যে সংশ্লিষ্ট সকল মন্ত্রনালয় অর্থাৎ সরকার পক্ষের সুস্পষ্ট নির্দেশনা দাখিলের জন্য বলা হলো।

46. Pursuant thereto the respondent No. 1 vide Memo No. বপাম/বেঃবিঃ/হমি(পাট)-২৯/১১/৯২ dated 18-4-2011 (Annexure-R) has stated, *inter-alia*,

> "(১) সরকারের নিকট প্রদত্ত অঙ্গীকারনামা অনুযায়ী প্রতিষ্ঠানটি চালু করা হয়নি।
>
> (২) প্রদত্ত ব্যাংক গ্যারান্টি বাবদ অর্থ নগদায়ন করা হয়নি অর্থাৎ মিলে সরকারের পাওনা অপরিশোধিত রয়েছে।
>
> (৩) ব্যাংকে আর্থিক কোন পাওনা নেই এ অঙ্গীকারের স্বপক্ষে দলিলাদি দাখিলক্রমে তা নিশ্চিত করা হয়নি।
>
> (৪) চুক্তি অঙ্গীকার ভঙ্গ করে জনাব কাজী ছাইয়েদুল আলম বাবুল ন্যাশনাল জুট মিলস লিঃ প্রতিষ্ঠানটি অন্যত্র বিক্রয় করতে পারেন না।"

47. Accordingly, respondent No. 4 vide order dated 25-4-2011 had kept the application of the petitioner-company on record (Annexure-S). On 18-4-2011 the respondent concerned had directed the Deputy General Manager, Local Office, Uttara Bank Ltd. to encash the bank guarantee dated 9-3-2010 in favour of the respondent No. 1. However, in both the Memos no reference had been made about Memo No. বপাম/শাঃবেঃবিঃ/বিঃ সেল-২৯/৯৬/(অংশ)/২১২ dated 2-9-2010 (Annexure-N of the writ petition).

48. At this stage, Mr Ragib Rouf Chowdhury, the learned Advocate appearing on behalf of the petitioner in connection with writ petition No. 3821 of 2011 informs the court that challenging Memo No. বপাম/শাঃবেঃবিঃ/হমি (পাট্)-২৯/১১-৯৩ dated 18-4-2011 (Annexure-Q) the said petitioner filed writ petition No. 3821 of 2011 and the Rule Nisi so issued earlier on 15-5-2011 is still pending. Meanwhile, the respondent concern having encashed the bank guarantee this Hon'ble court vide order dated 28-9-2011 had directed to restore the amount of money to its previous position as on 8-5-2011 and that the said direction has duly been complied with.

49. In this regard Mr Dr. Rafiqur Rahman, the learned Senior Advocate appearing on behalf of the respondent No. 1 informs the court that Kazi Syed-ul-Alam Babul also filed writ petition No. 11988 of 2012 challenging the amount of Taka 6,64,47000, as claimed by the respondent No. 1 and that the Rule so issued therein has ultimately been made absolutely vide judgment and order dated 30-5-2013. Being aggrieved the BJMC represented by its Chairman has filed Civil Miscellaneous Petition No. 943 of 2013 before the Appellate Division. However, the learned Judge in Chamber of the Appellate Division vide order dated 7-11-2013 has stayed operation of the said judgment and order.

50. From the above, it is, thus, evident that without taking prior permission of respondent No. 1 the former Bangladeshi share holders had transferred their shares to one Islam Group who subsequently had transferred its shares to one Kazi Syed-ul- Alam Babul. Said Kazi Syed-ul-Alam Babul vide letter dated 8-9-2009, however, made a prayer to respondent No. 1 to pay Taka 4,78,16,937 (which subsequently stood at Taka 6,64,47,000 with 2% penal interest in 4(four) years. Ultimately, having been allowed by the respondent No. 1 vide Memo No. বপাম/শাঃবেঃবিঃ/বিঃ সেল-২৯/৯৬/২৬৯ dated 13-12-2009 (Annexure-F) he submitted bank guarantee dated 9-8-2010 in favour of the respondent No. 1 (Annexure-G).

51. Bank guarantee is a guarantee which the concerned financial institution gives ensuring payment on the failure of the incumbent bank concerned to make payment within the prescribed period of time. In the instant case, the dispute as to payment of Taka 6,64,47,000 to the respondent No. 1 has not yet been finalized, for neither the said bank guarantee could be encashed till 8-3-2014 nor the respondent No. 1 has yet waived payment of the said amount by the company. Moreover, the judgment and order dated 30-5-2013 passed in writ petition No. 11988 of 2012 with regard to the payment of the said amount is still under challenge before the Appellate Division, which has not yet been adjudicated and disposed of; hence, it cannot be said that the company has already made the said payment, as claimed vide letter dated 5-7-2010 (Annexure-X of the supplementary affidavit.)

52. In the said back drop, we have no manner of doubt to find that since the issue of payment of Taka 6,64,47,000 to the respondent No. 1 has not yet been resolved as such, issuance of the impugned order dated 18-4-2011 (Annexure-R) by the respondent No. 1 is justifi-

able in the given facts and circumstances of the case, which has been issued for the sole reason, to protect the interest of the government.

53. In this regard it will not be out of place to observe that nowhere within the 4(four) corners of the official correspondences, as have been annexed in the writ petition, the supplementary affidavit as well as affidavit-in- opposition, the respondent government has challenged or disputed transfer of the property in question to the petitioner company, vide registered sale deed No. 2639 dated 29-3-2010 (Annexure-W). The only objection which has been raised by the respondent government is the issue of disposal of payment of Taka 6,64,47,000. As such, we are of the view that justice will better be served if the process of mutation, pending before the proforma respondent No. 4 in favour of the petitioner-company be kept in abeyance till disposal of the said issue. However, upon disposal of the said issue the authority concern i.e. the respondent No. 4 as well as the respondent No. 1 are at liberty to take immediate steps towards mutation of the case property in favour of the petitioner-company in accordance with law.

54. So far the claim of the respondent Nos. 1 and 2 is concerned that the Directors of the petitioner company being foreigners this Rule must fail in view of Article 42 of the Constitution; we find no substance to the same, for the petitioner is a company registered under the Company, Act, 1994 and that the said respondents have failed to show that there is any bar provided in the said statute restricting foreigners from becoming Directors of the Company in Bangladesh.

55. In view of the above observations and findings this Rule is accordingly disposed of.

There will be no order as to costs.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Moyeenul Islam Chowdhury J } Goni Mollah and others .....Appellants

vs

State.....Respondent*

Judgment
May 22nd, 2014. } In Criminal Appeal No. 7250 of 2008.

