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Appellate Division

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

Customs Act (IV of 1969)
Section 139

Passenger (Non-tourist) Baggage (Import) Rules, 2000
Rules 6 and 2(kha)—Section 139 of the Act refers to declaration of contents of baggage carried by passengers or crew members. Crew members and passengers are liable in the same way to declare the goods carried in their baggage. There is no distinction or extra privilege afforded to either category of persons so far as declaration of their goods carried in their baggage is concerned. However, this provision has no connection with the import of goods under the baggage rules. The rules apply generally to goods imported by passengers. *State vs Md Manzurul Alam (Criminal)* 303

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Sections 4(Kha) and 10

Penal Code (XLV of 1860)
Section 376

Code of Criminal Procedure (V of 1898)
Sections 374 and 376—The process of sentencing is at the discretion of the Judge and is at the same time circumscribed by the law. The respondent was in custody during the pendency of the appeal from 1993 to 2001 and, therefore, served a term of imprisonment of about 8 years. The High Court Division has thought that the period served by the respondent was sufficient to meet the ends of justice. *State vs Md Shamsur Rahman Sikder @ Kalu (Criminal)* 292

Limitation Act (IX of 1908)
Article 158—The question of limitation of filing of the objection within 30 days as required under section 158 of the Act is unwarranted and uncalled for because the award being a nullity and *void ab-initio* and need not be avoided, no question of limitation is applicable as the illegality is apparent on the face of the record and the Court should take judicial notice of it and in the facts and circumstances of the case, it is not necessary that a party should file objection to the award under section 30 within the period prescribed under section 158 of the Act. *Concord Engineers and Construction Ltd vs CE, Road and Highways Department (Civil)* 294

Passenger (Non-tourist) Baggage (Import) Rules, 2000
Rule 2(kha)—A special facility is provided by these rules for crew members, who may bring into the country goods to the value of $100 without payment of customs duty. By no stretch of the imagination can crew members be equated to or classified as passengers. *State vs Md Manzurul Alam (Criminal)* ... 303

High Court Division

Code of Civil Procedure (V of 1908)
Order VII, rule 11—While dealing with an application for rejection of plaint the question of prove or disprove cannot play any role because as per the civil jurisprudence the question of prove and disprove are totally based upon evidence which can only be done after framing issues and taking evidence. While rejecting the plaint the Court below also came to a conclusion regarding the schedule of the property which is absolutely a question of fact. *Farook (Md) vs Md Serajul Islam (Civil)* 734

Code of Civil Procedure (V of 1908)
Order XVII, rule 1(4)—If the plaintiff fails to pay adjournment cost as given by the Court the suit shall liable to be dismissed and if the defendant fails to pay the adjournment costs the suit is liable to be disposed of *ex parte*. *Asok Kumar Roy vs Monsur Ali Gazi (Civil)* 728

informed to the lessee and transferee, Amanullah as well, because by the purchase of the suit plot from the lessee by investing his good money Amanullah also acquired an inchoate right if not vested and that right could not be taken away or denied behind his back by just saying that since RAJUK did not recognize the father (Amanullah) of the plaintiffs as its lessee in respect of the suit plot, there was no need to give any notice to him before cancellation of the lease of lessee, Khaleda Rahman as held by the trial Court and confirmed by the Appellate Court. *(emphasis supplied)*

87. Let us see also what documents were filed by defendant No.2 in the suit. From the judgment and decree, of the trial Court, it appears that the documents produced by defendant No. 2 were proved and marked as Exhibits-'A-F'. The appellant (defendant No. 1 is the appellant) has filed the documents in a supplementary paper book. At page 148 of the supplementary paper book, description of the documents has been given, but the documents do not correspond with 'the description mentioned therein. We have also perused the testimony of DW 3 and except Exhibit 'A' letter dated 9- 11-1995, we do not find any conformity with the documents and the deposition of DW 3. None appeared for defendant No.2-respondent. Mr Bhuiyan who appeared for the appellant could not also clarify the anomaly. Therefore, we shall refer those documents by date and not by exhibit mark.

88. Exhibit-'A' is the letter dated 9-11-1995 allegedly written by the Deputy Director (Estate), RAJUK, Dhaka to Mrs Khaleda Rahman, the original lessee asking her to hand over possession of the suit plot to RAJUK within 15 days from the date of receipt thereof asserting that as she failed to make construction on the suit plot within the specified time as per terms of the lease deed and even within the extended time, her allotment was cancelled in the Board meeting of RAJUK held on 21-5-1995 *(emphasis supplied)*. No proof, whatsoever, was filed to show that Exhibit-'A' was ever sent to the address of the original lessee, Khaleda Rahman through due process for service upon her and that the same was received by her, no proof was also filed by the defendant to show that the decision of the Board to cancel the allotment of the suit plot was served upon the lessee and even letter, intimating that lease was cancelled, was addressed to her. It is very significant to note that the copy of the said letter was not issued to Amanullah, who, in the meantime, got the registered sale deed from the lessee on 24-10-1988 (Exhibit-4) and who, as per own admission of the defendant, in the meantime on 30-12-1990, filed the required documents necessary for mutation. However, Exhibit-'A' shows that its copy was given to the Executive Engineer, Uttara, Dhaka (RAJUK) Division, Dhaka and to the Magistrate 1st Class, RAJUK.

89. The next document is the office note prepared by the officials of RAJUK for placement before its Board meeting. The note reads as under

"উত্তরা আবাসিক এলাকার ৩নং সেক্টরের ১৫নং রাস্তার ৪১নং প্লটের পরিবর্তে অন্য একটি প্লট বরাদ্দ প্রদান প্রসঙ্গে।

উত্তরা আবাসিক এলাকার ৭নং সেক্টরের ১৮ রাস্তার ৭৯ নং প্লটটি জনাব আনোয়ারুল হকের নামে বরাদ্দ প্রদান করা হয়। পরবর্তীতে তাহার আবেদনের প্রেক্ষিতে তাহার নামে বরাদ্দকৃত প্লটের পরিবর্তে ৩নং সেক্টরের ১৫নং রাস্তার ৪১নং প্লটটি বরাদ্দ প্রদান করা হয়। তিনি ১৯৯৬ ইং সালে উক্ত প্লটের লীজ দলিল সম্পাদন ও রেজিস্ট্রী করিয়াছেন। উল্লেখ যে, ইতিপূর্বে অত্র পরিবর্তীতে *(sic)* প্লটের লীজ গ্রহিত্রী ছিলেন মিসেস খালেদা রহমান। তিনি ১১-২-১৯৭০ ইং তারিখে প্লটটির লীজ দলিল সম্পাদন ও রেজিষ্ট্রী করিয়া নিয়াছেন। পরবর্তীকালে আর্থিক অসুবিধার জন্য উল্লেখিত খালি প্লটটি জনাব আমানুল্লাহ মিয়া, পিতা মৃত-হাজী রোশন আলী এর নিকট টাকা ৮,০০,০০০ মূল্যে হস্তান্তরের জন্য গত ১০-৫-১৯৮৭ইং তারিখে আবেদন করিলে হস্তান্তর ফি ও সার্ভিস চার্জ জমা দেওয়ার জন্য চিঠি দেওয়া হয়। সেই মোতাবেক হস্তান্তর ফি ও সার্ভিস চার্জ জমা প্রদান করিলে অত্র অফিস স্বারক নং-রাজউক/এস্টেট/১৬৬৯ স্বাঃ তারিখ ২৬-৬-৮৮ ইং এর মাধ্যমে উক্ত চিঠি ইস্যুর তারিখ হইতে ৪(চার) মাসের

মধ্যে হস্তান্তর দলিল রেজিষ্ট্রী করতঃ হস্তান্তর গ্রহিতার বরাবরে নামজারীর নিমিত্তে উহার সার্টিফাইড কপিসহ চুক্তিনামা, অংগীকার নামা দাখিল করার জন্য অনুরোধ করা হয়। কিন্তু ৪ মাসের পরিবর্তে ২(দুই) বৎসরের অধিক কাল পরে অর্থাৎ গত ৩০-১২-১৯৯০ইং উহা দাখিল করিয়াছেন। পত্রের নির্ধারিত সময়সীমার মধ্যে তিনি হস্তান্তর দলির রাজউকে দাখিল করিতে ব্যর্থ হওয়ার কর্তৃপক্ষের বিগত ২৬-৯-১৯৯৫ ইং তারিখে অনুষ্ঠিত সভায় উক্ত হস্তান্তরের অনুমতিপত্র বাতিল করা হয় এবং উল্লেখিত প্লটের লীজ দলিল ১৯৭১ সালের ৩১শে ডিসেম্বরের জন্য মধ্যে রেজিস্ট্রি হওয়ার বিগত ২১-৫-১৯৯৫ ইং তারিখে অনুষ্ঠিত ৪/৯৫ তম সাধারণ সভায় সিদ্ধান্তের আওতায় অত্র প্লটটির লীজ ও বাতিল করা হয় বিধায় উল্লেখিত ২৬-৯-৯৫ ইং তারিখের সভার সিদ্ধান্তে ইহা বাতিল হিসাবে গণ্য করা হয়। সেই মোতাবেক অত্র অফিস স্মারক নং-রাজউক/এস্টেট/৩৮৭ স্বাঃ তারিখ ৯-১১-১৯৯৫ইং এর মাধ্যমে প্লটের লীজ বাতিলের চিঠি জারী করা হয়। পরবর্তীকালে হস্তান্তর গ্রহিতা জনাব আমানুল্লাহ মৃত্যুবরণ করায় তাহার ওয়ারিশগণ কর্তৃক আদালতে একটি দেওয়ানী মামলা দায়ের করিয়াছেন যাহার টি এস নম্বার ২৫২/৯৭ বর্তমানে ইহা বিচারাধীন আছে।

এমতাবস্থায়, বিষয়টির উপর সদয় সিদ্ধান্ত গ্রহনের নিমিত্তে কর্তৃপক্ষের সভায় উপস্থাপন করা হইল।"

90. The office note does not bear any date, so it is not possible to know on which date actually the same was prepared. And in the deposition of PW 3, no date has also been mentioned. As already stated hereinbefore, the letter dated 26-6-1988 as mentioned in the office note, has not been filed and proved as exhibit. It is also necessary to point out that in the office note, the letter dated 9-11-1995 (Exhibit-'A') has wrongly been mentioned as the letter of cancellation of lease and no document was produced and proved to show that the said letter dated 9-11-1995 was sent to the original lessee, Khaleda Rahman and she received the same. Along with this office note, the alleged extract of the resolutions of the Board meeting, has been filed. Interesting thing is that neither the office note nor the resolutions of the Board meeting bears any date. From the resolutions of the Board meeting, it appears that there were several agenda for consideration by the Board. Agendum No.2 is relevant to our purpose. The first line of the extract of the resolution of the Board meeting and agendum No.2 read as follows:

"..... ৫/৯৫ ইং তারিখে অনুষ্ঠিত কর্তৃপক্ষের ৪/৯৫তম সাধারণ সভায় গৃহিত সিদ্ধান্ত হইতে লওয়া হইয়াছে।

২। রাজউকের আওতাবান বিভিন্ন আবাসিক ও পূর্নবাসন এলাকার যে সকল বরাদ্দ গ্রহিতা গত ৩১-১২-৭১ইং তারিখের পূর্বে লীজ দলিল রেজিষ্ট্রী করিয়া নিয়াছেন কিন্তু প্লটে এখন ও ইমারত নির্মাণ করেন নাই তাহাদের ব্যাপারে সিদ্ধান্ত গ্রহণ প্রসঙ্গে *(emphasis supplied)*।

১। আলোচনাঃ

(১) বিষয়টি প্রসঙ্গে সভায় উপস্থাপিত সার-সঙ্গে এবং এতসংক্রান্ত বিষয়ে আনুসাঙ্গিক তথ্যাদি অবহিত হইয়া বিস্তারিত ও পংখানুপুংখ আলোচনা কার্য্যে সদস্য-পদ নিম্নরূপ সিদ্ধান্ত গ্রহণ করেন।

২। সিদ্ধান্তসমূহঃ

(ক) ১৯৭১ইং সালের ৩১শে ডিসেম্বর এর মধ্যে রাজউকের গুলশান, বনানী ও xxx উত্তরা আবাসিক এলাকার লীজকৃত যে সকল প্লটের লীজ গ্রহিতা/গ্রহিত্রী লীজ দলিলের শর্ত মোতাবেক নির্ধারিত সময় সীমা প্রার্থনা পরবর্তীতে প্রদত্ত দিতে সময়সীমার লক্ষ্যে স্ব-স্ব প্লটে অনুমোদতি নকশা মোতাবেক ইমারত নির্মাণ করিতে ব্যর্থ হইয়াছেন, ইমারত নির্মাণে ব্যর্থতার দায়ে ঐ সকল প্লটের লীজ বাতিল করা হইল।

(খ) ১৯৭১ইং সালের ৩১শে ডিসেম্বরের লক্ষ্যে উল্লেখিত এলাকাসমূহে বরাদ্দকৃত যে সকল প্লটের বরাদ্দগ্রহিতা স্ব স্ব প্লটের লীজ দলিল রেজিষ্ট্রি করিয়া দিতে ব্যর্থ হইয়াছেন ঐ সকল প্লটের বরাদ্দও বাতিল করা হইল।

(গ) উক্ত সিদ্ধান্ত মোতাবেক সংশ্লিষ্ট প্লটসমূহে লীজ গ্রহিতা/বরাদ্দ গ্রহিতাদের অবগতির জন্য তাহাদের স্ব স্ব ঠিকানায় রেজিস্ট্রার্ড উইথ এ/ডি ডাকযোগে চিঠি প্রেরণের নিমিত্তে এস্টেট শাখাকে নির্দেশ দেওয়া হইল *(emphasis supplied)*।

(ঘ) আগামী সভার Constitution এর জন্য অপেক্ষা না করিয়া পরবর্তী প্রয়োজনীয় কার্য্যক্রম গ্রহণের জন্য সংশ্লিষ্ট শাখা/বিভাগকে নির্দেশ দেওয়া হইল।"

91. If we accept the follow up of the office note as the extract of the resolutions of the Board meeting dated 21-5-1995, it shows that

the Board took decision in a general way to cancel the lease of those lessees/ allottees of Gulshan, Banani and Uttara, who failed to make construction within 31st December, 1971 as per terms of the lease deed and also within the extended time. There is no specific reference to the lease of Khaleda Rahman and no decision was given on the office note.

92. The next document is also an office note prepared by the officials of RAJUK for placement before its Board meeting. Again this office note does not bear any date, so like the other office note as discused above, it is not possible to know the date of the same. Let us have a look at the office note which reads as follows:

"উত্তরা আবাসিক এলাকার ৩নং সেক্টরের ১৫নং রাস্তার ৪১নং প্লটে ইমারত নির্মাণকরণ প্রসঙ্গে।

উত্তরা আবাসিক এলাকার ৩নং সেক্টরের ১৫নং রাস্তার ৪১ নং প্লটের বরাদ্দ গ্রহিত্রী জনাবা খালেদা রহমান জমির সমূদয় টাকা পরিশোধ করিয়া গত ১১-২-৭০ ইং তারিখে লীজ দলিল সম্পাদন ও রেজিস্ট্রী করিয়া নিয়াছেন।

পরবর্তীকালে লীজ গ্রহিত্রী আর্থিক অসুবিধার জন্য উল্লেখিত খালি প্লটটি জনাব আমানুল্লাহ মিয়া, পিতা মৃত-হাজী রোশন আলী এর নিকট টাকা ৮,০০,০০০ মূল্য হস্তান্তরের জন্য গত ১০-৫-৮৭ ইং তারিখে আবেদন করিলে তাহাকে হস্তান্তর ফি ও সার্ভিস চার্জ জমা দেওয়ার জন্য চিঠি দেওয়া হয়। সেই মোতাবেক তিনি হস্তান্তর ফি ও সার্ভিস চার্জ প্রদান করিলে অত্র অফিস স্বারক নং-রাজউক/এস্টেট/১৬৬৯ স্বাঃ তারিখ ২৬-৬-৮৮ইং এর মাধ্যমে উক্ত স্বারক ইস্যুর তারিখ হইতে ৪(চার) মাসের মধ্যে হস্তান্তর দলিল রেজিস্ট্রি করতঃ হস্তান্তর গ্রহিতার নামজারীর নিমিত্তে উহার সার্টিফাইড কপিসহ চুক্তিনামা, অংগীকার নামা দাখিল করার জন্য বলা হয়। কিন্তু তিনি উহা ৪ মাসের পরিবর্তে ২(দুই) বৎসরের অধিক কাল পরে অর্থাৎ ৩০-১২-৯০ ইং তারিখে দাখিল করায় হস্তান্তরের অনুমতিপত্রের শর্তের চরম লংঘনের দায়ে কেন প্রদত্ত হস্তান্তরের অনুমতি বাতিল বলিয়া গণ্য করা হইবে না এই মর্মে পত্র প্রাপ্তির ১৫(পনের) দিনের মধ্যে যথার্থ কারণ দর্শানোর জন্য অত্র অফিস স্বারক নং রাজউক/এস্টেট। ২৩৬ স্বাঃ তারিখ ২৯-৯-৯১ ইং এর মাধ্যমে চিঠি জারী করা হয়। কিন্তু তিনি অদ্যাবধি উক্ত চিঠির কোন জবাব দেন নাই। উল্লেখ্য যে, প্লটে কোন ইমারত নির্মান করা হয় নাই।

এমতাবস্থায়, বিষয়টির উপর সদয় সিদ্ধান্তের নিমিত্তে কর্তৃপক্ষের সভায় পেশ করা হইল।"

93. And nothing has been produced from the side of the defendant that the Board took any resolution/decision on the basis of this office note. However, in this office note, there is also mention of the alleged letter dated 26-6-1988. And there has been an addition that after filing the documents as mentioned in the letter dated 26-6-1988 and 30-12-1990 a letter was allegedly served upon the lessee, Khaleda Rahman to show cause within 15(fifteen) days through a letter dated 29-9-1991 as to why the permission letter shall not be treated as cancelled, as the filing of documents after two years was the clear violation of the conditions of the permission letter. Interesting thing is that this letter dated 29-9-1991 has also neither been filed nor exhibited in the suit.

94. The next document is a letter allegedly written by the Deputy Director (Estate) RAJUK to the lessee, Mrs. Khaleda Rahman (this letter has been described by the trial Court as Exhibit-'C' as already mentioned hereinbefore) asking her to show cause within 15(fifteen) days as to why the permission to transfer the suit plot shall not be treated cancelled for violating the conditions mentioned therein, i.e. to file the documents within 4(four) months from the date of issuance of the letter dated 26-6-1988. Two different dates are appearing on this exhibit, at the top of the right side, it is mentioned 29-11-1995, whereas at the bottom, the date mentioned is 29-1-1991, if we take the year 91 mentioned at the top of this document in place of 95, even then the anomaly as to the month remains. In the list of documents, it has been described as "খালেদাকে হস্তান্তরের চিঠি", DW 3 in his deposition described the document as "খালেদাকে হস্তান্তরের অনুমতির চিঠি", It is better to quote this letter in its entirety. The letter reads as follows:

"রাজধানী উন্নয়ন কর্তৃপক্ষ
রাজউক ভবন, ঢাক-২।

স্মারক নং-রাজউক/এস্টেট/৩৮৮৭ স্বাঃ তারিখঃ ২৯-১১-৯৫ (৯১)।

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

প্রাপকঃ মিসেস খালেদা রহমান
বি-৩৪৪, খিলগাঁও পূর্নবাসন এলাকা,
তালতলা, ঢাকা-১১।

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

সূত্রঃ আপনার ৩১-১২-৯০ইং তারিখে আবেদন।

সূত্রোল্লিখিত আবেদনের পরিপ্রেক্ষিতে আপনাকে জানান যাইতেছে যে, রাজউকের স্বারক নং রাজউক/এস্টেট/১৬৬৯ স্বাঃ তারিখ ২৬-৬-৮৮ইং এর মাধ্যমে উক্ত স্বারক ইস্যুর তারিখ হইবে ৪(চার) মাসের মধ্যে বিক্রয় দলিল রেজিস্ট্রী করতঃ উহার সার্টিফাইড দলিলের রেজিস্ট্রী কপিসহ চুক্তিপত্র ও অঙ্গীকার নামা দাখিল করিতে বলা হইয়াছিল। কিন্তু আপনি উহা ৪(চার) মাসের পরিবর্তে ২(দুই) বৎসরের অধিকাল পরে দাখিল করা হইয়াছে যাহা হস্তান্তরের অনুমতিপত্রের শর্তের চরম লংঘন।

অতএব, হস্তান্তরের অনুমতি পত্রের শর্তের উল্লেখিত লংঘনের দায়ে কেন প্রদত্ত হস্তান্তরের অনুমতি বাতিল বলিয়া গণ্য হইবে না, এই মর্মে অত্র পত্র প্রাপ্তির ১৫(পনের) দিনের মধ্যে যথার্থ কারণ দর্শানোর জন্য আপনাকে অনুরোধ করা যাইতেছে।

ব্যর্থতায় আপনার আবেদনপত্র বিবেচনা করা সম্ভব নয়।

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

স্বারক নং-রাজউক/এস্টেট/ তারিখঃ ২৯-১-৯১

অবগতি ও প্রয়োজনীয় ব্যবস্থা গ্রহণের নিমিত্তে প্রতিলিপি প্রেরিত হইল।

জনাব আমানউল্লাহ মিয়া,
পিতা মৃত-হাজী রোশন আলী
৩৩৮, তেজগাঁও শিল্প এলাকা,
ঢাকা।
উপ-পরিচালক (এস্টেটস),
রাজধানী উন্নয়ন কর্তৃপক্ষ, ঢাকা।

95. Whereas from the second office note as quoted hereinbefore, it appears that such an alleged notice was served on 29-9-1991.

96. From the exhibits filed by defendant No. 2 as discussed hereinbefore, it is, *prima facie*, clear that no copy of the letter dated 26-6-1988 was filed and exhibited in the suit. It is also, *prima-facie*, clear from, the second office note that an alleged show cause notice was allegedly served upon lessee, Khaleda Rahman vide Memo No.RAJUK/Estate/230-stha: dated 29-9-1991 asking her to show cause within 15 days as to why the transfer permission shall not be treated cancelled as the documents mentioned in the letter dated 26-6-1988 were filed after 2 years, i.e. on 30-12-1990, if that was really served upon Khaleda Rahman what prevented RAJUK to produce the same.

97. From the contents of the letter dated 29-11-95(91)/29-1-91 as quoted herein before, one thing is very clear that even if it is accepted for argument's sake that the letter dated 26-6-1988 was issued to the original lessee, Mrs. Khaleda Rahman and the copy of the letter was given to the plaintiffs' father-Amanullah asking them to file the documents mentioned therein with 4(four) months from the date of issuance of the same, there was no default clause, because had there been any default clause then the question of issuing any show cause notice would not have arisen *(emphasis supplied)*. At the risk of repetition, it may be stated that in the permission letter (Exhibit '2'), there was no such condition. The whole controversy would have been set at rest if the letter dated 26-6-1988 was filed and proved as exhibit. We failed to understand what prevented RAJUK to file the letter dated 26-6-1988 by which the original lessee or the plaintiffs' father as the case may was asked to file the necessary documents/papers, such as

the certified copy of the registered deed, the deed of agreement, the affidavit within 4 months from the date of issuance of the said letter dated 26-6-1988 as asserted by defendant No.2 in his written statement when the defendant asserted the said fact, onus to produce and prove the document was surely upon him *(emphasis supplied).*

98. It is also very interesting to refer to the letter dated 9-11-1995 allegedly issued by RAJUK to Mrs. Khaleda Rahman (Exhibit 'A'). From this letter, it appears that the lease was allegedly cancelled in the meeting of the Board held on 21-5-1995 (extract of the Board meeting has already been quoted hereinbefore) on the ground of Khaleda Rahman's failure to construct building on the suit plot within the period specified in the lease deed and also in the extended time, although admittedly before expiry of the extended time, RAJUK on 24-1-1988 (Exhibit 2) gave permission to Khaleda Rahman to transfer the suit plot to Amanullah and as per direction of RAJUK, she deposited Taka 1,72,313 as transfer fee and Taka 886 as service charges on 22-2-1988 and 24-2-1988 respectively (Exhibits 3 and 3(Ka)). The plea taken by RAJUK in cancelling the lease of Khaleda appears to us absolutely unfair and malafide *(emphasis supplied).* We wonder how RAJUK could cancel the lease of Khaleda in respect of the suit plot on the ground of non-construction of the building thereon when RAJUK itself permitted her to transfer the suit plot on the condition of deposit of transfer fee and other service charges and admittedly those had already been deposited *(emphasis supplied).* In this regard, the High Court Division rightly found that by giving permission to Khaleda to transfer the suit plot to Amanullah during the extended time to construct the building, "the conditions in the lease deed for making construction before transfer was waived by RAJUK itself *(emphasis supplied)."*

99. Nowhere in the written statement as well as in the testimonies of DW 3, who was examined on behalf of RAJUK, it was stated as to how the letter dated 26-6-1988 was sent to the original lessee and the plaintiffs' father and as to how the same was served upon the plaintiffs or upon the original lessee, Mrs Khaleda Rahman. To us it appears that the letter dated 26-6-1988 allegedly issued by RAJUK either to the original lessee or to Amanullah, the plaintiffs' predecessor asking them to file the documents within 4(four) months from the date of issuance thereof, in the facts and circumstances of the case, was very crucial, due to the failure of lessee/Amanullah to file the documents within the said period, permission to transfer the suit plot was cancelled, but that was not filed by RAJUK and no explanation, whatsoever, was given by it for non-filing the same, but none of the Courts below applied their mind to this aspect of the case and proceeded, in a manner to decide the merit of the suit as if the defendants proved that the letter dated 26-6-1988 was issued and the same was received by the plaintiffs, but they failed to comply with the directions given therein *(emphasis supplied).* In the context, we find nothing wrong with the finding of the High Court Division that "I do not find anything from the record that the petitioners received the letter dated 26-6-1988 and willfully violated any term and direction of the letter..... It appears that the petitioners 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. The opposite parties could not show anything before the Courts below that the letter dated 26-6-1988 was received by Amanullah or by the plaintiff petitioners."

100. Mr Abdul Wadud Bhuiyan, learned Counsel, appearing for the appellants, could not assail the above quoted findings given by the High Court Division by referring to any material or evidence on record and could not

also satisfy us why this letter dated 26-6-1988 was not produced and exhibited either from the side of defendant No. 1 or defendant No. 2.

101. It is the specific case of the plaintiffs that before cancellation of the lease as well as the transfer permission neither any notice was given upon the lessee or upon the plaintiffs' father nor were they heard. Onus was squarely upon defendant No. 2 to show that before cancellation of transfer permission given to the lessee as well as cancellation of the lease, the lessee or the plaintiffs' father was heard and they were given many chances of showing cause or hearing, but defendant No. 2 failed to produce any paper/document, whatsoever, to show that they were either heard or given any chance of showing cause before cancellation of the permission letter to transfer the suit plot and cancelling the lease deed and that they had any knowledge of such cancellation as well. Rather DW 3 admitted that RAJUK did not give any notice to Khaleda Rahman to cancel the suit plot for not undertaking any construction work in the suit plot from 1969 to 1988. This DW first stated that a notice was issued to Khaleda Rahman before cancellation of her lease deed as to why her lease shall not be cancelled and then said that he could not remember whether any such notice was given before cancellation of the lease. The High Court Division held that "without hearing the original lessee or petitioners 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 High Court Division observed that "The Courts below failed to consider that before cancelling of the transfer permission, notice ought to have been issued to the prospective (sic) transferee who has filed required documents before RAJUK and was awaiting mutation. Law requires that authority exercising action of cancellation of lease deed and transfer permission must always act with fairness "We find nothing wrong with the findings given and the observations made by the High Court Division in the facts and circumstances of the case and the state of evidence as discussed above.

102. RAJUK failed to file any decision of the Board on any specific agenda to cancel the lease of Khaleda Rahman on 21-5-1995 as mentioned in Exhibit 'A' on the ground of non-construction of any building thereon as per terms of the lease deed as claimed by defendant No.2. This was necessary because though admittedly, Khaleda Rahman did not construct any building on the suit plot within the specified time mentioned in the lease deed and then during the extended time, she was allowed permission to sell the same to Amanullah as back as on 24-1-1988. As observed earlier, the extract of the Board meeting shows that the Board of RAJUK took a general decision in its 4th meeting of the year 1995 (it is accepted that the meeting was allegedly held on 21-5-1995) to cancel the lease of all the lessees, who in spite of getting the lease deed registered before 31-12-1971, failed to construct building on the lease hold land, there is no specific mention of the suit plot. Office note which preceded the Board meeting dated 21-5-1995 shows that the same was prepared for decision of the Board on the suit filed by the plaintiffs being Title Suit No. 252 of 1997 (giving rise to this appeal). And it does not appear either from the Board meeting or from any other exhibit that the Board gave any decision on the said office note (office note has been quoted hereinbefore). It is also necessary to state that although in the first office note, it was stated that the permission to sell the suit plot was cancelled in the Board meeting held on 26-9-1995, but no resolution of the said Board meeting was produced and proved *(emphasis supplied)*. We failed to understand how the defendants could connect the general decision of the Board to cancel the lease of the lessees who failed to construct building on their lease hold land within 31-12-1971, with that of the lease of Khaleda Rahman, because RAJUK itself permitted her to transfer the suit plot knowing fully

well that she did not make any construction therein. The very fact that permission was given to lessee, Khaleda on 24-1-88 to transfer the suit plot to Amanullah though, admittedly, she failed to make construction therein, the option of the lessor to cancel the lease for non-construction of the building on the suit plot as per terms of the lease deed, no more remained. In this connection decision (M) of the Board meeting is very important which reads as follows:

"(গ) উক্ত সিদ্ধান্ত মোতাবেক সংশ্লিষ্ট প্লটসমূহে লীজ গ্রহিতা/বরাদ্দ গ্রহিতাদের অবগতির জন্য তাহাদের স্ব-স্ব ঠিকানায় রেজিষ্ট্রার্ড উইথ এ/ডি ডাকযোগে চিঠি প্রেরণের নিমিত্তে এস্টেট শাখাকে নির্দেশ দেওয়া হইল। *(emphasis supplied)"*

103. At the risk of repetition, it is stated that defendant No. 2 failed to show that the so-called cancellation of lease of the original lessee, Khaleda Rahman was communicated to her by registered post with acknowledgment due pursuant to the decision of the Board in its 4th meeting of the year, 1995 (emphasis supplied). All these show that the whole episode of cancellation of the lease of Khaleda Rahman was fishy, mysterious, nontransparent, unfair and malafide, RAJUK is a statutory body, it must act with fairness and cannot act surreptitiously and in a fishy manner as has been done in the instant case *(emphasis supplied)*. Even for argument's sake, the case of RAJUK is accepted that by letter dated 26-6-1988 the lessee, the vendor of the plaintiffs' father or plaintiffs' father was asked to file the required documents, within 4(four) months from the date of issuance thereof, but they the same on 30-12-1990, RAJUK did not inform anything either to the lessee or to the transferee whether they accepted the documents or not. Though by the letter dated 29-11-95(91)/ 29-1-91 RAJUK tried to show that a notice was issued upon the lessee to show cause as to why the transfer permission should not be treated to have been cancelled for filing the documents beyond the period of 4(four) months, but it was not also proved that any such letter was served upon her *(emphasis supplied)*.

104. For the discussions made hereinabove, we are constrained to hold that the lease of Mrs. Khaleda Rahman was cancelled illegally, arbitrarily, unfairly, non-transparently and malafide behind her back without giving her any chance of hearing and giving her any notice, whatsoever, and even the fact of such cancellation was not intimated to her. The High Court Division rightly set-aside the finding of the trial Court as to the cancellation of lease of Khaleda Rahman on the ground of non construction of the building on the suit plot (as already stated at the beginning of the discussion of the submission the Appellate Court did not give any finding on the question of cancellation of the lease of Khaleda on the ground of non construction of the building on the suit plot) and also the finding of the Courts below as to the cancellation of permission given to Khaleda to sell the suit plot as both the findings were based on total misreading and non-consideration of the material evidence and also on the basis of a non-existing document, namely, the letter dated 26-6-1988. And such findings are not immune from interference by the High Court Division. Therefore, we find no substance in sub mission No.2 on which leave was granted.

105. Now the 3rd submission on which leave was granted: whether the plaintiffs' suit for declaratory decree without the prayer for recovery of possession of the suit plot was maintainable in law and whether finding of the Courts below on the question of possession of the suit plot is concurrent.

106. The trial Court did not give any finding whatsoever on possession of the suit plot. The trial Court did not also frame any issue as well on the question of possession. The Appellate Court found possession of the suit plot with defendant No. 1, so finding of possession of the suit plot given by the Appellate Court is not

concurrent. *(emphasis supplied)*

107. The High Court Division did not reverse the finding of possession of the Appellate Court and did not also give any finding of its own. Mr Mahmudul Islam has submitted that this Court as the last Court can see the evidence adduced by the parties and decide the question finally in order to do complete justice invoking the power bestowed on it, under article 104 of the Constitution of the People's Republic of Bangladesh (the Constitution). In support of his contention, he relied upon the case of M/s. Gannysons Ltd and another (supra). That case arose out of the following facts:

108. Sonali Bank, respondent No.1, obtained a decree in Title Suit No. 249 of 1976 for foreclosure and sale of the mortgaged properties belonging to the appellant company and put it into execution in Title Execution No.46 of 1980. Appellant-company appeared before the Court and prayed for staying the execution of the decree on the grounds that since the Bank proceeded against the appellant Company's properties being treated as abandoned by the Government, the Directors of the appellant Company were not properly served with notice and that had, therefore, no knowledge of the aforesaid title suit. As a result they did not appear in the suit. Also the Government which was made a party did not take any steps. However, on the prayer of the appellant Company the proceeding in the execution case was stayed till October 20, 1981. In Writ Petition No. 720. of 1981 a Rule was issued at the instance of the appellant company on October 20, 1981. But it abated on 24 March 1982 after the proclamation of Martial Law. In Miscellaneous Case No. 958 of 1981 which was filed by the appellant Company under section 47 of the Code its prayer against the execution of the decree obtained in Title Suit No.249 of 1976 was disallowed by the Court. The appellant Company's appeal against this order was dismissed by the High Court Division on 9 November 1982. The appellant Company, being aggrieved, moved this Court and succeeded in having the appeal (Civil Appeal No. 43 of 1983) against the order of the trial Court rejecting their objection under section 47 of the Code allowed. Appellants filed review petition against the concluding paragraph of the judgment which was as follows:

> "Decree dated 27-3-80 passed by the Subordinate Judge, 3rd Court, Dhaka in Title Suit No. 249 of 1976 be stayed for six months and the Miscellaneous Case No. 958 of 1981 pending in the 3rd court of Subordinate Judge, Dhaka be struck down."

109. And leave was granted to consider the only ground to the following effect:

> "For that consistently with the reasoning in the main body of the judgment and the decision allowing the appeal (CA No. 43 of 1983) arising out of Miscellaneous Case No.958 of 1981 started under section 47 CPC (at the instance of M/s. Gannysons Ltd. and another) the Title Execution Case No.46 of 1980 pending in the 3rdCourt of Subordinate Judge, Dhaka, needs to be struck down and the said Miscellaneous Case No.958, of 1981 of the same court allowed and that the order saying the decree dated 27-3-80 in Title Suit No. 279 of 1976 of the 3rd Court of the Subordinate Judge needs to be deleted."

110. Considering the definition of abandoned property as given in President's Order No. 16 of 1972, it was found that Gannysons Limited (Company, in no circumstances could be declared as an abandoned property, allowed the review application, declared that the property was not an abandoned property, struck down the execution case subject to payment (of the decreetal amount to the Bank directly by the appellant and directed the Government to

release the properly treating Title Suit No.508 of 1982 filed by the appellant as withdrawn being infructuous. In that case, Fazle Munim CJ observed:

> "17. In view of the circumstances above and in virtue of the power conferred upon this Court by the Constitution of Bangladesh, vide Article 104, to do complete justice in a case it is declared that Gannysons Limited is not an abandoned property, it should, therefore, be immediately released. Along with the release of Gannysons Limited any of its properties, assests and capital should also be released and returned to it."

111. The instant suit was instituted on 27-8-1997 and by now more than 15(fifteen) years elapsed. The Courts below are the Courts of fact and fundamentally, the question of possession is a question of fact. But, in fact, only one Court, i.e. the Appellate Court has given finding of possession of the suit plot. The High Court Division did neither give any finding of its own as to the possession of the suit plot nor reversed the finding of the Appellate Court, but the fact remains that plaintiffs asserted their possession in the suit plot and in support of their case of possession adduced oral evidence to which Mr Islam has drawn out attention. Mr Islam has also drawn out attention to the various clauses of the lease deed which need to be construed as rightly submitted by him, which the Appellate Court has not at all considered. Mr Islam has also pointed out the misreading and non-consideration of the material evidence on record by the Appellate Court in arriving at the finding of possession.

112. In view of the above, we find force in the submission of Mr Islam and in order to do complete justice, we are inclined to examine whether the finding of the Appellate Court as to the possession of the suit plot was based on proper reading of the evidence on record as well as on non-consideration of the material evidence including the various clauses of the lease deed. At the same time, 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 Appellate Court gave finding that the plaintiffs were not in possession of the suit plot and defendant No. 1 was in possession therein. Let us consider the evidence adduced by the parties as to the possession of the suit plot.

113. The plaintiffs examined 3(three) witnesses. PW 1 is plaintiff No.1. This PW in his Examination-in-Chief categorically stated that Khaleda Rahman got allotment of the suit plot in 1970 and she had been in possession thereof till 1988 and after purchase of the suit plot by them (Exhibit-'4' is the sale deed executed by Khaleda Rahman in favour of Amanullah, the plaintiffs' father), she delivered possession of the same to them and presently, they are in possession thereof and after getting possession of the suit plot, they did not get any notice from RAJUK verbal or written. In cross-examination by defendant No.1, he asserted that his father got possession of the suit plot from Mrs. Khaleda Rahman in 1988, but he could not say the actual date. He also stated that he did not know when Khaleda Rahman got possession of the suit plot. This PW further stated that there were boundary walls in the suit plot, but he could not say who erected the same and when it was erected. This PW categorically denied the suggestion given to him that defendant No.1, Anwarul Huq was in possession of the suit plot. In cross-examination by defendant No.2, this PW further asserted that he could not remember on what date Khaleda Rahman delivered possession of the suit plot to them.

114. PW 2, Faruk Ahmed, also asserted in his Examination-in-Chief that the suit plot belonged to Amanullah Shaheb. After the death

of Amanullah Shaheb, his sons and daughters filed the suit. The suit plot was a vacant land and he used to look after the same occasionally (মাঝেমধ্যে নালিশী জমি দেখাশুনা করি) as the staff of the plaintiffs Amanullah was in possession of the suit plot. In cross-examination by defendant No.l, this PW asserted that he had gone to the property last time in the last month, but he could not remember the date. There were boundary walls in the suit plot which were erected by Amanullah, but he could not say the accurate date of erection of such boundary walls. This PW denied defendant No. 1's suggestion that he constructed the boundary walls. He denied the further defence suggestion that he deposed falsely for the sake of his job.

