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

vs

MOL Enterprise Inc.
.....Respondent*

Arbitration Act (X of 1940)
Section 30

The pleas that the application for setting-aside of the application under section 30 of the Act, having been filed beyond 30 days of the service of notice, the award cannot be set-aside and appeal is liable to be dismissed are of no substance and such plea is a plea which is dying similar in the deep sea trying to save his life catching even a straw. .....(14)

Arbitration Act (X of 1940)
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In case of appointment of arbitrator, notice of appointment upon other party for the purpose is imperative because only upon such notice being given the right of each party to appoint arbitrator arises but the right to appoint the sole arbitrator arises only if there is failure or default on the part of other party to appoint his own arbitrator within the statutory period as required under law and failure to give such notice renders every appointment of arbitrator itself is illegal and imperative.

.....(10)

*Civil Appeal No. 111 of 2002.

(From the judgment and order dated the 14th day of March, 1999 passed by the High Court Division in Appeal from Original Order No (FMA) No.87 of 1996)

Murad Reza, Additional Attorney-General instructed by Sufia Khatuan, Advocate-on-Record—For the Petitioners.

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

Judgment

Md Fazlul Karim J: This Appeal by leave is directed against the judgment and order dated the 14th day of March, 1999 passed by the High Court Division in Appeal from Original Order (FMA) No. 87 of 1996 allowing the appeal.

2. The facts involved in the case, in short, are that an agreement dated 20-3-1977 was entered into between the petitioner, the Government of the People's Republic of Bangladesh, and the respondent, MOL Enterprises Inc., USA stop giving licence to export Rhesus Monkeys from Bangladesh to the USA for medical and scientific research for 10 (ten) years. The monkeys were to come from two sources namely, regulated trapping and breading farms. On January 3, 1979 the petitioner terminated the agreement for violation of clauses 5 and 33 of the agreement as the respondent firstly, did not build any breeding farm in 1978 and secondly, the Rhesus monkeys were sold to the Armed Forces Radiobiology Research Institute, USA for neutron bomb radiation test. The respondent allegedly took the matter for arbitration and designated Mr Jacob Tanzer as their arbitrator. The respondent claims to have served notice upon the petitioner, Government of Bangladesh, to appoint an arbitrator as per the agreement but the petitioner failed to appoint the arbitrator. Accordingly, as per section 9(b) of the Arbitration Act the respondent's appointed arbitrator acted as the sole arbitrator. On April 3, 1985 the arbitrator allegedly gave award in favour of the respondent. Thereafter, the respondent on May 8, 1986 filed an application under section 14(2) of the Arbitration Act in the 3rd Court of the Subordinate Judge, Dhaka for making the award a rule of the Court. The petitioner filed an application under

section 30 of the Arbitration Act for setting-aside the award along with an application under section 5 of the Limitation Act for condonation of delay of 28 days contending, *inter-alia*, that no notice of arbitration was ever served upon the Government of Bangladesh. Therefore, no question of appointing an arbitrator arose and, as such, the arbitrator appointed by the respondent could not be the sole arbitrator under section 9(b) of the Arbitration Act. Moreover, the award is barred by limitation. The learned Subordinate Judge, 3rd Court, Dhaka by his judgment and order dated 27-2-1996 in Title Suit No. 166 of 1986 set-aside the award. Being aggrieved, the respondent preferred First Miscellaneous Appeal No.87 of 1996 under section 39 of the Arbitration Act, 1949 before the High Court Division which was allowed by judgment dated 11-3-1998 and 14-3-1998.

3. Leave was granted to consider the submissions of the learned Advocate for the appellant that "in view of the clear provision of clause 42 of the agreement and the positive assertion and specific finding of the second party-petitioner and learned Subordinate Judge respectively that no notice was served upon the second party as to reference of the dispute to arbitration and appointment of an Arbitrator by the first party, learned Judges of the High Court Division erred in law in allowing the appeal inasmuch as section 9(b) of the Arbitration Act, 1940 would come into play only in a situation when notice is served upon one party and that party fails to appoint its arbitrator within the time specified in the Act and, as such, the impugned judgment as well as the award are liable to be set-aside. The notice dated March 9, 1948 as quoted in paragraph 30 of the impugned judgment allegedly served upon second party was neither produced and proved before the Subordinate Judge, nor it was available in the lower Courts records of Title Suit No. 166 of 1986, nor it was incorporated in the paper book and supplementary paper book of First Miscellaneous Appeal No.87 of 1996 preferred by the first party itself, nor there was any application under rule 27 of Order XLI of the Code of Civil Procedure for adducing additional evidence by the first party before the Court of Appeal below and, as such, the said so-called notice is not evidence in the eye of law to prove the fact of notice of arbitration or far less any service of notice upon the second party. No notice having been served upon the second party as to the reference of the matter to arbitration and the alleged appointment of arbitrator and the second party having not submitted to the jurisdiction of the arbitrator, the entire arbitration proceeding, a unilateral reference without any sanction of law is *void ab initio* and the award is liable to be set-aside. On assuming office as sole arbitrator the arbitrator ought to have served notice upon the Government of Bangladesh to enter appearance and adduce evidence. The arbitrator while assessing quantum of damages in the award acted arbitrarily without any basis and evidence on record. The award delivered and filed in Court is barred by limitation."