Evidence Act (I of 1872)
Section 32(1)

Dying declaration—Declaration in Part—Declaration made by the victim being incomplete, no one can tell what he was about to add. It is a declaration in part and it is a serious error to admit a dying declaration in part. Alleged dying declaration being an incomplete one is not a dying declaration within the meaning of sub-section (1) of section 32 of the Act. .....(36)

Code of Criminal Procedure (V of 1898)
Section 154

FIR is not a substantive piece of evidence; but nevertheless, its importance cannot be whittled down in that it is the first recorded version of the prosecution case. ..... (48)

Evidence Act (I of 1872)
Section 8

Absconding—Abscondence is only a supporting circumstance to be considered along with the incriminating evidence, if any, on record connecting them with the commission of the offence. As there is no reliable substantive evidence on record connecting them

*Criminal Appeal No. 7250 of 2008 with Criminal Appeal No. 974 of 2013 with Criminal Appeal No. 289 of 2011 with Jail Appeal No. 1026, 1027, 1071, 1072, 1074 1075 of 2008 and Death Reference No. 110 of 2008.

with the commission of the offence, their mere abscondence will not help the prosecution in any way. .....(59)

Code of Criminal Procedure (V of 1898) Section 154

FIR is not an encyclopaedia and, as such, it is not expected that it will contain all the minute details of the incident. When a very vital statement as to eye-witnessing of the occurrence has not been mentioned in the FIR, this renders the entire prosecution case highly doubtful. .....(54)

Corroboration

There is no hard and fast rule that the evidence of partisan or interested or relative witnesses cannot be accepted without corroboration from independent witnesses. But if their evidence is found to be reliable and unblemished, it can be acted upon without corroboration from any independent source. The testimony of the alleged eye-witnesses ought to have been corroborated by disinterested, non-partisan and independent witnesses. Question of reliance on the interested, relative and partisan witnesses is out of the question. .....(62)

Observations

Observations made by the Appellate Division in paragraph 16 in the decision reported in 53 DLR (AD) 1 do not appear to have any applicability to the facts and circumstances of the present case in so far as the belated disclosure of the names of the assailants of the victims are concerned. .....(64)

Duty of Judge

Duty of a Judge is to look for the truth while the duty of disclosing the truth to the Judge lies with the rest of the world. So if the witnesses fail to divulge the truth to the Judge during the trial of the case for some reason or other, then justice becomes a casualty. In such a situation, the Judge feels hapless and helpless. .....(71)

Observations

Brutal murders are being committed even in broad daylight by professional killers and hired goons. But in most cases, the killers get off scot-free either because of lack of evidence or because of the star witnesses' obliging statements made in favour of the defence in fear or because of bungling of investigation of those cases by the Investigating Officers concerned. In this way, a culture of impunity has been created in this country to the detriment of the rule of law. .....(82)

Witness Protection Act

The reluctance and unwillingness of the witnesses to disclose the truth before the Courts in criminal trials due to threats and evil influence of money power, muscle power and political power, an Act like. The Witness Protection Act' may be enacted by the Legislature. In this regard, the Government will have to play a pro-active role if it wants to salvage the criminal justice delivery system from its near collapse. .....(85)

Sarafat Mandal alias Mander Mondal vs State,

14 BLT 290= 11 BLC 1; Hosen Sheikh alias Hochen and Hashem Sheikh vs State, 18 BLD 701= 50 DLR 508; State vs Abdus Sattar and others, 43 DLR (AD) 44; State vs Moslem, 55 DLR 116; State vs Keramat Ali, 16 MLR (AD) 268; Zahed Ali Foreman (Driver) vs State, 9 BLC (AD) 122; Cyril Waugh vs The King, 9 DLR 353; Nowabul Alam vs State, 15 BLD (AD) 54; Masalti vs State of Uttar Pradesh, AIR 1965 (SC) 202; Nazir vs State, 14 DLR (SC) 159; Abdul Karim vs State and another, 1981 BLD (AD) 200; Mohammad Ali vs State, 13 MLR (AD) 121; Siraj Mal vs State, 45 DLR 688; State vs Ful Mia, 5 BLC (AD) 41; Md Ali Haider vs State, 40 DLR 97; Nazrul Islam vs State, 45 DLR 142. Gopal Rajgor vs State, 42 DLR 446; Liakat Ali Chaklader vs State, 4 BCR (AD) 114; State vs Abdus Sattar, 43 DLR (AD) 44; State vs Moslem, 55 DLR 116; Zahed Ali Foreman (Driver) vs State, 9 BLC (AD) 122; State vs Keramat Ali, 16 MLR (AD) 268; Mahmudul Islam alias Ratan vs State 53 DLR (AD) 1; State vs Golam Mostafa, 9 BLC 63; Md Luqman vs State, 21 DLR (SC) 461; Alkas Mia vs State, 25 DLR 398 and Zahira Habibullah Sheikh vs State of Gujarat, 3 SCC 374 ref.

Khandker Mahbub Hossain with M Masud Rana, Nasrin Khandker, Kamrun Nahar and Niaz Muhammad Mahboob, Advocates—For the condemned-appellant Goni Mollah in Criminal Appeal No. 7250 of 2008.

AKM Fazlul Huq Khan Farid with Md Shafiquzzaman and Harun-ur-Rashid, Advocates—For the condemned-appellants Mozibar Mollah and Abdul Mannan Khan in Criminal Appeal Nos. 7250 of 2008 and 974 of 2013.

Rezbaul Kabir, Advocate—For the accused-appellant Bablu in Criminal Appeal No. 289 of 2011.

Hasna Begum, Advocate appointed by the National Legal Aid Services Organization, Dhaka, Bangladesh—For the condemned-appellants Mozibar Mollah and Goni Mollah in Jail Appeal Nos. 1026 of 2008 and 1027 of 2008.

Md Hatem Ali, Advocate appointed by the National Legal Aid Services Organization, Dhaka, Bangladesh—For the accused-appellant Kalam Member in Jail Appeal No. 1071 of 2008.

Shirin Afroze, Advocate appointed by the National Legal Aid Services Organization, Dhaka, Bangladesh—For the accused-appellants Md Taleb Kha and Omar Ali in Jail Appeal Nos. 1072 of 2008 and 1074 of 2008.

Mohammad Khabir Uddin Bhuiyan, Advocate appointed by the National Legal Aid Services Organization, Dhaka, Bangladesh—For the accused-appellant Latif Mondal in Jail Appeal No. 1075 of 2008.