115. PW 3, Nur Muhammad Khan, stated in his Examination-in-Chief that he resides at House No.39,. Road No. 15, section-3 at Uttara, the owner of the house is SM Akram Hossain, MP. He knows the suit plot which is adjacent to plot No. 39 and the suit plot is in possession of the plaintiffs. He categorically stated that he never saw the defendant to possess the suit plot. He further stated that at the request of the plaintiffs, he cultivates vegetables in the suit plot. He further stated that he had been residing in the house of SM Akram Hossain for the last 18 years. In cross-examination by defendant No.l, he stated that he was the Darowan of the house of SM Akram Hossain and there are boundary walls in the suit plot and he saw the same when he came at the house of SM Akram Hossain and he also saw Amanullah who died 3(three) years before leaving behind 3(three) sons, and 2(two) daughters. He further stated that there was no house in the suit plot. He denied the defence suggestion that he does not cultivate vegetables in the suit plot and that he does not know the same and that he also was not the Darowan of S.M. Akram Hossain and that it is defendant No.l who possesses the suit plot and it is he who constructed the boundary walls. He further stated that he did not know Anwarul Haque. In cross-examination by defendant No. 2, he further stated that he heard that the suit plot was allotted to Mrs. Khaleda Rahman from whom the plaintiffs purchased, he heard this from his Shaheb. He further asserted that Amanullah Shaheb used to give him some money of and often for looking after the suit plot.

116. DW 1 is defendant No.l. He stated that he applied to RAJUK on 28-2-1996 for giving him possession of the suit plot and thereafter, on 17-4-1996, possession thereof was delivered to him physically. He filed the letter of delivery of possession (দখল হস্তান্তরপত্র) and the same was marked as Exhibit-'R'. He further stated that he mutated his name and paid rents, the mutation paper and duplicate carbon receipts were proved and marked as Exhibit T series. The rent receipts were proved and marked as Exhibit 'U' series. He further asserted that after getting possession of the suit plot, he erected boundary walls and also an iron gate and in the process, he had spent a sum of Taka 79,800. He submitted a bill in proof of his expenditure. In cross-examination, the DW stated that the house of Akram Shaheb was to the east of the' suit plot, but he could not say who was the owner of the contiguous plot on the southern side? He also could not say who was the owner of the next plot of Akram Shaheb? Before allotment to him, there was boundary wall on the western side of the suit plot. The plot of Mr Akram Hossain is just adjacent to the southern side of the suit plot and there was boundary wall adjacent to the suit plot. He stated that it was true 'that there were boundary walls on the two sides of the adjacent plots to the suit plot *(emphasis supplied)* and he constructed the walls of the remaining two sides and also constructed a gate in front of Rabindra Sarani. He could not say the correct measurement of the gate and the boundary walls of the suit plot; There were trees on the suit plot, but neitherr of us could say the species of the trees. He denied the plaintiffs' suggestion that he did not erect any boundary wall on the suit plot.

117. DW 2, Zahid Hossain, who claimed to be a Director of City NT Bricks Limited, stated in his Examination-in-Chief that the Company manufactures bricks and supplies the same. He knew defendant No. 1. He supplied bricks, sand and cement for constructing boundary walls around the Rabindra Sharani plot of defendant No. 1 worth of Taka 79,800. He proved the bills signed by him against supplying the goods as Exhibit-'the' series. He further stated that he received the money of the bills on 15-5-1996. He further stated that "উত্তর এর আংশিক সম্পূর্ণ এবং পশ্চিমের আংশিক বাউন্ডারী ওয়াল নির্মাণ করা হয়। অপর দুই পার্শ্বে আগেই ছিল। *(emphasis supplied)*". In cross-examination, he stated that the height of the northern wall was $5^1/_2$ feet and was 60-70 feet at length. He could not say how many bricks would be required to construct a 5(five) feet wall. He further stated that in both the bills, the dates were penned through. The trial Court recorded the deposition as follows:

> "অত্র দুটি বিলেই তারিখ কেটে সংশোধন করা হয়েছে *(emphasis supplied)*". He further stated that he could not say bricks of which brand were used in constructing the boundary walls of defendant No.1.

118. DW 3, Abdul Mannan Sarkar, Superintendent of RAJUK, in his Examination-in-Chief, stated that after cancellation of the allotment of Khaleda Rahman as per decision of the Board, Anwarul Haque (defendant No.1) took possession of the suit plot (no particular date mentioned) and as per the paper of RAJUK, he is in possession thereof and that "এবং তার নামে দখল রেজিস্ট্রারী ও সমস্ত করে দেওয়া হয়েছে।" In cross-examination, he admitted that RAJUK gave permission to Khaleda to transfer the suit plot to Amanullah and as per the documents kept with the record, Khaleda registered the deed in favour of Amanullah *(emphasis supplied)*, but stated that Amanullah submitted the registered deed in his name after 2 years, though time for submitting the same was 4 months. The name of Amanullah was not mutated with RAJUK as he did not fulfill the conditions of RAJUK. This DW, however, asserted that the possession of the suit plot was given to defendant No.1 (this time also no date was mentioned as to the delivery of possession).

119. From the evidence as discussed above, it is clear that the assertions of PW 1 in his Examination-in-Chief that Mrs Khaleda Rahman, the lessee had been in possession of the suit plot and after purchase by Amanullah, their predecessor, possession was given to him and they are in possession of the suit plot remained unassailed during cross-examination. The only thing he stated in cross-examination is that he could not say the actual date of the delivery of possession by Khaleda. PW 1 was corroborated by PWs 2 and 3 as to the possession of the suit plot, Though PW 2 is an employee of the plaintiffs, PW 3 is an independent and natural witness being the Darwan of the adjacent house. The defendants by cross- examining PW 3 could not shake his credibility. Moreso, though DW 1 (defendant No. 1) claimed that he got possession of the suit plot on 17-4-1996, he could not say the name of the adjacent plot owners while deposed on 5-5-1999. Had defendant No.l got possession of the suit plot on 17-4-1996 as claimed by him, he would have been supposed to know the names of the adjacent plot owners. From the finding of the Appellate Court, it appears that it did not consider the evidence of PW 1 in its entirety. The Appellate Court did not at all consider the evidence of PWs 2 and 3 *(emphasis supplied)*. It disbelieved the plaintiffs' case of possession by referring to a portion of the evidence of PW 1 that he could not say the date when Khaleda Rahman got possession of the suit plot and also the date when his father got possession thereof from Khaleda Rahman and that he could not say who and when the boundary walls in the suit plot were constructed. The Appellate Court further observed that the plaintiffs did not produce any evidence that the boundary walls were constructed either by them or their prede-

cessor and then came to the abrupt conclusion that it was not proved that the plaintiffs were in possession of the suit plot completely overlooking the evidence of PWs 2 and 3 who clearly and categorically stated that the plaintiffs were in possession in the suit plot. The Appellate Court also failed to consider Exhibit 'A' (dated 9-11-95) by which lessee, Khaleda was allegedly asked to hand over possession of the suit plot to RAJUK within 15(fifteen) days from the date of service thereof. It further appears that the Appellate Court without discussing the evidence of the DWs and referring to any particular exhibit abruptly came to the finding that on consideration of the evidence and the documents, it appeared that defendant No.l proved his possession in the suit plot(emphasis supplied). The Appellate Court recorded its finding that "স্বাা-প্রমান ও কাগজপত্র পর্যালোচনায় ১নং বিবাদীর দখল প্রমানীত হয়।"

120. The reasoning of the Appellate Court in disbelieving PW 1 appears to us absolutely fallacious and not based on fair and sound judicial principle of assessing and sifting the evidence of a witness. Simply because a witness cannot remember the exact date as to the delivery of possession, his other unassailed assertions of possession of the suit plot corroborated by the other PWs cannot be disbelieved. The Appellate Court also failed to consider that this was never the case of RAJUK that Khaleda Rahman was not given possession of the suit plot after the lease deed was registered in her name as back as on 11-2-1970 (emphasis supplied). It also sounds absolutely ridiculous to think that Khaleda Rahman did not get possession of the suit plot though the lease deed was registered on 11-2-1970. Possession of the suit plot was given to Khaleda Rahman by RAJUK is, *prima facie,* manifested by Exhibit-'A', i.e. the letter allegedly written by RAJUK to her on 9-11-1995 whereby she was asked to deliver possession thereof to it *(emphasis supplied)* within 15(fifteen) days from the date of service thereof. In the said letter (the letter has been quoted hereinbefore), it was clearly stated that in case she failed to deliver possession of the lease hold property, RAJUK should be compelled to take over the possession thereof. Copy the said letter was also given to the Executive Engineer, Uttara Dhaka (RAJUK) Division, Dhaka and also Magistrate, 1st class, RAJUK. It is not the case of RAJUK that after the issuance of said letter (dated 9-11-1995), RAJUK took physical possession of the suit plot through its officials to whom copy was given. None was also examined by RAJUK to prove the fact of taking over possession of the suit plot from lessee, Khaleda Rahman after 9-11-95. The Appellate Court also failed to consider a broad fact that RAJUK on 24- 1-1988 by Exhibit-2' gave permission to Khaleda Rahman to transfer the suit plot to Amanullah subject to the payment of transfer fees and service charges and pursuant to that permission, she deposited Taka 1,72,313 as transfer fee and Taka 886 as service charges on 22-2-1988 and 24-2-1988 respectively (Exhibits-3 and 3(Ka)) and the sale deed was registered by Khaleda Rahman as back as on 24-10-1988 being deed No. 13282 in favour of Amanullah. Therefore, there could not be any reason on the part of Amanullah not to take over possession of the suit plot till 1995 when Khaleda's lease was allegedly cancelled for non-construction of the building after investing so much of money on account of transfer fee, service charges and also paying the vendor, (Khaleda) a sum of Taka 8,00,000 for the price of the suit plot. It is also against common course of natural events, human conduct and public and private business that a person shall allow the vendor to continue in possession even after getting the necessary deed registered as conceived of in section 114 of the Evidence Act. These facts coupled with the testimony of PWs 2 and 3 that it is Amanullah who is in possession of the suit plot, in no way, could make the assertion of PW 1 that they are in possession of the suit plot unbelievable, even if he failed to give the exact date of delivery of possession of the suit plot to them by Khaleda as found by the Appellate

Court.

121. In the written statement filed by defendant No.l as well as defendant No.2, no specific date was mentioned as to delivery of possession of the suit plot to defendant No.1 by RAJUK after allotting him the same on cancellation of the lease of Mrs. Khaleda Rahman. In view of the specific averments made in the plaint that after allotment, the original lessee got possession of the suit plot and while she had been in possession thereof she transferred the same to the plaintiffs' predecessor after obtaining necessary permission from RAJUK and the claim of the plaintiffs that they are in possession of the suit plot, and particularly of the contents of Exhibit-'A', the fact of stating the specific date of delivery of possession by RAJUK to defendant No. 1 was a must within the meaning of rules 2 and 4 of Order VI of the Code, mere statement that possession of the suit plot was delivered to defendant No. 1 by RAJUK, was not enough as provided in the said rules. It is also very pertinent to note that while PW1 was examined, no suggestion was given to him that after getting allotment of the suit plot, defendant No.l was given possession thereof by RAJUK by mentioning any particular date. Suggestion given to PW 1 was that defendant No.1 was in possession of the suit plot. No suggestion was given on behalf of defendant No.2 that after cancellation of the lease of Khaleda possession of the suit plot was taken over from her by RAJUK and then possession was delivered to defendant No. 1 on a particular date. It is for the first time when defendant No. 1 was examined as DW 1, he stated in his Examination-in-Chief that he got possession of the suit land on 17-4-1996 and in support of his said assertion he filed Exhibit-জ'. It is also necessary to state that the written statement of defendant No. l was filed on 3-3-1998, i.e. much after the alleged delivery of possession. This portion of the evidence is absolutely beyond pleading and the trial Court should not have recorded this portion of the evidence of DW 1 in view of the provision of Order VI, rule 7 of the Code. DW 3 who was examined on behalf of RAJUK also in his Examination-in-Chief simply stated to the effect "আনোয়ারুল হক প্লট এর দখল বুঝে নেয় এবং রাজউকের কাগজপত্র অনুযায়ীই ১নং বিবাদীর নালিশী দখলে আছে।" DW 3 did not say any specific date as to the taking of possession of the suit plot by defendant No.l. DW 3 in his testimony did not also assert that after cancellation of lease of Khaleda, possession of the suit plot was taken over from her.

122. Let us have a look at Exhibit-'R' and examine whether this can be treated as a document of delivery of possession The exhibit reads as follows:

"রাজধানী উন্নয়ন কর্তৃপক্ষ
রাজউক ভবন, ঢাক-২।

"উত্তরা আবাসিক এলাকার ৩নং সেক্টরের ১৫ নং সড়কের ৪১ নং দাগের জমি যাহার বরাদ্দ গ্রহিতা জনাব/আনোয়ারুল হক বরাদ্দ গ্রহিতার জনাব নিজ এর উপস্থিতিতে ৬-৩-১৯৯৬ইং তারিখে চুড়ান্ত জরিপ সু-সম্পন্ন করা হইল। *(emphasis added)*

উক্ত জরিপ অনুযায়ী সরে-জমিনে পরিমাণ ৫৫১৩ বর্গফুট অথবা ৭(সাত) কাঠা ১০(দশ) ছটাক ২৩ (তেইশ) বর্গফুট পাওয়া গেল। উক্ত জমির চতুর সীমানার বাহুগুলির পরিমাপ নিম্নে ছকের মাধ্যমে দেখানো হইল। বরাদ্দপাত্রর উক্ত জমির পরিমাণ ৩(তিন) কাঠা × ছটাক দেখানো হইয়াছে। চুড়ান্ত জরিপে ইহা ঠিক নাই।

সুতরাং বর্তমান চুড়ান্ত জরিপ অনুযায়ী পরিমাণ ৪(চার) কাঠা ১০(দশ) ছটাক ২৩(তেইশ) বর্গফুট বেশী আছে।

চুড়ান্ত-জরিপ গ্রহিতার স্বারঃ চুড়ান্ত জরিপ গ্রহিতার স্বারঃ
১৭-৪-৯৬
১৭-৪-৯৬
বরাদ্দ গ্রহিতার/বরাদ্দগ্রহিতার
জরিপকার,
প্রতিনিধি স্বারঃ-
বিষয়তদারকী শাখা,
রাজধানী উন্নয়ন কর্তৃপক্ষ ঢাকা।
জরিপকার,
প্রকৌশলী শাখা
রাজধানী উন্নয়ন কর্তৃপক্ষ ঢাকা।

জরিপকার,
১৭-৪-৯৬
কানুনগো
রাজধানী উন্নয়ন কর্তৃপক্ষ ঢাকা।"

123. Exhibit-'R' at the most shows that the area of the suit plot was measured by RAJUK in presence of the new allottee, defendant No 1 on 6-3-1996 Nowhere, in this document, it has been stated that after measurement of the suit plot, possession thereof was delivered to defendant No. 1 and he accepted the same. We are also at a loss to see the date put at the end of measurement as 17-4-1996, when the same was made/done on 6-3-1996, and this is enough to doubt its genuiness on the face of it *(emphasis supplied)*. The story of delivery of possession of the suit plot to defendant No. 1 on 17-4-1996 vide Exhibit-'R' is believed by the statements made by defendant No in paragraph-24(d) and (e) of his written statement under the head "THE" BRIEF FACTS AS POLLOWS"

"24(d) Originally the plot in question was show *(sic)* comprised of 3 kathas of land but subsequently by measurement it was found that actually the area of land was 7 kathas 10 chhatacks and 23 square feet equivalent to 5513 square feet and, therefore, an excess of 4 kathas 10 chhatacks and 23 square feet was there in the plot. Accordingly, the price of the said excess land of 4 kathas 10 chhatacks and 23 square feet has fixed at Taka 3,72,556 and this defendant was directed by RAJUK under cover of letter dated 9-6-96 to deposit the said amount as price of the excess land by 20-7-96. This defendant had, accordingly, deposited the said amount in the Sonali Bank, RAJUK Bhaban Branch, Dhaka by voucher No.6186 dated 23-6-96. This defendant got his name mutated and paid rents from 1390 BS upto 1403 BS on receipt of Dakhilas therefore.

(c) That possession of the plot in question was duly delivered to this defendant by RAJUK and this defendant peacefully took over possession of the plot and has since then been in possession therein (sic) by demarcation and specification as a bonafide lessee in occupation under RAJUK for valuable consideration without any notice of the alleged right' of the plaintiffs or their predecessor as claimed by them."

124. From the relevant statements made in paragraph 24(d) of the written statement as quoted hereinbefore, at best, it can be deduced that a measurement of the area of the suit plot might have been done by the officials of RAJUK in presence of the allottee, defendant No.l and that too without any specific date when such measurement took place. Paragraph 24(c) is also silent about the date of delivery of possession which is unusual in case of a plot of land alloted by RAJUK, a statutory body. Had there been any actual delivery of possession of the suit plot to defendant No.l than the date would have surely been mentioned and a bilateral document would have been executed between defendant No.1 and RAJUK showing such delivery of possession and acceptance thereof. In the facts and circumstances of the case and the evidence as discussed above, it, *prima-facie*, appears to us that, in fact, Exhibit 'R' was created after filing of the written statement just to show that possession of the suit plot was delivered to defendant No.1 by way of measurement of the suit plot.

125. 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. In the schedule to the plaint, the suit plot has been described as under:

126. Plot No.41, Road No.15, Sector No. 13 (old) New. 3 of the layout plan of the Uttara Residential Model Town within Mouja Faidabad, PS Uttara, District Dhaka measuring 612 square yards and 6 sq. ft.

127. The suit land being a plot of RAJUK has been correctly described in the schedule to the plaint within the meaning of rule 3 of Order VII of the Code. In paragraph-i of the plaint the plaintiffs have prayed the same area of land that is the suit plot. So we find nothing wrong with the description of the suit land. It does not matter what was the quantum of land which was allegedly leased out to defendant No. 1 in view of the fact that we have already found that the lease of the original lessee was cancelled illegally, arbitrarily, unfairly, non-transparently and malafide.

128. Mr Mahmudul Islam rightly referred to clause 5 of the lease deed (Exhibit-'I') which in clear terms has stipulated that if the lessee fails to complete the building of such house and appurtenances within the period referred to in clause 4, the lease shall be liable to be terminated by the lessor and on such termination, the lessee shall surrender the demised property to the lessor forthwith and the lessor shall refund to the lessee the actual amount on account of premium excluding interest, if any, paid and the right, title and possession of the demised property shall be deemed to have automatically vested with the lessor who shall have right to enter physically and remove any obstruction that might be found and dispose of the land in the discretion of the lessor (emphasis supplied). But in the instant case, admittedly nothing was done, i.e. neither the lease was terminated with the intimation to the original lessee, Mrs. Khaleda Rahman nor she surrendered possession of the suit plot to the lessor, RAJUK nor the lessor refunded the lease money paid by the lessee nor RAJUK took over actual physical possession of the suit plot, then how the suit plot could be leased out to defendant No. 1 and how possession thereof could be delivered to him. In this regard, it is also significant to note that in the letter dated 9-1-1995 (Exhibit-A), it was clearly stated to the effect "আপনার কর্তৃক প্লটের দখল বুঝাইয়া দেওয়ার পর প্লটের মূল্য বাবদ জমাকৃত টাকা আপনার নিকট হইতে উক্ত মর্মে আবেদন প্রাপ্তি সাপেক্ষে ফেরৎ প্রদানের ব্যবস্থা গ্রহণ করা হইবে।" *(emphasis supplied).* And this is quite in conformity with the terms of clause 5 of the lease deed. Mr Abdul Wadud Bhuiyan tried to argue that after cancellation of lease, the lessor had the right to enter into possession of the lease hold plot, but the submission of Mr Bhuiyan is negatived by the terms of clause 5 of the 'case agreement and Exhibit-'A' as discussed above. Even if for argument's sake, it is accepted that the letter dated 9-11-1995 was sent to Khaleda Rahman and she failed to hand over the possession of the suit plot, then RAJUK ought to have averred in its written statement that on the failure of Mrs. Khaleda Rahman to comply with the direction given in Exhibit-'A', it took over possession of the suit plot, particularly, when, in the meantime, the suit plot was transferred to the plaintiffs' father on the basis of permission duly given by it and the registered sale deed executed by Khaleda Rahman along with other necessary documents had already been filed by Amanullah on 30-12-1990.

129. 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 latitute 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. In this regard, we fully endorse the observations made by DC Bhattacharya, J made in the case of Chairman Bangladesh Steel Mills Corporation, now Bangladesh Steel Engineering Corporation (supra) to the effect:

> "54. I am not prepared to accept such an extremely mechanical proposition

which looks merely for the form, rather than the substance of a matter. A property taken over as an abandoned property will not *ipso facto* vest in the Government. Under article 4 of the President's Order No. 15 of 1972 all abandoned properties within the meaning of article 2(1) of the Order vested in the Government of Bangladesh on the commencement of the Order. If any property, which has been taken over and treated as an abandoned property is not in fact an abandoned property within the meaning of the Order, it has certainly not vested in the Government. The Government has not acquired any right or authority in respect of such a property. In such circumstance, the Government must be deemed to be not in lawful occupation of such a property and shall be, under the general law, accountable to the rightful owner for depriving him of the profits and gains of the property, subject to the provision of article 23 of the Order which gives legislative protection to the Government and any person for anything done in good faith under the Order and the rules framed thereunder. It is an inherent duty of every person in a State governed by the rule of law refrain from doing an act which is contrary to law and so it is also his duty to dissociate from, or purge himself of, any illegal action with which he may have unknowingly or inadvertently associated. This duty is all the more incumbent upon the Government, the executive organ of the State, which has the supreme duty of enforcing the rule of law. So if it is found that a property which was not an abandoned property but 'through some mistake or misconception was taken over as an abandoned property and that under the law in force it has not vested in the Government the Government has certainly on discovery of such a mistake or misconception, have the right and the duty, to restore the property to the rightful owner forthwith, independently of any positive provision of law in this regard. So if it can be shown that the assets of the Respondents' firm were never abandoned properties and has never vested in the Government under any law, the impugned order of release may be taken as a valid and lawful order of release, although it was wrongly described to have been made under article. 15(3) of the Order."

130. As already found hereinbefore, cancellation of lease of the original lessee Khaleda Rahman was done illegally, arbitrarily, unfairly, non-transparently and malafide behind her back and possession of the lease hold property, i.e. the suit plot was not taken over from her in compliance with the provisions of clause 5 of the lease deed, the plaintiffs, being the purchasers from the original lessee, Khaleda Rahman, shall be deemed to be in possession thereof, besides the evidence adduced by them in that respect.

131. The Appellate Court gave unnecessary stress on the fact of construction of boundary walls on the suit plot (evidence has already been discussed hereinbefore so those are not repeated herein) in coming to the finding of possession of the suit plot. In the plaint, the plaintiffs stated that the original lessee, Khaleda Rahman after getting delivery of possession of the suit plot enjoyed the same from 12-2-1970 to 24-1-1988, that is, for more than 18 (eighteen) years by exercising all acts of possession and while in urgent need of cash money transferred the same 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 dated 24-1-988 and the transaction was complete between the vendor and the vendee in presence of defendant No.2. After purchase of the suit plot from the original allot-

tee, the predecessor of the plaintiffs for the purpose of his business as well as for treatment had to stay in United State of America as well as in the European Countries for a quite long time and kept the plot under the custody of his caretaker and after the death of the plaintiffs' predecessor, they inherited the suit plot. In the plaint, the story of construction of boundary walls was not at all stated by the plaintiffs. In the written statement, defendant No. 1 did not all state the fact that he constructed the boundary walls in the suit plot after he allegedly took possession of the same. But while he deposed in Court on 5-5-1996 for the first time stated that "নালিশী প্লটের দখল পাওয়ার পর সীমানা প্রাচীর করেছি, লোহার গেট নির্মান করেছি। উক্ত সীমানা প্রাচীর নির্মান কার্যে ৭৯ হাজার ৮০০ শত টাকা খরচ হয়েছে। আমি উক্ত তারিখে ৮-৫-১৯৯৬ ইং তাং বিল অত্রাদালতে দাখিল করিলাম।" This portion of the evidence of DW 1 is contrary to the pleading of defendant No. 1 as has already been discussed hereinbefore. DW 2 was examined to corroborate DW 1 that he constructed the boundary walls and gate on the suit plot by spending a sum of Taka 79,800 and it is City NT Brick Ltd which supplied the bricks for the purpose (whose evidence has already been discussed hereinbefore). But this DW cannot be relied upon for two reasons: (i) though he claimed to be the Director of City NT Bricks Limited and specifically stated in his Examination-in-Chief that the company manufactures bricks and supplies the same, stated that they supplied sand and cement as well to defendant No.1. When a company manufactures and supplies bricks, we cannot understand how it could supply sand and cement, (ii) he admitted that the dates mentioned in the two bills were penned through. This very fact of penning through the dates of the bills creates a doubt as to the supply of bricks to defendant No. 1 for constructing the boundary walls. Further the boundary walls in an immovable property, here the' suit plot, are constructed by Mason and not by the bricks suppliers, but defendant No.l did not examine any Mason or any labourer who worked in constructing the boundary walls. Further DW 1 himself in his cross-examination clearly admitted that there were already boundary walls on the western and the southern side of the suit plot. Besides DW 2 in his Examination-in-Chief clearly stated that "উত্তর এর আংশিক সম্পূর্ণ এবং পশ্চিমের আংশিক বাউন্ডারী ওয়াল নির্মাণ করা হয়। অপর দুই পার্শ্বে আগেই ছিল।" When, as per own admission of DW 1, there was already a boundary wall on the western side of the suit plot, how could he again, construct the wall on the said side? So, it cannot be said that defendant No.l got possession of the suit plot and then constructed the boundary walls therein in the absence of any proof that actually he was delivered the possession of the same by RAJUK through a duly executed bipartite paper (reason already discussed earlier) Therefore, the Appellate Court was absolutely wrong in forming an adverse presumption against the plaintiffs' case of possession in discarding the evidence of PW 1 on the observation that "নালিশী প্লটের চারিদিকে সীমানা প্রাচীর দেওয়া হইয়াছে। উক্ত সীমানা প্রাচীর কবে কে নির্মাণ করিয়াছেন তাহা তিনি বলিতে পারেন নাই।.....বাদী পরে স্বীকৃত মতে এই সম্পত্তিতে দেওয়াল বিদ্যমান আছে বাদীপক্ষ বা তাহাদের পূর্ববর্তী এই দেওয়াল নির্মান করেন এই রূপ কোন দাবী বা প্রমান বাদীপক্ষ হইতে পাওয়া যায় না। বরং ১নং স্বাক্ষী নিজেই স্বীকার করেন যে, কে নালিশী জমিতে দেওয়াল নির্মাণ করিয়াছেন বা কবে নির্মান হয় তাহা তিনি জানেন না বলিতে পারেন না।"

132. Mr Abdul Wadud Bhuiyan, by referring to the statements made in paragraphs 4 and 6 of the plaint, tried to show that the plaintiffs themselves admitted that defendant No.l brought bricks and sands in the suit plot to make some construction therein which, in fact, proved the fact of possession of the suit plot by defendant No.1. But Bhuiyan is absolutely mistaken in relying upon those statements of the plaint to prove possession of defendant No. 1 in view of so many other broad facts as discussed above which *prima-facie* proved that RAJUK never took back possession or got back possession of the suit plot from Khaleda Rahman and never put defendant No.l in possession thereof.

The statements made in the said two paragraphs of the plaint, at best, prove that defendant No.l made an attempt to get into the possession of the suit plot forcibly by bringing some bricks being emboldened by the letter of allotment, though lease of lessee, Khalada was not cancelled legally and bonafide following a fair procedure. Further in paragraph 4, it was clearly stated that "and while the plaintiff predecessor-protested the defendant No.1 fled away and did never come forward." Since we have found that the possession of the suit, plot was neither delivered to RAJUK by original lessee, Khaleda Rahman nor RAJUK took over possession thereof from her and further no proof was filed showing delivery of such possession by RAJUK to defendant No.l on the basis of duly executed bipartite document, the question of construction boundary walls in the suit plot by defendant No. 1 does not arise at all.

133. It is true that the name of defendant No.l has been recorded with RAJUK and he has paid rents as well, but these do not prove the fact of his possession in the suit plot when actual possession is with the plaintiffs as found earlier. Moreso, the name of defendant No.l was mutated by RAJUK when the case of mutation in the name of Amanullah, plaintiffs' predecessor, was pending with it.

134. From the above, it, *prima-facie*, appears to us that the finding of the Appellate Court that the plaintiffs failed to prove their possession in the suit plot and defendant No.l is in possession thereof, is based on total misreading as well as on non-consideration of the evidence on record including the provisions of clause 5 of the lease deed (Exhibit-'1') and therefore, the finding of the Appellate Court is not immune from interference. In view of the above, the Appellate Court was absolutely wrong in holding that the plaintiffs' suit for declaratory decree without the prayer for consequential relief, by way of seeking recovery of possession, was not maintainable in law. The cases cited by Mr Bhuiyan as noted while noting his submission that the suit for declaratory decree without the prayer for consequential relief when the plaintiffs are out of possession, is of no help to him. We find no substance in submission No.3.

135. Now, the first submission of the leave granting order: whether the plaintiffs were required to pray for any decree for cancellation of the lease deed executed on 23-9-1996 and registered on 16-10-1996 by RAJUK in favour of defendant No.l in respect of the suit plot.

136. Admittedly, neither Amanullah, predecessor of the plaintiffs nor the plaintiffs are parties to the lease, agreement/deed executed and registered by RAJUK in favour of defendant No. 1 in respect of the suit plot. It is an agreement between RAJUK and defendant No. 1. In view of our findings given hereinbefore that the lease of the original lessee, Mrs. Khalada was cancelled illegally, arbitrarily, unfairly, non-transparently and malafide and that the plaintiffs are in possession of the suit plot, they plaintiffs were not required to pray for cancellation of the lease deed executed and registered by RAJUK in favour of defendant No.l within the meaning of section 39 of the Specific Relief Act. However, the High Court Division misread the prayer of the plaint in saying that "on a perusal of the record I find that in the present suit plaintiff also prayed for cancellation of the Lease Deed executed by RAJUK in favour of opposite party No. 1" but that in no way affected its findings as discussed hereinbefore. Therefore, we find no substance in the first submission of the leave granting order as well.

137. The suit as framed by the plaintiffs was for two declarations: (i) to declare their sixteen annas "lease hold right holder" to the suit plot and (ii) to declare the "cancellation of lease, if any, in respect of the suit land" as illegal, malafide and not binding upon them. No prayer was made in respect of the lease agree-

ment executed and registered by RAJUK in favour of defendant No.l in respect of the suit plot. Before this Court, an application has been filed on behalf of the plaintiff-respondents for amendment of the prayer of 'the plaint by adding the prayer that the registered lease deed dated 23-6-1996 (the date is wrong, it would be 23-9-96) executed by RAJUK in favour of defendant No.l, is illegal and not binding on the plaintiffs and the total prayer has been replaced as under:

> "(a) The suit may be decreed declaring that the plaintiffs have sixteen annas lease hold interest in the suit plot, that the cancellation of the leased deed dated 12-1-1970 executed in favour of Mrs Khaleda Rahman is illegal and void and the registered lease deed dated 23-6-1996 (correct date is 23-9-96) executed by RAJUK in favour of defendant No.1 is illegal and not binding on the plaintiffs."

138. Mr Bhuiyan has opposed the prayer for amendment on the submission that the prayer for amendment has been filed long after the period of 6(six) years as provided in article 120 of the Limitation Act. Mr Bhuiyan referred to number of decisions of this Court and of the Indian Jurisdiction as well (the decisions noted while noting his submission). In the facts and circumstances of those cited cases, prayer for amendment of the plaint was rightly rejected and the principle of law enunciated in those cases has got no manner of application in the facts and circumstances of the instant case. However, considering the facts and circumstances of the case and the findings given hereinbefore, we consider it 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 as quoted hereinbefore without entering into the niceties of law asto the amendment as argued by Bhuiyan.

139. It appears from the operative part of the judgment of the High Court Division that though it made the Rule absolute and set-aside "the judgments of the Courts below", it did not say anything about the fate of the suit and, as such, the operative part of the judgment of the High Court Division needs to be corrected as well by invoking the same power.

140. Accordingly, the appeal is dismissed. The suit is decreed. It is declared that the plaintiffs have sixteen annas lease hold interest in the suit plot. The cancellation of lease deed executed on 12-1-1970 in favour of Mrs. Khaleda is declared illegal and void and it is further declared that the lease deed executed and registered by RAJUK in favour of defendant No.l appellant in respect of the suit plot is illegal and not binding on the plaintiffs. The other order/direction of the High Court Division except "and cancel the subsequent allotment of the suit plot to opposite party No.1" is maintained.

141. There will be no order as to costs.

142. Nazmun Ara Sultana J: 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.

143. Muhammad Imman Ali J: I have gone through the judgments proposed to be delivered by my brothers, Surendra Kumar Sinha, J. and Md Abdul Wahhab Miah, J. 1 agree with the reasoning and findings given by Md Abdul Wahhab Miah, J

Court's Order

The appeal is dismissed by majority decision without and order as to costs.

Ed.

Appellate Division
(Criminal

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

Judgment
February 11th, 2014.

State.....Appellant

vs

Md Shamsur Rahman Sikder @ Kalu & other.....
.....Respondents*

Cruelty to Women (Deterrent Punishment) Ordinance (LX of 1983)
Sections 4(Kha) and 10

Penal Code (XLV of 1860)
Section 376

Code of Criminal Procedure (V of 1898)
Sections 374 and 376

The process of sentencing is at the discretion of the Judge and is at the same time circumscribed by the law. The respondent was in custody during the pendency of the appeal from 1993 to 2001 and, therefore, served a term of imprisonment of about 8 years. The High Court Division has thought that the period served by the respondent was sufficient to meet the ends of justice. .....(14)

Biswajit Deb Nath, Deputy Attorney-General—For the Appellant instructed by B. Hossain, Advocate-on-Record

Ex-parte—The Respondents:

Judgment

Md Imman Ali J: This criminal appeal, by leave, is directed against the judgment and order dated 18-7-2001 passed by a Division Bench of the High Court Division in Criminal Appeal No. 1710 of 1993 allowing the appeal in part.

2. The prosecution case, in brief, is that on 21-9-1992 informant Shakhaot Hossain's wife Aysha was sleeping in their dwelling hut with her daughter Dilruba Sultana Fouzia Khatun, aged about 14 years in the western room of the hut. At dead hours of the night the accused persons by cutting the fencing of the room entered into the hut and tried to forcibly abduct Fouzia but she raised alarm. Hearing her hue and cry, the wife of the informant woke up and lit the hurricane and recognized accused Shamsur Rahman who was forcibly taking Dilruba Sultana out of the house. Accused Akkas threatened the wife of the informant when she tried to obstruct the taking away of her daughter, Dilruba. They raised alarm and hearing hue and cry neighbouring people and witnesses rushed to the scene and chased the accused persons, but the accused persons already boarded a waiting tempo and hurriedly left the place of occurrence. It has been further alleged that the accused Shamsur Rahman proposed to marry Dilruba, daughter of the informant but the informant refused his proposal. Dilruba was taken to a distant village and kept confined there for about 10/15 days, and against her will the respondent Shamsur Rahman arranged a fake marriage for her. Thereafter, the respondent Shamsur Rahman raped Dilruba repeatedly against her will. About 15 days after the occurrence Dilruba managed to escape from the illegal confinement of the accused persons. On returning home she narrated the occurrence to the inmates of the house and other witnesses.

3. After investigation police submitted charge-sheet under sections 4(b) and (c) read with section 10 of Cruelty to Women (Deterrent Punishment) Ordinance, 1983. The respondent Shamsur Rahman was also charged under section 376 of the Penal Code.

*Criminal Appeal No. 54 of 2003

(From the judgment and order dated 18th of July, 2001 passed by the High Court Division in Criminal Appeal No. 1710 of 1993)

4. During trial the case record was transmitted to the Court of learned Assistant Sessions Judge and Special Tribunal, Magura for trial. The learned Judge of the said Court framed charge against the accused respondents under the above mentioned sections. The charge was read over to the accused to which they pleaded not guilty and claimed to be tried.

5. In support of this case the prosecution examined as many as 9(nine) witnesses but the defence examined none.

6. The defence case as it transpires from the trend of cross-examination of the witnesses is that Dilruba had an affair with accused Shamsur Rahman and she eloped with him of her own free will and married him. The accused have been falsely implicated in this case.

7. After completion of taking evidence, the accused respondents were examined under section 342 of the Code of Criminal Procedure, where they again pleaded not guilty and declined to adduce a y evidence in support of their defence.

8. The learned Assistant Sessions and Special Tribunal Judge, Magura after conclusion of the trial convicted the appellant Shamsur Rahman under sections 4(b) and 10 of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 read with section 376 of the Penal Code and sentenced him to suffer imprisonment for life and to pay a fine of Taka 10,000, in default to suffer rigorous imprisonment for a further period of 2 (two) years. Accused Akkas and Golam Mawla were convicted under sections 4(b) and (c) and 9 of the said Ordinance and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Taka 10,000 each, in default, to suffer rigorous imprisonment for a further period of 2 (two) years.

9. Being aggrieved, the accused respondent preferred Criminal Appeal No. 1710 of 1993 before the High Court Division. Upon hearing, the High Court Division allowed the appeal in part and set-aside the conviction and sentence passed against appellants Akkas Sikder and Golam Mawla and they were acquitted from the charge levelled against them and the order of conviction and sentence of respondent Shamsur Rahman Shikder under sections 4(b) and 10 of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 was affirmed but he was sentenced to suffer imprisonment for the period already undergone by him.

10. Being aggrieved by the said judgment and order of the High Court Division a petition for leave to appeal was filed by the State and leave was granted to consider whether the charge under section 4(c) of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 has been proved against the respondent No.1 beyond all reasonable doubt, and whether the High Court Division erred in law in reducing the sentence of respondent No. 1 without assigning any reason whatsoever or showing any extenuating circumstances.

11. The learned Deputy Attorney-General, Mr Biswajit Deb Nath, appearing on behalf of the appellant submitted that in view of clear findings of the High Court Division to the effect that it has been convincingly proved that the accused persons particularly accused Shamsur Rahman forcibly abducted victim Dilruba for forcible marriage, the High Court Division erred in law in acquitting Akkas and Mawla and reducing the sentence of respondent Shamsur Rahman. He also submitted that charge under section 4(c) of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 having been proved beyond all reasonable doubt and the High Court Division erred in law in reducing the sentence without assigning any reasons whatsoever or upon considering any extenuating circumstances. The learned DAG lastly submitted that the prosecution case having being convincingly proved beyond all reasonable doubts by the testimony of the victim

girl and her mother and other witnesses, the High Court Division erred in law in acquitting Akkas and Mawla and reducing the sentence of respondent Shamsur Rahman.

12. We have considered the submissions of the learned Deputy Attorney-General appearing for the appellant and perused the impugned judgment as well as other evidence and materials on record.