Zahirul Haque Zahir, DAG with Mahmuda Parveen, AAG—For the State in Criminal Appeal Nos. 7250 of 2008, 974 of 2013 and 289 of 2011 and Jail Appeal Nos. 1026 of 2008, 1027 of 2008,1071 of 2008, 1072 of 2008, 1074 of 2008 and 1075 of 2008 and Death Reference No. 110 of 2008.

Judgment

The Criminal Appeal Nos. 7250 of 2008, 974 of 2013 and 289 of 2011 and Jail Appeal Nos. 1026 of 2008, 1027 of 2008, 1071 of 2008, 1072 of 2008, 1074 of 2008 and 1075 of 2008, at the instance of the accused-appellants, are directed against the judgment and order of conviction and sentence dated 27-10-2008 passed by the Additional Sessions Judge, Rajbari in Sessions Case No. 57 of 2007 arising out of GR Case No. 140 of 2003 corresponding to Rajbari Police Station Case No. 3 dated 4-6-2003. By the impugned judgment and order, the learned Additional Sessions Judge convicted the accused-appellants and others under sections 302/34 of the Penal Code, 1860 and sentenced the accused Mozibar Mollah, Goni Mollah and Abdul Mannan Khan thereunder to death and to pay a fine of Taka 5,000 each and also sentenced the accused Momin (absconding), Akai (absconding), Nepal alias Jabbar alias Dada Bhai (absconding), Omar Ali, Bablu, Kalam Member, Md Taleb Kha and Md Latif Mondal thereunder to suffer imprisonment for life and

to pay a fine of Taka 10,000 each, in default, to suffer imprisonment for a further period of 2(two) years each. The learned Additional Sessions Judge also made a statutory reference to the High Court Division under section 374 of the Code of Criminal Procedure, 1898 for confirmation of the death sentence imposed upon the concerned appellants, namely, Mozibar Mollah, Goni Mollah and Abdul Mannan Khan.

2. All the appeals and the death reference were heard together by a Division Bench of the High Court Division consisting of my learned brothers Mr Shahidul Islam, J and Mr Abdur Rob, J. By his judgment and order dated 10-10-2013, the presiding Judge Mr Shahidul Islam, J rejected the death reference and allowed all the appeals having not found the accused-appellants guilty of the charge levelled against them under sections 302/34 of the Penal Code and acquitted them of the charge. On the contrary, the 2nd Judge Mr Abdur Rob, J by his dissenting judgment and order dated 10-10-2013 concurred with the findings of conviction arrived at by the learned trial Judge in the impugned judgment and maintained the conviction and sentence awarded to all the accused and dismissed their Criminal and Jail Appeals in consequence.

3. As both my learned brothers, namely, Mr Shahidul Islam, J and Mr Abdur Rob, J have narrated the prosecution version of the case and the defence plea and other facts and circumstances in detail in their respective judgments, I refrain from repeating the same for the sake of brevity. Be that as it may, I being the 3rd Judge will only refer to the relevant evidence and materials on record and the attending circumstances of the case and re-assess the same with an eye to arriving at a correct decision.

4. To begin with, I feel tempted to advert to the provisions of sections 374, 376, 377, 378 and 429 of the Code of Criminal Procedure which are reproduced below:

"374: When the Court of Sessions passes sentence of death, the proceedings shall be submitted to the High Court Division and the sentence shall not be executed unless it is confirmed by the High Court Division.

376. In any case submitted under section 374, the High Court Division—

(a) may confirm the sentence, or pass any other sentence warranted by law, or

(b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or

(c) may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

377. In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court Division, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.

378. When any such case is heard before a bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

429. When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order

shall follow such opinion."

5. The above provisions show that whenever a sentence of death is passed by a Court of Sessions, the proceedings of the case shall be submitted to the High Court Division for confirmation of the sentence under section 374 of the Code of Criminal Procedure. In dealing with the proceedings of the case, the High Court Division itself acts and exercises its power on its appellate side irrespective of whether the accused sentenced to death has preferred an appeal or not and accordingly, the High Court Division is bound to consider the evidence and arrive at an independent conclusion as to the guilt or innocence of the accused. The power of the High Court Division to confirm the sentence of death is provided in section 376 of the Code. So a duty is cast upon the High Court Division to satisfy itself that the conviction of the accused is justified on the evidence and that the sentence of death is appropriate in the facts and circumstances of the case.

6. It appears that though section 378 is included in Chapter XXVII of the Code of Criminal Procedure under the heading "OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION" and section 429 is included in Chapter XXXI under the heading "OF APPEALS", yet the language used in both the sections is almost identical. The expression "as he thinks fit" used in both the sections postulates that the 3rd Judge is completely free in resolving the difference as he thinks fit and accordingly if he decides that there is no need to hear the arguments in respect of any accused of whom the Judges are not divided in their opinion, he may decline to do so. It also appears that the use of the words "equally divided" in both the sections mean that the Judges differ in their opinions, in respect of complicity of an accused or on the charge framed against him or on any particular point; but in a case where the Judges concur with each other in respect of a particular accused and in respect of the offence charged, it cannot be said that the Judges are equally divided in respect of the accused charged with.

7. On construction of sections 378 and 429 of the Code of Criminal Procedure, views that have been taken by the Superior Courts of the Subcontinent are that what is laid before another Judge is the "case" and secondly, the judgment or order shall follow the opinion given by such Judge and the opinion of the 3rd Judge will be regarded as the final judgment.

8. Mr AKM Fazlul Huq Khan Farid, learned Advocate appearing for the appellant Mozibar Mollah in Criminal Appeal No. 7250 of 2008 and the appellant Abdul Mannan Khan in Criminal Appeal No. 974 of 2013, submits that pursuant to Rajbari Police Station General Diary Entry No. 152 dated 4-6-2003 (Exhibit-X), inquests were held on the deceased Mahbub Hossain and Habib by the PW 23 AK Azad in presence of the PW 13 Md Amirul Islam, PW 14 Md Abdus Salam and PW 15 Khandaker Golam Kibria; but curiously enough, those prosecution witnesses did not mention the name of any of the accused to the inquest-holding officer (PW 23) on 4-6-2003 and what is more, the PW 24 Md Basarat Moral held an inquest on the dead body of the victim Quddus on 9-6-2003 in presence of the PW 1 Rahamat Ali Sheikh, PW 2 Shahana Parveen and PW 4 Mostafa Kamal; but for reasons known best to themselves, they did not also mention the name of any of the accused to the PW 24 and given this scenario, it is crystal clear that the accused were subsequently implicated in the commission of the offence out of bad blood and the Court below failed to consider this aspect of the case causing a miscarriage of justice. In this connection, Mr AKM Fazlul Huq Khan Farid has drawn my attention to paragraph 29 of the decision in the case of State vs Monu Meah and others reported in 6 BLC 402.