13. We find from the impugned judgment that the High Court Division after elaborate discussion of the evidence came to the finding that the prosecution failed to prove its case against appellants Akkas and Mawla and upon giving them the benefit of doubt, acquitted them. However, it was found that there was sufficient evidence that accused Shamsur Rahman (respondent herein) forcibly abducted the victim Dilruba for seducing her to a forcible marriage with him. The High Court Division also found that the charge of rape was not proved by cogent and reliable evidence. Accordingly, the accused was acquitted of the charge under section 376 of the Penal Code while conviction under section 4(Kha) and 10 of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 was affirmed. The High Court Division then sentenced the respondent to suffer imprisonment for the period already undergone by him in jail.

14. The punishment provided under section 4(Kha) and 10 of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 is imprisonment for life or rigorous imprisonment for a term which may extend to 14 years and shall also be liable to a fine. The process of sentencing is at the discretion of the Judge and is at the same time circumscribed by the law. In the instant case, the accused Shamsur Rahman could have been sentenced to imprisonment for life or, taking into consideration the facts and circumstances of the case, he could have been sentenced to suffer rigorous imprisonment for any period up to 14 years. It transpires that the respondent was in custody during the pendency of the appeal from 1993 to 2001 and, therefore, served a term of imprisonment of about 8 years. The High Court Division has thought that the period served by the respondent was sufficient to meet the ends of justice. We do not find any illegality in the impugned judgment and, therefore find no reason to interfere with the impugned judgment and order.

Accordingly, the appeal is dismissed.

Ed.

Appellate Division
(Civil)

Syed JR Mudassir Husain CJ
Md Fazlul Karim J
MA Aziz J
Amirul Kabir Chowdhury J

Judgment
August 3rd, 2004.

Concord Engineers and Construction Ltd.....
.....Appellant
vs
Chief Engineer, Road and Highways Department, Government of the People's Republic Bangladesh, Dhaka.....
.....Respondent*

Limitation Act (IX of 1908)
Article 158

The question of limitation of filing of the objection within 30 days as required under section 158 of the Act is unwarranted and uncalled for because the award being a nullity and *void ab-initio* and need not be avoided, no question of limitation is applicable as the illegality is apparent on the face of the record and the Court should take judicial notice of it

*Civil Appeal No. 9 of 2001

(From the judgment and order dated 4th April 1996 passed by the High Court Division in First Miscellaneous Appeal No.82 of 1993)

and in the facts and circumstances of the case, it is not necessary that a party should file objection to the award under section 30 within the period prescribed under section 158 of the Act. .....(20)

Sachindra Lal Das vs Hriday Ranjan Das being dead his heirs: Bimal Kanti Das, 40 DLR (AD) 56 and Hashmat Ali Jamadar vs Asmatali Jamadar, 6 DLR 478 ref.

Rafique-ul-Huq, Senior Advocate, instructed by Md Wahidullah, Advocate-on-Record—For the Appellant.

Fida M Kamal, Additional Attorney-General, (Borhanuddin, Deputy Attorney-General and Karuna Moy Chakma, Assistant Attorney-General, with him), instructed by Ahsanullah Patwary, Advocate-on-Record—For the Respondent.

Judgment

Md Fazlul Karim J: This appeal at the instance of the plaintiff-appellant is directed against the judgment and order dated 4th April, 1996 passed by the High Court Division in Appeal from Original Order No.82 of 1993 allowing the appeal setting-aside those dated 30-11-1992 of the Subordinate Judge, First Court, Dhaka in Miscellaneous Case No. 71 of 1991 declaring the award dated 21-9-1991 signed and delivered by the sole arbitrator, Mr Justice Sultan Hossain Khan making the same a rule of the Court to be without jurisdiction and a nullity in the eye of law.

2. Facts relevant for disposal of the appeal, *inter-alia*, are that the Government of the People's Republic of Bangladesh decided to construct some flyovers in the city of Dhaka, one at Mohakhali and another at Banani and for this purpose they floated tender from intending contractors. Many contractors including the appellant participated in the said tender and on scrutiny their bid was found to be the lowest and, as such, the same was accepted by the Government of Bangladesh for construction of the said flyovers. After acceptance of the same a work order was issued to the contractor. Subsequently, a formal contract dated 3-9-1990 between the parties was signed. After the conclusion of the said contract, about 5/6 months later the Government has cancelled the contract and decided not to go with the construction of those flyovers in the city of Dhaka. Being aggrieved by the said cancellation of the agreement the appellant in terms of the aforesaid agreement referred the matter of cancellation to the Additional Chief Engineer and claimed an amount of Taka 30 (thirty) Crores and added as compensation on the ground that after conclusion of the agreement they had already undertaken various works and they had procured men, materials and specialized agencies for the purpose of completion of the construction of the said flyovers and sudden cancellation of the contract would cause them huge loss. On receipt of the claim from the appellant, the Additional Chief Engineer vide Memo dated 10-4-1991 requested the appellant to submit item-wise their claim in details and with all related papers to the concerned Executive Engineer. The Additional Chief Engineer by his aforesaid Memo also informed that he will give his decision in the matter on getting their claim with comments of the concerned officer. The concerned Executive Engineer by his Memo dated 29-4-1991 also requested the appellant concerned Engineers to furnish all related documents and explanations in support of their claim to facilitate determination of the same by the Additional Chief Engineer. The appellant without complying with the said request of the Additional Chief Engineer wrote to the Chief Engineer invoking clause B. 6.31 of the agreement and requested him to appoint an Arbitrator on his behalf in the matter informing him that they had already appointed Mr Justice Sultan Hossain Khan as their Arbitrator in the matter to settle the dispute between the parties

as the Additional Chief Engineer did not settle the dispute. The Chief Engineer on receipt of the letter dated 29-4-1991 did not appoint any arbitrator on his behalf and after waiting for six weeks the appellant requested their appointed Arbitrator to start arbitration proceeding as sole arbitrator. In that view of the matter the Arbitrator appointed by the appellant as per provisions of the Arbitration Act, 1940, assumed jurisdiction in the instant case as a sole Arbitrator and notified both the parties to appear before him and submit their case in writing. It appears that the appellant in pursuance of that notice appeared before the Arbitrator and submitted their statement of claim. On the other hand, the respondents though prayed for time but subsequently they did neither file any written objection nor participated in the proceedings and in that view of the matter the Arbitrator concluded the proceeding *ex parte* against the respondents and gave an award amounting to Taka 15 Crores and added as compensation in favour of the appellant. The learned Arbitrator signed and delivered the award on 21-9-1991 with notice to both the parties but the respondents did not appear before the Arbitrator nor signed the Award. After the pronouncement of the said award, the arbitrator sent the same to the Court of Subordinate Judge, First Court, Dhaka on 6-10-1991 for making the said award a rule of the Court.

3. On receipt of the said award along with relevant files the learned Subordinate Judge issued notice fixing 30-11-1991 for filing objection, if any, by the parties. It further appears that the respondents in response to that notice appeared before the learned Subordinate Judge and took few adjournments for the purpose of submitting written objection and ultimately on 21-3-1992 they filed the written objection under section 16 read with section 31 of the Arbitration Act. The learned Subordinate Judge after hearing both the parties and perusing the relevant documents and the award made the award a rule of the Court vide his judgment dated 30-11-1992 holding that the objection filed by the respondent under sections 16 and 31 of the said Act was absolutely misconceived. The learned Subordinate Judge further found that the objection, if any, in the instant case could have been filed under section 33 read with section 30 of the Act but instead of that they have filed an objection under section 16 read with section 31 of the said Act which is not tenable in law in the facts and circumstances of the case. The learned Subordinate Judge further observed that even if, for argument's sake, it is assumed that the said objection was in fact filed under section 33 read with section 30 of the Act then also the same is not acceptable on two counts, firstly it is barred by limitation as provided under Article 158 of the Limitation Act and secondly for non-compliance of the proviso to section 33 of the Act which has been added to it after the amendment of the aforesaid section by virtue of provision of Law Reforms Ordinance, 1978. The learned Subordinate Judge also perused the records of the Arbitration case and the award itself and did not find anything on record to interfere with the award passed by the learned Arbitrator and in that view of the matter the award was made a rule of the Court by the impugned judgment and order dated 30-11-1992. Being aggrieved by the said judgment and order the respondents preferred an appeal being First Miscellaneous Appeal No.82 of 1993 which was allowed by the judgment and order dated 4-4-1996 by the High Court Division.

4. In the case the respondent filed an application under section 16 and 31 of the Arbitration Act for setting-aside the award stating, *inter-alia*, that in view of the overall resource constraints of the Government and the dispute over the land to be used for the construction of the flyovers, the Executive Committee of the National Economic Council

gave its opinion for non-implementation of the project whereupon the Government of Bangladesh acting through the Ministry of Communication asked the Chief Engineer of the respondents to cancel the contract dated 3-9-1990 for construction of the flyover in the greater national interest and to communicate the same to the appellant. The Chief Engineer by his letter dated 28-2-1991 addressed to the appellant informing cancellation of the said contract in view of the inability of RAJUK to mobilise resources during the 4th five years plan along with other resource constraints of the Government. The Chief Engineer accordingly refunded the bank guarantee for an amount of Taka 5 lakh furnished by the Contractor. Consequent upon cancellation of the contract, the appellant Contractor by letter dated 11-3-1991 claimed an amount of Taka 30 crores without any break up of the said amount, whereupon the Chief Engineer asked for a claim with details and item-wise with all related papers by its Memo dated 10th April, 1991 and on getting the comments of the concerned officers action will be taken by the competent authority but the Contractor appellant without supplying the claim details item-wise appointed Arbitrator on their behalf and intimated that in case of failure to nominate an Arbitrator within 15 days the Arbitrator appointed themselves would act *ex parte*. The Arbitrator on assumption issued notice dated 14-6-1991, 27-6-1991 and on 8-7-1991 and ultimately on 14-9-1991 intimated the pronouncement of the award. Meanwhile, the respondent employer on receipt of the notice fixing 25-6-1991 as the date of hearing of the proceeding the Additional Chief Engineer by letter dated 20-6-1991 intimated the Chief Engineer about the receipt of the said notice with copy to the Arbitrator stating that no action could be taken in the matter on 25-6-1991 which is a holiday due to Eid-ul-Azha. The copy of which was forwarded to the Arbitrator with a note to that effect only that upon receipt of the reply from the Ministry steps would be taken for disposal of the matter. But the Arbitrator proceeded ex-parte inspite of the fact that he was not appointed in terms of the Contract embodied in clause B 6.31 of the Tender document (which forms part of (the contract) i.e., if any party to the contract is dissatisfied with the decision of the Additional Chief Engineer he is required first to give a written notice to the other party within 20 days after receipt of the decision of the Additional Chief Engineer requiring that the matter in dispute should be settled through Arbitration in terms of clause 25 of the Bangladesh Tender Form No. 2911 as amended on 23-9-1987. The aggrieved party would thereafter, refer the dispute to the Chief Engineer for appointment of an Arbitrator or Arbitrators for arbitrating the dispute. The Chief Engineer was, thereafter, required either to appoint an Engineer not below the rank of Superintending Engineer or a Board of Engineers with an officer above the rank of Superintending Engineer as its Chairman. Thereafter, the Arbitrator or the Board of Arbitrators was to make an Award after such investigation as he or it might think proper and such Award was final and binding on the parties to the contract.

5. The respondent further stated that the contractor did not allow the Additional Chief Engineer to give his decision on the dispute concerning their claim in details item-wise filing or submitting the relevant paper or papers in support of their claim but illegally and without jurisdiction appointed Mr Justice Sultan Hossain Khan as Arbitrator in the matter contrary to the terms of the contract and reference to the dispute contrary to the said clauses of Bangladesh Tender Form No.2911 amended upto 23-9-1987 and obtained an *ex parte* award which is not an award in the eye of law as being *void, ab initio* and, as such, the award dated 21-9-1991 given by the Arbitrator has no existence or validity in the eye of law being a nullity which is liable to be set-aside.

6. The learned Subordinate Judge, however, made the award a rule of the Court decreeing in favour of the first party who is entitled to get a sum of Taka 15,35,03,390 from the second party-respondents. The defendant-respondents thereafter moved the High Court Division in Memorandum of Appeal Original Order No. 82 of 1993 which was allowed setting-aside the judgment and order dated 30-11-1992 passed by the Subordinate Judge, 3 rd Court, in Miscellaneous Case No. 71 of 1991 setting-aside the award dated 21-9-1991 signed and delivered by the Arbitrator Mr Justice Sultan Hossain Khan declaring the same without jurisdiction and nullity in the eye of law.

The appellant thereupon obtained the leave from this Court upon the submissions that:

"Syed Ishtiaq Ahmed, learned Counsel appearing on behalf of the petitioner submits that the High Court Division committed an error of law in setting aside the award as *void ab initio on* the face of admitted fact that the respondent did neither file any application for setting aside the award within 30 days of the notice nor deposited the award amount in the trial court or even before the High Court Division as provided under the Arbitration Act. It is also submitted that when the law has laid down a procedure for setting aside an award on the ground mentioned in the Arbitration Act the Court cannot *suo motu* set-aside that award unless the procedure and conditions precedent laid down in the Act have been complied with and the application is filed within the statutory time limit under the Limitation Act, otherwise, even a void order will operate as a valid effective award the remedy to set-aside the order having been cut off. Syed Ishtiaq Ahmed submits that in the present case no application was filed within 30 days from the date of receipt of the notice of the award and the statutory award money was not deposited as provided under the law but the High Court Division overlooked these legal objections and illegally set-aside the award."

7. Mr Rafique-ul-Huq, the learned Counsel appearing for the appellant has submitted that in view of the admitted failure of the respondent to file any written objection for setting-aside the award within 30 days from the date of receipt of the notice or that failure to deposit the amount by way of security of the award amount as required under the provision of section 33(3) of the Arbitration Act, the impugned order setting aside the award is a nullity has been done illegally and the same is without" jurisdiction inasmuch as the High Court Division could not under the circumstances when the defendant-respondent have surrendered to the jurisdiction of the Arbitration Court *suo motu* set-aside the award contrary to the provision of Arbitration Act. Mr Rafique-ul-Huq further submits that the written objection having been filed under section 16 for remission of the award and section 31 and surrendering to the jurisdiction of the arbitration only challenging the award praying for remission of the same for an award in accordance with law, the Award is not *void ab initio* inasmuch as under section 39 of the Arbitration Act refusing to remit the award by the Subordinate Judge is not an appealable order, the High Court Division erred in law in not holding that the appeal is not maintainable inasmuch as no objection was filed within 30 days from the date of service of filing of the award under Article 158 of the Limitation Act. The learned Counsel has further submitted that the respondent having invoked the jurisdiction of the arbitration by filing an application under sections 16 and 31 of the Arbitration Act, it is too late to raise any objection inasmuch as no objection having been filed under sections 16 within 30 days, the Court could not *suo motu* set-aside the award or set-aside the same by invoking section 151 of the Code of Civil Procedure. In view of

the specific provision in Article 158 of the Limitation Act, the learned Counsel submitted that the notice in the case having been served legally on 8-7-1991 no objection having been filed within 30 days, the same is barred under Article 158 of the Limitation Act inasmuch under the provision of section 33 as amended, filing of an appeal is condition precedent to the deposit of the amount or to file the security to the satisfaction of the Court and that not having been done the appeal is also not maintainable. The learned Counsel has further submitted that the suit challenged the self same award having been filed in which the plaint was rejected upto the appellate stage considering the provision of sections 16, 31, 32 and 33 of the Arbitration Act, involved in the instant case, the issues involved therein are barred by *res-judicata* inasmuch as the self-same Court being in seisin of the previous suit and having disposed of the same the said previous decision of the learned Judge is binding on the learned Judges of the High Court Division disposing of the appeal.

8. Mr Fida M. Kamal, the learned Additional Attorney-General appearing for the defendant-respondent submits that in view of the provision of arbitration clause 6.31, the arbitration being to a designated Arbitrator and to be appointed by the designated authority under clause in BD form No. 2199 as amended and in the instant case the Arbitrator was appointed in gross contravention of the said provision of the agreement and utterly divorced the agreement, the award is a nullity and, as such, there was no arbitration in accordance with law or in the eye of law. Referring to the aforesaid clause the learned Additional Attorney-General has further submitted that there being total lack of jurisdiction of the Arbitrator as the reference or appointment of the Arbitrator not being a valid one or contemplated therein or not being in terms of the clause 25 as amended, the proceeding of the arbitrator is a nullity being *void ab initio.* The learned Additional Attorney-General has further submitted that under section 2(6) award means a valid award under the provision of section 8 read with section 20 of the Arbitration Act and no dispute having been raised following the procedure in the agreement but short circuited the clause by appointing an arbitrator contrary to the provision of arbitration clause the purported award has no legal validity as has been decided by the High Court Division. The learned Additional Attorney-General has further submitted that in Title Suit No.99 of 1992 filed on 6-6-1992 wherein the plaint was rejected as it is barred under the provision of section 32 of the Arbitration Act providing the only remedy to be filed against the award under the provision of the Arbitration Act and not by way of filing a suit which is expressly barred.

9. The learned Counsel for the appellant submits that the finding in appeal from the original decree No. 296 of 1994 consequent upon rejection of the plaint of the said suit considering the provision of sections 30, 32 and 33 of the Arbitration Act and the adverse finding to that effect operates as *res judicata* and has referred to a decision in the case of *Sachindra Lal Das vs Hriday Ranjan Das being dead his heirs: Bimal Kanti Das and others* reported in *40 DLR (AD) 56* wherein it has been held that if the adverse finding is actually on decision of the suit and it forms a fundamental part of the decree then it operates as *res-judicata* but if adverse finding is extraneous and when it was not necessary for the disposal of the suit and made in a interlocutory matter will not operate as *res judicata.*

Res judicata has been defined in section 11 of the Code of Civil Procedure as under:

10. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties,

or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

'Former' mentioned show that there was a remedy in a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto and in order to constitute res judicata the matter which might ought not to have a ground of defence or attack in such former suit shall be deemed to have a matter directly and substantially in) issue in such suit, a relief claimed in the suit which has not been expressly granted by the decree shall for the purpose of the section deemed to have been refused.

11. Admittedly the Title Suit No. 92 of 1999, was filed during the pendency of the present proceeding between the parties challenging the award which is the subject-matter of the present proceeding but plaint was rejected as barred by law; the order though prayed for shall be deemed to have been a decree in the suit but no issue which are involved in the present case was determined even in the appeal against the said order of rejection nor the same was directly or substantially in issue or was decided but incidentally the applicability of sections 30, 32 and 33 was considered to determine as to whether the plaint is liable to be rejected being barred by section 32 of the Arbitration Act and, as such, no such issue was directly or substantially involved in the said suit or constructively in issue in the suit so as to render the present one barred by *res-judicata*. Reference in this regard may be had in the case of *AIR 1935 Bombay 131 (Paragraph 133), AIR 1977 Allahabad 201, AIR 1974 SC 1069.*

12. Though no leave was granted on the point of *res-judicata* but the point has been raised by the learned Counsel for the appellant as an important question of law allegedly involved in the appeal.

13. We have allowed him to argue on the said point of law, but for the forgoing reasons we do not find that the issue raised in the matter against the award is barred by the principle of *res-judicata*.

14. As to the main question centering around the appeal as to whether the maintainability of the objection to the award on ground of nullity or *void ab initio* having been filed beyond the period of 30 days as contemplated under sections 30 and 33 of the Arbitration Act, without depositing the decreetal amount or any security furnished for the same as required under the provision of section 33(3) of the Arbitration Act rendering the objection illegal as argued by the learned Counsel for the appellant, the learned Additional Attorney-General alleged the said objection under section 16 read with section 31 of the Arbitration Act is designed to recall the Award which was a nullity being *void ab initio* being contrary to clause B 6.31, reference to arbitration proceeding for referring the matter for arbitration to a designated arbitrator by the deputed/designated authority by raising a dispute as per procedure laid down therein having been violated, the reference to arbitrator was illegal and consequen appointment of Arbitrator was invalid rendering the award invalid one. Reference in this regard may be had to the case of *Hashmat Ali Jamadar vs Asmat Ali Jamadar* reported in *6 DLR 478* wherein the fact was that the parties to an arbitration agreement referred their dispute to the Arbitration of 7 named Arbitrators and stipulated that they would abide by an award passed unanimously or by majority; 5 out of the 7 Arbitrators passed an award which after being registered was filed by them in Court under section 14 of the Arbitration Act. One of the party thereafter filed an application under section 7 of the Arbitration Act for judgment in accordance with the award. While the other party objected to the award as invalid and

unenforceable in law. It was held by Chowdhury J. as his Lordships then was, that:

> "it is apparent on the face of the award that is an award of Arbitration of 5 of the 7 Arbitrators, it is not the award of the majority but an arbitration of the majority of the Arbitrators it is one thing to say to abide by the award of the majority of the Arbitrators and quote a different thing to say to abide by the arbitration of the majority of the Arbitrators. Since the objection the parties informed the Courts and submitted to such arbitration that the award is without jurisdiction and void and need not be avoided."

15. The aforesaid clause B. 6.31 is reproduced below for ready reference and proper appreciation as the point involved herein is mainly centering round the said clause and interpretation thereof.

Clause B. 6.31:- Settlement of disputes : All dispute of any kind whatsoever arising out of, or connected with the contract shall be referred to the Addl. CE for settlement. If either the Engineer/Engineer-in-Charge or the contractor be dissatisfied with the decision of the Addl. C/E. on any matter of dispute the employer or the contractor may within 20 days after receiving notice of such decision give a written notice to the other part requiring that the matter in dispute be arbitrated upon. In such case, the present rules of RHD for arbitration will be followed i.e. as per Clause No. 25 of BD Form No. 2911 with amendment dated 23-9-1987."

The said clause 25 as amended on 23-9-1987 reads as under:

> "Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions here in before mentioned and as to the quality of work manship or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, order or these conditions or other wise concerning the works or the execution or failure to execute the same, whether arising during the progress of work or after the cancellation or abandonment thereof shall be referred to the Chief Engineer for appointment of Arbitrator or Arbitrators for arbitrating the dispute and the Chief Engineer shall appoint either an Engineer not below the rank of the Superintending Engineer or a Board of Engineers with its Chairman an officer above the rank of Superintending Engineer as he deems fit and the Arbitrators or the Board of Arbitrators shall, after such investigation as he or it may think proper, deliver his or its award which shall be final conclusive and binding on all parties to this contract.
>
> Note:- The Executive Engineer holding the current charge of the post of Superintending Engineer shall not be appointed as arbitrator or as Member of the Board of Engineers under the above clause."

16. In the instant case the above-mentioned relevant arbitration clause 6.31 provides that all the disputes of any kind whatsoever arising out the contract shall be referred to the Chief Engineer for settlement, if either the Engineer or Engineer-in-Chief or the Contractor be dissatisfied with the decision of the Additional Chief Engineer on any matter of dispute, the employer or the contractor may within 30 days after receipt of such notice giving a notice to the other party requiring that the matter in the dispute may be arbitrated upon and in that event the rules of department for arbitration would be followed as provided under section 25 of the Bangladesh Form 2911 as amended.

17. Under said clause 25 any such dispute

shall be referred to the arbitration of the Superinten- dent Engineer of the Circle for the time being in force but in the instant case though the appellant sought to raise a dispute by order dated 30th March, 1991 was required to refer the dispute regarding the legality of the cancellation of the contract and other claim for reinvestigation and comparison as per B.6.31 of the tender document. The Additional Chief Engineer by its letter dated 10th April, 1991 asked the Contractor to submit claim, if any, in details and item-wise along with all relevant papers to the concerned Executive Engineers and on getting materials over the claimed amount action will be placed for the decision of competent authority but the Contractor without any further reference and without furnishing details of the claims item-wise and ignoring the provision of B.6.31 and clause 25 of the tender document straightway appointed an arbitrator in Mr Justice Sultan Hossain Khan and asked the respondents to appoint their Arbitrator within 15 days, in default their Arbitrator shall proceed exparte. Nowhere in the contract agreement such procedure for appointment of Arbitrator having been provided and the same being contrary to the clause B.6.31 and 25 of the tender agreement and reference to the arbitration being the appointment of an Arbitrator by designated authority and the Arbitrator appointed not being a designated appointed Arbitrator in accordance with law, award by an unauthorised agency/arbitrator is without jurisdiction and void and need not be avoided.

18. The defendant-respondents filed an objection under sections 16 and 31 of the Arbitration Act. Section 16 is for remission of the award read with section 31 of the Act was not for surrendering to the jurisdiction of the Arbitrator or divesting the authority to the arbitrator to pass the award but with the prayer for setting-aside the same as it has no validity or existence in the eye of law for the reasons stated therein. Since the award has been alleged to be *void ab initio*, no question of surrendering to the jurisdiction of the Arbitrator by filing the application under section 16 at all arose and the same was of no avail to the appellant but the same was the nearest provision adopted by the respondents as a vehicle to undo the award, illegally passed by an unauthorised Agent alleged to be an Arbitrator.

19. The learned Counsel for the appellant has objected to the maintainability of the said objection as the same did not comply with the provision of section 33 by depositing the amount of award or for furnishing the security for the purpose, thus rendering the same not maintainable under section 33 of the Arbitration Act.

20. Since the award was a nullity and *void ab initio* which need not be avoided as stated above, no such requirement required to be complied with for setting-aside the award and the same has no validity or existence in the eye of law. Similarly the question of limitation of filing of the objection within 30 days as required under section 158 of the Limitation Act is unwarranted and uncalled for because the award being a nullity and *void ab-initio* and need not be avoided, no question of limitation is applicable as the illegality is apparent on the face of the record and the Court should take judicial notice of it and in the facts and circumstances of the instant case, it is not necessary that a party should file objection to the award under section 30 within the period prescribed under section 158 of the Limitation Act.

20. We do not find any cogent reason to interfere with the unreasoned-impugned judgment and order.

For the reasons aforesaid, this appeal is dismissed without any order as to costs.

Ed.

Appellate Division
(Criminal)

Nazmun Ara Sultana J
Syed Mahmud Hossain J
Md Imman Ali J
Judgment
July 2nd, 2014.

State.....Appellant

vs

Md Manzurul Alam
.....Respondent*

Passenger (Non-tourist) Baggage (Import) Rules, 2000
Rule 2(kha)

A special facility is provided by these rules for crew members, who may bring into the country goods to the value of $100 without payment of customs duty. By no stretch of the imagination can crew members be equated to or classified as passengers. .....(8)

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

Customs Act (IV of 1969)
Section 139

Passenger (Non-tourist) Baggage (Import) Rules, 2000
Rules 6 and 2(kha)

Section 139 of the Act refers to declaration of contents of baggage carried by passengers or crew members. Crew members and passengers are liable in the same way to declare the goods carried in their baggage. There is no distinction or extra privilege afforded to either category of persons so far as declaration of their goods carried in their baggage is concerned. However, this provision has no connection with the import of goods under the baggage rules. The rules apply generally to goods imported by passengers. .....(7)

Kh. Diliruzzaman, Deputy Attorney-General, instructed by ASM Khalequzzaman Advocate-on-Record —For the Appellant.

Chowdhury Md Zahangir Advocate-on-Record—For Respondent.

Judgment

Md Imman Ali J: This criminal appeal by leave arises out of the judgment and order dated 3-5-2005 passed by the High Court Division in Criminal Miscellaneous Case No. 5650 of 2003 making the Rule absolute quashing the proceedings of Metropolitan Special Tribunal Case No. 167 of 2003 in the court of Metropolitan Sessions Judge and Metropolitan Special Tribunal No. 1, Chittagong.

2. The facts relevant for disposal of this appeal are that the respondent, Md Manzurul Alam is a Ground Service Engineer Officer of Bangladesh Biman Corporation and posted at Biman Engineering Hangar, Zia International Airport. On 16-5-2002, while on duty on Biman flight No. BG-022 Muscat-Chittagong-Dhaka, he had concealed inside his socks and underwear 25 gold bars weighing 3 kg. A departmental proceeding was started against him and after receiving his reply to the show cause notice, the matter was enquired into and a report submitted on 26-10-2002. Thereafter, a second show cause notice was issued, whereupon the respondent filed a writ petition and obtained Rule, which is still pending for hearing. In the meantime Patenga PS Case No. 9(5) 2002 under sections 19/32 of the Customs Act, 1969, section 3(1) Foreign Exchange Regulations Act, 1947 and section 25B of the Special Powers Act, 1974 was filed against him. Challenging the criminal case, the respondent filed Criminal Miscellaneous Case No. 5650 of 2003 under section 561A of the Code of Criminal Procedure for quashing the criminal proceedings.

*Criminal Appeal No. 27 of 2006.

(From the judgment and order dated 3rd of May, 2005 passed by the High Court Division in Criminal Miscellaneous Case No. 5650 of 2003)

3. By judgment and order dated 3-5-2005 the High Court Division quashed the criminal proceedings, against which the State filed Criminal Petition for Leave to Appeal No. 283 of 2005. Leave was granted by this Division to consider whether the High Court Division failed to apply its judicial mind in quashing the criminal proceedings when the respondent was caught red-handed when carrying 245 tolas of gold violating Rule 6 of the Passenger (Non-tourist) Baggage (Import) Rules, 2000.

4. Mr Kh. Diliruzzaman, learned Deputy Attorney-General submitted that admittedly the respondent was on duty in the flight and cannot be considered as a passenger within the Passenger (Non-tourist) Baggage (Import) Rules, 2000. He submitted that the said Rules are applicable for passengers as defined in Rule 2 (kha), who at that time could bring up to 10 kg of gold on payment of customs duty. He pointed out that the only benefit given under the Baggage Rules to crew members is found in Rule 6 of the said Rules, which allows a crew member to import any goods up to the value of $100 without payment of customs duty. The learned DAG finally submitted that in view of the facts and circumstances of the case and the legal provisions involved, the High Court Division seriously erred in quashing the criminal proceedings.

5. Mr Chowdhury Md Jahangir, learned Advocate-on-Record appearing on behalf of the respondent, by reference to section 139 of the Customs Act, 1969, submitted that the law does not make any distinction between a passenger and a crew member and allows import of up to 10 kg of gold upon payment of customs duty. He pointed out that the respondent was due to travel to Dhaka. But before he reached his destination, he was searched and apprehended at Chittagong airport before he had the opportunity to declare the gold in his possession and pay customs duty.

6. We have considered the submissions made by the learned Deputy Attorney-General appearing for the appellant and the learned Advocate-on-Record appearing for the respondent, perused the impugned judgment and other materials on record.

7. At the outset, we would like to point out that section 139 of the Customs Act refers to declaration of contents of baggage carried by passengers or crew members. It is true that under this provision of law crew, members and passengers are liable in the same way to declare the goods carried in their baggage. In other words, there is no distinction or extra privilege afforded to either category of persons so far as declaration of their goods carried in their baggage is concerned. However, this provision has no connection with the import of goods under the baggage rules. The relevant rules under consideration are the Passenger (Non-tourist) Baggage (Import) Rules, 2000. Quite clearly, the rules apply generally to goods imported by passengers.

8. The Passenger (Non-tourist) Baggage (Import) Rules, 2000 give details of items that may be brought into the country either free of duty or on payment of duty, by passengers, who are defined in Rule 2(kha) as any passengers coming from abroad. A special facility is provided by these rules for crew members, who may bring into the country goods to the value of $100 without payment of customs duty. By no stretch of the imagination can crew members be equated to or classified as passengers.

In view of the above discussion, we find substance in the submissions made by the learned Deputy Attorney-General. We are of the view that this is not a proper case for quashing the criminal proceedings. Accordingly, the appeal is allowed and the impugned judgment and order passed by the High Court Division is set-aside.

Ed.

any step for holding of any Test Identification Parade for the purpose of identification of the armed accused by the PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, Ferdousi Begum and the neighbouring people.

46. Furthermore, it is in the FIR—"সন্ত্রাসীরা চলিয়া গেলে গুলির শব্দ ও জখমীদের আত্মচিৎকারে আমার নাতনী ফেরদৌসী ও ভাতিজা আজাদসহ আশে পাশের অনেক লোকজন ঘটনাস্থলে আসিয়া এবং তাহারা রক্তাক্ত ও কাটা জখম অবস্থায় হাবিব ও মাহবুবদের গুলিবিদ্ধ এবং কোপানো জখম অবস্থায় মৃত দেখিতে পায়। আমার ছেলে আঃ কুদ্দুসকে মারাত্মক জখম ও রক্তাক্ত গুলিবিদ্ধ অবস্থায় আজাদ চিকিৎসার জন্য রাজবাড়ী সদর হাসপাতালে নিয়া আসে।" This statement in the FIR undoubtedly reveals that not a single person could eye-witness the occurrence.

47. At this stage, I feel tempted to say that although an FIR may be sketchy and may omit the details of the case, yet it is the first version of the prosecution in point of time. The FIR is the genesis of the case. When it does not contain an important statement deposed to by the witnesses, it is clear that there has been subsequent embellishment of the prosecution case in the course of the trial making the case untrustworthy. This view is underpinned by the decision in the case of *Md Ali Haider vs State* reported in *40 DLR 97*. Subsequently, this view has been reinforced by the decision in the case of *Nazrul Islam vs State* reported in *45 DLR 142*.

48. It is well-settled that the 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.

49. Anyway, it has been held in the decision in the case of *Gopal Rajgor and others vs State* reported in *42 DLR 446* that where the prosecution has a definite case, it must prove the whole of it; partial departure from the prosecution case affects the credibility of the witnesses and complete departure therefrom makes their testimony worthy of rejection in their totality.

50. In the case of *Liakat Ali Chaklader vs State* reported in *4 BCR (AD) 114*, it has been held by our Appellate Division that it is true that the FIR binds, contradicts or corroborates only its maker; but being a narration of the event first in point of time, it is the most valuable document to assess the entire prosecution case, particularly to see what the case was before and how it changed subsequently to suit the purpose of the prosecution.

51. In the case of *State vs Basirullah* reported in *16 DLR (Dhaka) 189*, it has been held that the Court is entitled to note the conflict between the first recorded version of the prosecution case and the story that was made out in the course of the trial and a comparison between two such versions of the case is not only permissible, but imperative in the context of the circumstances of the case.

52. It has been held in the case of *State vs Azharul* reported in *3 BLC 382* that the FIR is the foundation of the prosecution case and if the foundation is removed, the whole prosecution case shall fall. It has been further held in that case that any subsequent deviation from the FIR story and the embellishment of the same by the alleged eye-witnesses at the trial make the credibility of the witnesses doubtful.

53. Coming back to the present case before me, it has already been observed that there is no mention of any eye-witness within the four corners of the FIR, though during the trial of the case, 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 have assumed the roles of eye-witnesses to the occurrence. The act of eye-witnessing the occurrence by those prosecution witnesses is, no doubt, an important fact. Had they really eye-witnessed the occurrence as deposed to by them, the informant Rahamat Ali Sheikh would have definitely mentioned their names as eye-witnesses in the FIR. So it is man-

ifestly clear that there has been a gross embellishment of the prosecution version in the course of the trial of the case in contradistinction to the initial version as set out in the FIR. In such a situation, a man of ordinary prudence will be loath to accept the ocular testimony 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 at face value. That being so, I cannot place my reliance on their ocular version of the case.

54. It is a settled proposition of law that the FIR is not an encyclopaedia and, as such, it is not expected that it will contain all the minute details of the incident. But when a very vital statement as to eye-witnessing of the occurrence by 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 has not been mentioned in the FIR, this renders the entire prosecution case highly doubtful. In the facts and circumstances of the present case, the reference to the decision in the case of the *State vs Abdus Sattar and others reported in 43 DLR (AD) 44* by the learned Deputy Attorney-General Mr Zahirul Haque Zahir does not appear to be of any avail.

55. There is another dimension of the case which needs consideration from this Court. According to the alleged eye-witnesses, the accused Goni Mollah, Mozibar Mollah and Abdul Mannan Khan and others are responsible for the death of the three victims, namely, Quddus, Mahbub Hossain and Habib. But astoundingly enough, it is in the cross-examination of the Investigating Officer Sub-Inspector Md Hayat Ali (PW 22)—"পি ডব্লিউ ২ শাহানা, পি ডব্লিউ ৩ আজাদ, পি ডব্লিউ ৫ নুর জাহান, পি ডব্লিউ ৬ গুলজান বিবি ও পি ডব্লিউ ৯ কিসমত ১৬১ ধারায় জবানবন্দীতে কেহ নির্দিষ্টভাবে বলে নাই আসামী গনি মাহবুবকে গুলি করে, আসামী মান্নান গুলি করে হাবিবকে ও মজিবর কুদ্দুসের পেটে গুলি করে।" It is on record that those prosecution witnesses were examined by the PW 22 on the very date of lodgment of the FIR, that is to say, on 4-6-2003. In other words, they were examined by the PW 22 under section 161 of the Code of Criminal Procedure at the earliest opportunity. As they did not attribute the liability of killing of the victims to the accused Goni Mollah, Mozibar Mollah and Abdul Mannan Khan in so many words in their statements before the PW 22 Sub-Inspector Md Hayat Ali, I feel inclined to look askance at their testimony on this point.

56. What is very striking is that not a single prosecution witness stated to the Investigating Officer concerned that he or she could not disclose the whole truth to him (Investigating Officer) for fear of reprisal by the accused or that they were under the spell of fear or threats held out from the side of the accused-party. This factum cannot be disregarded at all while assessing the 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 as alleged eye-witnesses to the occurrence.

57. According to the deposition of the PW 5 Nur Zahan and PW 6 Gulzan Bibi, the accused Goni Mollah shot at the victim Mahbub. It is also the evidence of the PW 3 Md Azad Sheikh, PW 5 Nur Zahan and PW 6 Gulzan Bibi that the accused Mannan Khan shot at the victim Habib. It is further the evidence of the PW 2 Shahana Parveen, PW 3 Md Azad Sheikh, PW 5 Nur Zahan and PW 6 Gulzan Bibi that the accused Mozibar shot at the victim Quddus. These ocular accounts of the aforesaid prosecution witnesses, narrated for the first time during the trial of the case, do not carry any conviction in the absence of any allegations of reprisals or threats from the side of the accused made to the Investigation Officer during the investigation of the case.

58. I have already mentioned earlier that the life-term convicts in this case are the accused Momin, Kalam Member, Md Taleb Kha, Md Latif Mondal, Akai, Nepal alias Jabbar alias Dada Bhai, Omar Ali and Bablu. Now let me analyze the evidence, if any, forthcoming

against them on record. A reference to the evidence of the PW 3 Md Azad Sheikh indicates that he has implicated the accused Momin, Kalam Member, Taleb, Latif, Akai, Nepal, Lokman, Omar Ali and Bablu in the commission of the offence along with the accused Goni, Mozibar and Mannan. In this connection, it will not be out of place to note that the accused Lokman died during the pendency of the case in the Trial Court. However, it transpires from the evidence of the PW 5 Nur Zahan that she has implicated the accused Mozibar, Mannan, Goni, Taleb, Latif, Momin, Kalam Member, Akai and others in the commission of the offence. Again it appears from the evidence of the PW 9 Kismat Ali Sheikh that he has implicated the accused Mozibar, Goni, Taleb, Mannan, Latif etc. in the commission of the offence. From the evidence of the PW 3, PW 5 and PW 9, it is evident that they have not uniformly implicated the life-term convicts in the commission of the offence. In other words, their evidence as to implication of the life-term convicts in the commission of the offence is inconsistent and discrepant. Since the eye-witness accounts of the occurrence given by the PW 3, PW 5 and PW 9 have already been discarded as being doubtful and untrustworthy, the implication of the life-term convicts in the commission of the offence as testified to by them stands rejected as a natural corollary.

59. It is undisputed that the accused Momin, Akai and Nepal alias Jabbar alias Dada Bhai are still on the run and their unexplained abscondence all through is, no doubt, a relevant fact under section 8 of the Evidence Act and favours the prosecution pointing a finger at their alleged guilt, though abscondence by itself is not conclusive of one's guilt. Precisely speaking, their 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. So the reference to the decision in the case of *State vs Moslem* reported in *55 DLR 116* is a shot in the dark.

60. In the decision in the case of *Zahed Ali Foreman (Driver) vs Stat* reported in *9 BLC (AD) 122* adverted to by the learned Deputy Attorney-General Mr Zahirul Haque Zahir, it has been held, *inter alia*, in paragraph 7:

> "7.....
> .....
> The law is now settled that mere relationship of the witnesses inter se or relationship with the victim do not make them unreliable or, in other words, their evidence unworthy of consideration. The Court can very much rely on the evidence of a witness who is related to the victim or to other witnesses if the witness is considered by the Court reliable and that evidence of the witness is corroborated by other reliable witnesses who were not related to the victim.....
> ....."

61. In the decision in the case of *State vs Keramat Ali and another* reported in *16 MLR (AD) 268* relied upon by the learned Deputy Attorney-General Mr Zahirul Haque Zahir, it has been held in paragraphs 10 and 11:

> "10. There is no hard and fast rule that the evidence of partisan witnesses cannot be acted upon, without corroboration. If their presence at the scene of occurrence cannot be doubted and their evidence is consistent with the surrounding circumstances and the probabilities of the case, it can be a good foundation for a conviction, more so, if the medical evidence available corroborates their statements. In the absence of anything to warrant a contrary conclusion, the conviction is not unwarranted merely because it is based on partisan witnesses. It is also true that in such

cases, the Court must focus its attention whether there are discrepancies in the evidence of partisan witnesses, whether the evidence strikes the Court as genuine and whether the prosecution story narrated by them is probable.

11. It is seen that a close relation of the deceased would be most reluctant to spare the real assailants. It is also to be kept in mind that these witnesses having relationship with the deceased volunteered to speak the true facts-sometimes the independent witnesses are not inclined to depose for fear of reprisal. There, is therefore, no general rule that the evidence of relations must be corroborated by independent witnesses for securing the conviction of the offender. We are also not unmindful that in cases like this where the prosecution has examined relations only, the Court should be guarded whether there was possibility of presence of other neutral witnesses. The Court may draw adverse presumption against the prosecution if those witnesses are withheld by the prosecution.....
....."

62. The upshot of the above discussions is that 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. I have already referred to the background of bitter enmity and bad blood between the informant-party and the accused-party. In the facts and circumstances of the case, it is my considered opinion that the testimony of the alleged eye-witnesses ought to have been corroborated by disinterested, non-partisan and independent witnesses. Besides, I have already found the alleged eye-witnesses to be unworthy of credence. Against this backdrop, I think Mr AKM Fazlul Huq Khan Farid has rightly relied upon the decisions in the cases of *Sarafat Mandal alias Mander Mondal vs State, 14 BLT 290* and *Hosen Sheikh alias Hochen and Hashem Sheikh vs State, 18 BLD 701.* In such view of the matter, the question of reliance on the interested, relative and partisan witnesses is out of the question in this case.

63. The trump card of the learned Deputy Attorney-General Mr Zahirul Haque Zahir is the decision in the case of *Mahmudul Islam alias Ratan vs State* reported in *53 DLR (AD) 1* and he has drawn my attention to paragraph 16 of the decision which is couched in the following terms:

"16. The learned Judges also held that PW 12 Bidhu Bhuson Saha who saw the occurrence of killing Munir from his balcony made contradictory statement to the Investigating Officer. This is really a total non-application of judicial mind of the learned Judges to the evidence of PW 12. PW 12 said before the Court that he did not disclose names of the accused-persons to the police officer being afraid of his life and disclosed to the Investigating Officer that whatever he had to say he would disclose before the Court of law. PW 24 Tofazzal Hossain, Investigating Officer, also spoke that PW 12 declined to disclose in detail everything to him. The broad fact stands that while recording the statement under section 161 of the Code, PW 12 declined to give any details of the occurrence for fear of his life, although he deposed everything in detail before the Court of law. Now the question is, whether such a witness should be believed or not? A statement under section 161 of the Code of Criminal Procedure is not a substantive evidence. In such a statement under section 161 of the Code, the witness is required to state what he saw and heard about the occurrence soon after. In the case, an explanation was given by PW 12 that due to fear of his life, he did not

disclose immediately to the police details of the occurrence. We, as Judges, are competent to take judicial notice of the fact about the present condition of law and order situation in the country and, as such, it is not unlikely that a witness will hesitate to tell the truth for fear of his life. Unfortunately, while delivering this judgment, I am also the Chief Justice of Bangladesh and my own experience which I have gathered from the District and Sessions Judges of Bangladesh truly reveals that today 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. This is what I have gathered from the Judges of Bangladesh. I ought to have avoided these utterances of the Trial Judges of Bangladesh, but since in my administrative capacity such communications have been made by the trial Judges of original Crimin. Courts, I want to put it on record, as we are taking judicial notice of the fact and relying on the satisfactory explanation given by PW 12 in this case. We do not find any infirmity in the statement of this witness before the Court and we accept the belated disclosure of the names of the assailants by accepting the cogent explanation given by this witness. As a matter of fact, we do not find any valid reason to discard the evidence of PW 12 to hold it incredible. A belated statement in Court, if can stand the scrutiny of cross-examination, can be believed if not otherwise unbelievable."

64. In the instant case, not a single professed eye-witness has told the Investigating Officer that for fear of his life, he will not disclose the details of the incident and what he will have to disclose, he will disclose before the Trial Court. Besides, no explanation whatsoever has been furnished by any of the professed eye-witnesses for belated disclosure of the names of the assailants during the trial of the case after a long lapse of 5(five) years from the date of commission of the offence. This is why, in my humble view, the observations made by the Appellate Division in paragraph 16 in the decision reported in *53 DLR (AD) 1 (supra)* 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.

65. There is no denying the fact that the PW 8 Bachchu Mondal, in the facts and circumstances of the case, is a star prosecution witness. In his Examination-in-Chief, he has stated that the occurrence took place in the month of June, 2003 and at 9-00 AM, he took Quddus and his other two companions in his van with a view to reaching Belgachi Railway Station from the house of Quddus and while he (PW 8) reached the front side of the old house of Quddus, some shots were fired at the van and he fled away in fear; but he saw that Quddus was alive in lying condition and afterwards he carried the injured Quddus to Gandimara Bus Stand.

66. In his cross-examination, the PW 8 Bachchu Mondal has stated that when the accused encircled his van, he took to his heels; but he could not recognize the accused. At this stage, the learned trial Judge has recorded a remark respecting the demeanour of the PW 8 Bachchu Mondal in his deposition sheet that he is afraid of disclosing the names of the accused.

67. It is also in the cross-examination of the PW 8 Bachchu Mondal that he did not see the accused including Goni and Mozibar present in the dock at the place of occurrence and the accused did not hold out any threats to him and he also did not state to the Investigating Officer that he had recognized the accused.

68. If the statements made in the Examination-in-Chief and those made in the cross-examination of the PW 8 Bachchu Mondal

are juxtaposed and considered together, what do I find? In view of the remark recorded by the trial Judge observing the demeanour of the PW 8, he might have been under the spell of fear; but in any event, professedly he failed to recognize the accused at the time of commission of the offence. It is also his claim that he did not tell the Investigating Officer that he had recognized the accused at the time of commission of the offence. The Investigating Officer, it appears, has not controverted this claim of the PW 8 Bachchu Mondal in his cross-examination. Over and above, I myself have gone through the statement of the PW 8 recorded by the Investigating Officer under section 161 of the Code of Criminal Procedure for my satisfaction. So the claim that the PW 8 did not state to the Investigating Officer that he had recognized the accused at the time of commission of the offence appears to be true. Under the circumstances, the evidence of the PW 8 Bachchu Mondal does not help the prosecution with regard to the killing of the three victims, namely, Quddus, Mahbub and Habib by the accused.

69. It is in the Examination-in-Chief of the PW 11 Md Samed Ali that at 9-00 AM about five years back, he was reaping paddy in a field by the side of the road and then a van passed by and he heard the sound 'দুড়ম দুড়ম'and came forward and saw that the accused assaulted the victims and Quddus sustained abdominal and other injuries and thereafter he was whisked away to hospital by that van.

70. In his cross-examination, the PW 11 Md Samed Ali states that he could not recognize the accused and the persons in the dock did not assault Quddus. However, the learned trial Judge has recorded a remark respecting the demeanour of this witness (PW 11) and it appears from that remark that he was withholding the truth from the Court. Anyway, the tone an tenor of the deposition of the PW 11, as I find, is that although he witnessed the act of assaulting of the victims by the accused, yet he could not recognize anyone of them being a local person. This appears to be somewhat unusual. In this view of the matter, the PW 11 might have withheld the truth from the Court as remarked by the Court below under section 363 of the Code of Criminal Procedure.

71. It goes without saying that the 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.

72. However, the record shows that the PW 13 Md Amirul Islam, PW 14 Md Abdus Salam, PW 15 Khandaker Golam Kibria and PW 16 Abul Kashem Biswas are admittedly post-occurrence witnesses and some of them being witnesses to the inquest-reports of the deceased Mahbub and Habib are formal witnesses as well.

73. It is admitted that inquests were held on the dead bodies of 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 pursuant to Rajbari Police Station General Diary Entry No. 152 dated 4-6-2003. But since the PW 13, PW 14 and PW 15 do not claim to be eye-witnesses to the occurrence, the question of disclosing the names of the assailants of the victims Mahbub Hossain and Habib to the PW 23 at the time of holding of inquests does not arise at all. On this point, the contention of Mr AKM Fazlul Huq Khan Farid falls through.

74. It is further admitted that the PW 24 Md Basarat Moral held an inquest on the dead body of Quddus on 9-6-2003 in presence of the PW 1 Rahamat Ali Sheikh, PW 2 Shahana Parveen and PW 4 Mostafa Kamal. In this perspective, it is the contention of Mr AKM Fazlul Huq Khan Farid that it was quite natural on the

part of the PW 1, PW 2 and PW 4 to disclose the names of the assailants of the victim Quddus to the inquest-holding officer (PW 24); but as they failed to disclose the same to the PW 24, no reliance can be placed on their evidence. I have discussed earlier that the PW 1 Rahamat Ali Sheikh and PW 4 Mostafa Kamal are not alleged eye-witnesses to the occurrence. Anyway, the PW 2 Shahana Parveen, wife of the victim Quddus, claims to be an eye-witness to the occurrence. I have already discarded her alleged ocular testimony assigning reasons therefor. As such it was not possible for the PW 1, PW 2 and PW 4 to disclose the names of the assailants of the victim Quddus to the PW 24 even on 9-6-2003, that is to say, after 4(four) days of the occurrence. 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* reported in *6 BLC 402* which runs as under:

> "29. It is surprising to see that although the inquest was made in presence of PW 26 and others but from the inquest-report it appears that none of them said anything about the cause of death at the earliest opportunity to the Investigating Officer. This inquest-report is an important document which may be considered to ascertain what was the earliest version of the prosecution case."

75. On the other hand, the learned Deputy Attorney-General Mr Zahirul Haque Zahir has relied upon the decision in the case of *State vs Golam Mostafa* reported in *9 BLC 63*. In that decision, it has been held, *inter alia*, in paragraph 40 which runs as follows:

> "40. The correct legal position is that the documents like inquest-report, seizure-list, side plan consist of two parts. One part is based on the observation of the witness himself. This is the direct evidence and admissible under section 60 of the Evidence Act. The other part consists of the information given to the Investigating Officer. This part is not admissible in evidence but may be used under section 162 of the Code. Reliance in this respect is made on the decision in the case of *Rameshwar Dayal vs State of UP AIR 1978 (SC) 1558*.....
> .....
> ....."

76. Be that as it may, indisputably the PW 2 Shahana Parveen is a signatory to the inquest-report of Quddus. As held above, her ocular testimony is unreliable and shaky. Had she really eye-witnessed the act of killing of her husband Quddus by the accused, she would have naturally disclosed the names of the assailants of Quddus to the inquest-holding officer (PW 24). As a matter of fact, she did not eye-witness the occurrence leading to the eventual death of her husband Quddus in Dhaka.

77. As to the contention of Mr Md Hatem Ali that had Kalam Member really participated in the commission of the offence, he would not have been present at the scene of occurrence immediately thereafter and have signed the inquest-reports of the deceased Mahbub Hossain and Habib as a witness and this phenomenon does not indicate any 'mens rea' of the accused Kalam Member, it is seen that it is in the cross-examination of the PW 13 Md Amirul Islam that the accused Kalam Member was present at the time of holding of inquests on the deceased Mahbub Hossain and Habib along with him. Besides, the factum of presence of the accused Kalam Member at the scene of occurrence immediately thereafter has been borne out by the PW 14 Md Abdus Salam in his cross-examination. It is normal human conduct that a person participating in the commission of an offence will not be present at the scene of occurrence immediately thereafter in broad daylight. Moreover, I have already found the testimony of the relevant prosecution witnesses untrustworthy with regard to the implication of the accused Kalam Member and other lifers in

the commission of the offence. So the above contention of Mr Md Hatem Ali cannot be brushed aside altogether.

78. It transpires that Mr Md Hatem Ali has rightly argued 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 and the PW 6 Gulzan Bibi and PW 9 Kismat Ali Sheikh have not implicated the accused Kalam Member at all in the commission of the offence and the PW 2 Shahana Parveen has not implicated the accused Kalam Member in the killing of the victims Quddus, Mahbub and Habib and she has only implicated the accused Kalam Member along with others in vandalizing their house and admittedly the PW 8 Bachchu Mondal has failed to recognize any of the accused at the time of occurrence. However, as the evidence of the alleged eye-witnesses has already been thrown overboard, the factum of implication or non-implication of the accused Kalam Member in the commission of the offence in the evidence of those witnesses is fully and wholly irrelevant.

79. Mr Mohammad Khabir Uddin Bhuiyan has rightly submitted that the accused Latif Mondal is not one of the three accused referred to in the alleged dying declaration of the victim Quddus. But nevertheless the PW 3 Md Azad Sheikh, PW 5 Nur Zahan and PW 7 Nizam Uddin Sheikh have implicated the accused Latif Mondal along with others who allegedly struck the victims right and left with various weapons. Since the evidence of the PW 3, PW 5 and PW 7 is unworthy of credit, the finding of conviction against the accused Latif Mondal cannot be sustainable in law.

80. At this stage, I would like to say that I am conscious of the principle stated in the case of *Md Luqman vs State, 21 DLR (SC) 461* that a finding of guilt against the accused cannot be based merely on the high probabilities that may be inferred from the evidence in a given case. Mere conjectures and probabilities cannot take the place of proof. I am also not unmindful of the principle enunciated in the case of *Alkas Mia vs State, 25 DLR 398* that the Court of law has to dispense justice in accordance with law and not according to the moral conviction of the Judge with regard to the occurrence.

81. In view of the foregoing discussions and regard being had to the facts and circumstances of the case, the defence version that the victims were killed by the members of Sarbahara Party and the accused have been falsely implicated in the case out of bitter enmity and bad blood cannot be ruled out altogether. In the result, I am inclined to award the benefit of doubt to the accused.

82. Before parting with the case, I would like to observe that there has been a wave of crime in this country. 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.

83. Reverting to the instant case, needless to say, the victims Quddus, Mahbub Hossain and Habib were done to death in a very brutal, gruesome and macabre manner. Their death is shocking to all conscientious people. But because of lack of reliable evidence and because of some of the witnesses' unwillingness to disclose the whole truth to the Court, I have no other option but to preside over the acquittal ceremony of the accused. In any event, a Court of law cannot record a moral conviction and a conviction must be based on legal evidence. A Court of law is mandated to dispense justice according to the law of the land.

84. By the way, a reference may be made to the decision in the case of *Zahira Habibullah Sheikh and another vs State of Gujarat* reported in *3 SCC 374*. In that decision, the Indian Supreme Court has expressed its anxiety about miscarriage of justice in criminal cases in the following terms:

> "40. 'Witnesses' as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle the truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but irreversible and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to a mockery. Doubts are raised about the roles of investigating agencies. Consequences of defective investigation have been elaborated in *Dhanaj Singh vs State of Punjab (3 SCC 654)*.....
>
> .....
>
> 41. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens, it has to ensure that during a trial in the Court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation (sic repetition). We can only say this with regard to the criticism levelled against the State of Gujarat. Some Legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately the truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of jus-

tice do not get incapacitated in the sense of making the proceedings before the Courts mere mock trials as are usually seen in movies.

42. Legislative measures to emphasize prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of society. On the contrary, efforts should be to ensure a fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interest of the individual accused. In this Courts have a vital role to play."

85. In view of what have been stated above about 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 proactive role if it wants to salvage the criminal justice delivery system from its near collapse.

86. From the discussions made hereinbefore and regard being had to the facts and circumstances of the case, I do not find any merit in the death reference and consequently the death reference is rejected. As I have already stated that I am inclined to award the benefit of doubt to the accused, they are entitled to acquittal. In the result, all the criminal and jail appeals are allowed and the impugned judgment and order of conviction and sentence dated 27-10-2008 rendered by the Additional Sessions Judge, Rajbari in Sessions Case No. 57 of 2007 is set-aside.

87. Let the accused in jail be set at liberty at once, if not wanted in connection with any other case.

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

Let a copy of this judgment be immediately transmitted to the Minister for Law, Justice and Parliamentary Affairs, Government of Bangladesh, Bangladesh Secretariat, Dhaka for information and necessary action.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Sheikh Abdul Awal J

Saiful Islam (Md).....
...Defendant-Petitioner

vs

AK Fozlul Haque and others.....Plaintiff-Opposite Parties*

Judgment
May 6th, 2014.

Muslim Marriages and Divorce (Registration) Act (LII of 1973)
Rule 10

License of a Nikah Registrar is to be granted only for 1 (one) union, not more than one union. .....(14)

AJ Mohammad Ali and Rubaiyat Hossain, Advocates —For the Petitioner.

Mohammad Nurul Haque, Advocate—For the Opposite Party No.1.

Md Abdul Hai, DAG—For the Opposite Party No.4.

*Civil Revision No.128 of 2012.

Judgment

This Rule was issued calling upon the opposite party No.1 to show cause as to why the judgment and decree dated 19-10-2011 passed by the learned Additional District Judge, 3rd Court, Kishoregonj in Other Appeal No.125 of 2005 reversing those dated 29-9-2005 passed by the learned Senior Assistant Judge, Sadar, Kishoregonj in Other Class Suit No.233 of 2004 allowing the application under Order VII, rule 11(d) of the Code of Civil Procedure for rejection of the plaint should not be set-aside.

2. Short facts necessary for the disposal of the case are that the opposite party, as plaintiff instituted a suit being Other Class Suit No. 233 of 2004 in the Court of Senior Assistant Judge, Sadar, Kishoregonj for declaration that the order dated 12-10-2004 issued under Memo No. 7/2No-92/85/1135 by the defendant opposite party No.1 appointing the defendant No.2 as Nikah Registrar of Maria Union is illegal, void and without jurisdiction.

3. Defendant-petitioner No. 2 entered appearance in the suit and filed an application under Order VII, rule 11(d) of the Code of Civil Procedure for rejection of the plaint stating, *inter-alia*, that the plaintiff is not entitled to continue as Nikah Registrar for more than one union according to the provision of Rule 10 of Rules, 1975 as amended on 2-10-2002.

4. Plaintiff-opposite party resisted the said application by filing written objection stating, *inter-alia*, that the contents of the plaint do disclose cause of action for the suit and the plea of implied bar raised in the application for rejection of the plaint is mixed question of law and fact which need thorough investigation on adequate evidence for arriving at a correct decision on framing specific issues by the trial Court and, as such, the application for rejection of the plaint is liable to be rejected.

5. The learned Senior Assistant Judge, Sadar, Kishoregonj upon hearing parties and considering the relevant law along with the contents of the plaint allowed the application for rejection of the plaint by his judgment and decree dated 29-9-2005.

6. The plaintiff-petitioner, thereafter, preferred Other Appeal No.125 of 2005 before the learned District Judge, Kishoregonj against the said judgment and decree dated 29-9-2005, which was eventually transferred to the Court of Additional District Judge, 3rd Court, Kishoregonj, who by the impugned judgment and decree dated 19-10-2011 set-aside the judgment and decree dated 29-9-2005 passed by the learned Senior Assistant Judge, Sadar, Kishoregonj in Other Class Suit No.233 of 2005 on the ground that the suit is not barred by any law.

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

8. Mr AJ Mohammad Ali, the learned Advocate appearing for the petitioner in the course of his argument upon placing the plaint of the suit submits that it is apparent from the plaint the plaintiff filed the suit challenging the Memo No.7/2N-92/85/1135 dated 12-10-2004 issued by the Senior Assistant Secretary, Ministry of Law, Justice and Parliamentary Affairs by which the concerned authority of the Government appointed the defendant petitioner as Nikah Registrar of No. 8, Maria Union in curtailing the power of plaintiff opposite party as he continued to remain as Nikah Registrar for two Unions which is in conformity with the Rule 10 of Rules, 1975 as amended on 2nd October, 2002. The learned Counsel further submits that the learned Additional District Judge erred in law in setting-aside the well founded judgment of the trial without properly considering the facts of the case and the case made out by the petitioner and the same has occasioned failure of justice.

9. Mr Mohammad Nurul Haque, the learned Advocate appearing for the plaintiff-opposite party, on the other hand, supports the impugned judgment and decree which was according to him just, correct and proper. He submits that the Court of appeal below was perfectly justified in setting-aside the judgment and decree of the trial Court on the clear finding that neither the defendant nor the trial Court mentioned under what law the suit is barred. Finally, the learned Advocate submits that the proposition of law is by now well settled that in deciding an application under section 7, rule 11(d) of the Code of Civil Procedure the Court cannot travel beyond the averments of the plaint and the plea of implied bar raised in the application for rejection of the plaint is mixed question of law and fact, which can be decided only at the trial on taking evidence.

10. Mr Md Abdul Hai, the learned Deputy Attorney-General appearing for the opposite party No.4, Secretary, Ministry of Law, Justice and Parliamentary Affairs submits that under section 9 of the Code of Civil Procedure all suits of civil nature lie in Civil Court unless the same is impliedly barred by specific provision of law, the issues involved in the present suit are clearly and plainly barred by the provisions of Rule 10 of Rules 1975 as amended on 2-10-2002. Finally, the learned Deputy Attorney-General submits in any event this is not a case in which the ordinary Civil Court has jurisdiction to grant the relief asked for by the plaintiff opposite party No. 1.

11. I have heard the learned Advocates for both the sides as well as the learned Deputy Attorney-General and perused the revision application, judgments of two Courts below together with the connected laws. The only material question for consideration in this case is, whether the Court of appeal below has committed any illegality in holding that the suit is not barred by any law.

12. It appears that in the present case the plaintiff-opposite party No.1 continued to remain as Nikah Registrar for 2(two) unions, that is, Maria Union and Binnati Union under Kishoregonj District.

13. In exercise of the power under section 14 of the Muslim Marriage and Divorce Registration Act, 1974, Rules, 1975 was promulgated. Rule 10 speaks of an area in which a Nikah Registrar may be licensed to exercise his jurisdiction. Rule 10 was amended on 19-1-93 and thereafter it was further amended on 30-12-97 by specifying the area within which a Nikah Registrar may be appointed and thereafter further it was amended on 2nd October, 2002 as published in Official Gazette on 3-10-2002. The jurisdiction of a Nikah Registrar as per present amended Rule 10 of Rules 1975 is as under:

> 10. Jurisdiction:—Notwithstanding anything contained in these Rules or in any license granted under these Rules, an area for which a Nikah Registrar may be licensed shall be-
>
> (a) In the case of a City Corporation, not more than one ward;
>
> (b) In the case of a municipality of-
>
> (i) Category 'A' not more than one ward;
>
> (ii) Category 'B' not more than two wards; and
>
> (iii) Category 'C' not more than three wards; and
>
> (c) in other cases, not more than one union".

14. From a reading of the above mentioned notification published in the Official Gazette 3rd October, 2002, it appears that license of a Nikah Registrar is to be granted only for 1 (one) union, not more than one union.

15. I like to cut short this matter inasmuch

as I have already found the opposite party No.1 continued to remain as Nikah Registrar for 2 (two) unions, that is, Maria Union and Binnati Union under Kishoregonj District.

16. For an answer to the question raised in this Rule it is necessary to examine the impugned Memo No.7/2N-92/85/1135 dated 12-10-2004 issued under the signature of the defendant opposite party No. 1. The impugned Memo No.7/2N-92/85/1135 dated 12-10-2004 reads as follows:

বিষয়ঃ কিশোরগঞ্জ জেলার সদর উপজেলার ৮ নং মারিয়া ইউনিয়নে নিকাহ রেজিষ্ট্রার নিয়োগ প্রসংগে।

উপরে উল্লেখিত বিষয়ের নিম্ন স্বাক্ষরকারী আদিষ্ট হইয়া জানাইতেছি যে, সরকার ১৯৭৪ সনের মুসলিম বিবাহ ও তালাক (রেজিষ্ট্রীকরণ) আইনের ৪ ধারা এবং ১৯৭৫ সনের মুসলিম বিবাহ ও তালাক (রেজিষ্ট্রীকরণ বিধিমালার ৫(১) বিধির প্রদত্ত ক্ষমতা বলে জনাব এ, কে, ফজলুল হক, নিকাহ রেজিষ্ট্রর এর এলাকা হইতে ৮ নং মারিয়া ইউনিয়নটি কর্তন পুর্বক নতুন অধিক্ষেত্র সৃষ্টি করতঃ জনস্বার্থে জনাব মোঃ সাইফুল ইসলাম, পিতা-মৃত নুরুল হক সাং মোল্লাপাড়া, পোঃ+উপজেলা+ জেলা-কিশোরগঞ্জ-কে ৮ নং মারিয়া ইউনিয়নের অস্থায়ী নিকাহ রিজিষ্ট্রার নিয়োগের অনুমোদন প্রদান করিলেন।

২। এই বিষয়ে প্রয়োজনীয় ব্যবস্থা গ্রহন ও বিধি মোতাবেক দরখাস্ত আহবান পূর্বক স্থায়ী নিয়োগের প্যানেল প্রেরনের জন্য অনুরোধ করা হইল।

৩। অত্র আদেশ কোন মামলায় কোনরুপ নিষেধাজ্ঞা বা স্থগিতাদেশ থাকিলে কার্যকর হইবে না।

স্বা/

(এ, এইচ, এম, সামসুল আরেফিন)

সিনিয়র সহকারী সচিব

তাং- 12-10-2004

17. From the above together with the amended provision of section 10 of the Muslim Marriage and Divorce Registration Act, I am led to hold that the defendant-opposite party No. 2 committed no wrong in curtailing the Nikah Registrar ship of the plaintiff-opposite party No.1 inasmuch as the plaintiff-opposite party No.1 was continuing as Nikah Registrar for 2(two) unions, that is, Maria Union and Binnati Union under Kishoregonj District which is in conformity with the Rule 10 of Muslim Marriage and Divorce Registration Act as amended on 2-10-2002. I do not think therefore that the learned Additional District Judge made a correct approach to the simple problem.

18. In view of this, I am led to hold the instant suit filed by the plaintiff challenging the order dated 12-10-2004 issued under Memo No.7/2N-92/85/1135 by the defendant No.1 by which the concerned authority of the Government appointed the defendant petitioner as Nikah Registrar of No.8 Maria Union in curtailing the power of plaintiff opposite party is clearly barred by the provisions of Rule 10 of Rules, 1975 as amended on 2-10-2002.

19. The learned Senior Assistant Judge on the facts of the case and on consideration of the legal position rightly rejected the plaint by his judgment and decree dated 29-9-2005 on assigning sound reason.

20. For the foregoing reasons stated above, both on law and fact, I hold that the judgment and decree of the appellate Court below is liable to be set-aside and that of the trial Court be restored. Consequently, the Rule is made absolute without any order as to costs. Impugned judgment and decree dated 19-10-2011 passed in Appeal No.125 of 2005 is set-aside and that the judgment and decree of the trial Court dated 29-9-2005 passed in Other Class Suit No.233 of 2004 is restored.

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

Ed.

High Court Division
(Special Original Jurisdiction)

Md Ashfaqul Islam J
Md Ashraful Kamal J

Abu Sufian Ahmed...
.....Petitioner
vs
National Board of Revenue and others..
.....Respondents*

Judgment
March 6th, 2014.

Value Added Tax Act (XXII of 1991)
Section 37(2)/55

Under the amended law it has become easier on the part of the VAT authority to issue notice directly under section 55 of the Act in which offences under section 37(2) can also be included in a given situation. But there cannot be a direct notice under section 37 of the Act without making a final demand under section 55 (3) of the Act.

Time and again the VAT authority has appeared before this Division and we have cautioned them to issue a proper notice in the manner as discussed above which they failed. This time we want to make ourselves clear that after receiving of this judgment and order if for any reason whatsoever the National Board of Revenue, the writ respondents in future fails to issue any notice without mentioning clearly that the said notice has been issued under section 55 of the Act, the consequence will be dire. Let this aspect be set at rest once for all. .....(14 & 15)

United Mineral Water and PET Industries Ltd. vs Commissioner, Customs Excise, and VAT and others, 61 DLR 734 and Hotel Zakaria International vs The National Board of Revenue and others 30 BLD 388 ref.

Taufiq Anwar Chowdhury, Advocate—For the Petitioner.

SM Moniruzzaman, Deputy Attorney-General with Mosammat Khairun Nessa, Purabi Saha, AAGs—For the Respondents.

*Writ Petition No. 3704 of 2013.

Judgment

Md Ashfaqul Islam J: At the instance of the petitioner Mr Abu Sufian Ahmed, this Rule was issued in the following terms:—

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why the proceeding of Tax Evasion Case No. 3/2011 dated 25-7-2011 initiated by the VAT Authority for alleged evasion of Value Added Tax (VAT) by the petitioner during the period from January 2007 to April 2011 and issuance of the notice under Memo No. ঢাকা (দঃ) কমিঃ/৪/মূসক/৮(৪০ কর ফাকি/বিচার/২০১১/৩৫৬ dated 6-8-2012 issued by the respondent No. 2 (Annexure-A) should not be declared to have been initiated without lawful authority and is of no legal effect."

2. The background leading to the Rule, in short is that the VAT authority initiated impugned proceeding being Tax Evasion Case No. 3/2011 dated 25-7-2011 for alleged offence of evasion of Value Added Tax (VAT) of Taka 66,88,226 by the petitioner during the period from January 2007 to April 2011 and accordingly of the notice under Memo No. ঢাকা (দঃ) কমিঃ/৪/মূসক/৮(৪০ কর ফাকি/বিার/২০১১/৩৫৬ dated 6-8-2012 was issued by the respondent No. 2 (Annexure-A). The issuance of the said notice by the respondent VAT Authority claiming the outstanding VAT under section 37 of VAT Act, 1991 (hereinafter referred to as Act) without fixing the liability of the petitioner under section 55 of the same Act even after the amendment of the VAT Act is legally not sustainable. The petitioner being aggrieved mainly on that score moved this Division and obtained the present Rule and the order of stay.

3. Mr Taufiq Anwar Chowdhury, learned Advocate appearing on behalf of the petitioner

submits that the order impugned against is the notice issued directly making a claim under section 37 of the Act without giving a notice under section 55 of the Act. By now it is well settled that nothing short of prior compliance of section 55 of the Act, the VAT authority by any means cannot go for an action under section 37 of the Act. He also placed reliance on the decision of *United Mineral Water and PET Industries Ltd. vs Commissioner, Customs Excise, and VAT* reported in *61 DLR 734.*

4. The Rule has not been opposed by filing any affidavit-in-opposition on behalf of the respondent. However, on our query regarding the submission pressed into service by the petitioner, the learned Deputy Attorney-General found it difficult to advance any plausible counter argument.

5. We have heard the learned Advocate of both sides and gone through the petition and the impugned order carefully.

6. In many decisions this Division has decided this issue holding that without fixing the liability under section 55 of the VAT Act, a direct notice under section 37 of the Act cannot be issued.

7. The question now needs to be considered in this Rule is whether the aforesaid *Ratio Decedendi* shall operate in the same manner after the amendment of the VAT Act, 1991 made under Artha Ain No. 25 of 2013.

8. The provision of section 37 of the VAT Act is a penal provision, which can be exercised only after determination of the VAT evaded by any person under a given situation. Section 55 of the VAT Act provides for realization of unpaid or less paid VAT and other taxes. Section 55(1) clearly empowers among others to the concerned authority to issue notice of show cause or make demand as the case may be for unpaid VAT, or less paid VAT would not be deposited and adjusted.

9. Section 55(3) provides for hearing on the basis of reply, if any, submitted to such notice and after such hearing to make the demand final. This is exactly what has been observed in the decision of United Mineral Water and *PET Industries Ltd. vs Commissioner, Customs Excise, and VAT* reported in *61 DLR 734.*

10. In that decision, Justice Md Abdur Rashid on this issue observed:

> "If the entire provision of section 55 is considered then it would be clear that section 55 empowers the concerned VAT authority to take steps for realization of unpaid or less paid VAT or tax, upon first issue of a notice asking to show cause and then, upon hearing, within 90 days to make a final demand in respect of any VAT or tax unpaid, evaded or less paid."

11. He further observed:

> "On the other hand, section 37 of the said Act defines various offences and punishments for such offence. Before any final demand could be made under section 55(3), none of the provisions of section 37 could be resorted to. It is needless to say as the fiscal law demands strict interpretation so equally demands for strict application by an authority authorized to apply. The VAT Act is a comprehensive tax law. It has defined the tax to be paid as VAT on the specified sales and/or services. Similarly, it has laid down elaborate procedure for realization of the tax and punishment for any violation or omission. The concerned authority is therefore, dutybound to follow the procedure as laid down in the Act for each and every action. The Act does not empower any of the authorities created to become zealot to overpower and/or overawe any tax payer. Invoking and/or resorting to section 37 while issuing a notice under section 55(1) of the VAT Act therefore, could not be said to have been issued

bonafide for the simple reason that at the time of issue of the notice, the authority concerned had not yet arrived at as to any evasion of VAT by the petitioner."

11. We are in respectful agreement with the observations made in the decision cited above. This principle was also applied in the case of *Hotel Zakaria International vs The National Board of Revenue 30 BLD 388* where one of us was a party. On the conspectus, we hold that nothing short of prior compliance of section 55 of the VAT Act, the VAT authority by any stretch of imagination cannot go for an action under section 37 of the VAT Act, which is a penal provision. Liability has to be fixed first under section 55 of the Act nothing more nothing less.

12. Now comes the focal point that needs to be addressed. We hold that the aforesaid *Ratio Decedendi* operates in the same manner even after the amendment of section 55 of the VAT Act, 1991 by Artha Ain No. 25 of 2013. We want to mention in this context that after the amendment of the Act in the year 2010 section 55 of the Act has taken a new look. Now the offences under section 37 can be dealt with by giving notice but under section 55 of the Act. By no means it can be said that the aforesaid amendment has changed the settled proposition of law as discussed above.

13. The amended law runs thus:—

"৫৫। [১][অনাদায়ী ও কম পরিশোধিত মূল্য সংযোজন করসহ অন্যান্য [২][শুল্ক ও কর] আদায়]– [৩][(১) যেক্ষেত্রে কোনো নিবন্ধিত বা নিবন্ধনযোগ্য ব্যক্তি বা টার্নওভার কর এর আওতায় তালিকাভুক্ত বা তালিকাভুক্তির যোগ্য ব্যক্তি, তদকর্তৃক ধারা ৩৭ এর উপ-ধারা (২) এ বর্ণিত এক বা একাধিক [৪][অপরাধ সংঘটনের] কারণে অথবা: ভুল ব্যাখ্যার কারণে, সরবরাহকৃত পণ্য বা প্রদত্ত সেবার উপর প্রদেয়–

(ক) মূল্য সংযোজন কর বা, ক্ষেত্রমত, মূল্য সংযোজন কর ও সম্পূরক শুল্ক ধার্য বা পরিশোধ করা হয় নাই,

(খ).....

(গ).....

(ঘ).....

সেক্ষেত্রে উক্ত ব্যক্তিকে তাহার উপর যে তারিখে উক্ত মূল্য সংযোজন কর বা, ক্ষেত্রমত, মূল্য সংযোজন কর ও সম্পূরক শুল্ক প্রদেয় হইয়াছিল বা প্রত্যর্পণ বা ফেরত প্রদান বা সমন্বয় করা হইয়াছিল সেই তারিখ হইতে পাঁচ(৫) বৎসরের মধ্যে সংশ্লিষ্ট মূল্য সংযোজন কর কর্মকর্তা নোটিশ দ্বারা, নোটিশে উল্লিখিত শুল্ক বা মূল্য সংযোজন কর দাবি করিয়া, উহাতে উল্লিখিত সময়সীমার মধ্যে উক্ত শুল্ক বা মূল্য সংযোজন কর পরিশোধের জন্য কারণ দর্শানো নোটিশ জারি করিবেন।" *(Underlings are mine)*

14. Under the amended law it has become easier on the part of the respondent VAT Authority to issue notice directly under section 55 of the Act in which offences under section 37(2) can also be included in a given situation. But there cannot be a direct notice under section 37 of the Act without making a final demand under section 55(3) of the Act.

15. Time and again the VAT Authority has appeared before this Division and we have cautioned them to issue a proper notice in the manner as discussed above which they failed. This time we want to make ourselves clear that after receiving of this judgment and order if for any reason whatsoever the National Board of Revenue, the writ respondents in future fails to issue any notice without mentioning clearly that the said notice has been issued under section 55 of the Act, the consequence will be dire. Let this aspect be set at rest once for all.

Resultantly, the impugned notice issued in the petition should be declared *ex-facie* illegal and without lawful authority. Accordingly, the Rule is made absolute. The order impugned against is declared to have been passed without lawful authority and of no legal effect and, as such, set-aside. However, the respondents will be at liberty to issue fresh notice in the manner as decided above.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

AKM Asaduzzaman J
Shahidul Karim J

Judgment
March 4th, 2014.