9. Mr AKM Fazlul Huq Khan Farid next

submits that the record shows that the occurrence took place at 9-30 hours on 4-6-2003 and the FIR was lodged with Rajbari Police Station at 17.15 hours on 4-6-2003 by the PW 1 Rahamat Ali Sheikh and this being the position, it is abundantly clear that the FIR was lodged with the Police Station concerned after about 8(eight) hours of the occurrence and assuming for the sake of argument that the delay of 8(eight) hours in lodging this case is not fatal to the veracity of the prosecution story, even then there is no statement within the four corners of the FIR that the PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 5 Nur Zahan, PW 6 Gulzan Bibi and PW 9 Kismat Ali Sheikh witnessed the occurrence; but stunningly enough, they posed themselves as eye-witnesses to the occurrence after 5 (five) years during the trial of the case which leads us to infer that the prosecution story was embellished during the trial of the case in order to suit the convenience of the prosecution rendering the prosecution story doubtful, but the learned trial Judge failed to consider this dimension of the case causing a failure of justice.

10. Mr AKM Fazlul Huq Khan Farid also submits that all the alleged eye-witnesses to the occurrence, namely, PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 5 Nur Zahan, PW 6 Gulzan Bibi and PW 9 Kismat Ali Sheikh were examined by the Investigating Officer concerned (PW 22) at the earliest opportunity, that is to say, on the night following 4-6-2003; but they did not claim themselves as eye-witnesses to the occurrence in their statements recorded under section 161 of the Code of Criminal Procedure as revealed from the cross-examination of the PW 22 Md Hayat Ali and had those prosecution witnesses really eye-witnessed the occurrence, they would have definitely claimed so in their statements given to the PW 22 Md Hayat Ali and given this situation, it is ex-facie clear that those prosecution witnesses embellished the prosecution case during the trial of the case rendering the same untrustworthy; but as ill luck would have it, the Court below signally failed to notice this aspect of the case rendering the impugned judgment unsustainable in law.

11. Mr AKM Fazlul Huq Khan Farid further submits that indisputably the star prosecution witnesses, that is to say, PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 5 Nur Zahan, PW 6 Gulzan Bibi and PW 9 Kismat Ali Sheikh are kith and kin of the victim Quddus and by that reason, they are partisan and interested witnesses and it is also admitted that there is a background of intense inimical feelings between the informant-party and the accused-party and that being so, the evidence of those star prosecution witnesses must be corroborated by some disinterested, non-partisan and competent witnesses and in the absence of the evidence of any disinterested, non-partisan and competent witnesses in support of the prosecution version of the case, the impugned order of conviction and sentence is not tenable in law and, as such, it is liable to be reversed. In this connection, Mr AKM Fazlul Huq Khan Farid relies on the decisions in the cases of *Sarafat Mandal alias Mander Mondal and others vs State, 14 BLT 290= 11 BLC 1* and *Hosen Sheikh alias Hochen and Hashem Sheikh vs State, 18 BLD 701= 50 DLR 508.*

12. Mr AKM Fazlul Huq Khan Farid also submits that in the facts and circumstances of the case, the only competent, disinterested and non-partisan witness appears to be the PW 8 Bachchu Mondal and it is Bachchu Mondal who was carrying all the three victims, namely, Mahbub, Habib and Quddus to Belgachi Railway Station from the house of Quddus when the occurrence took place at 9-30 AM on 4-6-2003; but this van-driver Bachchu Mondal did not support the prosecution version of the case and this is why, the lower Court committed a manifest illegality in recording the impugned order of conviction and sentence.

13. Mr AKM Fazlul Huq Khan Farid further submits that there is a so-called dying declaration of the victim Quddus dated 4-6-2003 (Exihibit-10) and the same was referred to in the evidence of the PW 1 Rahamat Ali Sheikh, PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 4 Mostafa Kamal, PW 7 Nizam Uddin Sheikh, PW 10 Md Abu Naser, PW 19 Dr. Md Zakir Hossain and PW 20 Md Mahabub Hossain and as per the so-called dying declaration, the victim Quddus wrote the names of only three accused, that is to say, Mozibar Mollah, Goni Mollah and Abdul Mannan Khan and nothing else and since the so-called dying declaration is incomplete on the face of it, it cannot be accepted and relied upon; but unfortunately the learned Additional Sessions Judge relied upon the same as a piece of connecting evidence with the other evidence on record, though he did not term it as a dying declaration within the meaning of Sub-section (1) of section 32 of the Evidence Act, 1872 and as the so-called dying declaration is not virtually any declaration of the victim Quddus, the impugned order of conviction and sentence recorded against his clients, namely, Mozibar Mollah and Abdul Mannan Khan is bad in law.

14. Mr AKM Fazlul Huq Khan Farid next submits that it is the defence version of the case that the accused have been falsely implicated in the case out of previous enmity and bad blood, though all the three victims, namely, Mahbub, Habib and Quddus were killed by the members of Sarbahara Party; but the lower Court failed to juxtapose both the prosecution and defence versions of the case and consider them together with reference to the relevant evidence and materials on record and scan the attending circumstances of the case with searching eyes resulting in the illegal conviction and sentence of the accused.

15. Mr Khandker Mahbub Hossain, learned Advocate appearing for the condemned-appellant Goni Mollah in Criminal Appeal No. 7250 of 2008, contends that the victim Quddus wrote the names of the accused Goni Mollah and others on a blank sheet of paper at Rajbari Hospital after the occurrence on 4-6-2003 and this writing is a dying declaration as per the claim of the prosecution; but since the alleged dying declaration is ex-facie incomplete, it is inadmissible in evidence and no conviction can be recorded against the accused Goni Mollah on the basis of this inadmissible alleged dying declaration (Exhibit-10). On this point, Mr Khandker Mahbub Hossain adverts to the decision in the case of *Cyril Waugh vs The King* reported in *9 DLR 353.*

16. Mr Khandker Mahbub Hossain also contends that it is undisputed that the victim Quddus sustained multiple grievous injuries on his person including his right hand and as he was critically injured, he had no capacity to make any dying declaration in black and white and in such view of the matter, the alleged dying declaration of Quddus is a fishy document which cuts at the root of the prosecution case.