State.....Petitioner
vs
Ayub Ali Munshi @ Ayub Munshi and others.....Condemned Prisoners*

Code of Criminal Procedure (V of 1898)
Section 374
Penal Code (XLV of 1860)
Section 304, Part-1

Injury of inflicting one chair leg blow on the head of the victim by the accused Kamrul Matubbor constituted an offence punishable under section 304 part-1 of the Code. The conviction of the accused Ayub Munshi, who was an order giver also converted to section 304 part-1 of the Code and their sentence is commuted to life imprisonment instead of death penalty. .....(87)

Mobarak Ali vs State, 1969 Crl. LJ 766; Mottadin vs State of Maharashtra, 1999 Crl. LJ 22; Surendra Chauhan vs State of Madda Pradesh (2000) 4 SCC 110 and Abul Kashem vs State, 10 BLD (AD) 210 ref.

Forhad Ahmed, DAG Bashir Ahmed, AAG Kazi Mahmudul Karim, AAG—For the State.

Khandker Mahbub Hossain with Muhammad Masud-ul-Haque, Advocates—For the appellant in Crl. Appeal No. 6491 of 2008, 6492 of 2008 and 6493 of 2008.

SM Shahjahan, Md Jafor Ali, Advocates—For the Appellant in Crl. Appeal No. 6622 of 2008.

Hasna Begum, Advocate—For the Appellant in Jail App. No. 916 of 2008.

*Death Reference No. 95 of 2008 with Criminal Appeal No. 6491 of and Jail Appeal No.103 of 2008.

HC–89

Judgment

AKM Asaduzzaman J: By the judgment and order dated 19-8-2008 the Judge of the Druto Bichar Tribunal No. 1, Dhaka convicted 1) Ayub Munshi, 2) Kamrul Matubbar, 3) Md Nurul Islam, 4) Jahurul Hossain, 5) Magrib Hossain, 6) Abdur Razzaq, 7) Billal Hossain and 8) Badhsa Mia under sections 302/34/114 of the Penal Code and sentenced to death to accused 1) Ayub Munshi and 2) Kamrul Matubbor and imprisonment for life to the aforesaid rest accused with a fine of Taka 50,000 each, in default to suffer rigorous imprisonment for 1(one) year more and acquitted the other accused in Druto Bichar Tribunal Case No. 19 of 2006. The death penalty was referred to this court for confirmation in the death reference case. The convicts also preferred the other appeals against the said conviction and the information also preferred appeal being No. 6622 of 2008 against the order of acquittal. Since all of the above matters arising out of a single judgment are heard together and disposed of by the single judgment.

2. On 20-6-2005 Shohag Hossain (PW 1) as informant lodged the FIR against 15 accused persons.

3. Prosecution case as it appears from the FIR in short is that on 20-6-2005 the informant along with his father Commander Abul Hossain (victim) and others were coming home through two motor cycles from Vhanga. When they reached near the house of Bajlu Kha (PW 2), the accused persons encircled them; accused Ayub Munshi passed the order and accused Kamrul dealt iron blow to the head of the victim and caused serious injury to him. The informant, brother and uncle, accompanying them also got injuries on the blow of different weapons inflicted by the accused. Thereafter victim along with others were admitted to the local hospital and the victim finally referred to

Dhaka Medical College Hospital wherein he died on 22-6-2005.

4. The police took up the investigation of the case and submitted charge-sheet against 17 accused persons on 19-7-2005 under sections 323/325/307/302/114/120(kha)/34 of the Penal Code and not sent up accused Abdur Razzaq.

5. The case thereafter sent to the Druto Bichar Tribunal No.1, Dhaka for trial and registered as Druto Bichar Tribunal Case No. 19 of 2006. The Tribunal finally framed charge against 18 accused persons including, but did not sent up charge sheets, accused Abdur Razzaq under sections 302/34/114 of the Penal Code and after considering the deposition of 20 PWs and 6 DWs and hearing the parties convicted the accused as stated above and referred the matter to this court under section 374 of the Code of Criminal Procedure for confirmation of the death penalty awarding to the accused.

6. Mr Forhad Ahmed, the learned Deputy Attorney-General appearing for the state on placing the deposition of the PWs and the judgment of the trial court submits that when prosecution has successfully been able to prove the charge leveled against the accused person by way of corroborative evidence, the trial court committed no illegality in awarding sentence upon them. He thus prays that the death reference may be accepted.

7. Mr SM Shahjahan, the learned Advocate appearing for the informant along with Md Jafor Ali submits that where there is sufficient corroborative evidence against all of the FIR named accused the trial court erred in law in acquitting the rest of the FIR named accused.

8. Mr Khandker Mahbub Hossain, the learned Advocate appearing along with Mr Md Masud-ul-Haque on behalf of the accused appellant contended that:

a) Accused Ayub Munshi would be seen from the record that he was a mere ordering accused but did not touch any victim of the occurrence. His participation in the incident since not been proved by any evidence, he cannot be held guilty for committing murder. In support of his contention he has cited a decision in the case of *Mobarak Ali vs State* reported in *1969 Crl. LJ 766* and in the case of *Mottadin vs State of Maharashtra* reported in *1999 Crl. LJ 22.*

b) Accused Badsha Mia, Billal Hossain and Magrib Hossain were alleged to have been inflicted stick and iron rod blow upon the informant uncle Abul Hasan (PW 8). But the medical certificate (Ext.5) did not reflect the said injury. Accordingly when their participation in the incident has not been proved, their conviction is illegal.

c) Accused Jahurul Hossain was said to cause a cut injury on the head of the said Abul Hasan (PW 8) by ram dao blow. But the medical certificate (Ext.5) only reflect one Lacerated wound caused by blunt weapon, which do not corroborate the said injury. Accordingly his participation in the incident since not been proved by the evidence, his conviction is also illegal.

d) Accused Md Nurul Islam was convicted on the finding that although he was not named in the FIR but since the witnesses in their statement under section 161 of the Code of Criminal Procedure has disclosed his name with a conspiracy in his house he was convicted. This finding arrived upon statement under section 161 of the Code of Criminal Procedure is absolutely illegal, accordingly his

conviction is not tenable in law.

e) Accused Abdur Razzaq was taken into cognizance and tried by the Tribunal in violating the provision laid down under section 193 of the Code of Criminal Procedure accordingly his conviction and sentence is illegal and without jurisdiction.

9. He thus prays for acquittal of the accused.

10. Mrs. Mahmuda Khatun, the state defence lawyer appearing for the accused Kamrul Matubbor contended that the evidence is discrepant and that the case is not been proved against the accused Kamrul beyond any reasonable doubt, accordingly he is entitled to get an order of acquittal giving him benefit of doubt at least.

11. Heard both the parties and perused the record.

12. Before we proceed to consider the contention of the respective parties, first of all we like to see at a glance, what the prosecution case was and how the trial was started.

13. According to the FIR all on a sudden 15 accused persons surrounded the informant party while they were returning back home by motor cycle and on the order of the accused Ayub Munshi different FIR named accused persons injured them including the victim by way of different weapons and they were taken to the hospital for treatment. Thereafter victim died two days thereafter in the hospital, while he was under treatment.

14. Police after investigation submitted charge-sheet against 17 accused persons but not sent up FIR named accused Abdur Razzaq.

15. By the order dated 3-8-2005 the learned Magistrate accepted the charge-sheet and discharged the not sent up accused Abdur Razzaq along with other and after taking cognizance against the accused sent up, forwarded the case record to the Special Court for trial as per section 192 of the Code of Criminal Procedure. Thereafter through the Bangladesh Gazette dated 5-10-2006 the case was listed for trial by Druto Bichar Tribunal and it was transferred to the Tribunal on 30-10-2006 for trial. On 6-4-2008 while framing charge one Naraji application was filed by the public prosecutor for inclusion of the accused Abdur Razzaq in this case which was ordered to be kept with the record. Thereafter, on 16-4-2008 after examining 6 PWs, the said application was again taken up for hearing by the tribunal and ultimately on allowing the same, the Tribunal sent the matter along with the deposition so far recorded together with the record to the Officer-in-charge Vanga Thana for further investigation, which again ended on final report. Thereafter, on 15-5-2008 upon another Naraji petition filed by the Public Prosecutors the case was again sent for judicial enquiry and obtaining a report from judicial enquiry, the learned Tribunal by the order dated 15-6-2008 issued a summons and finally taking cognizance, framed charge against the said accused Abdur Razzaq. It has been contended by Mr Khandker Mahbub Hossain that the above order of taking cognizance by the Tribunal, who is practically a Court of Sessions, is illegal and without jurisdiction.

16. Section 193 of the Code of Criminal Procedure provides that:

> "193. Cognizance of offences by Courts of Sessions.—(1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Sessions shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been [sent] to it by a Magistrate duly empowered in that behalf."

17. In view of above stated provision as laid down under section 193 CrPC the Session Judge has got no jurisdiction to take cognizance of any offence as a court of original jurisdiction, unless the accused has been sent to it by a Magistrate duly empowered on that behalf. Accordingly, the above all stated procedure done by the Tribunal is *per se* illegal and without jurisdiction. Thus the conviction against the accused Abdur Razzaq is also not tenable in law and thus he is hereby acquitted.

18. Now let us see the evidence of the witnesses.

19. In this case prosecution examined 20 PWs and defence examined 6 witnesses, who have stated in the following manner:

PW 1 Shohag Hossain stated in his deposition that at about 10-00 AM on 20-6-2005 they were coming back to their house from Vhanga by way of two motor cycles. Out of which in one motor cycle he was accompaied by his elder brother and his father and was riding another motorcycle his two uncles Abul Hasan and Abu Taleb. On the way to their house when they reached near to the house of Bazlu Khan, under the leadership of Aiyub Munshi local terrorist Kamrul, Nurul Islam, Alamgir, Abdur Razzak, Badsha, Billal, Abu Zayed, Mahbub, Shahin, Zinnat, Nazrul, Magrib, Jahurul, Kamrul, Nazma Begum carrying with different weapons namely ram dao, sen dao, Chinese axe, leg of chair, iron rod and stick attacked them all on a sudden. Aiyub Munshi ordered them to kill them when Nur Islam caught hold the hand of his father, accused Kamrul then inflicted chair leg blow on his head. He then fell down on ground. Nearby uncle Abul Hasan when tried to rescue him, accused Jahurul inflicted ram dao blow on his head who then fell down on the ground with severe bleeding. At that time Magrib Hasan with his iron rod and Badsha with his bamboo stick started beating him. When his elder brother went to rescue them, the accused Abdul Razzak injured him on his head by inflicting a Chinese axe on his head who then fell down on the ground. When Abu Sayed by iron rod, Mahbub and Shahin with their stick started beating him, then he along with others tried to rescue his brother but Nazma Begum resisted them and the accused Alamgir and Fakhrul with the iron rod and Zinnat and Nazrul with their stick started beating him who then fell down on the ground and heard that Aiyub Munshi was shouting that now commander is dead and the other would be finished. Thereafter, they took the victim in Vanga Hospital for treatment when blood was coming out from nose, mouth and of his whole body of the father. Noticing the serious condition of his father and uncle to the Vanga Hospital, they were then shifted to Faridpur Hospital. He along with his brother took treatment at Vanga Hospital. Later on his father started blood vomiting and his condition was deteriorating and he was referred to Dhaka Medical College and in the following morning he died at Dhaka. Later on he came to know that Jillu, Mofazzal and Habibur Rahman were also accompanying the attacker. Thereafter he informed the matter to the daroga at police station and ultimately an ejahar was written by computer type and they took his signature there. It was that ejahar (Exhibit-1) and he identified all of the accused in the dock accepting accused A Razzak, Kamrul, Shahin, Abu Sayed and Nazma Begum.

20. In his cross-examination he further asserted that he did not have any litigation with accused Aiyub Munshi and he is also not his relatives but man of some political party. He is engaged in labour politics and most of the time he stayed in Vanga. He denied the defence sug-

gestion that on the date of occurrence he was at Vanga and not present at the place of occurrence. He further asserted that it was not a fact that he disclosed before the daroga that Kamrul inflicted the victim by way of a leg of chair and also did not state in the ejahar to that respect. Although he further asserted that he along with other witnesses were taken to Vanga Hospital for treatment but no papers regarding their treatments were submitted in the case.

21. He denied the defence suggestion that due to family dispute on making a false story he initiated a false case against the accused.

22. On recall he further deposed that the house of accused A. Razzak and his house are in the same compound, who is his cousin.

23. He denied the defence suggestion that he did not hit anybody with Chinese axe.

24. PW 2 Bazlu Khan stated in his deposition that he is the right guard of Government Office. Occurrence has taken place at 10-00 AM on 20-6-2005 when he was in front of his house and saw two motor cycles coming. One of which was carrying Abul Hossain commander along with his two sons and another was carrying two brothers of Abul Hossain and also saw that 20 to 25 persons were assembled by the side of a closed door shop who were carrying different weapons namely bamboo stick, ram dao and Chinese axe. The accused Aiyub Munshi, Kamrul, Nur Islam, Mofazzal Madbar, Habib, Zinnat, Nazrul, Jahurul, Magrib, Fakhrul, Alamgir, A. Razzak, Badsha, Billal, Mahbub, Abu Zahid, Shahin blocked the road and surrounded the rider of the motor cycles. When they tried to flee away at that time Aiyub Munshi gave order to kill the commander. When Nur Islam proceeded towards him and caught hold his hand and accused Kamrul gave a chair leg blow on right side of his head, he then fell down on me ground and rest of the accused started beating him when Jahurul inflicted by ram dao blow on the head of Abul Hasan he then fell down on the ground with severe bleeding. Mahfuz fell down on the ground when Abdur Razzak inflicted him by a Chinese axe on his head. All of the other accused persons also beat him, when Aiyub Munshi said that: "শালা কমান্ডারের নাক মুখ দিয়ে রক্ত বেরুচ্ছে শালা শেষ, পরে শালার গোষ্ঠীকে ও শেষ করে দেব।" Saying that the accused persons left the place. This witness along with Jakaria, Bellal Ali Hossain, Sabur, Mamun and others cleaned the blood and some of them tried to stop bleeding by bandage and sent to hospital by van. Later on he heard commander first was taken to the Vanga hospital and thereafter taken to Faridpur and lastly taken to big hospital at Dhaka and then he died. He was cross-examined by the defence.

25. In his cross-examination he further stated that the road passing through his house was made by brick swelling. Only van, rickshaw, cycle and people can go through it. He himself witnessed the occurrence. He denied the defence suggestion that at the time of occurrence he was in his office. He further stated that the accused persons committed the offence within few minutes and left the place of occurrence. Later on when the people came to the spot none of the accused persons were there. He denied the defence suggestion that he has not witness to the occurrence and he deposed falsely.

26. PW 3 Billal Bepary stated in his deposition that he is the hawker of breaking articles. At 10-00 AM on 20-6-2005 he saw a lot of people were waiting with different weapons in front of the house of Bazlu Khan. As soon as commander Abul Hossain, along with his two sons and two brothers riding two motor cycles came near to them, the accused surrounded them. Amongst them Aiyub Munshi, Kamrul, Nur Islam, Mofazzal, Zillu, Habib, Alamgir, A, Razzak, Billal, Badsha, Mahbub, Abu Sayed, Shahin, Zinnat, Nazrul, Magrib, Kamrul,

Jahurul were there. Aiyub said that: তোরা কি দেখছিস ধর শালা কমান্ডারকে মেরে ফেল। When accused Nurul Islam caught hold him and Kamrul inflicted chair leg blow on his right side of the head and he fell down. When his brother came to rescue him, accused Jahurul inflicted ram dao blow on him. The others accused beat them by way of stick and rod. When Mahfuz proceeded towards them, A. Razzak gave a Chinese axe blow on his head. The others, son when tried to rescue them they were also then beaten by bamboo stick. Blood was coming out from nose and ear of commander. Noticing that Aiyub said that: তোরা চলে আয় কমান্ডার শেষ হয়ে গেছে পরে ওর গোষ্ঠী সহ শেষ করে দেব। He along with Jakaria, Ali Hossain, Bazlu Khan, Sumon and the other villagers sent them to the hospital by van. In the night returning home he came to know that commander was taken to Dhaka and in the night on the following day he further came to know that commander Abul Hossain died.

27. In his cross-examination he further disclosed that his younger brother got married to the niece of Abul Hossain and all of them are his relatives. He denied the defence suggestion that he did not disclose to the police that at quarter before 10-00 he saw accused to wait with different arms. He further disclosed that occurrence was taken place in the broad day light and he witnessed the occurrence. Although he saw the occurrence but he did not reach to the place of occurrence. He denied the defence suggestion that he was not the witness of occurrence and he deposed falsely.

28. PW 4 Jakir Hossain stated in his deposition that he is the van puller. At 10-00 AM on 20-6-2005 when he came near to the house of Bazlu Khan saw that 20 to 25 people were standing there with ram dao, Chinese axe, iron rod and bamboo stick. The accused persons stopped two motor cycles, out of which in one was commander along with his two sons and another was riding by Abul Hasan and Abu Taleb. Accused were Aiyub Munshi, Kamrul, Nurul Islam, Mofazzal, Zillu, Habib, Alamgir, A. Razzak, Badsha, Billal, Abu Zayed, Mahabub, Shahin, Zinnat Mia, Magrib, Jahurul and Kamrul. When Aiyub said that দাড়িয়ে দাড়িয়ে কি দেখিস শালা কমান্ডারকে শেষ করে দে। Before proceeded with chair leg Nurul Islam caught hold the hand of the commander and Kamrul inflicted chair leg blow on his head from back who then fell down on the brick soiling road. Then the accused persons started beating him. Abul Hasan when proceeded Jahurul inflicted ram dao blow on his head. The other accused persons beat him by rod and stick when he fell down on ground. Abdur Razzak inflicted Chinese axe blow on the head of Mahfuz and rest of the accused also beat him when he fell down on ground. Shohag, son of commander also beaten by rod and stick. Noticing the blood to come out from noose and ear of commander Aiyub said that শালা কমান্ডার শেষ হয়ে গেছে। তোরা চলে আয় পরে ওর গোষ্ঠীকে শেষ করবো। They then left the place of occurrence. Bazlu Khan, Belal, Ali Hossain and Masud rescued the injured persons and sent to the hospital by van. They were admitted to Vanga Hospital. Out of them two were found in severe condition and then sent to Faridpur Medical. Later on he came to know that commander was taken to Dhaka. One day thereafter he came to know that commander died at about 2.00 in night. Accepting 4.00, he identified all of the accused in the dock.

29. In his cross-examination he further asserted that he is the younger brother of Billal. He is a very close persons and is a relative to both the parties. He denied the defence suggestion that he has not seen the occurrence and victims were not taken to the van and since he was relative he deposed falsely against the accused as being a tutor witness.

30. PW 5 Ali Hossain stated in his deposition that he is a hawker selling cloths. At 10-00 AM on 20-6-2005, 20 arms people were standing in front of Bazlu Khan's house, who were Aiyub Munshi, Kamrul, Nur Islam Mofazzal

Madbar, Zillu Madbar, Habib Master, Zinnat Mir, Nazrul Mir, Magrib, Jahurul, Kamrul, A. Razzak, Alamgir, Billal, Badsha, Mahbub, Abu Zayed and Shahin. At that time noticing two motor cycles to come, they surrounded them by putting barricade. Out of the said two motor cycles, in one, commander Abul Hossain was there along with his two sons and in another his two brothers were there. Then Aiyub Munshi said চেয়ে চেয়ে তোরা কি দেখস শালারে শেষ করে দে। When Nur Islam caught hold his two hands and Kamrul struck chair leg blow on the right side of his head who then fell down on the ground. When all of the accused persons started beating him thereafter Jahurul inflicted ram dao blow on the head of Hossain causing bleeding injury. Thereafter A Razzak inflicted Chinese axe blow on the head of Mahfuz causing bleeding injury on his head. Thereafter all of them started beating Shohag, the son of commander. Thereafter noticing the blood to come out from the noose and ear of commander, Aiyub Munshi called of them to go back since commander died. Then they sent commander and his brother to hospital through another van. In the night he heard that they were taken to Faridpur Hospital from Vanga. In the following morning he came to know that commander died at Dhaka. Accepting 2/3 he identified all of the accused in the dock.

31. In his cross-examination he further asserted that informant is his nephew. There is no dispute between informant and Aiyub Munshi. He further asserted that he witnessed the occurrence standing beside the place of occurrence but on fear he did not go to resist them. None has beaten him. He denied the defence suggestion that he did not witness any occurrence.

32. PW 6 Md Mosharaf Hossain a local businessman stated in his deposition that at 9-30 to 10-00 PM on 18-6-2005 he along with Abu Taleb (PW 19) went on walking on the bank of the river. When they were crossing the house of Nurul Islam, they heard that because of commander Aiyub Munshi they could not do anything and hence he need to die. When the accused persons present in the dock including Nur Islam, Mir Zinnat, Najrul, Alamgir said that he was the leader they will obey his direction. When Aiyub Munshi said that well, get ready and be prepared and wait for his decision how to kill him. They were hearing the same standing near to shop and thereafter they went back to their respected house. Thereafter they disclosed it to the commander Abul Hossain, who in reply asked them to stop and not to disclose this matter to others and further said that he was not inclined to make any quarrel regarding the same. Thereafter at 10-00 AM on 20-6-2005 he was going towards Vanga. On the way near to the house of Bazlu Khan, he saw that some people were assembled there with Chinese axe, ram dao, stick and other weapons. Amongst them Aiyub Munshi, Kamrul, Nur Islam, Tofazzal, Zillu, Habib Mir, Zinnat Ali, Nazrul, Magrib, Kamrul, Jahurul, Alamgir, A. Razzak, Badsha, Billal, Mahbub, Ayub Zayed, Shahin were there. At that time two motor cycle came there. In one motor cycles commander and his two sons were there and in another his two brothers were there. The accused persons surrounded them when Aiyub Munshi ordered them to kill. Getting the order Nur Islam caught hold the hands of commander and Kamrul coming from back struck on his head by a leg of chair he then fell down on the ground. At that time all of the accused persons coming to him, beat him. Jahurul inflicted ram dao blow on the head of Abul Hossain. Mahfuz when came to rescue, A. Razzak injured him by way of Chinese axe blow. Shohag when came forward to rescue them he was also been beaten. He saw bloods are coming out from the noose and ear of Abul Hossain. When Aiyub Munshi ordered them to kill them and further disclosed them to leave the place and later on their whole family would be killed. Thereafter, the accused persons left the place of occurrence. He along with

others injured including Abul Hossain commander were taken to the hospital by two vans. Out of the victims, two were taken to the Faridpur Hospital and thereafter commander was taken to Dhaka Medical College Hospital and two days thereafter he heard commander died. Accepting 3/4 persons all of the accused were present in the dock.

33. He was cross-examined by the defence wherein he admits that informant is his nephew and deceased was his brother. His house is near to the river and he went on walking the river and return back at about 10-30 PM. The house of Nurul Islam is on the south east side of his house. At 9-00 to 10-00 PM he heard about conspiracy in the house of Nurul Islam. Aiyub Munshi is a labour leader.

34. He denied the defence suggestion that he did neither go to the house of Nurul Islam nor he heard about the conspiracy nor he deposed before the police about the said conspiracy.

35. He denied the defence suggestion that Aiyub Munshi did not utter the language that attack the accused and kill them. He further denied the defence suggestion that Abul Hasan got injury on the ram dao blow inflicted by Jahurul. He denied the defence suggestion that commander was a diabetic patient and died after falling down on the brick soiling road from the motor cycle.

36. On recall he further proved the surthal report (Exhibit No. 7) wherein he put his signature.

37. In his cross-examination he further deposed that he could not say where the seized alamats were placed in this middle time but it was handed out to the police by Shohag after recovery from the place of occurrence. He could not say where from Shohag collected the same.

38. PW 7 Md Shahid stated in his deposition that he is a cultivator. At 10-00 AM on 20-6-2005 he along with his brother-in-law Jahurul were sitting under a tree. At that time they saw 18 to 20 persons having different weapons namely stick, ram dao, Chinese axe, iron rod and chairs leg were passing them. On his query they did not make any reply. They stood in front of the house of Bazlu Khan. At that time they saw two motor cycles coming who were stopped by those people. Said motor cycles were rided by commander Abul Hossain and his elder son Mahfuz and Shohag and the other motor cycle was rided by Abu Taleb and Abul Hasan. The accused persons namely Aiyub Munshi, Kamrul, Nur Islam, Nazrul, Jahurul, Magrib and Fakhrul surrounded them. When Aiyub Munshi ordered them to kill them. At that time Nur Islam proceeded towards the commander and caught hold his hand when Kamrul inflicted chair leg blow on his head, commander then fell down on the ground. The other accused then beat him spontaneously. At that time Abul Hasan came forward, when Jahurul inflicted ram dao blow he then fell down on the ground. Badsha and Billal and Magrib beat him by stick and rod. When Mahfuz, tried to stop them, accused A. Razzak gave a Chinese axe blow on his head and he got injury on his head. Mahbub and Shahin beat him by stick. Abu Zayed beat him by rod. When Shohag proceeded towards them to stop, Nazma Begum resisted him. Zinnat and Nazrul beat him by stick. Alamgir, Fazlu beat him by iron rod. When Aiyub Munshi said that since bloods are coming out from the noose and ear of the commander, he would be dead and asked the accused persons to go back. After the departure of the accused the victims were taken to hospital by two vans. Mahfuz and Shohag were taken to Vanga Hospital and Abul Hasan and commander were taken to Faridpur Hospital. One day thereafter he came to know that he died in the hospital. Regarding the collection of money of a club Aiyub Munshi and commander had a dispute. Commander always tried to

stop Aiyub Munshi from doing this all event and hence Aiyub Munshi committed this occurrence.

39. In his cross-examination he further asserted that he had witnessed Kamrul to inflict commander by a leg of chair.

40. He denied the defence suggestion that he did not witness any occurrence and he deposed falsely.

41. PW 8 Md Abul Hasan, one of the victims of the occurrence stated in his deposition that he was a cultivator. At 7-00 AM on 20-6-2005 they went on marketing. At about 10-00 AM after marketing when they reached near to the house of Bazlu Khan by motor cycle, the accused persons namely Aiyub Munshi, Kamrul, Nurul Islam, Mofazzal, Zillur, Habib, Alamgir, A. Razzak, Badsha, Billal, Abu Zayed, Mahbub, Shahin, Zinnat, Nazrul, Magrib, Jahurul, Kamrul stopped their motor cycle. He then came down from the motor cycle, when Aiyub Munshi ordered the other accused to kill them then Nurul Islam proceeded towards commander by up rising his hands. They thought he might have come to settle the dispute but coming to commander he caught hold him, when Kamrul inflicted a chair leg blow on the head of the commander, he then fell down on the ground. The other accused persons started beating him he then proceeded towards them, when Jahurul inflicted ram dao blow on his head causing bleeding injury and he then fell down on the ground. Badsha, Billal and Magrib beat him he then became unconscious later on he heard accused A. Razzak also gave a chop on his head and Nazrul beat him also. He along with commander were taken to Faridpur Hospital and rest of the accused to Vanga Hospital. Later on commander was taken to Dhaka Medical where he succumbed. In the night of 18th they held a meeting in the house of Nurul Islam and had shown their anger on the resistance of the commander regarding tolls and occurrence has taken place on the following day.

42. In his cross-examination he has asserted that amongst the accused he has cousins. About 9 to 10 years ago before he got injury when he went for testing his car and hence he became injured.

43. He denied the defence suggestion that at the time he got some injury on his head. At that time he was admitted for about 20 to 22 days in the hospital. He denied the defence suggestion that A. Razzak was not at the place of occurrence and Mahfuz, also did not inflict Chinese axe blow on the head. He further denied the defence suggestion that victim got injury after falling down on the ground since he was a diabetic patient he died on it. He denied the defence suggestion that he deposed falsely against the accused as being a tutor witness.

44. PW 9 Mahfuzur Rahman stated in his deposition that he was a businessman. At about 10-00 AM on 20-6-2005 he was returning back home by motor cycle. In one motor cycle he was accompanied by his father Abul Hossain commander and younger brother Shohag and other was rided by his uncle Abul Hasan and Abu Taleb. When they reached near to the house of Bazlu Khan, 18 to 19 persons resisted their motor cycle and they encircled them. Amongst them Aiyub Munshi, Kamrul, Nurul Islam, Habib, Zillu, Mofazzal, Alamgir, A. Razzak, Badsha, Billal, Abu Sayed, Mahbub, Shahin, Zinnat, Nazrul, Magrib, Jahurul, Kamrul were there with different weapons. Aiyub Munshi ordered them to kill them, soon thereafter Nurul Islam proceeded towards him on rising his hands up. They thought he might have come to settle the dispute but coming to commander he caught hold him, when Kamrul inflicted a chair leg blow of his head. His father then fell down on the ground. All of the accused persons then started beating him. His uncle Abul Hasan then proceeded towards

them. When accused Jahurul inflicted ram dao blow on his head, he then fell down on the ground on bleeding. Badsha and Billal then started beating him along with Magrib. He then went to rescue his father and uncle, when A. Razzak inflicted Chinese axe blow on his head, he then fell down on the ground and became unconscious. After recovery he came to know that Shahin and Abu Zayed beat him. His younger brother also being resisted by Kamrul and Nazma and Nazrul Zinnat beat him by stick. They were taken to the hospital and his father was taken to Dhaka where he stayed for one day and one night and thereafter he died at 2-00 at night. A Chinese axe cut injury was shown to his head.

45. In his cross-examination he further asserted that about 2 days before his father-in-law died. For the same they went to for marketing for doing kulkhani. The purchase goods were bringing through van and they were coming through motor cycle.

46. He denied the defence suggestion that no such occurrence was happened they have a long term dispute with Aiyub Munshi, he deposed falsely against him and the case was false.

47. PW 10 Shamsunnahar, the wife of the victim commander Abul Hossain stated in her deposition that at about 11-00 hour at night on 18-6-2005 his brother-in-law Abu Taleb coming to their house call her husband from sleeping and heard to inform something. As soon he looks unmindful. She then asked him what has happened and he replied that in the house of Nurul Islam a meeting was held to kill him. Her husband then said to her not to disclose the same to others. She then told her husband to inform the local police but her husband said to her that he will wait for some days and thereafter observing the situation something would be done. She further disclosed that her husband was killed on preplan. At about 10-00 AM on 20-6-2005 she saw some people to go with stick. She then followed them. When she noticed that 20 to 22 people, were standing there. At that time she saw two motor cycles to come. Out of them, one was riding by her husband and two of her brother-in-law and another was carried by her two sons. Accused persons, named Aiyub Munshi, Kamrul, Nur Islam, Mofazzal, Zill, Habib, Alamgir, A. Razzak, Badsha, Billal, Abu Sayed, Mahbub, Shahin, Zinnat, Nazrul, Magrib, Jahurul, Kamrul, encircled them. When Aiyub Munshi ordered them to kill them. Soon thereafter Nurul Islam proceeded towards them on rising his hands up and thereafter caught hold his hand. When Kamrul inflicted chair leg blow on his head and he then fell down on the ground. When Abul Hasan proceeded towards them he also got injury by ram dao on his head. In the similar way Mahfuz also became injured by A. Razzak and he then fell down on the ground and the accused persons spontaneously beat him. Thereafter, Shohag proceeded towards them. His mother happened and he replied that in the house of Nurul Islam a meeting was held to kill him. Her husband then said to her not to disclose the same to others. She then told her husband to inform the local police but her husband said to her that he will wait for some days and thereafter observing the situation something would be done. She further disclosed that her husband was killed on preplan. At about 10-00 AM on 20-6-2005 she saw some people to go with stick. She then followed them. When she noticed that 20 to 22 people, were standing there. At that time she saw two motor cycles to come. Out of them, one was riding by her husband and two of her brother-in-law and another was carried by her two sons. Accused persons, named Aiyub Munshi, Kamrul, Nur Islam, Mofazzal, Zillu, Habib, Alamgir, A. Razzak, Badsha, Billal, Abu Sayed, Mahbub, Shahin, Zinnat, Nazrul, Magrib, Jahurul, Kamrul, encircled them. When Aiyub Munshi ordered them to kill them. Soon thereafter Nurul Islam proceeded towards

them on rising his hands up and thereafter caught hold his hand. When Kamrul inflicted chair leg blow on his head and he then fell down on the ground. When Abul Hasan proceeded towards them he also got injury by ram dao on his head. In the similar way Mahfuz also became injured by A. Razzak and he then fell down on the ground and the accused persons spontaneously beat him. Thereafter Shohag proceeded towards them. His mother then stopped him. Rehana, the wife of Hasan when reached to rescue her husband she was also beaten by the accused. She then tried to rescue her husband, when accused Aiyub Munshi noticing the blood to come out from noose and mouth from the commander, ordered the other accused to leave the place since he was about to die. Accused persons then left the place of occurrence. The persons witnessing the occurrence took them to Vanga by van. Later on her husband and Dholan were taken to Faridpur hospital. Noticing her husband to vomiting, doctor sent him to Dhaka Medical College Hospital, where he succumbed at night on 21-6-2005. These accused persons killed her husband on preplan. Since her husband opposed the illegal acts of Aiyub Munshi in the club they killed her husband with preplan.

48. She was also cross-examined by the defence wherein she denied the defence suggestion that she did not witness the occurrence. Since they had long dispute regarding land, road and boundaries with the accused they instituted false case against the accused.

49. PW II Imran Hossain stated in his deposition that the killing was held on 20-6-2005. The seizure list was prepared on the following night of that day where he put his signature. He proved that seizure list (Exhibit-2) and his signature thereon. On that day he along with his brother Tutul were standing there. All on a sudden he saw his mother and aunt were proceeding towards the house of Bazlu Khan. He along with his brother following them and stayed far away from a shop and saw that some people were assembled there with rod, Chinese axe. All on a sudden two motor cycles came to the place of occurrence and reacted in front of the house of Bazlu Khan. The accused persons stopped them. The accused Aiyub Munshi, Kamrul, Nurul Islam, Mofazzal, Zinnah, Habib, Alamgir, A. Razzak, Badsha, Zinnat, Abu Sayed, Mahbub, Shahin, Zinnat, Nazrul Islam, Magrib, Jahurul, Kamrul encircled the motor cycle. When Aiyub Munshi ordered them to kill him, soon thereafter Nurul Islam going to his uncle commander caught hold of and accused Kamrul gave a chair leg blow on his head he then fell down on the ground. The other accused then started beating him. When his father tried to rescue them Jahurul gave a ram dao blow on his head and his father fell down on the ground and all of the accused persons started beating him. Mahfuz then tried to stop them, when A. Razzak gave a Chinese axe blow on his head causing bleeding injury to his younger brother. His middle brother tried to rescue them but the mother of Kamrul stopped him and the accused persons started beating him. Noticing the blood to come out from noose and mouth from the commander Aiyub Munshi, disclosed that he might be killed and all the accused left the place. Later on all of the victims including his mother were taken to the hospital. Later on his father and uncle were sent to Faridpur hospital and his brother was taken to Vanga and subsequently considering the deteriorating condition, his uncle was taken to Dhaka and one day thereafter at 2-00 AM at night he died.

50. He proved the seized alamats which were an iron rod (Material Exhibit No-I) a chair leg measuring 39" (Material Exhibit No-II) and a ram dao measuring 38" (Material Exhibit No-III) rest of the alamats were put in jimma which were not in court.

51. He was also cross-examined by the defence where he denied the defence sugges-

tion that nothing was recovered as alleged by him and he deposed falsely.

52. PW 12 Kazi Mosharaf, PW 13 Md Ziaur Rahman Tutul were tendered by the prosecution and the defence declined to cross-examine them.

53. PW 14 Dr Md A. Hashem Sheikh who proved the injury certificate given to the two witness of the occurrence and deposed that he is the RMO of Vanga Medical Health Complex, Faridpur at 10-00 AM on 20-6-2005 he examined the injured Mahfuz in the emergency department and found the following injuries-

1) One lacerated wound on forehead, measurement about 1-$^1/_2$"x $^1/_2$" x skin depth. It was caused by blunt heavy weapon. Nature of the wound is simple hurt.

2) One bruise type wound on dorsum of right hand measurement 2"x 1"x $^1/_2$". It was done with heavy and blunt weapon. Nature of the wound was simple hurt.

54. This patient was identified to the hospital and was identified by A. Taleb. He proved the injury certificate (Exhibit No-3).

55. He examined Rehena Begum and found the following injuries-

1) Abrasion on left shoulder. Measurement is 2"× 1"× superficial skin layer. It was done with blunt weapon. Nature of the wound is simple hurt.

2) Abrasion on bruise on right shoulder. Measurement is 2-$^1/_2$"× 1-$^1/_2$" × $^1/_2$" acsquamated depth. It was done with blunt weapon. Nature of the wound is simple hurt.

3) One bruise type of wound on rig Flunk (renal aria from book). Measurement is 1-$^1/_2$"× $^1/_2$"× $^1/_2$". It was done with blunt weapon. Nature of wound is simple hurt.

He proved the injury certificate (Exhibit No. 4).

56. He examined Abul Hasan Matabbar and found the following injuries-

1) One lacerated wound was noted on left mid-left parietal area of head. Measurement of wound way 2"x $^1/_2$"x $^1/_2$". It was done with heavy and blunt weapon. Nature of the wound is grievous hurt.

He proved the injury certificate (Exhibit No. 5).

57. He was also cross-examined by the defence wherein he disclosed that the injury he found on Mahfuz and Rehena Begum were been also obtained upon an accident.

58. PW 15 Dr. Md Rafikul Bari is the doctor of the forensic department, Dhaka Medical College who held the autopsy of the deceased Abul Hossain and asserted the following injury, he found and described in the post mortem report-

1) Swelling in right parital area.

2) Abrassion of various sizes in left elbow & dorsum hand of hand (left side)

On dissection—Haematoma under scalp in right half is found, Depressed fractured 1-$^1/_2$"x $^3/_4$" in right parital bone and is obliquely pleaced. neck of rt. temporal bone is obliquingly pleace, Brain haemorrhage in right half is found. Mentioned injuries are antemortem(NB Horizontal death certificate attached herewith).

Opinion— In my opinion death was due to haemorrhage and shock resulting from above mentioned head injury & was antemortem & homicidal in nature caused by blunt weapon. He proved the post mortem report (Exhibit No. 6).

59. In his cross-examination he further disclosed that injury No. 1 may have happened on falling down on the ground but it was not applicable for this injured person. The deceased died in internal haemorrhage, he sustained on his head injury.