17. Mr Khandker Mahbub Hossain next contends that apart from the so-called dying declaration (Exhibit-10), the PW 3 Md Azad Sheikh, PW 5 Nur Zahan and PW 6 Gulzan Bibi have deposed that at the relevant time, the accused Goni Mollah shot at Mahbub resulting in his eventual death; but as those prosecution witnesses did not state the alleged overt act of the accused Goni Mollah to the Investigating Officer (PW 22 Md Hayat Ali) in their statements recorded under section 161 of the Code of Criminal Procedure, the act of firing on the victim Mahbub by the accused Goni Mollah as deposed to by the aforementioned PW 3, PW 5 and PW 6 does not inspire any confidence and in this perspective, the impugned order of conviction and sentence is illegal so far as it relates to the condemned-prisoner Goni Mollah.

18. Mr Mohammad Khabir Uddin

Bhuiyan, learned Advocate appearing for the appellant Latif Mondal in Jail Appeal No. 1075 of 2008, argues that Latif Mondal is not one of the 3(three) accused referred to in the alleged dying declaration of Quddus and it is on record that the PW 3 Md Azad Sheikh, PW 5 Nur Zahan, PW 6 Gulzan Bibi and PW 7 Nizam Uddin Sheikh have mentioned the names of the accused Latif Mondal along with others who struck the victims right and left with various weapons; but it does not specifically transpire from the evidence of those prosecution witnesses as to whom the accused Latif Mondal assaulted and furthermore, those prosecution witnesses did not implicate the accused Latif Mondal in the commission of the offence in their statements made to the Investigating Officer concerned under section 161 of the Code of Criminal Procedure and in such a posture of things, the Court below illegally recorded the impugned order of conviction and sentence against the accused Latif Mondal which is liable to the set-aside.

19. Mr Md Hatem Ali, learned Advocate appearing for the appellant Kalam Member in Jail Appeal No. 1071 of 2008, contends that the accused Kalam Member is a witness to the inquest-reports of the deceased Mahbub Hossain and Habib and it is in the cross-examination of the PW 13 Md Amirul Islam that Kalam Member was present at the time of holding inquests along with him and a reference to the cross-examination of the PW 14 Md Abdus Salam shows that he along with Kalam Member rushed to the place of occurrence after the commission of the offence and had Kalam Member really been involved therein, he would not have been present at the scene of occurrence along with others immediately after the occurrence and this phenomenon indicates that the accused Kalam Member had no 'mens rea'; but the lower Court did not apply its judicial mind to this facet of the case and illegally convicted the accused Kalam Member by the impugned judgment.

20. Mr Md Hatem Ali also contends that the PW 3 Md Azad Sheikh and PW 5 Nur Zahan have not spelt out the role of the accused Kalam Member in the commission of the offence, though the allegation against him and others is omnibus in nature and the PW 6 Gulzan Bibi and PW 9 Kismat Ali Sheikh have not implicated the accused Kalam Member in the commission of the offence at all and the PW 2 Shahana Parveen has not implicated the accused Kalam Member in the act of killing of the three victims, namely, Quddus, Mahbub and Habib and she has only implicated the accused Kalam and others in vandalizing their house for which they have not been arraigned and on top of that, the most vital witness of the case, namely, PW 8 Bachchu Mondal has failed to recognize any accused at the time of commission of the offence and this being the state of affairs, the impugned order of conviction and sentence passed against the accused Kalam Member is bad in law.

21. Mr Rezbaul Kabir, learned Advocate for the accused-appellant Bablu in Criminal Appeal No. 289 of 2011, Ms Hasna Begum, learned Advocate for the condemned-appellants Mozibar Mollah and Goni Mollah in Jail Appeal Nos. 1026 of 2008 and 1027 of 2008 and Ms Shirin Afroze, learned Advocate for the accused-appellants Md Taleb Kha and Omar Ali in Jail Appeal Nos. 1072 of 2008 and 1074 of 2008 have not turned up before this Court to make any submissions on the merit of their respective appeals.

22. Ms. Mahmuda Parveen, learned Assistant Attorney-General appearing on behalf of the State-respondent and in support of the death reference, submits that the most vital witnesses in this case are the PW 1 Rahamat Ali Sheikh, PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 4 Mostafa Kamal, PW 5 Nur Zahan, PW 6 Gulzan Bibi, PW 7 Nizam Uddin Sheikh,

PW 8 Bachchu Mondal, PW 9 Kismat Ali Sheikh, PW 10 Md Abu Naser, PW 11 Md Samed Ali, PW 19 Dr Md Zakir Hossain and PW 20 Md Mahabub Hossain and the evidence of those prosecution witnesses coupled with the medical evidence of the PW 17 Dr Md Liakot Ali Khan and PW 21 Dr Md Mizanur Rahman have brought the charge home against the accused and, as such, the Court below rightly convicted and sentenced them by the impugned judgment.

23. Mr Zahirul Haque Zahir, learned Deputy Attorney-General appearing on behalf of the State-respondent and in support of the death reference, submits that even if the dying declaration of the victim Quddus (Exhibit-10) is an incomplete one, it may be considered along with other incriminating evidence and circumstances on record and the learned trial Judge did not commit any illegality in considering them together in finding the guilt of the accused.

24. Mr Zahirul Haque Zahir next submits that it is well-settled that the First Information Report (FIR) can be used only to corroborate or contradict its maker and there is neither any law nor any principle on the basis of which the testimony of another witness can be ignored or rejected because the informant had made an omission to mention about the fact which the witness stated in his deposition and to reject the evidence of a witness only on such ground is against the accepted norms of the administration of criminal justice and although there is no reference to any eye-witness in the FIR lodged by the PW 1 Rahamat Ali Sheikh, yet the ocular evidence of the PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 5 Nur Zahan, PW 6 Gulzan Bibi, PW 9 Kismat Ali Sheikh and PW 11 Md Samed Ali cannot be discarded at all. To buttress up this submission, Mr Zahirul Haque Zahir refers to the decision in the case of The *State vs Abdus Sattar and others* reported in *43 DLR (AD) 44.*

25. Mr Zahirul Haque Zahir also submits that the accused Momin, Akai and Nepal alias Jabbar alias Dada Bhai are still absconding and their abscondence is a relevant piece of evidence to be considered along with other evidence on record and their abscondence after the occurrence is a circumstance which may be considered as sufficient corroboration of their participation in the commission of the offence. In this respect, Mr Zahirul Haque Zahir relies upon the decision in the case of *State vs Moslem* reported in *55 DLR 116.*