60. PW 16 Rehana Begum stated in her deposition that she is a housewife. At about 10-00 AM on 20-6-2005 she saw some people were coming with stick on the hand then he along with her mother (Shamsunnahar) followed them up to the house of Bazlu Khan and take shelter near to the shop where she saw 20 to 22 persons were assembled by iron rod, Chinese axe, stick and the leg of chair. Then they saw two motor cycles to come from Vanga. The said 20 to 22 accused persons stop them in front of the house of Bazlu Khan. They were Ayub Munshi, Kamrul, Nurul Islam, Mofazzal, Zillu, Habib, Alamgir, A. Razzak, Badsha, Zinnah, Abu Sayed, Mahbub, Shahin, Zinnat, Kamrul, Jahurul, Magrib. When Aiyub ordered them to kill him, Nurul Islar proceeded towards commander on up rising his hands and caught hold his hands, when Kamrul inflicted a chair leg blow on his head and commander fell down on the ground. All of them started beating him. When her husband proceeded to rescue them accused Jahurul inflicted blow on his head he then fell down on the ground and the other accused persons started beating him. Thereafter, Mahfuz proceeded towards them, accused A. Razzak inflicted Chinese axe, he then fell down on the ground and became unconscious. Shohag was stopped by the mother of accused Kamrul when all of the accused persons encircled him he then noticed that blood are coming out from the head of her husband making his body smeared by blood. When Billal struck him by bamboo stick. One of them also beat her but she could not recognize him. Noticing the blood to come out from the noose and mouth from her brother-in-law he was taken to the Vanga Hospital. She also been taken to Vanga and other persons were referred to Faridpur. Subsequently considering the deteriorating condition, her brother-in-law was taken to Dhaka and one day thereafter in night he died. Thereafter when they started crying Abu Taleb disclosed that on 18th day accused Nurul Islam made a planning to his house and accordingly killed his brother. Since her brother-in-law tried to resist the terrorism on Aiyub Munshi he was killed. Accepting three accused persons she identified rest of the accused persons in the dock.

61. She was cross-examined by the defence where she denied the defence suggestion that she has seen nothing and deposed falsely against the accused as being a tutor witness.

62. PW 17 Md Jashim Uddin Khan Upazila Nirbahi Officer of the Kaliganj Upazila who being the recording Magistrate, recorded the statement of Zillur Rahman under section 164 of the Code of Criminal Procedure on 5-7-2005, and proved the said statement in court.

63. PW 18 ASI Md Nazrul Islam stated in his deposition that on 22-6-2005 he was on duty at Ramna Police Station. On that day upon a GD he was sent to Dhaka Medical Hospital wherein on the identification by the witness he prepared a Surthal Report on the deceased Abul Hossain and he proved the Surthal Report in court.

64. PW 19 Md Abu Taleb stated in his deposition that he was a businessman. At 9-30 PM on 18-6-2005 he along with Mosharaf went on walking on the bank of the river. When they reached near to the house of Nurul Islam, they got to know that behind a tree some people were whispering. They heard that Aiyub Munshi was saying because of Abul Hossain commander they could not work properly. All the way he tried to resist them when other accused persons asked him what to do. Then Aiyub Munshi said that commander is needed

to be killed. He along with Mosharaf then coming back to their house called commander Abul Hossain to wake up and disclosed him in details about the meeting. Who after hearing the same requested them not to disclose it to others, since he does not like to make a quarrel with them. In the morning he also disclosed all about it to his younger brother Abul Hasan. On the date of occurrence i.e. on 20-6-2005, at about 10-00 AM he along with the others were coming back to the house riding by two motor cycles. When they reached near to the house of Bazlu Khan 20 accused persons resisted them and encircled them. Amongst them Aiyub Munshi, Kamrul, Nurul Islam, Mofazzal, Zillu, Habib, Alamgir, A. Razzak, Badsha, Billal, Abu Sayed, Mahbub, Shahin, Zinnat, Nazrul, Magrib, Nazrul, Kamrul were there. He then took shelter near to the house of Bazlu khan. When Aiyub Munshi ordered them to kill him. Getting the order Nurul Islam proceeded towards the commander and caught hold his hands, soon thereafter Kamrul inflicted chair leg blow on the head of commander, who then fell down on the road, when all of the accused persons started beating him. Jahurul inflicted a ram dao blow on the head of Abul Hossain, who then fell down with a bleeding injury. When Badsha and Billal started beating him. Magrib also beat him by rod. A. Razzak inflicted a Chinese axe blow on the head of Mahfuz. He then fell down and became unconscious. Mahbub, Shahin, Abu Zahid started beating him. When Shohag tried to resist them. The mother of Kamrul stopped him. Then Aiyub Munshi noticing the blood of noose and mouth of commander disclosed that he might have died and asked them to leave the place. Then his sister-in-law caught hold his bleeding head, when Billal also struck her. He then took the victim to the hospital by two van. Thereafter commander and Hasan were sent to the Faridpur Hospital, where commander started vomiting and then he was referred to Dhaka Medical, where after two days, he died there and he along with his Sister-in-Law took the dead body to their home alter the autopsy and buried near to Bantra Madrasa on 22-6-2005. A seizure list was prepared where he put his signature.

65. In his cross-examination he further asserted that he did not disclose about the meeting of the night to Shohag. He denied the defence suggestion that he did not put his signature on surthal report and he deposed falsely.

66. PW 20 SI Md Ferdous Islam is the investigation Officer of this case. He submitted charge-sheet against 17 accused persons. He proved the charge-sheet what he has submitted.

67. DW 1 One Abu Sayem Mollah disclosed in this case as defence witness No. 1 and has said that he was the superintendent of Yusufia Dakhil Madrasa in Nagarkanda Faridpur. On 20-6-2005 the headmaster of morning section accused A. Razzak confirmed his presence in Madrasa and thereafter went to the UNO office at 10-00 AM to join in the meeting of the managing committee which was continued up to 11-30 AM. In the said meeting 12 members were there. The meeting was presided by UNO in the office of UNO. He placed the name of the member of the meeting (Exhibit No-Ka) which was certified by UNO. Later on he heard that this accused was falsely been implicated in this case.

68. DW 2 One of the member of the managing committee Md Mahfuzur Rahman stated in his deposition that he was a member of the managing committee of the Yusuf Dia Dakhil Madrasa. Accused A. Razzak was a teacher representative. He identified him as the teacher of the Madrasa. He met with him in the examination centre. At 10-00 AM on 20-6-2005 in the meeting presided by UNO A. Razzak was present along with him. The meeting was continued up to 11-30AM.

69. DW 3 Md Shahin Alam deposed as

defence witness No. 3 stated in his deposition that he being the son of his father got the responsibility of taking care of the vehicle in the market of Vanga. At about 9-00 to 10-00 AM on 20-6-2005 he was there in the hotel of Aiyub Munshi while Aiyub Munshi running the business sitting in the cash counter.

70. DW 4 One Alamgir Chowdhury deposed as defence witness No. 4 stated in his deposition that he is a deed writer at Atade under Vanga police station under the district of Faridpur. At about 6-30 AM on 20-6-2005 he was going to Vanga. In the hotel near to Vanga bus station he was taking his breakfast. After having his breakfast while he was paying bills he saw Aiyub Munshi was sitting in cash box and heard that an accident was held and the injured persons were taking to the hospital and Abul Hossain got injury.

71. DW 5 Md Osman disclosed that he cultivated fish. He is a commissioner of the Pourashava in ward No. 5 under Atadi village. He took his breakfast in the hotel of Aiyub Munshi. On 20-6-2005 he saw Aiyub Munshi was sitting in the cash box. There was grocery shop beside that hotel then he saw that a patient was taking by van.

On his query they replied that Abul Chacha got injury on an accident and he was taking to the hospital. After two days he died. He was present in the Janaza of Abul Hossain. He was the Ward Commissioner of Ward No. 5.

72. DW 6 One Abul Kalam Shamsuddin disclosed that he is now employed as ADC Bandarban. On 20-6-2005 he was posted at UNO in the Nagarkanda Upazila under Faridpur district. On that day a meeting of the managing committee of Yusufia Dakhil Madrasa was called on at UNO office. It was continued up to 10-00 to 12-00 AM. In the said meeting, all of the members were present and put their signature on the Resolution Book. A. Razzak Matabbar was also present in the said meeting and put his signature in the said Resolution Book. He also put his signature in the minutes paper. Later on A. Razzak Matabbar informed him that he was falsely been implicated in this case. He informed the police station through Superintendent of Police about the presence of A. Razzak in the meeting. In each and every papers he got his signature.

73. Those are the evidences of this case.

74. On the allegation of preplan, the accused Md Nurul Islam was convicted. On the contention that this findings against him is perverse and not tenable in law, we have examined the record and finds that:

a) In the FIR there is no statement about any preplan as been held by the trial court nor the said Md Nurul Islam was mentioned as an accused therein. Although the informant (PW 1) as being one of the victim and eye-witness of the occurrence given a vivid description against each and every 15 FIR named accused.

b) The trial court in its judgment observed that "আলোচ্য মামলায় প্রসিকিউশন পক্ষে দাখিলী এফ,আই,আর, পর্যালোচনায় দেখা যায় যে, আসামী নুরুল ইসলাম, হাবীব, জিল্লুর রহমান ও মোফাজ্জল মাতুব্বরের নাম উল্লেখ করা হয় নাই অথচ এই মামলার প্রায় সকল সাক্ষী আসামী নুরুল ইসলামের নাম সহ মোফাজ্জল মাতুব্বর, জিল্লু ও হাবিবের নাম উল্লেখ করিয়াছেন। আসামী জিল্লু মোফাজ্জল মাতুব্বর ও হাবীবের বিষয়ে সিদ্ধান্ত গ্রহনের পূর্বে ১৬১ ধারার জবানবন্দি এজাহার, আদালতে পেশকৃত প্রসিকিউশন পক্ষের সাক্ষীদের বক্তব্য ও ঘটনা প্রেক্ষাপট সার্বিকভাবে বিবেচনা করিতে হইবে। ১৬১ ধারার জবানবন্দিতে প্রায় সকল সাক্ষী আসামী নুরুল ইসলামের নাম উল্লেখ করিয়াছে। এই আদালতেও সকল সাক্ষী আসামী নুরুল ইসলামের নাম উল্লেখ করিয়াছেন। ফলে এজাহার, ১৬১ ধারায় জবানবন্দি তদন্ত কর্মকর্তার তদন্ত রিপোর্ট ইত্যাদি পর্যালোচনা করিলে নতুন ভাবে কয়েকজন আসামীর

নাম ভুক্ত হওয়ায় বিষয়টিকে কোন ক্রমেই Embellishment হিসাবে বিবেচনা করা যায় না। "and then held that"

যদিও এজাহারে আসামী নুরুল ইসলাম সহ চার্জশীট ভুক্ত চারজন আসামীর নাম উল্লেখ করা হয় নাই তথাপি আসামী নুরুল ইসলামের বাড়ীতে আইয়ুব মুন্সীর নেতৃত্বে ভিকটিমকে হত্যা করার পরিকল্পনার বিষয়টি তদন্ত ও সাক্ষ্যে সুস্পষ্টভাবে আদালতে প্রমান হইয়াছে।"

c) Shamsunnahar (PW 10), the wife of the victim Md Abu Taleb (PW 19), Md Mosharraf Hossain (PW 6) in their statement narrated a fact that they have witnessed a gathering of holding conspiracy and disclosing the same to the victim Commander Abul Hossain, but the following fact of stopping the others from saying the same and not taking any precaution for the same is against the normal behaviour of the human conduct and is not believable. If there is at all any such incident and the accused Nurul Islam is at all had any participation as narrated by the PWs of holding the hand of the victim before receiving the fatal blow from Kamrul Matubbor, obviously it would come in the FIR which was produced and lodged by the victims injured son, eye-witness informant Shohag Hossain. Thus it can safely be held that disclosure of his name and all above facts by the PWs in the case regarding presence and planning of Nurul Islam is nothing but a subsequent establishment. His conviction is thus not sustainable in law.

75. Accused Badsha Mia, Billal Hossain and Magrib Hossain were alleged to have beaten informant's uncle Abul Hasan (PW 8) on different parts of his body by stick and iron rod. This victim Abul Hasan also alleged that he caused head cutting injury as was inflicted by accused Jahurul Hossain by ram dao blow.

76. Injury certificate (Ext.5) reflects of having the following injury by Abul Hasan Matbor:

> "One Lacerated wound was noted on left mid-left parital area of head. Measurement of wound was 2"× $^1/_2$" × $^1/_2$". It was done with heavy and blunt weapon. Nature of the wound is GRIEVOUS-HURT."

77. The injury certificate do not corroborate the injury of the accused Badsha Mia, Billal Hossain and Magrib Hossain. Moreso the injury shown therein was also shown to have been caused by a blunt weapon. It was not a cut injury as alleged by Abul Hasan (PW 8) to be caused by ram dao blow inflicted by the accused Jahurul Hossain. However, since the doctor found grievous hurt on the vital part of the head of PW 8, which was caused to be inflicted by the accused Jahurul Hossain and thus he can be held guilty of committing an offence punishable under section 326 of the Penal Code. But the involvement of the above rest three accused namely Badsha Mia, Billal Hossain and Magrib Hossain were also not been proved.

78. In this case charge has been framed under sections 302/34/114 of the Penal Code against the accused, not under section 302/149 of the Penal Code. Thus there is no vicarious liability imposed upon each and every person alleged to be present there as contemplated under section 149 of the Penal Code. Section 34 of Penal Code only construe to an offence when individual acted jointly with other in furtherance of the common intention of all.

79. In this context reference may be made from a case of *Surendra Chauhan vs State of Madda Pradesh* reported in *(2000) 4 SCC 110*, wherein their Lordships opinion that "the existence of a common intention can be interred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the

purpose of common intention even the participation in the commission of the offence need to be proved in all cases. Thereafter the learned judges proceeded to state that to apply section 34 of the Penal Code apart from the fact that there should be two or more accused, two factors must be established:

(1) Common intention and

(2) Participation of the accused in the commission of an offence.

80. If a common intention is proved but no overt act is attributed to the individual accused, section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case.

81. Regard being had to the aforesaid principles, we shall proceed no analysis of the fact situation in the present case. On a scrutiny of the evidence, we find that the accused shown above although were alleged to have present there and alleged to cause some injury to the witness but there is no allegation against them that they made any preplan or common intention or have by any means taken any part to inflict any injury upon the victim. Thus they cannot be held guilty under section 34 of the Penal Code.

82. Now let us see the allegation against the accused Ayub Munshi and Kamrul Matubber. Ayub Munshi was alleged to be given an order to kill the victim. This version was corroborated in court through PWs 1 to 11, PW 16 and PW 20. They have in a voice corroborated this order to kill the victim. Thereafter regarding the giving of fatal blow upon victim it has been said in the FIR that the accused Kamrul Matubber inflicted iron rod blow on the head of the victim Commander Abul Hossain. But this assertion of indicting iron blow was not been corroborated by the witnesses while deposing in court. Rather all of the PWs in a voice said that Kamrul Matubbor getting the order, inflicted a chair leg blow on the head of the victim. However there may be discrepancy in the version of inflicting iron rod blow and chair leg blow in between F1R and the deposition of the persecution witness. But so far the presence and participation and infliction of injury by the accused Kamrul Matubber there is no dispute. And the defence after cross-examining the PWs could not find out any contrary to it. Medical evidence, viz. surthal report (Exhibit 9) and post mortem report (Exhibit 6) also corroborate the said injury.

83. Surthal report (Exhibit 9) speaks that 'ডান চোখ বন্ধ কালো ফোলা (আঘাতের ফলে মনে হয়) বাম চোখ খোলা মুখ খোলা দাত দেখা যায়। মাথার ৪ দিকে ফোলা। ডান দিকে একটি বেশী ফোলা। ডান কানে রক্ত দেখা যায়। বাম হাতের কনুই ও আঙ্গুলের ছাল যাওয়া। হাত পা স্বাভাবিক শরীরের সাথে আটানো। প্রশাব পায়খানা স্বাভাবিক। পরনে প্রিন্ট লুঙ্গী। মর্গে উপস্থিত স্বাক্ষীদের জিজ্ঞাসাবাদে মৃতের কারন জানা যায়। গত ২০-৬-২০০৫ইং তারিখ অনুমঃ ৯-৩০ সকাল, ফরিদপুর জেলার, ভাঙ্গা থানার অন্তর্গত আতাদী নামক গ্রামে বজলু খার বাড়ির পার্শ্বে ভাঙ্গা মাওয়া সড়কের বগাই ব্রীজের পশ্চিম পার্শ্ব হইতে চৌকি, গাটা হাট অভিমুখি ইটের ছলিং রাস্তার উপর বজলু খার বাড়ীর সংলগ্ন স্থানে মৃতকে পূর্ব শত্রুতার জের ধরে প্রতিপক্ষ হঠাৎ মৃতকে আক্রমন করে লাঠি শোটা দিয়া আঘাতের ফলে তিনি আহত হন।'

84. Post mortem report (Exhibit 6) speaks about the following injury:

1. Swelling in right parital and rt. temporal area.
2. Abrassion of various sizes in left elbow & dorsum of hand (left side).

85. All the prosecution witnesses having in a voice corroborated the infliction of above injury by the accused Kamrul Matubber upon the victim. Thus the presence and participation of the accused Kamrul Matubber been proved

by unimpeachable evidence.

86. Now the fact remains that the infliction of a single injury on a vital part i.e. on head and the death of deceased not instantly whether can construe an offence of murder under section 300 and punishable under section 302 of the Penal Code or it would be an offence of culpable homicide not amounting to murder punishable under section 304 of the Penal Code. In this regard we can take a reference from a case of *Abul Kashem vs State* reported in *10 BLD (AD) 210.* In the said case their lordships observed and held that:

> "According to PWs. 3 and 4 the accused persons were armed with lathis and halangas. The four injuries were however caused by lathis. There is no doubt that a lathi can be wielded as a deadly weapon. The lathi blows were inflicted on the vital parts of the victim the temporal regions of the head, the chest and the abdomen. There does not, however, appear to have been any fracture of bones caused by the assault. The doctor found only swelling injuries. The victim did not immediately succumb to the injuries and was alive for more than two days. Thus it is reasonable to hold that the injuries caused by the appellants do not appear to have been inflicted with the intention of causing the death of the victim. Nevertheless, from the use of the lathis on the vital parts of the deceased's body and that also one after another it can reasonably be inferred that the accused had at least the intention to cause such bodily injuries as were likely to cause death. The offence committed by the appellants, therefore, in our opinion, falls under the first part of section 304 of the Penal Code and not under the second part as contended by Mr Karim."

87. Upon agreeing with the view expressed above, we are also of the opinion that the injury of inflicting one chair leg blow on the head of the victim by the accused Kamrul Matubbor constituted an offence punishable under section 304 part-1 of the Penal Code. Accordingly the conviction of the accused Ayub Munshi, who was a order giver also converted to section 304 part-1 of the Penal Code and their sentence is commuted to life imprisonment instead of death penalty.

88. Accused Jahurul Hossain, who was found guilty under section 326 of the Penal Code is hereby sentenced to suffer rigorous imprisonment for 2 years with a fine of Taka 5,000 in default to suffer rigorous imprisonment for 6 months more. The accused Jahurul Hossain is directed to surrender before the court below to serve his rest sentence giving with the benefit of section 35A of the CrPC, failing which the trial court will take necessary action for assurance to secure his arrest and served out the rest of sentence. The convicted accused Ayub Munshi and Kamrul Matubber are convicted under section 304 Part-1 of the Penal Code and sentenced to suffer rigorous imprisonment for life with a fine of Taka 50,000 in default to suffer rigorous imprisonment for one year more

89. In the result, the death reference is hereby rejected and connected appeal being Criminal Appeal No.6293 of 2008 is allowed in part and the accused Abdur Razzaq, Bellal Hossain, Badsha Miah, and Magrib Hossain are hereby acquitted and conviction and sentence of the accused Jahurul Hossain is hereby modified as stated above and other Criminal appeal being Nos. 6491 of 2008, 6492 of 2008 and 6622 of 2008 are allowed and the Jail Appeal No.916 of 2008 is dismissed.

Send down the LCR along with the judgment at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Moyeenul Islam Chowdhury J
Md Ashraful Kamal J

Judgment
September 10th, 2014.

Dr Muhiuddin Khan Alamgir....Petitioner

vs

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

Constitution of Bangladesh, 1972
Article 102(2)
Malice in Law

The very initiation of the case is without any lawful authority inasmuch as admittedly the ejahar is predicated upon the enquiry report , we find malice in law in the matter of initiation and continuation of the proceedings of the case. A proceeding initiated with bad faith vitiates everything. The initiation and continuation of the case stand vitiated by malice in law. .....(16)

Emergency Powers Rules, 2007
Rule 18
Druto Bichar Tribunal Ain (XXVIII of 2002)
Section 6
Penal Code (XLV of 1860)
Section 198/420

Offences specified in section 6 of the Ain, do not attract the offences punishable under sections 198/420 of the Code. But by applying the provisions of Rule 18 of the Emergency Power Rules, 2007, the case was transferred to the Druto Bichar Tribunal, for trial by a notification published in the official gazette. The offences punishable under sections 198/420 of the Code are not serious offences in any view of the matter. The consideration of the Government for transfer of any serious offence to any Druto Bichar Tribunal should be objective. There is no scope for any subjective consideration of the Government in this respect. Government was actuated by malice in transferring case to the Druto Bichar Tribunal, for trial. The very transfer of the case to the Druto Bichar Tribunal, is not tenable in law. .....(17)

Emergency Powers Ordinance (I of 2007)
Sections 2 and 4
Emergency Powers Rules, 2007
Rule 18

Emergency Power Ordinance of 2007 was not given any retrospective effect, the question of application of the Emergency Power Rules to the case does not arise at all. .....(18)

Constitution of Bangladesh, 1972
Article 102(2)

Malice in Law—The alleged offence was committed by the petitioner long before the promulgation of the proclamation of the emergency. The question of applicability of the Emergency Power Rules of 2007 to the case in hand cannot be raised at all. The proceedings of the case being without lawful authority cannot be proceeded. .....(18)

Chairman, Anti-Corruption Commission vs Enayetur Rahman, 64 DLR (AD) 14 and Surendra Nath Saha vs State, 12 DLR 178 ref.

Shah Monjurul Hoque and Khairul Alam Choudhury, Advocates—For the Petitioner.

Md Motaher Hossain (Sazu), DAG with Purabi Rani Sharma, AAG and Khairun Nessa, AAG—For the Respondent No. 1.

Md Khurshid Alam Khan, Advocate—For the Respondent No. 2.

*Writ Petition No. 9150 of 2007.

Judgment

Moyeenul Islam Chowdhury J: On an application under Article 102 of the Constitution, a Rule Nisi was issued calling upon the respondents to show cause as to why the transfer of the Druto Bichar Tribunal Case No. 25 of 2007 arising out of DABGR.Case No. 1 of 2007 corresponding to Kotwali (Comilla) Police Station Case No. 92 dated 30-3-2007, now pending before the Druto Bichar Tribunal, Chittagong pursuant to SRO No. 209-Ain/2007 dated 28-8-2007 (as evidenced by Annexure-A(4) to the writ petition) and why the continuation of the Druto Bichar Tribunal Case No. 25 of 2007, pending in the said Druto Bichar Tribunal, Chittagong, should not be declared to be without lawful authority being inconsistent with section 6 of the Druto Bichar Tribunal Ain, 2002 and why the application of the Emergency Power Rules, 2007 to the said case should not be declared to be without lawful authority in the absence of any sanction required thereunder and as being hit by section 3(3)(Ka) of the Emergency Power Ordinance, 2007 and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The case of the petitioner, as set out in the Writ Petition, in short, is as follows:

The petitioner is an ex-member of the Civil Service of Pakistan. After his retirement from the Civil Service, he was involved in politics. At one stage, he was appointed State Minister-in-Charge of the Ministry of Planning. Subsequently, he was appointed Minister-in-Charge of the Ministry of Civil Aviation and Tourism and the Ministry of Science and Technology. However, during the currency of the emergency period in 2007, the respondent No. 3, an officer of the Anti-Corruption Commission (respondent No. 2), lodged an enquiry report with Comilla Kotwali Police Station against the petitioner which was subsequently treated as an ejahar on 30-3-2007. On the basis of that ejahar, Comilla Kotwali Police Station Case No. 92 dated 30-3-2007 under sections 198/420/109/120B of the Penal Code was initiated. It was alleged in the ejahar that by resorting to misrepresentation of facts, the petitioner obtained loan to the tune of Taka 3,84,000 from Agrani Bank, Rajgonj Branch, Comilla for construction of a building on his plot of land in Comilla; but he did not utilize the loan for the said purpose and that there was already a building on the plot of land in question which was rented out to another branch of Agrani Bank before sanctioning of the said loan and in this way, the petitioner deceived the bank. Anyway, it is the claim of the petitioner that he adjusted the entire loan amount on time. Although the offence was allegedly committed in between 1-1-1990 and 5-5-1999, that is to say, long before the proclamation of emergency on 11-1-2007, the Emergency Power Rules, 2007 framed under the Emergency Power Ordinance, 2007 cannot be invoked. As the alleged offence is not a scheduled offence of the Anti-Corruption Commission Act, 2004, the respondent No. 3 had no legal authority to enquire thereinto and submit an enquiry report which was eventually treated as an ejahar. However, after registration of the case by Comilla Kotwali Police Station, the police investigated the same and submitted charge-sheet against the petitioner under sections 198/420 of the Penal Code read with Rule 14 of the Emergency Power Rules, 2007. In the said charge-sheet, it was stated that the petitioner was allotted Plot No. 8, Block-N, section-1 of Comilla Housing Estate on 7-12-1977 and thereafter he transferred the said plot in favour of his son, namely, Mr Joy Alamgir by a deed of gift dated 1-1-1990. Having submitted the said deed of gift dated 1-1-1990, the petitioner obtained the loan of Taka 3,84,000 from Agrani Bank, Rajgonj Branch, Comilla for construction of building on the plot by having recourse to fraud and deception. On 27-3-1990, he rented out the building on the plot to Agrani Bank, Housing Estate Branch which

indicated that the building had been constructed before sanctioning of the loan. This conduct of the petitioner amounted to cheating. But it is his assertion that from the averments made in the charge-sheet, no case was disclosed against him either under section 198 or under section 420 of the Penal Code. Be that as it may, by SRO No. 209-Ain/2007 dated 28-8-2007, the case was transferred to the Druto Bichar Tribunal, Chittagong for trial in view of section 6 of the Druto Bichar Tribunal Ain, 2002 read with Rule 18 of the Emergency Power Rules, 2007. But the Druto Bichar Tribunal has no jurisdiction whatsoever to try the said case thereunder. As the Emergency Power Rules, 2007 framed under the Emergency Power Ordinance, 2007 were not given any retrospective effect beyond 12-1-2007, and their applicability to the case does not arise at all. This being so, the initiation and continuation of the case is without lawful authority and of no legal effect. Hence the Rule.

3. Neither the Government-respondent No. 1 nor the Anti-Corruption Commission-respondent No. 2 has filed any Affidavit-in-Opposition opposing the Rule. However, Mr Md Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent No. 1 and Mr Md Khurshid Alam Khan, learned Advocate appearing on behalf of the respondent No. 2, have advanced submissions before this Court.

4. At the outset, Mr Shah Monjurul Hoque, learned Advocate appearing on behalf of the petitioner, submits that in view of section 17 (ka) of the Anti-Corruption Commission Act, 2004, the Anti-Corruption Commission may enquire and investigate the offences mentioned in the schedule of the Act; but indisputably the alleged offences punishable under sections 198/420 of the Penal Code were not mentioned in the schedule of the Anti-Corruption Commission Act at the material time and this being the position, the respondent No. 3 had no legal authority to enquire into the alleged offences and submit an enquiry report which is malafide on the face of it.

5. Mr Shah Monjurul Hoque further submits that admittedly the enquiry report submitted by the respondent No. 3 was treated as an ejahar by Comilla Kotwali Police Station and this treatment of the enquiry report as an ejahar is a classic case of illegality and consequentially, the initiation and continuation of the proceedings of the case are a nullity in the eye of law.

6. Mr Shah Monjurul Hoque next submits by referring to the definition of " "দূর্নীতি" as provided in section 2(Umo) of the Anti-Corruption Commission Act that the word "দূর্নীতি" adverts to the offences mentioned in the schedule of the Act and as the alleged offences were not scheduled offences of the Anti-Corruption Commission Act at the relevant time, the entire exercise undertaken by the respondent No. 3 is 'de hors' the law.

7. Mr Shah Monjurul Hoque also submits that if the complaint of cheating is not made by the person cheated, the case will fail and since admittedly the bank did not initiate the case, its continuation is of no legal effect, regard being had to the 'ratio' enunciated in the decision in the case of *Surendranath Saha vs State* reported in *12 DLR 178.*

8. Per contra. Mr Md Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent No. 1, submits that the materials on record *prima-facie* disclose the commission of the offence of cheating and that being so, it cannot be said that the initiation and continuation of the case are a nullity in the eye of law.

9. Mr Md Khurshid Alam Khan, learned Advocate appearing on behalf of the respondent No. 2, submits that the scope of a writ petition in such a matter is very limited in view of the principle enunciated in the decision in the

case of the *Chairman, Anti-Corruption Commission vs Enayetur Rahman* reported in *64 DLR (AD) 14.*

10. Mr Md Khurshid Alam Khan further submits that the enquiry was held properly by the respondent No. 3 and in course of enquiry, it transpired that the offences complained of were not scheduled offences of the Anti-Corruption Commission Act at the relevant time and in this view of the matter, it cannot be said that the respondent No. 3 committed any illegality in enquiring into the offences.

11. Mr Md Khurshid Alam Khan, however, concedes that the enquiry report submitted by the respondent No. 3 ought not to have been treated as an ejahar by the concerned Police Station and the treatment of the enquiry report as an ejahar is not tenable in law.

12. We have heard the submissions of the learned Advocate Mr Shah Monjurul Hoque and the counter-submissions of the learned Deputy Attorney-General Mr Md Motaher Hossain (Sazu) and the learned Advocate Mr Md Khurshid Alam Khan.

13. At this juncture, we feel tempted to refer to the definition of "দূর্নীতি" as postulated by section 2(Umo) of the Anti-Corruption Commission Act. Section 2(Umo) of the Act contemplates that "দূর্নীতি" means the offences mentioned in the schedule of the Act. It is an indisputable fact that the alleged offences were not scheduled offences of the Act at the relevant point of time. So the question of enquiry into the alleged offences by the respondent No. 3 is out of the question. What we are driving at boils down to this: the respondent No. 3 was not empowered to enquire into the alleged offences, but nonetheless, he enquired thereinto. Furthermore, it is an admitted fact that the enquiry report submitted by the respondent No. 3 was treated as an ejahar by the concerned Police Station which gave rise to the instant case. In this regard, Mr Md Khurshid Alam Khan has candidly conceded that the treatment of the enquiry report as an ejahar is not sustainable in law. This being the panorama, we feel constrained to hold that the very initiation of the case 'de hors' the law.

14. Of course, the police investigated the case and submitted charge-sheet against the petitioner under sections 198/420 of the Penal Code. According to the claim of the prosecution, Agrani Bank was defrauded by the petitioner in the matter of obtaining the loan to the tune of Taka 3,84,000. Admittedly the bank authority did not come forward to lodge any case against the petitioner. In this connection, it transpires that Mr Shah Monjurul Hoque has rightly relied upon the decision in the case of *Surendranath Saha vs State* reported in *12 DLR 178.* The principle that has been enunciated in the decision is that where a complaint of cheating before the Court has been made not by the person defrauded but by another on his behalf, the case must fail. Keeping the above principle of law in view, we are led to hold that as the bank authority failed to lodge any case against the petitioner under section 420 of the Penal Code, the present case initiated at the instance of the Anti-Corruption Commission is bad in law.

15. It is true that in a case of this nature, an aggrieved party can invoke the extra-ordinary jurisdiction of the High Court Division under Article 102 of the Constitution in some exceptional circumstances. It transpires that those circumstances have been specified in paragraph 7 of the decision reported in *64 DLR (AD) 14* (supra). Paragraph 7 of the decision has been couched in the following terms:

> "7. This Court on repeated occasions argued that Article 102(2) of the Constitution is not meant to circumvent the statutory procedures. The High Court Division will not allow a litigant to invoke the extra-

ordinary jurisdiction to be convened into Courts of appeal or revision. It is only where statutory remedies are entirely ill-suited to meet the demands of extra-ordinary situations, that is to say, where vires of a statute is in question or where the determination is malafide or where any action is taken by the executives in contravention of the principles of natural justice or where the fundamental right of a citizen has been affected by an act or where the statute is intra vires but the action taken is without jurisdiction and the vindication of public justice require that recourse may be had to Article 102(2) of the Constitution."

16. Reverting to the case in hand, we find that the very initiation of the case is without any lawful authority inasmuch as admittedly the ejahar is predicated upon the enquiry report submitted by the respondent No. 3. From the materials on record, we find malice in law in the matter of initiation and continuation of the proceedings of the case. In fact, that malice is writ large on the face of the record. A proceeding initiated with bad faith vitiates everything. That is a settled proposition of law. So the initiation and continuation of the case stand vitiated by malice in law.

17. The offences specified in section 6 of the Druto Bichar Tribunal Ain, 2002 do not attract the offences punishable under sections 198/420 of the Penal Code. But by applying the provisions of Rule 18 of the Emergency Power Rules, 2007, the case was transferred to the Druto Bichar Tribunal, Chittagong for trial by a notification published in the official gazette on 28-8-2007. The offences punishable under sections 198/420 of the Penal Code are not serious offences in any view of the matter. The consideration of the Government for transfer of any serious offence to any Druto Bichar Tribunal should be objective. There is no scope for any subjective consideration of the Government in this respect. In view of the materials on record, it seems that the Government was actuated by malice in transferring the instant case to the Druto Bichar Tribunal, Chittagong for trial. So the very transfer of the case to the Druto Bichar Tribunal, Chittagong is not tenable in law.

18. It is undisputed that the Emergency Power Ordinance was promulgated on 12-1-2007 and the Emergency Power Rules were framed thereunder. As the Emergency Power Ordinance of 2007 was not given any retrospective effect, the question of application of the Emergency Power Rules to the instant case does not arise at all. The record indicates that the alleged offence was committed by the petitioner long before the promulgation of the proclamation of the emergency, that is to say, in between 1-1-1990 and 5-5-1999. In this perspective, the question of applicability of the Emergency Power Rules of 2007 to the case in hand cannot be raised at all. Precisely speaking, malice in law pervades the case from its very initiation up to the present stage. So the proceedings of the case being without lawful authority cannot be proceeded with in the Druto Bichar Tribunal, Chittagong.

19. From the foregoing discussions and in the facts and circumstances of the case, we find merit in the Rule. The Rule, therefore, succeeds.

20. Accordingly, the Rule is made absolute without any order as to costs. The initiation of the Druto Bichar Tribunal Case No. 25 of 2007 arising out of DABGR Case No. 01 of 2007 corresponding to Kotwali (Comilla) Police Station Case No. 92 dated 30-3-2007 and its continuation in the Druto Bichar Tribunal, Chittagong are without any lawful authority and of no legal effect.

Communicate a copy of this judgment to the Druto Bichar Tribunal below at once.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

Sheikh Abdul Awal J

Asok Kumar Roy and others.....Defendant-Petitioners

vs

Judgment
May 22nd, 2014.

Monsur Ali Gazi and others.....Plaintiff-Opposite Parties*

Code of Civil Procedure (V of 1908)
Order XVII, rule 1(4)

If the plaintiff fails to pay adjournment cost as given by the Court the suit shall liable to be dismissed and if the defendant fails to pay the adjournment costs the suit is liable to be disposed of *ex parte*. .....(9)

Bivash Chandra Biswas, Advocate—For the Petitioners.

Judgment

By this Rule the opposite party Nos.1-4 were called upon to show cause as to why the impugned judgment and order dated 11-9-2012 passed by the learned Additional District Judge, Jessore in Civil Revision No.48 of 2009 disallowing the Revision and affirming the order dated 13-5-2009 passed by the learned Assistant Judge, Monirampur, Jessore in Title Suit No. 50 of 2002 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. Material facts relevant for disposal of the Rule, briefly, are that the opposite party Nos.1-4 as plaintiffs instituted a suit being Title Suit No. 50 of 2002 in the Court of Assistant Judge, Monirampur, Jessore against the petitioners and others for declaration of title along with further declaration that SA record of the suit land is illegal, collusive and not binding upon the plaintiffs.

*Civil Revision No. 3327 of 2012.

3. The defendant-petitioners entered appearance in the suit and filed written statement which was accepted by order No.13 dated 20-7-2003 and next date of the suit was fixed on 9-8-2013 for framing issues and thereafter, the date of the suit was fixed on 13-5-2013 for hearing but the defendant-petitioners could not be present before the Court as a result of which the trial Judge rejected the written statement by his order dated 13-5-2009.

4. The defendant-petitioners being aggrieved by and dissatisfied with the said order dated 13-5-2009 preferred Civil Revision No.48 of 2009 before the learned District Judge, Jessore which was subsequently, transferred to the Court of Additional District Judge, 2nd Court, Jessore for disposal, who by the impugned judgment and order dated 11-9-2012 disallowed the Revision and affirmed the order of the trial Court below on the finding that since the defendant-petitioners violated the Court's order in not paying cost the trial Court committed no illegality in rejecting the written statement and the instant Civil Revision is directed against that judgment and order.

5. Mr Bivash Chandra Biswas, the learned Advocate appearing for the defendant-petitioners submits that the learned Additional District Judge, 2nd Court, Jessore committed serious illegality in affirming the order of the trial Court inasmuch as it is apparent from the record that the written statement was accepted by the trial Court below vide Order No.13 dated 20-7-2003. He next submits that according to the provision of Order XVII, rule 1(4) of the Code of Civil Procedure if the plaintiff fails to pay adjournment cost as given by the Court the suit is liable to be dismissed and if the defendant fails to pay the adjournment costs the suit is liable to be disposed of *ex parte* but the written statement cannot be rejected and in that view of the matter the first Revisional Court committed an error of law resulting in an error in the impugned decision occasioning failure of justice. Finally, Mr

Bivash submits that the impugned judgment as well as order of the trial Court below are perverse being contrary to law and facts and the same are liable to be set-aside.

6. I have considered the submission of the learned Advocate and perused the revision application, impugned judgment as well as order of the trial Court below. It appears that the trial Court below by its order No.13 dated 20-7-2003 accepted the written statement stating as follows: "অদ্য একতরফা শুনানীর জন্য দিন ধার্য্য আছে। বাদীপক্ষ হাজিরা দিয়াছে। ২-৬নং বিবাদীপক্ষ জবাব দাখিল করিয়া এক দরখাস্ত দ্বারা জবাব গ্রহনের প্রার্থনা করিয়াছে। কপি বিলি হইয়াছে। শুনিলাম। প্রার্থনা মনজুর। জবাব গৃহীত হয়। (ভি,ও,পি)। একতরফা শুনানী প্রত্যাহার করা হইল। আগামী ৯-৮-২০০৩ ইং তারিখ ইস্যু গঠনের জন্য রহিল।" It also appears that the suit was fixed for hearing on 13-4-2009 and on that date the defendants filed an application for adjournment which was allowed with cost and next date was fixed on 13-5-2009 but the defendants did not deposit the said cost on 13-5-2009 as a result of which the trial Judge by its Order No. 50 dated 13-5-2009 rejected the written statement stating as follows: "অদ্য এফ, পি, এইচ, ও খরচ দাখিলের জন্য দিন ধার্য্য আছে। বিবাদীপক্ষ গড় হাজির খরচা পরিশোধ করে নাই। বাদী পক্ষ ফিরিস্তি যুক্তে কিছু কাগজপত্র দাখিল সহ ৩ জন স্বাক্ষীর হাজিরা দিয়াছে। দেখিলাম। বিবাদী পক্ষের দাখিলকৃত জবাব বাতিল করা হলো। মোকদ্দমা সংগত কারনে একতরফা শুনানীর জন্য ৫-৭-২০০৯ তারিখ দিন ধার্য্য করা হলো।"

7. In Revision, the learned Additional District Judge, 2nd Court, Jessore by the impugned judgment and order disallowed the Revision and affirmed the said order.

8. To resolve the dispute, I like to quote hereunder the provisions of Order XVII, rule 1(4) of the Code of Civil Procedure which reads as follows:

> "(4) Notwithstanding anything contained in the Code, the Court shall not grant any adjournment at the peremptory hearing stage and thereafter in a suit at the instant of either party to the suit:
>
> Provided that if for ends of justice any adjournment is granted to a party under this sub-rule, the Court shall direct that party to pay a cost of not less than two hundred taka and not more than one thousand taka to the other party, within time to be specified by it, non-compliance with which, by the plaintiff shall render the suit liable to be dismissed and, by the defendant shall render the suit liable to be disposed of *ex-parte:*
>
> Provided further that the Court shall not grant more than three adjournments to a party even with cost under the above proviso."

9. From the above, it is clear that if the plaintiff fails to pay adjournment cost as given by the Court the suit shall liable to be dismissed and if the defendant fails to pay the adjournment costs the suit is liable to be disposed of *ex parte.*

10. It is unfortunate that the Courts below without applying their judicial mind in the facts and circumstances of the case and law bearing on the subject most illegally rejected the written statement for non-payment of cost.

11. I do not think therefore that the revisional Court below made a correct approach to the simple problem.

12. For the reasons stated above, I am led to hold that the impugned judgment does not deserve to be sustained.

13. In the result, the Rule is made absolute. The impugned judgment and order dated 11-9-2012 passed by the learned Additional District Judge, 2nd Court, Jessore in Civil Revision No. 48 of 2009 affirming the order dated 13-5-2009 passed by the learned Assistant Judge in Title Suit No.50 of 2002 is set-aside.

14. The trial Court concerned is directed to accept the cost as deposited by the defendants on 20-7-2009 and proceed with the suit expeditiously in accordance with law.

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

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Syed Md Ziaul Karim J
Ashish Ranjan Das J

Judgment
April 15th, 2013.

Lal Mohammad.....
.....Convict-Appellant

vs

State.....Respondent*

Criminal Trial

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

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

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

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

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

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

.....(28)

*Criminal appeal No. 957 of 1990.

No one Appears—For the convict-Appellant.

MA Mannan Mahon, DAG with Md Osman Goni, AAG and Md Ensan Uddin Sheikh, AAG—For the Respondent.

Judgment

Syed Md Ziaul Karim J: By this appeal, the convict-appellant has challenged the legality and propriety of the judgment and order of conviction and sentence dated 30-8-1990 passed by learned Judge of Special Tribunal No. 5, Khulna, in Special Tribunal Case No. 160 of 1984 convicting the appellant under section 5 of the Explosive Substances Act, 1908 and sentencing him to suffer rigorous imprisonment for five years.

2. The prosecution case as projected in the first information report and unfurled at trial are that on the night following 20-01-1984 at 23-00 hrs. ASI Jalaluddin Ahmed of Daulatpur Police Station received an information to the effect that at 2-00 hrs. accused Lal Mohammad of Pabna, while manufacturing hand bombs at his quarter, suddenly a bomb went off, thus causing serious injuries on his both hands. Then the informant was directed to inquire into the matter and to take action as per law and accordingly he, accompanied by C- Morshed Anwar and C- Sudhir Paul, went to the PO on 21-1-1984 at 1-00 hrs. and came to know that on the night of 20-01-1984 at about 2-00 AM there was an explosion in the PO wherein the accused resides and both his hands were injured and then he got himself admitted in the sadar hospital Khulna on the night of occurrence. The informant and his party men went to hospital at 2-00 AM and found him in Cabin No. 1 and on interrogation he made no statement. The doctor on duty stated that both the hands of accused were lost because of explosion. The informant seized alamats from PO in presence of seizure list witnesses namely Sheikh Abdul Kader (PW 1) and Shamsur Rahman. Thereafter, the prosecution was launched by lodging an FIR which

was recorded as Daulatpur PS Case No. 35 dated 24-1-1984 corresponding to GR No. 56 of 1984.

3. The Police after investigation submitted charge-sheet under sections 4, 5 of the Explosive Substances Act, 1908 accusing the convict as accused.

4. Eventually, the case was taken up for trial by the learned Judge of Special Tribunal No. 5, Khulna wherein the convict was called upon to answer the charge under sections 4, 5 of the Explosive Substances Act, 1908 and the accused on dock pleaded not guilty and claimed to be tried.

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

6. After closure of the prosecution case the accused on dock was examined under section 342 of the Code of Criminal Procedure and again he repeated his innocence and led no evidence in defence.

7. The defence case as it appears from the trend of cross-examination of the prosecution witnesses are that of innocence and false implication out of vengeance at his local rivals.

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

(a) The prosecution successfully proved the charge under sections 4, 5 of the Explosive Substances Act, 1908 against the convict;

(b) There are circumstantial evidence against the convict as he lost his both hands during explosion ;

(c) The evidence of prosecution witnesses are consistent, uniform and corroborative with each other with all materials particulars.

9. No one appears to support the appeal. In view of the fact it is an old appeal of 1990, we are inclined to take it up for disposal on merit considering the materials on record.

10. The learned Deputy Attorney-General appearing for the State opposes the appeal and submits that the Court below after considering the evidence rightly convicted the accused which calls for no interference by this Court.

11. In order to appreciate his submission we have gone through the record and given our anxious considerations to his submissions.

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

13. PW 1, Sheikh Abdul Kader is a local seizure list witness. He deposed that on the relevant time he was a taxi-driver. He heard that accused Lal Mohammad was admitted to hospital after accident and he had no knowledge about the occurrence. On the following day he put his signature in the blank paper. He proved the seizure list as Exhibit. 1 and he was declared hostile by the prosecution.

14. In cross-examination he denied the suggestion that on the night following on 19-01-1984 he was at his home and also denied that at the instance of accused Lal Mohammad he was deposing falsely.

15. PW 2 Md Harunur Rashid is a local witness. He deposed that he heard the occurrence, he had no knowledge about the occurrence. He was declared hostile by the prosecution.

16. In cross-examination he denied the suggestion that he was deposing falsely.

17. PW 3 Abul Hossain was tendered by the prosecution and defence declined to cross examine him.

18. PW 4 ASI Md Jalal uddin. He recorded

some facts in GD entry No. 834 wherein it was stated that during manufacturing bombs the accused received injury.

19. In cross-examination he stated that he received an information from the locals. He recorded GD.

20. PW 5 SI Golam Kibria. He was the informant and investigated the case. He deposed that at the relevant time he was attached with Daulatpur Police station. On 20-1-1984 at 2-00 AM duty officer Jalaluddin recorded the GD wherein he stated that he received an information that on 20-1-1984 at 2-00 AM accused Lal Mohammad was injured due to explosion of bombs. The case was entrusted to him for investigation. He went to investigate the case and came to learn that accused Lal Mohammad, while manufacturing bomb suddenly on explosion he received injuries. He seized some alamats and identified the accused on dock. He lodged FIR(Exhibit. 2) and his signature on it (Exhibit 2/1).

21. After investigation he submitted charge-sheet against accused Lal Mohammad.

22. In cross-examination he denied the suggestion that accused was implicated by the local rivals and there is no local witness who saw the occurrence.

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

24. In course of trial, the prosecution in all examined five witnesses, of them PWs. 1 and 2 are the local witnesses who disowned the prosecution case. P.W. 3 was tendered by the prosecution. PWs. 4 and 5 are the Police personnel, of them P.W, 5 is the informant and investigating officer of this case. They are not eye-witnesses however they collected the alamats to prove the circumstances of the case.

25. On appraisal of the evidence on record it transpires that the prosecution case absolutely rests upon the circumstantial evidence and evidence of PW 5, who is the informant and investigating officer of this case, categorically stated that the case was entrusted to him for investigation. He went to the PO and seized alamats of explosions and found accused Lal Mohammad in hospital with severe injured condition by explosion, who lost his hands by explosion of bombs. Although the other two local witnesses did not support the prosecution case but circumstances shows that the accused lost both his hands by explosion which categorically indicates that at the time of manufacturing bomb he lost his both hands.

26. Circumstantial Evidence—All judicial evidence is either direct or circumstantial. By 'direct evidence' is meant when the principal fact, or *factum probandum*, is attested directly by witnesses, things or documents. To all other forms, the term 'circumstantial evidence' is applied; which may be defined, that modification of indirect evidence, whether by witnesses, things or documents, which the law deems sufficiently proximate to a principal fact or *factum probandum* to be receivable as 'conclusive' when the connection between the principal and evidentiary facts- the *factum probandum* and factum probans- is a necessary consequence of the laws of 'Nature presumptive' when the inference of the principal fact from the evidentiary is only probable whatever be the degree of persuasion which it may generate. Circumstantial evidence is the evidence of circumstances as opposed to what is called direct evidence. Evidence which proves or tends to prove the *"factum probandum"* indirectly by means of certain inferences of deduction to be drawn from its existence or its connection with other *'facts probantia'* it is called circumstantial evidence. Authorship of a document can be proved like any other fact, by both direct as well as circumstantial evidence.

27. Circumstantial evidence means the evidence afforded not by the direct testimony of an

eye-witness to the fact to be proved, but by the bearing upon that fact or other and subsidiary facts which are relied upon as inconsistent with any result other than truth of the principal fact. Circumstantial evidence may be best understood by comparison with direct evidence. It is not evidence direct to the point in issue, e.g. the statement of a person that he saw another give a fatal blow to the deceased, but evidence of various facts other than the facts in issue which are so associated with the fact in issue that taken together they form a chain of circumstances leading to an inference or presumption of the existence of the principal fact. In a sense circumstantial evidence is also direct as the testimony must be that of persons who saw, heard of perceived the series or other the facts referred to before. "Circumstantial evidence is merely direct evidence indirectly applied. And direct evidence, when closely analysed, is found to possess the inferential quality : Circumstantial evidence is something from which facts in issue are to be inferred. It is not to be expected that in every case depending on circumstantial evidence, the whole of the law governing cases of circumstantial evidence should be set out in the judgment. Legal principles are not magic in contentions and their importance lies more in their application to a given set of facts than in their recital in the judgment. The simple expectation is that the judgment must show that the finding of guilt, if any has been reached after a proper and careful evaluation of circumstances in order to determine whether they are compatible with any other reasonable hypothesis. Circumstantial evidence means a fact on which an inference is to be found. The facts must be closely knitted and must carry conviction to the mind of a Judge. The dogs of the dog squad pointing towards the accused cannot be said to be a circumstance which can exclude the possibility of guilt of any person other than that of the accused or be compatible only with the hypoesthesia of guilt of the accused.

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

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

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

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

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

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

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

30. The credit to be given to the statement of a witness is a matter not regulated by rule of procedure, but depends upon his knowledge of fact to which he testifies his disinterestedness, his integrity and his veracity. Apportion of oral evidence depends on such variable in consistence which as a human nature cannot be reduced as a set formula *(40 DLR 58).*

31. The weight to be attached to the testimony of witness depends in a large measure upon various consideration some of which are in the face of it his evidence should be in consonance with probabilities and consistent with other evidence, and should generally so fit in

with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. In a word evidence of a witness is to be looked at from point of view of its credibility, it is quite unsafe to discard evidence of witness which otherwise appears reasonable and probable because of some suggestion against truthfulness of the witness.

32. Therefore, we find that there are cogent, convincing and unimpeachable evidence on record regarding the complicity of the accused in respect of commission of the offence. The prosecution successfully proved the charge against the accused Lal Mohammad beyond all reasonable doubt.

33. So the evidence of the above prosecution witnesses in respect of complicity of accused Lal Mohammad in manufacturing bombs are consistent, uniform and corroborative with each other with all material particulars. There is absolutely no reason to disbelieve the consistent and corroborative evidence of those competent witnesses having no reason whatsoever to depose falsely against the convict. The defence extensively cross-examined them but nothing could be elicited to shake their credibility in any manner whatsoever. So the same are invulnerable to the credibility.

34. It is significant to point out that there are consistent and uniform evidence that at the time of manufacturing bombs the convict lost his both hands by explosion.

35. In the absence of any other reasonable explanation as to the safe departure of such facts, no conclusion other than the guilt of the accused can be drawn.

36. Moreover, the impugned judgment and order of conviction in its entirety is well founded in the facts and circumstances of the case.

37. In the light of discussions made above and the preponderant judicial views emerging out of the authorities refer to above we are of the view that the impugned judgment and order of conviction suffers from no legal infirmities which calls for no interference by this Court. Thus the appeal having no merit fails.

38. In view of foregoing narrative the appeal is dismissed.

39. The impugned Judgment and order of conviction and sentence dated 30-08-1990 passed by learned Judge of Special Tribunal No. 5, Khulna is hereby confirmed.

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

Ed.

High Court Division
(Civil Appellate Jurisdiction)

Mamnoon Rahman J
Md Abu Zafor Siddiq ue J

Judgment
June 18th, 2012.

Farook (Md).....
....Plaintiff-Appellant

vs

Md Serajul Islam & others...Respondents*

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

While dealing with an application for rejection of plaint the question of prove or disprove cannot play any role because as per the civil jurisprudence the question of prove and disprove are totally based upon evidence which can only be done after framing issues and taking evidence. While rejecting the plaint the Court below also came to a conclusion regarding the schedule of the property which is absolutely a question of fact. .....(26)

Md Ibrahim Mollah with Md Baharuddin-al-Razi, Advocates—For the Appellant.

*First Appeal No. 229 of 2008 with Civil Rule Nos. 362(F) & 529(R) of 2010.

AK Rashedul Huq, Advocate—For the Respondents.

Umme Salam, Advocate—For the Respondent No.5.

Judgment

Mamnoon Rahman J: The First Appeal No. 229 of 2008, Civil Rule No. 362(F)/2010 as well as Civil Rule No. 529(R)/2010 are disposed of herewith by a common judgment as they do involve similar question of fact and law and the parties are same.

2. This appeal being First Appeal No.229 of 2008 is directed against the judgment and decree dated 10-8-2008 (decree drawn on 18-8-2008) passed by the Joint District Judge, 7th Court, Dhaka in Title Suit No.958 of 2008.

3. During pendency of the appeal the appellant preferred an application for injunction resulting which this Court vide order dated 31-5-2010 issued Rule upon the opposite party to show cause as to why the opposite party should not be restrained vide order of injunction as prayed for as well as this Court at the time of issuance of the Rule, directed the parties to maintain *status quo* in respect of possession of the suit property for a period of 8 weeks.

4. Subsequently son an application filed by the appellant petitioner under Order XXXIX, rule 2(3) read with section 151 of the Code of Civil procedure another Rule was issued calling upon the opposite party to show cause as to why proceeding should not be drawn for violation of the order passed by this Court on 31-5-2010.

5. The appellant, as plaintiffs, instituted Title Suit being No. 958 of 2008 in the Court of Joint District Judge, 7th Court, Dhaka for partition along with a prayer for declaration that the deed being No. 6391 dated 11-10-1968 is forged, fraudulent, ineffective and not binding upon the plaintiff. The case of the plaintiffs in short is that the original owner and possessor of the suit land was Sekina Begum, maternal grand mother of the plaintiff petitioner and respondent Nos. 2 and 3 and the mother of respondent No.1, who purchased the said land vide registered deed No. 3427 dated 4-7-1947 from one Shaimaty Shantipoda Debi. Shakina Begum was owning and possessing the said land including pond and building with an area of 0.65 acres of land. She died leaving behind plaintiff and defendant No. 1 and also defendant Nos. 2 and 3 as her legal heirs. The said property was not partitioned amongst the said heirs, and now the heirs of the late Shakina Begum have been owning and possessing the said land as ejmali property. The defendant No. 1 is the son of Sakina Bibi and defendant No. 3 is the son of Begum Sayeda. Begum Sayeda died leaving behind one son Md Farook, the plaintiff petitioner and defendant Nos. 2 and 3 and the suit properties of Begum Sayeda i.e. all the heirs have been possessing the said land at their sweet will and the plaintiff-petitioner has been possessing a small part of the suit land and the rest of the land has been in possession of the defendant respondent opposite parties which are more land than that of the plaintiff-petitioner land, the plaintiff-petitioner is the grandson (Nati) of late Shakina Begum who will get 2/12 shares amounting to 1083 ajutangsha, and on the other hand defendant Nos. 2 and 3 would get 1083 ajutangsha, the plaintiff petitioner asked the defendant-opposite party No.1 Serajul Islam to give their share but on reply he stated that they will not get any share of the suit land as the mother of the defendant No. 1 Shakina Begum gifted all the property of the suit land in favour of defendant opposite party No. 1 and after hearing this the plaintiff-petitioner on 21-1-2008 found out that he created a deed by false personification which was clearly described in the schedule of kha and the said deed was created and the mother of the defendant-opposite party No. 1 was not owning of the said land as the owner and possessor

of the said land was Abdul Matin Dhali. The husband of Shakina Begum and their heirs was alive while the deed was created by the defendant-respondent opposite party No.1 which are false, fabricated and created by false personification and while the said deed was created by false personification and while the said deed was created the defendant-opposite party No. 1 was in France. So the possession of the said property was not at all handed over to him which was the main ingredient of a deed of heba-bil-ewaz which was not at all complied with. Moreso, the owner and possessor of the property mentioned in the schedule Mosammat Shakina Begum purchased the said by a registered deed being No. 3427 dated 4-7-1949 and the suit land was an ejmali property which was never partitioned between the heirs of Mosammat Shakina Begum by mates and bounds as a result the plaintiff-petitioner is unable to develop the said property. The cause of action firstly arose on 10-1-2008 when the defendant denied to partition the said property for which the plaintiff-petitioner was compelled to file the suit for partition with declaration that the deed in question is not binding upon the plaintiff as it is false and concocted to the said deed.

6. The defendant opposite party No.1 contested the suit by filing written statement denying all the material allegation made in the plaint. The defendant in their written statement categorically denied the case of the plaintiffs in 19 paragraphs as well as stated their case in a detailed manner.

7. Thereafter, the defendant-respondents filed an application under Order VII, rule 11, (A) to (D) for rejection of the plaint. The same was contested by the plaintiffs appellant by way of written objection. The Court below after considering the facts and circumstances, provision of law, the said impugned judgment and decree rejected the plaint. Being aggreived the plaintiffs appellant moved before this Court by way of appeal and consequently obtained subsequent two Rules one relating to injunction and one relating to violation of the order passed by this Court.

8. Mr Md Ibrahim Mollah, the learned Advocate appearing on behalf of the appellant submits that the Court below without applying its judicial mind and without considering the facts and circumstances most illegally and in an arbitrary manner passed the impugned judgment and decree and thereby the Court below committed an error which requires interference by his Court. He submits that Order VII, rule 11 of the Code of Civil procedure deals with the provision relating to rejection of plaint and admittedly the present case in hand does not come within the purview of the conditions as stipulated in Order VII, rule 11 of the Code as such, the judgment and decree passed by the Court below is liable to be set-aside for ends of justice. He submits that while rejecting the plaint the Court below not only considered the plaint in its entirety but also considered the defence case as narrated by the defendant in their written statement and, as such, the Court below violated the principle relates to rejection of plaint which tantamounts to miscarriage of justice. He submits that it is now a well settled proposition of law that while rejecting the plaint the Court below is to satisfy itself that on the assertion available or apparent on the face of the plaint is sufficient to reject the plaint but in the case in hand while rejecting the plaint the Court below considered the question of limitation, *res judicata* and other issues in a detailed manner which can only be done after framing specific issues on that point. He submits that in the instant case in hand the Court below not only travelled beyond the plaint but also considered written statement filed by the defendant in a detailed manner as well as while rejecting the plaint the Court below upon his own findings and some hypothecation rejected the plaint which is liable to be set-aside for ends of justice. He submits that it is now well settled

by this Court as well as of our Apex Court that the question of limitation as well as the question of *res judicata* are mixed questions of fact and law and these questions can only be resolved after framing issues on the particular points and in such circumstances, the impugned order so far it relates to rejection of plaint not only causes injustice but also non suited the plaintiff from claiming their legal right in the Court of law. In support of their contention the learned Advocate for the appellant relied on the decisions reported in *50 DLR (AD) 99, 49 DLR (1997) 531, 49 DLR (1997) 234, 50 DLR (1998) 29, 52 DLR (2000) 194.* The learned Advocate further submits that despite an order of injunction by way of *status quo* granted by this Court on 31-5-2010 the defendant respondent opposite party violated the order passed by this Hon'ble Court for which this Court issued Rule and on the proven facts and circumstances an appropriate order is also required under Order XXXIX, rule 2(3), of the Code of Civil Procedure. In support of his contention, the learned Advocate placed the application for drawing proceeding Annexure-B to show the manner of violation in the present case in hand.

9. Mr AK Rashedul Huq, the learned Advocate appearing on behalf of the respondents opposite parties vehemently opposes the appeal as well as Rules. He submits that the Court below on proper appreciation of the facts and circumstances and the provision of law has rightly rejected the plaint and thereby the same requires no interference by this Court. The learned Advocate referred the plaint as well as the written statement and submits that while rejecting the plaint the Court below came to a conclusion regarding the question of limitation in a lawful manner as well as addressed the other issues which are very much legal and acceptable as well as applicable for invoking the provision laid down in Order VII, rule 11 of the Code of Civil Procedure. He submits that apart from the provision as laid down in Order VII, rule 11 of the Code of Civil Procedure a Court of law exercising the power conferred under section 151 of the Code can also reject a plaint if the same is not covered within the ground as stipulated in Order VII, rule 11 of the Code of Civil Procedure. He submits that exercising the inherent power the Court of law reserved the absolute power to reject a plaint if it is apparent that the further proceeding of a suit is fruitless. The learned Advocate placed certain facts and circumstances and submits that there are serious suppression of fact and declaration as sought relates to the deed which is a very old one as well as the old description to the suit property was not there though the plaintiffs is praying for decree of partition as well as there are certain admissions by the plaintiff in the plaint regarding the Heba-bil-ewaz. He submits that the present case in hand not only is hit by the provision Order VII, rule 11(D) of the Code but also attract the provision of section 151 of the Code as it is apparent on the face of the record of the instant suit is nothing but a fruitless litigation and harassing the parties for indefinite period. He submits that the plaintiff failed to proof their claim in the plaint in an appropriate manner rather the plaint was not drawn in accordance with the provision of the Code of Civil Procedure as the grounds as pressed anf stated by the Court below while rejecting the plaint are fit and proper ground as such, the impugned judgment and decree is liable to be sustained for ends of justice. He submits that it is apparent from the plaint that there is no cause of action rather the plaintiffs failed to make out any *prima-facie* case regarding the question of limitation, cause of action as well as other issues and, as such, the trial Court committed no illegality in rejecting the plaint. The learned Advocate also submits that apart from invocation of section 151 of the Code of Civil Procedure, the Court of law while rejecting the

plaint can travel beyond the plaint to ascertain documents and materials which are admitted in the plaint itself and, as such, there is no harm in relying upon the documents and materials on record beyond the plaint which are admitted by the parties in the plaint and in the present case in hand the other materials which includes written statement filed by the defendants are admitted by both the parties and, as such, the Court below committed no illegality in rejecting the plaint summarily. Regarding injunction he submits that since the plaint was rejected as such, the appellant plaintiffs are not entitled to get any injunction as much as there was no violation as because the said show cause was in existence much earlier before filing of the suit in hand. In support of his contention the learned Advocate also relied upon the decision reported *50 DLR (AD) 99*. He also referred the decisions reported in *35 DLR 39, PLR (2008) (SC) 371, 51 DLR (AD) 155, 49 DLR (AD) 151, 54 DLR 310, 22 BLD (HCD) 423, 2002 (SCR) 338* and *53 DLR (AD) 12*.

10. We have perused the impugned judgment and decree, Memorandum of Appeal, counter-affidavits, application for injunction, application for drawing up proceeding under Order XXXIX, rules 2 and 3 of the Code and other orders passed by this Court. We have also perused the provisions of law and decisions as referred to. Admittedly the plaintiffs appellant filed a suit being No.958 of 2008 in the Court of Joint District Judge, Dhaka for the following reliefs;

১৩। বাদীর প্রার্থনা এই যে,

(ক) নালিশী ক তফসিলে বর্ণিত ২/১২ অংশে ১০৮৩ অযুতাংশ সম্পত্তি বাদীর বরাবরে এক সুনির্দিষ্ট ছাহাম বন্টনের প্রাথমিক ডিক্রী দিতে;

(খ) খ তফসিল বর্ণিত বিগত ১১-১০-৮৬ ইং তারিখ এর রেজিস্ট্রীকৃত ৬৩৯১ নং হেবা দলিল তঞ্চকী অবৈধ যোগসাজশী অকার্য্যকর ও বাদীর উপর বাধ্যকর নহে মর্মে ঘোষনা মূলক ডিক্রী দিতে;

(গ) ক প্রার্থনা মোতাবেক প্রাথমিক ডিক্রীর পর বিজ্ঞ আদালত কর্তৃক একজন কমিশনার নিয়োগ করিয়া নালিশী সম্পত্তিতে বাদীর ছাহাম চিহ্নিত করিয়া সকল প্রকার বাধা বিঘ্ন অপসারণক্রমে দখল বুঝাইয়া দিয়া বিজ্ঞ আদালতে প্রতিবেদন দাখিল পূর্বক চূড়ান্ত ডিক্রী প্রচার করিতে;

(ঘ) মোকদ্দমার সম্যক ব্যয়ের ডিক্রী দিতে;

(ঙ) আইন ও ইকুইটি মূলে বাদী আর যে, সকল প্রতিকার পাইতে হকদার তৎমর্মে ডিক্রী দিতে সদয় মর্জি হয়।

11. It appears that after filing of the suit, notices were served upon the defendants and the defendant entered appearance and filed written statement in a detailed manner on 29-5-2008 thereafter the defendants application under Order VII, rule 11 of the Code of Civil Procedure on 8-7-2008. The main contention of the defendants is that the plaintiffs by suppression of earlier knowledge of facts instituted the suit showing 10-1-2008 and 21-1-2008 as the cause of action which is not correct and, as such, there is no cause of action for the instituted suit in hand. The further contention is that since the deed in question was executed 40 years back and the same was within the knowledge of the plaintiffs and the predecessor in interest as such, the same is hit by the question of limitation. The further case as stated in the application is that neither the mother of the plaintiffs nor her other co-sharer claimed the-suit property in any manner and since the defendants predecessor executed the deed in the year 1968, the right and title of the donor was relinquished as the same is vested upon the defendant No.1 and, as such, the plaint is liable to be rejected. It appears that the same was contested by the appellant by way of written objection. The Court below vide the impugned judgment and decree rejected the plaint.

12. Admittedly the suit is for partition as well as declaration to the effect that a deed is not binding upon the plaintiffs as much as fraudulent and collusive one. It further appears from the lower Court record that the defendants before filing of the application under

Order VII, rule 11 of the Code filed detailed written statement denying all the material allegation made by the plaintiffs as, much as, in the written statement the defendant, narrated their case in a detailed manner. Order VII, rule 11 of the Code of Civil Procedure deals with the provision relates to the rejection of plaint which runs as follows;

The plaint shall be rejected in the following case:

(a) Where it does not disclose a cause of action;

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

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

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

(e) Where any of the provisions of rule 9(IA) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court fails to do so [Provided that the time fixed by the Court for the correction of the valuation or supplying the requisite stamp-paper shall not exceed twenty-one days.]

13. As per the said provision of law, it appears that a suit which is on the face of it is not competent under the law should not be allowed to proceed. A plaint can be rejected only on the grounds stated in the Rule and in the absence of any such ground the question of maintainability can be gone into at the time of hearing of the suit. There is no legal scope to reject the plaint unless the plaint itself shows the want of cause of action or the suit is barred by law. In determining whether a plaint is to be rejected, the court will take only the plaint and documents filed therewith into consideration and not what has been urged by the defendants in a petition or in the written statement. The power to reject a plaint or to return it for amendment should not be exercised, except in a clear case. Where on the averments made in the no cause of action is disclosed, the court is bound to reject the plaint. For ascertainment of cause of action the court has to read the plaint in its entirety.

14. Where materials other than the plaint has to be looked into to decide whether a suit is barred by law. The plaint cannot be rejected, plea of implied bar has to be decided on taking evidence unless the bar is patent. Where the suit on the averments made in the plaint appears to be barred by limitation, the plaint has to be rejected, but it is not mandatory and the court may allow the plaintiff to amend the plaint so as to enable the plaintiff to aver facts which would render the suit not to be barred limitation. However, a plaint cannot be rejected on the ground of limitation when questions of fact are involved. The rule is not exhaustive in the matter of rejection of plaint, in exceptional situation a plaint can also be rejected under section 151 of the Code even if it does not come within the mischief of this rule. A suit may be specifically barred by law in which case this rule is attracted. But even in a case where a suit is not permitted by necessary implication of law in the sense that a positive prohibition can be spelt out of the legal provision, the court has inherent jurisdiction to reject a plaint. A plaint may be rejected when there is an implied bar. However, the plea of implied bar should ordinarily be decided on evidence unless, the facts disclosed in the plaint clearly show that the suit is not maintainable. When the ultimate result of

the suit is as clear as day light, such a suit should be buried at its inception so that no further time is consumed in fruitless litigation.

15. It appears that while rejecting the plaint in hand the Court below basically came to a conclusion that there is no cause of action as well as the suit is barred by limitation. While passing the impugned judgment and decree the Court below came to a conclusion that the prayer or the claim relates to partition is relied upon the decisions regarding the deed in question executed in the year 1968 and as per the Court below if the plaintiffs fail to prove the claim so far it relates to the deed in question they are not entitled to get a decree in partition. It appears that the Court below held as follows;

বাদীপক্ষ দাখিলী আরজীর কোথাও বিগত ১১-১০-৬৮ ইং তারিখের ৬৩৯১ নং দলিলে দলিল দাত্রী সখিনা খাতুনের স্বাক্ষর নাই মর্মে সুস্পষ্ট ভাবে উল্লেখ করেন নাই। সখিনা খাতুনের পরিবর্তে অন্য ব্যক্তিকে সখিনা খাতুন হিসাবে দাঁড় করিয়া উক্ত দলিল খানা সৃজন করা হইয়াছে মর্মে দাবী করেন নাই।

16. The Court further held:

বাদীপক্ষ আরজীতে বলিয়াছেন যে, সখিনা খাতুন স্বামী-মাতা, কন্যাকে বঞ্চিত করিয়া কেবল মাত্র ১নং বিবাদীকেই সমস্ত সম্পত্তি দিয়াছিলেন, ইহা ও সম্পূর্ণ মিথ্যা, জাল, জালিয়াতি ও তঞ্চকী। কিন্তু বাদীপক্ষের এই বক্তব্য আদৌ আমল যোগ্য নয়।

17. So it appears that thought the plaintiffs claimed that the said deed was executed by depriving other heirs which cannot be accepted as per the Court. In such circumstances, the court held as follows;

কেননা আইন অনুযায়ী কোন সম্পত্তির সত্বাধিকারী তার অন্যান্য সকল আপন জনকে বঞ্চিত করিয়া নিজ সন্তানকে তার মালিকী সম্পত্তি হস্তান্তর করিয়া দিতে পারেন উহাতে কোন আইনগত বাধা নাই।

18. The Court further held as follows;

বাদীপক্ষ দাখিলী আরজীর ৮ম পৃষ্ঠার ৯ম অনুচ্ছেদের দ্বাদশ হইতে ত্রয়োদশ লাইনে উল্লেখ করেন যে, "যদি তিনি প্রকৃত পক্ষে হেবা করে দেন তাহা হলে খুবই গোপনে করেছেন"। দাত্রী নালিশা তপসিল বর্ণিত সম্পত্তি নালিশী দলিল মূলে হেবা করিছিলেন এই তথ্যই *(sic)* এই বক্তব্য হতে পরিস্ফটিত হয়। উল্লেখ্য, ১৯৬৮ ইং সনে ঢাকার সম্পত্তি মুন্সিগঞ্জে রেজিস্ট্রি হইতে কোন আইনগত বাধা ছিলনা বিধায় মুন্সিগঞ্জ রেজিস্ট্রি হওয়ার অজুহাতে নালিশী দলিলটিকে প্রথম দৃষ্টিতেই সন্দেহের চোখে দেখা যায় না।

19. The Court further held as follows;

কাজেই মৃত্যুর পূর্ব পর্যন্ত নালিশী দলিলের দাত্রী নালিশী দলিলে বর্ণিত নালিশী ভূমিতে দখলে ছিলেন বিধায় নালিশী দলিল বাতিল যোগ্য মর্মে বাদীপক্ষের দাবীকে স্বীকৃতি প্রদান করা যায়না। বাদীপক্ষ আরজীতে আরো বলেন ১১-১০-৬৮ইং তারিখে ১নং বিবাদী সিরাজুল ইসলাম সুদুর ফ্রান্সে ছিলেন। তিনি তখন সম্পত্তির দখল বুঝিয়া নিতে পারেন নাই এবং তাহার পক্ষে সম্পত্তির দখল কেহ বুঝিয়া নিয়াছে তাহার ও কোন প্রমান নাই। কিন্তু সুদুর ৩৯ বৎসর ৯ মাস ২৯ দিন পূর্বের বিগত ১১-১০-৬৮ইং দিনটিতে ১নং বিবাদী অবশ্যই ফ্রান্সে ছিলেন মর্মে কোন তথ্যের উপর ভিত্তি করিয়া বাদীপক্ষ স্থির সিদ্ধান্তে উপনিত হইয়াছে তাহা সুস্পষ্টভাবে আরজীতে বাদীপক্ষ বলেন নাই কাজেই বাদীপক্ষে এ দাবীটিও আপাততঃ যুক্তিগ্রাহ্য ও প্রমানিত নয়।

20. The Court further held as follows;

বাদীপক্ষ আরজীতে নালিশী ভূমির আর, এস জরীপি পরিচিতি প্রদান করেননি। এই মর্মে সুস্পভাবে আরজিতে বলেননি যে, নালিশী ভূমি বাবদ সর্বশেষ জরীপি খতিয়ান বাদীপক্ষের বায়া সখিনা খাতুনের নামে বা উভয় পক্ষের নামে প্রচারিত হইয়াছে এবং নালিশী ভূমির খাজনা অদ্যাবধি সখিনা খাতুনের নামে অথবা সখিনা খাতুনের মৃত্যুতে তদ্বীয় ওয়ারিশদের নামে বা উভয় পক্ষের মৌরযের নামে এজমালিতে প্রদান করা হইয়া থাকে। কাজেই এই মর্মে সিদ্ধান্ত গ্রহণ করা যায় যে, নালিশী দান পত্র সম্পাদন হইবার পর হইতে নালিশী ভূমির খাজনাদী এজমালিতে বা উভয় পক্ষের মৌরযের নামে আদায় না হইয়া বেকলমাত্র নালিশী দানপত্র গ্রহীতার নামেই আদায় করা হইতেছিল এবং নালিশী ভূমি বাবদ সর্বশেষ জরীপি খতিয়ান দান পত্র গ্রহীতার নামে প্রচারিত হইয়াছে এবং এই জন্যই বাদীপক্ষ আরজিতে এতদসংক্রান্ত কোন বাক্য ব্যয় করেননি এবং নালিশী দলিলখানা সর্বত ভাবে একটি কার্য্যকর দলিল এবং নালিশী দলিলের অর্ন্তভুক্ত ভূমি বর্তমানে উক্ত দলিলের গ্রহীতার ব্যক্তিগত ভূমি উহা উভয়পক্ষের এজমালি ভূমি নয় বাদীপক্ষ আরজীর ৭ম পৃষ্ঠার ৮ম অনুচ্ছেদে উল্লেখ্য করেন যে, নালিশী দলিল সম্পাদন কালীন দলিলের দাত্রীর স্বামী, মাতা, কন্যা সকলেই জীবিত ছিলেন। বাদীর আরজীর এই বক্তব্য এবং উপরিউক্ত আলোচনার আলোকে বলা যায় যে, নালিশী দলিল খানা এই সকল আপনজনের জ্ঞাতসারে সখিনা বেগম স্বীয় ইচ্ছার প্রতিফলন স্বরূপ সম্পাদন ও রেজিষ্ট্রি করিয়াছেন বিধায়ই এবং দলিলখানা উপরিউক্ত রূপে একটি কার্যকর দলিল হওয়ায় এই সকল নিকট জন দলিল খানার বিরুদ্ধে কোন আপত্তি উত্থাপন করেননি এবং বাদীপক্ষ

মৌরষানুক্রমে পূর্বাপর জ্ঞাত থাকিয়া সম্পূর্ণ ৩য় পক্ষ হিসাবে কার্যকর দলিল খানার বিরুদ্ধে অত্র মোকদ্দমা রুজু করিয়াছেন, দলিলখানা রেজিষ্ট্রি হইবার ৩৯ বৎসর ৯ মাস ১৩ দিন পর, যখন উক্ত দলিলের দাত্রী সখিনা বেগম এবং বাদীপক্ষের নিকটবর্তী মৌরষ বাদীপক্ষে মাতা সায়েদা বেগম মৃত।

21. By the aforesaid findings the Court below came to a conclusion that the claim of the plaintiff are not sustainable and there is no cause of action as much as the plaintiffs failed to prove their *prima-facie* right and title. Admittedly in the decisions as referred by the learned Advocate for the appellant this Court as well as our Apex Court came to a conclusion that the question of limitation can only be considered if there is no factual aspect available. As per their Lordships when the question of limitation about such facts that should be disposed of by taking evidence after framing issues. Also in the said decisions the High Court Division came to a conclusion that the Court should look into the averments made in the plaint and cannot go beyond the same to find whether the plaint is liable to be rejected or not. As much as while considering the application for rejection of plaint there is no scope to consider the possible defence plea. Apart from that the Court further came to a conclusion that the plaint could be rejected only when the Court comes to the conclusion that even if all the averments made in the plaint are taken to be proved still that the plaintiffs could not be entitled to any relief at all. Also this Court as well as of our apex Court came to a conclusion that the question of limitation and the question of *resjudicata* and others issues as raised in the application for rejection of the plaint are mixed questions of fact and law which needs through investigation on the basis of credible evidence for arriving in a correct decision by framing specific issues. In the case reported in *35 DLR 39* the Court below deals with the question of limitation but the same does not relate to rejection of plaint rather while deciding the judgment and order the Court came to a conclusion regarding the question of limitation in that case. In the case reported in *PLD (2008) (SC) 31* the Court deals with the issue relating to the cause of action and came to a conclusion that it would be pertinent to mention here that the term cause of action represents all the requisites and the facts which are necessary for the plaintiff to prove, before he can succeed in a suit. In the case reported in *53 DLR (AD) 12* their Lordships came to a conclusion that if the ultimate result of the suit is as clear as day light such a suit should be buried at its inception so that no further time is consumed in a fruitless litigation. In the case reported in *51 DLR (AD) 155* their Lordships came to a conclusion that in a partition suit in the hotchpotch the property are to be attracted in an appropriate manner. In the case reported in *49 DLR (AD) 151* their Lordships came to a conclusion that all the properties should be included in a suit for partition. A partial partition can be allowed, where it is not proved that the parties will be prejudiced by such partition. In the case reported in *54 DLR 310*, the Court came to a conclusion that it is not the relief which is claimed, rather it is the relief which can be given to the plaintiff, that has to be looked into and considered in a plaint. In the case reported in *22 BLD 423 = 54 DLR 310* the Court came to a conclusion, where certain facts are brought to the notice of the Court, which is not mentioned in the plaint or which arises, subsequent to filing of the suit and accepted as true by both the parties, such a fact can be taken into consideration in considering rejecting of the plaint under Order VII, rule 11 of the Code. In a case reported in *2002 SCMR 338* (Supreme Court of Pakistan) the Court came to a conclusion besides the averments made in the plaint, other material available on record which on its own strength was legally sufficient can be looked into for the purpose of rejection of the plaint.