26. Mr Zahirul Haque Zahir further submits that although the PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 5 Nur Zahan, PW 6 Gulzan Bibi, PW 9 Kismat Ali Sheikh and PW 11 Md Samed Ali are kith and kin of the victim Quddus, yet their eye-witness account of the occurrence cannot be rejected only on the ground of their relationship with him. In this respect, Mr Zahirul Haque Zahir adverts to the decisions in the cases of *State vs Keramat Ali and another, 16 MLR (AD) 268 and Zahed Ali Foreman (Driver) and others vs State, 9 BLC (AD) 122.*

27. Mr Zahirul Haque Zahir next submits that it is true that the PW 24 Md Basarat Moral held an inquest on the dead body of the victim Quddus on 9-6-2003 in presence of the PW 2 Shahana Parveen and PW 4 Mostafa Kamal; but they (PW 2 and PW 4) did not disclose the names of the accused as the assailants of the victims to the PW 24 as evidenced by the inquest-report dated 9-6-2003; but even then this will not derogate from the merit of the case in view of the fact that an inquest-report is not a substantive piece of evidence and it can only be used as a statement under section 162 of the Code of Criminal Procedure. In support of this submission, Mr Zahirul Haque Zahir banks upon the decision in the case of The State vs Golam Mostafa and another reported in 9 BLC 63.

28. Mr Zahirul Haque Zahir also submits

that because of fear, the PW 8 Bachchu Mondal and PW 11 Md Samed Ali could not disclose the whole truth before the Trial Court and regard being had to the remarks recorded by the learned Trial Judge respecting the demeanour of those two witnesses under section 363 of the Code of Criminal Procedure, the Court will take judicial notice of the current law and order situation in the country wherein the father is not deposing when his son is killed before him, the wife is not deposing when her husband is killed before her and the relations are compromising cases of grave nature for maintaining security of their future lives as articulated in the decision in the case of *Mahmudul Islam alias Ratan vs State reported in 53 DLR (AD) 1* and do the needful.

29. I have heard the submissions of the learned Advocates Mr AKM Fazlul Huq Khan Farid, Mr Khandker Mahbub Hossain, Mr Mohammad Khabir Uddin Bhuiyan and Mr Md Hatem Ali and the counter-submissions of the learned Assistant Attorney-General Ms. Mahmuda Parveen and the learned Deputy Attorney-General Mr Zahirul Haque Zahir and perused the impugned judgment, evidence on record and the judgments delivered by my learned brothers, namely, Mr Shahidul Islam, J and Mr Abdur Rob, J.

30. At the outset, I would like to discuss the dying declaration (Exhibit-10) dated 4-6-2003 made by the victim Quddus at Rajbari Hospital soon after the occurrence. It is in the evidence of the PW 1 Rahamat Ali Sheikh, PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 4 Mostafa Kamal, PW 7 Nizam Uddin Sheikh, PW 10 Md Abu Naser, PW 19 Dr. Md Zakir Hossain and PW 20 Md Mahabub Hossain that the severely injured victim Quddus wrote the names of the accused Goni Mollah, Mozibar Mollah and Abdul Mannan Khan on a piece of white paper at Rajbari Hospital after the occurrence on 4-6-2003. It is also in the evidence of the aforementioned prosecution witnesses that the victim Quddus could not write anything else barring the names of the three accused on the piece of white paper. Now a pertinent question arises: can the writing of the three names be construed as a dying declaration of the victim Quddus within the meaning of Sub-section (1) of section 32 of the Evidence Act?

31. The statement of a person about the cause of his death or circumstances leading to his death is a piece of substantive evidence within the meaning of Sub-section (1) of section 32 of the Evidence Act, and if by careful examination, it is found to be reliable, then it may by itself be the basis for conviction even without corroboration. Section 32 (1) of the Evidence Act runs as follows:

> "32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:
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> (1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
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> Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

32. Such a statement is called "dying declaration" in common parlance, though this term has not been used in this section. A dying declaration may be recorded by any person who is available and it may be written or it may be ver-

bal; it may also be indicated by signs and gestures, in answer to questions, if the person making it is not in a position to speak. There is no requirement of law that a dying declaration should be recorded by a Magistrate as in the case of the confessional statement of an accused under section 164(3) of the Code of Criminal Procedure.

33. The Legislature in its wisdom has put a dying declaration on a par with the evidence on oath for the simple reason that a man under the expectation of death is not likely to speak falsehood and involve innocent persons in preference to his assailant/assailants. That is why, a particular sanctity is attached to such a statement and it is admissible as a substantive piece of evidence. But the Court must take care to see that the statement is true and was actually made by the dying man inasmuch as it is not unlikely that he did not make any statement, but some interested person fabricated it from any motive and tried to use it as a piece of evidence.

34. However, it is the contention of Mr AKM Fazlul Huq Khan Farid and Mr Khandker Mahbub Hossain that as the victim Quddus sustained multiple severe injuries on his person including his right hand, he had no ability or capacity to write the names of the accused Goni Mollah, Mozibar Mollah and Abdul Mannan Khan on a piece of white paper and the alleged incomplete dying declaration is no declaration in the eye of law within the meaning of Sub-Section (1) of section 32 of the Evidence Act. On the other hand, it has been contended on the side of the State-respondent that although the victim Quddus sustained multiple severe injuries on his person including his right hand as deposed to the PW 21 Dr. Md Mizanur Rahman, yet the fact remains that somehow or other, he wrote the names of the accused Mozibar Mollah, Goni Mollah and Abdul Mannan Khan on a sheet of paper supplied by the police in presence of the PW 1 Rahamat Ali Sheikh, PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 4 Mostafa Kamal, PW 7 Nizam Uddin Sheikh, PW 10 Md Abu Naser, PW 19 Dr. Md Zakir Hossain and PW 20 Md Mahabub Hossain. Excepting the PW 19 and PW 20, all other aforementioned prosecution witnesses are close relatives of the victim Quddus. Assuming for the sake of argument that the evidence of the PW 1, PW 2, PW 3, PW 4, PW 7 and PW 10 is open to suspicion on this point, the evidence of the PW 19 and PW 20 cannot be discarded at all thereon.