22. We find no reason to deviate ourselves from the decisions as referred by the learned Advocate for the respondent but at the same

time it is apparent that all the aforesaid decisions except few relates to adjudication of suit on merit. The aforesaid principles as laid down by their Lordships of this Court as well as of our Apex Court relates to issues which were determined by the Court below after framing issues and determination of the same in accordance with law. The pertinent question in the present case in hand is that whether a plaint is liable to be rejected or not.

23. We have mentioned earlier about the legal scope relating to rejection of plaints which attracts Order VII, rule 11 read with section 151 of the Code of Civil Procedure and also the proposition as decided by this Court as well as of our Apex Court. It is admitted that the Court reserved the absolute power to reject plaint but at the same time it is desirable that while rejecting a plaint the Court should not travel beyond the plaint in any manner. Apart from that if the Court of law interest to exercise its power under section 151 of the Code in that case it is to be apparent in a crystal clear manner to the Court that further proceeding of a suit is a fruitless litigation. Apart from that a plaint is to be considered in its entirety. It appears from the plaint in hand that the plaintiffs stated as follows;

অত্র মোকদ্দমা কারন বিগত ১০-১-২০০৮ ইং তারিখে ১নং বিবাদী যখন নালিশী সম্পত্তি ভাগবন্টন করিয়া দিতে অস্বীকার করেন অতপর বিগত ২১-১-২০০৮ ইং তারিখে বাদী যখন 'ক' তফসিলে বর্নিত নালিশী দলিলের সই মুহুরী নকল পাইয়া জানিতে ও বুঝিতে পারেনা তখন অত্র আদালতের এখতিয়ারধীন মতিঝিল থানা এলাকাধীন নালিশী সম্পত্তিতে উদ্ভব হইয়া নিত্যই বিদ্যমান রহিয়াছে।

24. So it appears that the plaintiffs raises certain dates regarding the cause of action.

25. The question of limitation involved determination of fact and law which requires investigation and on such plea of limitation a plaint should not be rejected unless it is so clear and palpable from a meaningful reading of the plaint that no further evidence is required. It is apparent of the face of the record of the case in hand that the plaintiffs stated certain dates with narration of their knowledge of the cause of action. It is admitted that the plaintiffs in the present case in hand challenges an old deed but in the plaint they have given a detailed description about the delay in an appropriate manner. It is up to the discretion of they Court to consider it or not but the same can only be done after framing issues and taking evidence on that point. It is the absolute freedom and liberty of the trial Court to decide the question of limitation and doing so, when certain factual aspects are involved in that case it is desirable that a Court of law should frame issues and dispose of the question of limitation. The question of cause of action is not an isolated one. Cause of action is a bundle of facts and it is to be revealed from the plaint upon its entirely. A cause of action cannot be isolated from the plaint or the pleadings rather a cause of action is to be considered on the given facts and circumstances. When a cause of action is surrounded in the plaint in different ways and in that case it can only be stated that the same relates to certain facts which attract the cause of action and ultimately the cause of action is to be considered by taking evidence and for which a specific issue is to be framed. As quoted by us earlier that while rejecting the plaint the Court below came to a conclusion that the predecessor of the defendant, for depriving the plaintiffs, made the Heba which cannot be acceptable. Apart from that the Court below came to a conclusion that person can donate her entire property depriving all the other heirs. So it appears that the Court below in the present case in hand not only travelled beyond the plaint but also determined certain factual issues regarding the genuineness of the deed in question. Apart from that the Court below came to a conclusion that though the deed was registered in a different district but on that ground the same cannot be looked into a suspicious manner. While deciding the application under Order VII, rule 11 of the Code the Court below

came to a conclusion regarding the knowledge in the following manner;

কাজেই বাদী পক্ষের এই দাবিটি আপতত যুক্তিগ্রহ ও প্রমানিত নয়।

26. While dealings with an application for rejection of plaint the question of prove on disprove cannot play any role because as per the civil jurisprudence the question of prove and disprove are totally based upon evidence which can only be done after framing issues and taking evidence. While rejecting plaint the Court below also came to conclusion regarding the schedule of the property which is absolutely a question of fact.

27. Considering the facts and circumstances, we are of the view that in the present case in hand the Court below travelled beyond the plaint and considered numerous materials which can only be done after framing issues and taking evidence, as such we are of the view that the Court below committed an illegality in rejecting the plaint.

28. Considering the facts and circumstances the appeal is allowed. The judgment and decree passed by the Court below is hereby set-aside. Consequently, the connected Rules are disposed herewith in the following direction and observations. That the Rule relate to an order of injunction which is disposed herewith and the order of *status-quo* granted by this Court shall continue for a period of 3(three) months from the date of receipt of this order by the Court below. In the meantime, the plaintiffs are at liberty to file an application, for injunction if so advised.

29. The rule so far relates to violation is also disposed of as the same can only be decided by taking evidence.

30. The Court below is directed to dispose of the suit expeditiously as possible.

Communicate this order at once.

Ed.

High Court Division
(Civil Revisional Jurisdiction)

AKM Abdul Hakim J

Judgment
June 17th, 2014.

Ayesha Khatun.....
.....Petitioner

vs

Ambia Khatun and others.....Opposite-Parties*

Code of Civil Procedure (V of 1908)
Section 2(2)

Decree—When a trial court decrees a suit and the decree is challenged by a competent appeal, the appeal is considered as a continuation of the suit, and when the appellate decree affirms, modifies or reverses the decree on merits, the trial court decree is said in law to merge in the appellate decree, and it is the appellate decree which rules.

The doctrine of merger is too well known to call for further elaboration. Indeed, the moment the appellate decree comes into being, the original decree loses its independent entity. Perhaps, one can go to the length of saying that on an appellate decree being passed, the original decree by virtue of merger loses its very existence. In the concept of merger, thereafter it is the appellate decree which subsists. After it is rendered the decree which is enforceable is only that of the appellate Court and not of the original Court. To put it tersely, in the event of an appeal the enforceable decree is that of the appellate Court.

.....(19 & 20)

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

The mere error of law without occasioning failure of justice cannot itself be a ground for interference by this court under section 115 (1)

*Civil Revision No. 3854 of 2008.

of the Code. .....(21)

Syed Ali Asgor, Advocate—For the Petitioner.

Md Bakir Uddin Bhuiyan and Sikder Mahmudur Razi, Advocates—For the Opposite-Parties.

Judgment

This rule was issued calling upon the opposite-parties to show cause as to why the judgment and decree dated 25-3-2008 passed by the learned Joint District Judge, First Court, Netrokona in Other Class Appeal No. 36 of 2007 dismissing the appeal and affirming the judgment and decree dated 14-11-2007 passed by the learned Assistant Judge, Atpara, Netrokona in Other Class Suit No. 62 of 2005 dismissing the suit.

2. The present petitioner and opposite-party No. 5, Fultara as plaintiff instituted Other Class Suit No. 62 of 2005 in the Court of Assistant Judge, Atpara, Netrokona, impleading the predecessor of the opposite-party Nos.1(a) to 1(e) as defendant No.1 and opposite-party Nos.2-4 as defendant Nos.2-4 for declaration that the judgment and decree dated 26-5-1999 passed in Title Suit No.46 of 1997 is void, illegal, inoperative and not binding upon the plaintiffs.

3. Plaintiff's case, in short, is that the plaintiffs are co-sharer in the suit land by way of inheritance as described in the schedule 2 to the plaint. The predecessors of the opposite-party Nos. 1(a)-1(e) and opposite-party No.2 as plaintiffs instituted Partition Suit No.46 of 1997 impleading the present petitioner and others as defendant Nos.1, 2 and 4 and prayed for partition described in schedule of the plaint. The positive case of the plaintiffs is they had no knowledge about the alleged partition suit and no notice/summons was served upon the plaintiffs. It is further stated that the plaintiff of the partition suit by practicing fraud created false notice and showing a notice served upon the defendants but without serving any notice upon the defendant Nos. 3-4 of the partition suit, the plaintiff of the partition suit obtained the decreed. The plaintiffs acquired the suit property by way of inheritance and few days back the defendant No. 2, Hosen Banu and her husband disclosed in the locality that the defendant Nos.1 and 2 of the present suit got decree and further declare that they will take possession of the suit land at the earliest opportunity. Thereafter the plaintiffs on 25-9-2005 obtained certified copy by the judgment and decree of the previous partition suit and confirmed that the plaintiffs of the earlier suit obtained a decree by practicing fraud upon the court without serving any notice and thus the plaintiffs constrained to file the present suit.

4. That the predecessor of the opposite-party Nos.1(a)-1(e) as defendant Nos. 1 and 2 contested the suit by filing a joint written denying the materials allegations made in the plaint and contending, *inter-alia*, that the suit is not maintainable, the suit is barred by limitation and the principle of res-judicata and there is no cause of action to file the present suit. The positive case of the defendants is that the defendant's predecessor filed the Partition Suit No.46 of 1997 and in the said suit the summons and the postal notice was duly served upon the defendants and the defendant No.2 of the earlier suit, who is defendant No. 4 in the present suit contested the said suit with the knowledge of the plaintiffs; that after hearing and considering the materials and evidence on record decreed the suit by judgment dated 26-5-1999 in respect of their share of 30 decimal of land out of total 1.81 decimals of land and preliminary decree was passed accordingly. Against the said decree passed in Partition Suit No. 46 of 1997, the defendant No. 2 of the present suit preferred Title Appeal No.113 of 1999 in the Court

of District Judge, Netrokona and who after hearing the same affirmed the judgment and decree passed by the trial court. With these averment defendants prayed for dismissal of the suit.

5. In the present suit plaintiffs examined 3 witnesses including herself as PW 1 and on the other hand defendants also was examine 3 witnesses including the defendant No.2 as DW 1. The learned Assistant Judge, Atpara, Netrokona on consideration of the evidence and materials on record dismissed the suit by judgment and decree dated 14-11-2007. Against the said judgment and decree, the plaintiff preferred the Title Appeal No.36 of 2007 before the District Judge, Netrokona, consequently the said appeal was transferred and disposed of by the learned Joint District Judge, First Court, Netrokona who by judgment and decree dated 25-3-2008 dismissed the appeal and affirmed the judgment and decree passed by the trial court.

6. Being aggrieved by and dissatisfied with the judgment and decree dated 25-3-2008 passed by the learned Joint District Judge, First Court, Netrokona in Other Appeal No.36 of 2007 the plaintiff moved this court and obtained the present Rule.

7. It appears that this revisional application was filed with a delay of 60 days time and same was condoned subject to any objection that may be raised at the time of hearing of the Rule.

8. Mr Syed Ali Asgor, the learned Advocate appearing on behalf of the petitioner mainly submits that the judgment and decree of the appeal court suffers from misreading and non-consideration of the evidence on record. He further submits that the defendants of the present suit obtained the decree in the partition suit by keeping the present plaintiff petitioner in dark and without serving summons upon them and by practising fraud. He finally submits that the court of appeal below failed to consider that the summons upon the defendant No.4 has not been properly served in the suit.

9. On the other hand, Mr Sikder Mahmudur Razi, the learned Advocate appearing on behalf of the opposite-parties submits that the plaintiff-petitioner has not prayed for any declaration of title and consequential relief in the suit, therefore, the present suit is not maintainable without seeking any consequential relief. He further submits that the impugned judgment and decree do not suffer from any non-reading, misreading and non-consideration of materials evidence on record. He next submits that the present suit was filed challenging the decree of the partition suit after 7(seven) years as such, the suit is hopelessly barred by limitation. He also submits that the defendant No. 4 of the instant suit who was the defendant No. 2 in the Partition Suit No.46 of 1997 is the full brother of the present plaintiffs and the said defendant contested the said partition suit and therefore the present plaintiffs are fully aware of the partition suit from the very beginning. He finally submits that the plaintiffs filed the present suit only challenging the judgment and decree of the trial court only but not challenged the judgment and decree dated 4-6-2001 passed in the Other Class Appeal No.113 of 1999. Since the plaintiffs have only challenged the judgment and decree of the trial court as such, the present suit challenging the decree of the trial court is not maintainable.

10. Now, the main question that is to be decided in this rule is that whether the courts below have committed any illegality in dismissing the plaintiffs present suit and whether the summons of the Partition Suit No. 46 of 1997 was duly served upon the present plaintiffs Ayesha Khatun and Fultara, (defendant

Nos. 3 and 4) of the previous partition suit.

11. On examination of evidence on record it appears that Adil Hossain (Husband of present opposite-party No.1(d) and father of opposite-party Nos.1(a) to 1(c) and 1(e) and Hosen Banu (present opposite-party No.2) as plaintiff instituted a suit for Partition Suit No. 46 of 1997 on 26-11-1997 in the court of Assistant Judge, Atpara, Netrokona impleading Abdul Mazid, Firoz Miah (brother of Ayesha Khatun and Fultara) claiming partition of 1.81 acre of land and the claim of the plaintiffs was only for 30 decimals. Firoz Mia (defendant No.2) contested the said partition suit by filing written statements. His positive case was that Shachuni Kha died leaving behind one son namely Ali Afsar and one daughter namely Palisher Ma and by amicable family settlement Palisher Ma got her saham 10 decimals of land in plot Nos.716 and 5 decimals of land in plot No.27 and extinguished her interest in the remaining property. Ali Afsar, father of defendant Nos.2-4 (Firoz Mia, Ayesha Khatun and Fultara) brother of plaintiff Nos.1 and 2 of the present suit and plaintiff Nos.1 and 2 got the rest property of Shachuni Kha and thereafter Ali Afsar transferred 25 decimals of land from plot No.58 to defendant No.1 (Abdul Mazid). The plaintiff No.2 (Hosen Banu) transferred 10 decimal land to Firoz Miah by registered sale deeds dated 19-9-1993 and 14-12-1995. The said partition suit was decree in preliminary form on 26-5-1999 and against the said judgment and decree only Firoz Miah preferred Other Class Appeal No. 113 of 1999 and same was dismissed on contest on 4-6-2001. Ultimately final decree was drawn up in the partition suit on 26-4-2001. Subsequently, the decree-holder-present-defendants filed the Execution Case No. 2 of 2010 and in the present Civil Revision said execution case was stayed.

12. It appears that the present Other Class Suit No.62 of 2005 filed by Ayesha Khatun and Fultara for declaration that the judgment and decree dated 26-5-1999 passed in Partition Suit No.46 of 1997 by the Court of Assistant Judge, Atpara, Netrokona is illegal and void and not binding upon them. In the present suit Adil Hossain and Hosen Banu, Abdul Matin (son of defendant No. 1 of partition suit) of the Partition Suit No. 46 of 1997 were impleaded as defendant Nos. 1-3 and Firoz Mia (defendant No.2 of the said partition suit) was also impleaded as defendant No.4. It was the positive case of the plaintiffs that they did not receive any summons of the earlier partition suit and they had no knowledge about the said partition suit and it came to their knowledge when the husband of the defendant No.2 disclosed in the locality that very soon they are going to take possession of the plaintiff's suit land. Having came to learn about through the local people, the plaintiff made a search and confirmed about the judgment and decree passed in the earlier partition suit on 25-9-2005. Thereafter, on the death of Adil Hossain, defendant No. 1, his heirs were added in the suit as defendant Nos. 1(a) to 1(e). It appears that the trial court after considering the service return, Exhibits-(Ka) and (Kha) found that the summons upon the defendant No.3 of partition suit (present plaintiff No. 1) was duly served and same was received by her husband but the summons upon the defendant No.4 (present plaintiff No. 2) was received by her nephew but it is not clear whether they are joint family member. It was further found by the trial court that the defendant No.4 is the full brother of the plaintiffs, who contested the said partition suit and also preferred appeal against the decree passed in Partition Suit No. 46 of 1997. Therefore, the plaintiffs were fully aware about the partition suit. The appellate court also considered both the service return as proper. Appellate court after considering the deposi-

tion of PW 1 found that they were fully aware of the partition suit. The appellate court also considered the cross-examination of PW 1 wherein she deposed that she heard about the partition suit from her cousin Abdul Mazid. She further stated that Abdul Mazid died 7 years before and after 1 year of death of Abdul Mazid, PW 1 heard about partition suit. So, after the death of Abdul Mazid he came to PW 1 and informed her about the suit which is totally unbelievable and ridiculous. It further transpires that although the present plaintiffs are challenging the decree of earlier partition suit on the ground of non-service of summons upon them, but failed to examine Md Abul Kashem (nephew of Fultara) in support their case. Thus it transpires that the pleadings and the deposition of PWs are contradictory and unbelievable regarding knowledge of partition suit filed by the defendant's predecessor.

13. Learned Advocate for the opposite-parties vehemently submits that although the plaintiff in the present suit challenged the decree of the trial court passed in Partition Suit No. 46 of 1997 only, since the decree of the trial court have been merged with the decree of the appellate court passed in other Appeal No. 119 of 1999 and without challenging the judgment and decree of the appellate court, the plaintiffs have only challenged the judgment and decree of the trial court and, as such, the present suit itself is not maintainable. In support of his submissions learned Advocate relied upon the decision of *AIR 1987 Patna 733(Full Bench).*

14. On the other hand, learned Advocate for the petitioner vehemently submits that the judgment and decree of the appellate court suffers from misreading and non consideration of evidence and materials on record but failed to pin point what are the exhibits which were not considered or which are the evidences misread by the courts below. He also submits that the notice upon Fultara, defendant No.4 was not duly served upon her. In support of his contention learned Advocate referred a decision of our Appellate Division reported in *63 DLR(AD) 99.*

15. I have gone through the decision reported in *63 DLR (AD) 99.* It appears that the said decision was passed in a money suit invoking the jurisdiction under section 19(1) of the Artha Rin Adalat Ain and in that decision the decree was passed without any service of summons or even without any attempt to do so. As such, it is a nullity in the eye of law and it is imperative upon any Court of law, which is in seisin of the mater, to hold so, even without invoking the provisions of section 19 of the Ain or rule 13 of Order IX of the code. Because rule 13 of Order IX envisages at least a service, even if not 'duly' and sub-section (1) of section 19 also envisages a service of summons upon the defendant. In the present case, it is evident from the Exhibits-(Ka) and (Kha) that the notice of the Partition Suit was duly served upon the defendant Nos.3-4. Thus the case referred by the learned Advocate for the petitioner have no manner of application in the facts and circumstances of the present case.

16. It further appears that the plaintiff filed the instant suit for simple declaration without prayer for any consequential relief by way of cancellation and without payment of *ad-valorem* court fees. It also appears that the plaintiffs of the instant suit were parties of the earlier partition suit as defendant Nos.3 and 4 respectively. In this respect reliance may be placed on the decisions reported in *39 DLR (AD) 46 and 17 DLR 119.*

17. In the case reported in *17 DLR 119* it is observed by a Full Bench that if the plaintiff is a party to the instrument, the Court refuses as a rule to grant such a declaratory relief, on the

ground that the instrument, in such a case, need be avoided by cancellation. The plaintiff in such a case is required to pray for cancellation, by way of a consequential relief. Where, however, the plaintiff is not a party to the instrument no such difficulty arises. There he is entitled to a simple declaratory relief. (CP Code, Order II, rule 2).

18. It also transpires that in the present suit the plaintiff-petitioner have only challenge the judgment and decree dated 26-5-1999 passed by the Court of Assistant Judge, Atpara, Netrokona in Partition Suit No.46 of 1997 which was merged with the decree dated 4-6-2001 passed in Other Appeal No.113 of 1999 but the plaintiff did not challenge the decree of the appellate Court. Since the plaintiff in the present suit has only challenge the decree of the trial court, same is not maintainable.

19. It is well settled that when a trial court decrees a suit and the decree is challenged by a competent appeal, the appeal is considered as a continuation of the suit, and when the appellate decree affirms, modifies or reverses the decree on merits, the trial court decree is said in law to merge in the appellate decree, and it is the appellate decree which rules.

20. In this respect reliance may be placed in the case of Jokhan Rai vs Baikunth Singh decided by a Full Bench of three Judges, reported in *AIR (1987) Patna 133* has taken the view that in the event of an appeal the decree of the trial Court merges with that of the appellate Court. The doctrine of merger is too well known to call for further elaboration. Indeed, the moment the appellate decree comes into being, the original decree loses its independent entity. Perhaps, one can go to the length of saying that on an appellate decree being passed, the original decree by virtue of merger loses its very existence. In the concept of merger, thereafter it is the appellate decree which subsists. After it is rendered the decree which is enforceable is only that of the appellate Court and not of the original Court. To put it tersely, in the event of an appeal the enforceable decree is that of the appellate Court.

21. On perusal of the impugned judgment it appears that the court of appeal below, the last court of the facts on consideration and evidence and materials on record affirmed the judgment of the trial court and these been purely findings of facts based on the evidence on record, this court seating revisional jurisdiction cannot interfere in the concurrent findings of the facts of the courts below. In the present case the learned Advocate for the petitioner failed to point out that the impugned judgment has occasioned failure of justice to the present petitioner. The mere error of law without occasioning failure of justice cannot itself be a ground for interference by this court under section 115(1) of the Code of Civil Procedure and in that view of the matter, I find nothing to interfere with the same.

22. On the reading of the impugned judgment and decree and having regard to the all aspects of the case and on careful considerations of the entire evidence on record and the decisions cited above, I am of the view that the concurrent findings of the court below should not be interfered with.

23. In the result, the rule is discharged without any order as to costs.

24. The order of stay granted at the time of issuance of the Rule is hereby vacated.

Send down the lower court records at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Farah Mahbub J
Abdur Rob J

Khan A. Salam and others (in WP No. 613 of 2011)
.....Petitioners

vs

Chairman, Bangladesh Bar Council and others (in WP No. 613 of 2011)
.....Respondents*

Judgment
February 8th, 2012.

Private University Act, 2010
Section 35(7)

For the wilful laches of the University authority the career of the respective students have been jeopardized, for no fault of their own. The Chancellor, the Hon'ble President of the Country, is the *loco parante* of all the students of the University. Considering the gravity of the situation, also for the cause of justice, equity and fairplay the Chancellor, Hon'ble President of the country in consultation with the University Grants Commission and the Ministry of Education is to pass necessary order and direction to that effect for the noble cause of saving the invaluable student life and future career of the petitioners.

.....(32 & 33)

Yousuf Hossain Humayun, Senior Advocate with Md Rezaul Islam, Advocate—For the Petitioners. (in both the Rules)

ABM Bayezid, Advocate—For Respondents No. 7-10.

MI Farooqui, Senior Advocate with Naznin Nahar, Advocate—For Respondent No. 4.

Mirza Ashraf Ali, Advocate—For Respondent No.11. (in WP No. 613 of 2011)

*Writ Petition No. 613 of 2011 with Writ Petition N0. 10065 of 2010.

Judgment

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

2. In writ petition No. 613 of 2011, a Rule Nisi has been issued under Article 102 of the Constitution calling upon the respondents to show cause as to why non-publication of the result of the petitioners who appeared in the examination for enrolment as Advocates held in the year 2010 conducted by the Bangladesh Bar Council should not be declared to have been made without lawful authority and is of no legal effect and why the respondents should not be directed to publish the result of the petitioners and/or such other or further order or orders as to this Court may seem fit and proper.

3. Subsequently, vide order dated 4-5-2011 a supplementary Rule Nisi has been issued calling upon the respondent Nos. 7-10 to show cause as to why memo No. ইউজিসি/বেঃবিঃ/২৬৮(৫)/৯০/১১৪৭৩ dated 8-12-2010 issued under the signature of respondent Nos. 9 and 10 on behalf of the University Grants Commission (UGC) informing the respondents Nos. 1-6 of not according permission to the law students of 2 (two) years LLB (Pass) of the Darul Ihsan University to appear in the Sanad Examination of Bangladesh Bar Council (Annexure-E) should not be declared to have been passed without any lawful authority and hence, is of no legal effect and why the respondent Nos. 1-6 should not be directed to publish the result of the petitioners who appeared in the viva-voce examination as commenced from 24-11-2010 as well as the written examination held on 26-2-2010 in accordance with law.

4. In writ petition No. 10065 of 2010, the respondents have been called upon to show cause as to why the inaction of respondent Nos. 2 and 3 in not giving any approval/recognition

of the course of education for LLB (Pass) 2 years of Darul Ihsan University should not be declared to have been made without any lawful authority and hence, is of no legal effect; further, to show cause as to why the respondent No. 2 should not be directed to include the course of education of LLB (Pass) 2 years degree in the syllabus as per law as envisaged under the provisions of sub-sections (3), (4) and (5) of section 12 of the Private University Ordinance, 2008 and/or such other or further order or orders as to this Court may seem fit and proper.

5. In writ petition No. 613 of 2011 the facts, in brief, are that the petitioners got admission at Darul Ihsan University (in short, the University), respondent No. 11, the first private university of the country established in 1989 and approved by the respondent-government in 1993. The Faculty of Law is situated within the main campus of the University as per the requirements and policy of the University Grants Commission (in short, UGC).

6. The University published an advertisement for admission of students in the said Faculty. The petitioners accordingly applied for admission in the 2 years course of Bachelor of Law (Pass). After completion of the said course they had successfully passed the respective examinations and thereby had obtained provisional certificates (Annexures-A-A(4) respectively). Subsequently, after conclusion of all the required formalities the petitioners applied to the respondent Nos. 3 and 4 to be enrolled as an Advocate. Their applications were duly registered in the office of the respondent No. 4 bearing registration Nos. 3643, 3785, 3644, 3630 and 3620 all of 2009 (Annexures-B-B(4) respectively). The respondent Nos. 5 and 6 also issued admit cards in favour of the petitioners for attending the respective examinations bearing roll Nos. 4800, 5028, 4810, 2547 and 5024 respectively. The petitioners duly appeared in the written examination of the Bangladesh Bar Council and came out successful. Subsequent thereto they were invited to appear for the viva-voce examination scheduled to be held from 24-11-2010 (Annexure-D). The petitioners duly appeared before the viva-voce Board. The respondent Nos. 1-6, however, published the result in their official notice board, but the name and roll numbers of the petitioners were not endorsed in the result sheet. The petitioners accordingly met the respondent Nos. 4 to inquire about the matter. On query they came to learn that respondent Nos. 9 and 10 vide impugned office letter dated 8-12-2010 had advised respondent No. 3 not to allow the petitioners to take part in the Advocateship Examination. As a consequence, the respondent Nos. 1-6 did not publish the result of the petitioners. Hence, the application.

7. In writ petition No. 10065 of 2010 facts, in short, are that after getting approval from the Ministry of Education Darul Ihsan University, the petitioner, had proposed the respective subjects/courses of education as the syllabus of the University, but inadvertently LLB (Pass) 2 years Course was not included in the said proposed syllabus list (Annexures-A-A2 respectively). However, considering the prayer of the petitioner-University the respondent No. 2 duly approved the proposed syllabus including LLB (Honours) and LLM (Annexures- B and B-1 respectively). Thereafter, the Registrar of the petitioner-University duly submitted proposal of the subject/course of education for the LLB (Pass) 2 years for approval in the month of August, 2007, but there was no response. Subsequent thereto, the petitioner-University submitted 2 (two) reminders on 30-10-2007 and 29-1-2009 respectively to that effect, but till date the respondent No. 2 did not inform about any decision whatsoever, if so had taken about the said proposal (Annexure-C). In the said context the petitioner-University had opened the admission for the respective course on 1-1-2008. Ultimately, the first batch of LLB (Pass) 2 years who had completed their respective course

within June, 2010 duly submitted their intimation to the Bangladesh Bar Council, respondent No. 3 in time through their respective Senior Advocates (Annexures-D and Dl respectively). In response thereof, the respondent No. 3 issued registration cards to the applicants for the Advocateship Enrolment Examination' 2010 (Annexures- E-E4 respectively).

8. In spite of giving registration cards respondent No. 3 subsequently had refused the respective applicants to fill up the Forms for the ensuing Advocateship Enrolment Examination. As such, prayer was made before this Hon'ble Court by filing application to that effect. Ultimately, upon hearing the petitioners this Court vide order dated 15-2-2011 had directed respondent No. 3 to provide opportunity to the students of 2 years LLB (Pass) Course to fill up the respective Forms for the Advocateship Enrolment Examination' 2010 subject to the final decision of the Rule. Pursuant thereto the applicants duly appeared for the viva-voce examination, 2010. In the stated facts and circumstances the petitioner-University had preferred the instant writ petition and obtained the present Rule.

9. The University Grants Commission, respondent Nos. 7-10 appeared in both the Rules by filing separate sets of affidavits-in-opposition and supplementary affidavit to the affidavit-in-opposition contending, *inter-alia*, that the Faculty of Law of the University was opened without taking due approval from the UGC. Consequent thereto all the subsequent steps namely, the admission of the respective students, examination of the 2 years LLB (Pass) Course, the result declared by the University of the said course and award of certificates by the University have no legal basis in the eye of law. It has also been stated that the University applied for permission on 23-1-2007. In response thereof the UGC vide letter dated 8-5-2007 informed the University that without complying with the requirements as stated in the said letter no approval could be given for 2 years LLB (Pass) Course. To that effect the University did not make any further clarification. However, earlier the University was permitted to open University Curriculum as per the Private University Act, 1992 vide memo No. sha:15(l)/10/4-22/89 (Ministry of Education) dated 19-8-1993 for 5 (five) years on a temporary basis subject to fulfillment of conditions. The University authority neither complied with the pre-requisites within the stipulated period nor took any steps to extend the period of permission. Consequently, the said period of 5 (five) years elapsed in the year 1998. Consequent thereto it has no *locus standi* to carry on 2 years LLB (Pass) or any other course whatsoever in its name. It has also been stated that since the University opened 2 years LLB (Pass) without due approval of the Commission as such, the provisional certificates issued to the respective students are not legal instruments in the eye of law. Accordingly, the UGC duly instructed Bangladesh Bar Council not to publish the result of the petitioners.

10. The Bangladesh Bar Council, respondent No. 4, entered appearance in both the Rules by filing separate sets of affidavits-in-opposition contending, *inter-alia*, that the result of Enrolment Examination of 2010 in which the petitioners of writ petition No. 613 of 2011 had appeared had been duly published, but they could not pass the viva-voce examination. It has also been stated that they were not qualified to appear for Advocateship Examination since the 2 years LLB (Pass) Course of the University was not approved by the UGC.

11. The Darul Ihsan University, respondent No. 11 entered appearance in writ petition No. 613 of 2011 by filing affidavit-in-opposition stating, *inter-alia*, that in the year 1994 the founder Chairman of Darul Ihsan University Trust was appointed as the Vice Chancellor of the University as per the order of Hon'ble Chancellor and after expiry of his term

Professor Dr. MA Hamid was appointed as the Vice Chancellor on 02-11-2000. Later Professor Mr Monirul Hoque (a former Member of the UGC) was appointed as the Vice Chancellor of the University on 11-10-2006 by the order of the Hon'ble Chancellor. During his tenure initiatives were taken to establish Faculty of Law with LLB (Pass) Course of 2 years and LLM. Accordingly, vide letter dated 21-8-2006 the University authority submitted application to the UGC for according permission to open those programmes, also for approval of its syllabus observing all formalities, under its memo No. UGC/04/7574 (Annexure-3). Having receipt no reply from the UGC the University vide letter dated 30-10-2007 sent reminder (Annexure-4), but without any response. It has been stated that since there was no formal response from the UGC the University following the Private University Act, 1992 and the Private University Ordinance, 2008 published advertisement for admission of students in the LLB (Pass) Course of 2 years and following successful completion of the said course the University authority had awarded certificates to the respective students.

12. Mr Yousuf Hossain Humayun, the learned Senior Advocate appearing in writ petition No. 613 of 2011 on behalf of the petitioners (the students) submits that the letter dated 8-12-2010 (Annexure-E) issued by the respondent Nos. 7-10, the UGC, is collusive, motivated, and *ultra vires* the natural justice as they by their own conduct had not only allowed the petitioners to get admission in the Faculty of Law to complete 2 years LLB (Pass) Course but had also allowed them to attend the final examinations and allowed the University to issue provisional certificates in favour of the successful students. He also contends that the respondent Nos. 1-6 on accepting the enrolment applications having afforded opportunity to the petitioners to attend in the written as well as viva voce examinations cannot now withheld publishing the result of the petitioners. As such, issuance of the impugned letter dated 8-12-2010 directing the Bangladesh Bar Council not to publish the result of the petitioners is *malafide*. In this regard Mr Hussain also submits that in the year 2009 the respondent Nos. 1-6 had allowed 9(nine) students of the University to be enrolled as an Advocate and that they did not put any bar at the time of admission of the petitioners in the University, as such, they are stopped from raising any objection at this stage. Hence, he submits that the actions so had been taken by the Bangladesh Bar Council in not publishing the result of the petitioners pursuant to the direction of the UGC is without any lawful authority and hence, is of no legal effect.

13. Mr ABM Bayezid, the learned Advocate appearing for the University Grants Commission submits that Darul Ihsan University opened 2 (two) years LLB (Pass) Course in the year 2007 without due approval of the UGC. Consequently, the admission of the students in the said Course, completion of examination and ultimately awarding provisional certificates amongst those students have no legal mandate. Accordingly, he submits that producing those certificates before the Bangladesh Bar Council to appear in the Advocateship Examination, 2010 is not tenable in the eye of law. He further submits that the petitioners, the students, cannot be said to have been aggrieved against this respondent other than the University, for, the University is solely responsible for creating the said situation by opening two years LLB (Pass) course without due approval of the UGC and issued illegal certificate without disclosing the said fact to the respective students. As such, the University has, in fact, practiced fraud upon the petitioners-students, and hence, is now required to be resisted by the respondent government in accordance with law. He lastly submits that under section 15(2) of the Private University Act, 1992 an application regarding opening a course is required to be disposed of within 60 (sixty) days time and that under section 15(3) if

Code of Civil Procedure (V of 1908)

Section 2(2)—Decree—When a trial court decrees a suit and the decree is challenged by a competent appeal, the appeal is considered as a continuation of the suit, and when the appellate decree affirms, modifies or reverses the decree on merits, the trial court decree is said in law to merge in the appellate decree, and it is the appellate decree which rules. *Ayesha Khatun vs Ambia Khatun (Civil)* ... 743

Section 115(1)—The mere error of law without occasioning failure of justice cannot itself be a ground for interference by this court under section 115 (1) of the Code. *Ayesha Khatun vs Ambia Khatun (Civil)* ... 743

Code of Criminal Procedure (V of 1898)

Section 374

Penal Code (XLV of 1860)

Section 304, Part-1—Injury of inflicting one chair leg blow on the head of the victim by the accused Kamrul Matubbor constituted an offence punishable under section 304 part-1 of the Code. The conviction of the accused Ayub Munshi, who was an order giver also converted to section 304 part-1 of the Code and their sentence is commuted to life imprisonment instead of death penalty. *State vs Ayub Ali Munshi @ Ayub Munshi (Criminal)* 705

Constitution of Bangladesh, 1972

Article 102(2)

Malice in Law—The very initiation of the case is without any lawful authority inasmuch as admittedly the ejahar is predicated upon the enquiry report , we find malice in law in the matter of initiation and continuation of the proceedings of the case. A proceeding initiated with bad faith vitiates everything. The initiation and continuation of the case stand vitiated by malice in law. *Dr Muhiuddin Khan Alamgir vs Government of Bangladesh (Spl Original)* 723

Article 102(2)—Malice in Law—The alleged offence was committed by the petitioner long before the promulgation of the proclamation of the emergency. The question of applicability of the Emergency Power Rules of 2007 to the case in hand cannot be raised at all. The proceedings of the case being without lawful authority cannot be proceeded. *Dr Muhiuddin Khan Alamgir vs Government of Bangladesh (Spl Original)* ... 723

Emergency Powers Rules, 2007

Rule 18

Druto Bichar Tribunal Ain (XXVIII of 2002)

Section 6

Penal Code (XLV of 1860)

Section 198/420—Offences specified in section 6 of the Ain, do not attract the offences punishable under sections 198/420 of the Code. But by applying the provisions of Rule 18 of the Emergency Power Rules, 2007, the case was transferred to the Druto Bichar Tribunal, for trial by a notification published in the official gazette. The offences punishable under sections 198/420 of the Code are not serious offences in any view of the matter. The consideration of the Government for transfer of any serious offence to any Druto Bichar Tribunal should be objective. There is no scope for any subjective consideration of the Government in this respect. Government was actuated by malice in transferring case to the Druto Bichar Tribunal, for trial. The very transfer of the case to the Druto Bichar Tribunal, is not tenable in law. *Dr Muhiuddin Khan Alamgir vs Government of Bangladesh (Spl Original)* 723

Emergency Powers Ordinance (I of 2007)
Sections 2 and 4

Emergency Powers Rules, 2007
Rule 18—Emergency Power Ordinance of 2007 was not given any retrospective effect, the question of application of the Emergency Power Rules to the case does not arise at all. *Dr Muhiuddin Khan Alamgir vs Government of Bangladesh (Spl Original)* 723

Muslim Marriages and Divorce (Registration) Act (LII of 1973)
Rule 10—License of a Nikah Registrar is to be granted only for 1 (one) union, not more than one union. *Saiful Islam (Md) vs AK Fozlul Haque (Civil)* 698

Private University Act (XXXV of 2010)
Section 35(7)—For the wilful laches of the University authority the career of the respective students have been jeopardized, for no fault of their own. The Chancellor, the Hon'ble President of the Country, is the *loco parante* of all the students of the University. Considering the gravity of the situation, also for the cause of justice, equity and fairplay the Chancellor, Hon'ble President of the country in consultation with the University Grants Commission and the Ministry of Education is to pass necessary order and direction to that effect for the noble cause of saving the invaluable student life and future career of the petitioners. *Khan A. Salam vs Chairman, Bangladesh Bar Council (Spl Original)* 749

Value Added Tax Act (XXII of 1991)
Section 37(2)/55—Under the amended law it has become easier on the part of the VAT authority to issue notice directly under section 55 of the Act in which offences under section 37(2) can also be included in a given situation. But there cannot be a direct notice under section 37 of the Act without making a final demand under section 55 (3) of the Act. *Abu Sufian Ahmed vs National Board of Revenue (Spl Original)* ... 702

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

a) **The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.**
b) **The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused.**
c) **In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person suffer.**
d) **There must be clear and unequivocal proof of the *corpus delicit*.**
(e) **The hypothesis of delinquency should be consistent with all the facts proved.** *Lal Mohammad vs State (Criminal)* 730

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