35. What I am driving at boils down to this: the severely injured Quddus wrote the names of the three accused, that is to say, Goni Mollah, Mozibar Mollah and Abdul Mannan Khan on a piece of white paper supplied to him by the police in presence of the PW 19 and PW 20 and others. Against this backdrop, I am led to hold that the severely injured Quddus had the capacity or ability to write the names of those three accused on the piece of paper and thereafter he could not write further presumably because of the severe nature of the injuries on his person. So it is ex-facie clear that this is an incomplete dying declaration. In this context, I feel at one with Mr Khandker Mahbub Hossain that an incomplete dying declaration is not admissible in evidence. It seems that Mr Khandker Mahbub Hossain has rightly adverted to the decision in the case of *Cyril Waugh vs The King* reported in *9 DLR 353* wherein it has been held, amongst others, in paragraph 28:

> "28. Apart, however, from this question, their Lordships are of opinion that the dying declaration was inadmissible because upon its face it was incomplete and no one can tell what the deceased was about to add; that it was in any event a serious error to admit it in part ...."

36. Reverting to the case in hand, it leaves

no room for doubt that the declaration made by the victim Quddus being incomplete, no one can tell what he was about to add. In other words, it is a declaration in part and as held in the decision reported in *9 DLR 353*, it is a serious error to admit a dying declaration in part. Under the circumstances, I opine that the alleged dying declaration (Exhibit-10) being an incomplete one is not a dying declaration within the meaning of Sub-Section (1) of section 32 of the Evidence Act. Consequently, the alleged dying declaration stands discarded.

37. Now let us address the question of reliability or otherwise of the evidence of the interested, partisan and relative witnesses, namely, the PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 5 Nur Zahan, PW 6 Gulzan Bibi, PW 9 Kismat Ali Sheikh and PW 11 Md Samed Ali. Can I accept their testimony at face value? In this connection, a reference may be made to the decision in the case of *Nowabul Alam and others vs State* reported in *15 BLD (AD) 54*. In that decision, it has been held in paragraph 17:

> "17. The principle that is to be followed is that the evidence of persons falling in the category of interested, inter-related and partisan witnesses, must be closely and critically scrutinized. They should not be accepted at their face value. Their evidence cannot be rejected outright simply because they are interested witnesses, for that will result in a failure of justice, but their evidence is liable to be scrutinized with more care and caution than is necessary in the case of disinterested and unrelated witnesses. An interested witness is one who has a motive for falsely implicating an accused person and that is the reason why his evidence is initially suspect. His evidence has to cross the hurdle of critical appreciation. As his evidence cannot be thrown out mechanically because of his interestedness, so his evidence cannot be accepted mechanically without a critical examination. As Hamoodur Rahman, J (as his Lordship then was) observed in the case of *Ali Ahmed vs State [14 DLR (SC) 81]:*
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> "Prudence, of course, requires that the evidence of an interested witness should be scrutinized with care and conviction should not be based upon such evidence alone unless the Court can place implicit reliance thereon."

38. In the decision in the case of *Masalti vs State of Uttar Pradesh, AIR 1965 (SC) 202*, the Indian Supreme Court has observed:

> "There is no doubt that when a Criminal Court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence, whether or not the evidence strikes the Court as genuine, whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that the evidence given by witnesses should be discarded only on the ground that it is the evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, Criminal Courts have to deal with the evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would inevitably lead to failure of justice. No hard and fast rule can be laid down as to how such evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

39. The rule that the evidence of interested witnesses requires corroboration is not an

inflexible one. It is a rule of caution rather than an ordinary rule of appreciation of evidence. The Supreme Court of Pakistan has spelt out the rule in the case of *Nazir vs State, 14 DLR (SC) 159* in the following manner:

> ".....we had not intention of laying down an inflexible rule that the statement of an interested witness (by which expression is meant a witness who has a motive for falsely implicating an accused person) can never be accepted without corroboration. There may be an interested witness whom the Court regards as incapable of falsely implicating an innocent person. But he will be an exceptional witness and, so far as an ordinary interested witness is concerned, it cannot be said that it is safe to rely upon his testimony in respect of every person against whom he deposes. In order, therefore, to be satisfied that no innocent persons are being implicated along with the guilty, the Court will in the case of an ordinary interested witness look for some circumstances that give sufficient support to his statement so as to create that degree of probability which can be made the basis of conviction. That is what is meant by saying that the statement of an interested witness ordinarily needs corroboration."

40. In the case of *Abdul Karim vs State and another* reported in *1981 BLD (AD) 200*, it has been observed:

> "Relationship by itself cannot be a ground for rejecting testimony of a witness unless it is shown that the witness was biased and resorted to falsehood."

41. The decisions in the cases of *Mohammad Ali alias Shanu vs State, 13 MLR (AD) 121* and *Siraj Mal vs State, 45 DLR 688* are also in the same vein.

42. In the case of *State vs Ful Mia* reported in *5 BLC (AD) 41*, it has been held in paragraph 16 that interested evidence by itself cannot be a ground to discard the evidence if one is found to be a truthful witness and telling the truth.

43. I have already stated earlier that the professed eye-witnesses, namely, PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 5 Nur Zahan, PW 6 Gulzan Bibi, PW 9 Kismat Ali Sheikh and PW 11 Md Samed Ali are close relatives of the informant-party. That being so, their testimony is to be weighed with caution and circumspection as a rule of prudence. By the way, it may be mentioned that admittedly not a single disinterested, unrelated and non-partisan witness has come forward to support the ocular version of the aforesaid prosecution witnesses.

44. Admittedly, the PW 1 Rahamat Ali Sheikh is not an eye-witness to the occurrence. It is also admitted that there is bitter enmity and bad blood between the informant-party and the accused-party. So in the background of bitter enmity and bad blood between the parties and regard being had to the interestedness of the PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 5 Nur Zahan, PW 6 Gulzan Bibi, PW 9 Kismat Ali Sheikh and PW 11 Md Samed Ali, we are to be more careful in assessing the trustworthiness or otherwise of their ocular version.

45. There is no gainsaying the fact that the FIR does not contain the name of any alleged eye-witness to the occurrence. Anyway, the names of the accused Goni Mollah, Mozibar Mollah and Abdul Mannan Khan find place therein as disclosed by the victim Quddus in his alleged dying declaration. I do not find the names of any other accused in the FIR; rather it is in the FIR—"আমার পুত্রবধূ, নাতনী ফেরদৌসী, ভাতিজা আজাদসহ আশে পাশের লোকজন সশস্ত্র অস্ত্রধারীদের দেখিয়াছে এবং পুনরায় দেখিলে চিনিতে পারিবে।" From this statement, it is crystal clear that Shahana Parveen (PW 2), Azad Sheikh (PW 3), Ferdousi and the neighbouring people could not identify any of the armed accused definitely and they could identify them if they saw them again. But the Investigating Officer concerned did not take

sparingly. One should not lose sight of the fact that doing complete justice does not contemplate doing justice to one party by ignoring statutory provision and thereby doing complete injustice to the other party by depriving him the benefit of law. *(Per SK Sinha J, minority) Anwarul Huq vs Iqbal Ahmed (Civil)* ... 241

Limitation Act (IX of 1908)

Section 91—Article 91 of Act provides the limitation of 3 years for cancellation or setting aside an instrument from the date of knowledge. Such amendment would certainly cause serious prejudice to the defendant because the claim is barred. *Anwarul Huq vs Iqbal Ahmed (Civil)* 241

Specific Relief Act (I of 1877)

Sections 39 and 42—Distinction between suit for declaration and cancellation—The distinction between a suit for declaration that the instrument is not binding on the plaintiff and a suit for cancellation of an instrument is that when the plaintiff seeks to establish a title to himself and cannot establish that title without removing an obstruction such as, a decree or a deed to which he has been a party, then he must get that decree or deed cancelled or declared void. If the deed in respect of the suit plot stands even though the plaintiff is not a party, the defendant's title does not extinguish and in that case the plaintiff's title to in the suit plot will be clouded. *(Per SK Sinha J, minority) Anwarul Huq vs Iqbal Ahmed (Civil)* 241

Lease Deed—A clause of a lease deed has to be read as a whole and not in the divisive manner and cannot just be given a too mechanical or too technical meaning or interpretation. The lessor being a statutory body cannot be given the latitude to take the benefit of a part of a term of a clause which benefits it at the woes of the lessee without complying or fulfilling with the other part of the clause. *(Per MA Wahhab Miah J, majority) Anwarul Huq vs Iqbal Ahmed (Civil)* 241

Fairness —Law requires that authority exercising action of cancellation of lease deed and transfer permission must always act with fairness. *(Per MA Wahhab Miah J, majority) Anwarul Huq vs Iqbal Ahmed (Civil)* ... 241

High Court Division

Bangladesh Commerce and Investment Limited (Reconstruction) Act (XII of 1997)

Sections 3(3) and 20(2)—When the legislature has enacted a law and provisions therein in clear words without any ambiguity, the long standing practice of the higher judiciary of this subcontinent is that the Court will not go beyond those clear words. The legislature has expressed no doubt as to the special status of the provisions of the 1997. *Mofizul Islam (Md) vs Secretary, Ministry of Law, Justice and Parliamentary Affairs (Spl Orrginal)* 653

Section 7(5)—Board resolution is in conflict with the provisions of sub-section (5) of section 7 of 2007 as well as it conflicts with the provisions of Article 101 of the Articles of Association of Bank. Board resolution is quite illegal, *ultra vires,* based on misconception of law and the same that extent, hereby struck down hereby. *Golden Horizn Limited vs Bangladesh Commerce Bank Limited (Statutory Original)* 663

Section 19—Powers under section 19, to be exercised by the Bangladesh Bank in consultation with the government, can only be so exercised in respect of matters which are not included in the provisions of theAct, though they were required to be included therein. The clear reading of the provisions under section 19 takes us to only one conclusion that the power can only be exercised in respect of matters which are not included in the provisions of the Act. *Mofizul Islam (Md) vs Secretary, Ministry of Law, Justice and Parliamentary Affairs (Spl Orrginal)* 653

Section 20(2)—When the legislature even dictates the government to place any order issued within the first 5 years of the establishment of the BCBL before the Parliament as early as possible, this means, at least for the

period of the first five years, the BCBL would be under direct supervision of the Parliament. *Mofizul Islam (Md) vs Secretary, Ministry of Law, Justice and Parliamentary Affairs (Spl Orrginal)* 653

Code of Civil Procedure (V of 1908)

Section 151—Where a mistake of a Court or Court's officer causes injustice to a particular party, the power under section 151 of the Code can be exercised for the purpose of giving necessary relief even though there is an alternative remedy for doing the same. *Manik Mia vs Azimuddin (Civil)* 649

Section 151—Section 151 of the Code simply confirms the Courts inherent power and this power cannot be exercised where alternative remedies by way of appeal, revision or review are available. *NAM Abdur Razzaque vs Uttara Bank Ltd (Civil)* 660

Code of Criminal Procedure (V of 1898)

Section 154—FIR is not a substantive piece of evidence; but nevertheless, its importance cannot be whittled down in that it is the first recorded version of the prosecution case. *Goni Mollah vs State (Criminal)* ... 676

Section 154—FIR is not an encyclopaedia and, as such, it is not expected that it will contain all the minute details of the incident. When a very vital statement as to eye-witnessing of the occurrence has not been mentioned in the FIR, this renders the entire prosecution case highly doubtful. *Goni Mollah vs State (Criminal)* 676

Evidence Act (I of 1872)

Section 8—Absconding—Abscondence is only a supporting circumstance to be considered along with the incriminating evidence, if any, on record connecting them with the commission of the offence. As there is no reliable substantive evidence on record connecting them with the commission of the offence, their mere abscondence will not help the prosecution in any way. *Goni Mollah vs State (Criminal)* 676

Section 32(1)—Dying declaration—Declaration in Part—Declaration made by the victim being incomplete, no one can tell what he was about to add. It is a declaration in part and it is a serious error to admit a dying declaration in part. Alleged dying declaration being an incomplete one is not a dying declaration within the meaning of sub-section (1) of section 32 of the Act.*Goni Mollah vs State (Criminal)* 676

Section 115— Even if the petitioner, like other share-holders, enjoyed benefits from such illegality, he, or other share-holders, cannot be estopped from taking recourse to the writ petition as the doctrine of estoppel does not apply against statute. *Mofizul Islam (Md) vs Secretary, Ministry of Law, Justice and Parliamentary Affairs (Spl Orrginal)* 653

State Acquisition & Tenancy Act (XXVIII of 1951)

Section 96—Both the parties separated their joma by mutating their names in respect of the case land and, as such, the pre-emptor lost his right for pre-emption. *Harun-ur Rashid (Md) vs Rashed Harun (Civil)* ... 645

Bank Guarantee—Bank guarantee is a guarantee which the concerned financial institution gives ensuring payment on the failure of the incumbent bank concerned to make payment within the prescribed period of time. *Amigo Bangladesh Ltd vs Bangladesh (Spl Original)* 667

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