4. Mr Murad Reza, learned Additional Attorney-General, appearing for the appellant submitted that in view of the clear provision of Clause 42 of the agreement and the positive assertion of the appellant and specific finding arrived at on consideration of the learned Subordinate Judge that no notice was ever issued or served upon second party as to reference of the dispute to arbitration and alleged appointment of Arbitrator by the first party, learned Judges of the High Court Division erred in law in allowing the appeal inasmuch as section 9(b) of the Arbitration Act, 1940 would come into play only in a situation when notice is served upon one party and that party fails to appoint its arbitrator within the time specified in the Act and, as such, the impugned judgment as well as the award are liable to be set- aside. The notice dated March 9, 1984 as quoted in paragraph 30 of the impugned judgment

allegedly served upon second party was neither produced nor proved before the Subordinate Judge, nor it was available in the lower Court's records of Title Suit No. 166 of 1986, nor it was incorporated in the paper book and supplementary paper book of First Miscellaneous Appeal No.87 of 1996 preferred by the first party itself, nor there was any application under Rule 27of Order XLI of the Code of Civil Procedure for adducing additional evidence by the first party before the Court of Appeal below and, as such, the said so-called notice is no evidence in the eye of law to prove the service of notice upon the second party. No notice having been served upon the second party as to the reference of the matter to arbitration and alleged appointment of arbitrator and the second party having not submitted to the jurisdiction of the arbitrator, the entire arbitration proceeding, a unilateral reference without any sanction of law is *void ab initio* and the award is liable to be set-aside.

5. Mr Ahsanul Karim, learned Advocate, appearing for the petitioner submitted that the notice was served on the applicant for appointment of its Arbitrator but there was no response and, as such, the Arbitrator appointed by the respondent acted as the sole Arbitrator. The application for setting aside of the application under section 30 of the Arbitration Act, 1940 having been filed beyond 30 days of the service of notice, the award cannot be set-aside and, as such, the appeal is liable to be dismissed. The learned Advocate further submitted that the appellant having failed to furnish the statutory deposit as pre-condition for application for setting-aside of the award in clear violation of proviso to section 33 of the Arbitration Act, 1940 the award cannot be set-aside and, as such, the appeal is liable to be dismissed.

6. In the facts and circumstances of the given case it was incumbent upon the alleged sole Arbitrator on assuming office as sole arbitrator to serve a notice upon the Government of Bangladesh intimating the fact of such assumption and the sole arbitrator directing the appellant for entering appearance and adduce evidence but in the instant case the said procedure not having been followed entire proceeding of alleged arbitration is illegal, *void ab initio.* Furthermore, the alleged notice purportedly quoted in paragraph 30 was neither served nor produced before the Court nor proved by adducing evidence in support thereof by any competent witness for alleged loss for and on behalf of the 1st party-respondent nor placed on record by adducing any evidence in support thereof in accordance with law, hence the alleged service of notice is no service of notice upon the 2nd party- appellant nor the alleged quoted notice could be relied upon as a proper notice in the eye of law. Thus, no notice having been served upon the 2nd party-appellant as to the reference of the matter to arbitration between the parties and the 2nd party having not been submitted to the jurisdiction of the arbitrator, the entire arbitration proceeding being an alleged unilateral reference without any sanction of law is *void ab initio* making the award liable to be set-aside. Furthermore, the arbitrator while assessing quantum of damages in the award acted arbitrarily, without any basis or standard, reason and evidence on record. Moreover, the award delivered and filed in Court is barred by limitation as admitted by the first parry-respondent allegedly entering upon the reference on 9-3-1984 whereas the alleged Award was given on 3-4-1985. The 'misconduct' as contemplated in section 30(a) of the Arbitration Act is legal misconduct which includes any erroneous breach of duty and/or mishandling of the arbitration proceeding causing miscarriage of justice and in the instant case the arbitrator has passed the award without complying with the mandatory provisions of law and contrary to the terms of the contract and elementary principles of natural justice and, as such, the Arbitrator has mis-conducted himself and accordingly, the entire proceeding

is unilateral and illegal. In view of Clause 42 of the agreement read with section 1(2) of the Arbitration Act, 1940 the *ex-parte* arbitration proceeding held in the United States of America without any notice to the appellant is absolutely illegal and *void ab initio*. In any view of the matter the High Court Division has erred in law occasioning failure of justice in reversing the judgment and order of the Subordinate Judge and making the award rule of the Court without appreciating materials on record and laws applicable thereto and, as such, the award is liable to be set-aside, for, it has been improperly procured.

7. In the case of *Allah Bux Gabole vs Razia Begum* reported in *PLD 1960 Karachi 1960 KLR(l) 205* it is held that "The arbitrator should have communicated with the defendant's counsel and conveyed the plaintiffs claim against her and adjourned the case to some other date. This would have enabled her to make up her mind finally either to participate or not to participate in the arbitration proceedings which were likely to deprive her of valuable property and rights. If he had followed this procedure and on default of the defendant taken *ex-parte* proceedings the award would be perfectly valid. But since he failed to do so the award is defective and cannot be upheld. Accordingly I set-aside the award on the ground that the Arbitrator committed legal misconduct."

8. Under the facts and circumstances of the case, non-issuance of notice by the Arbitrator is a legal misconduct on the part of the Arbitrator which is very much patent in law and vitiates the Award.

9. Even in case of due notice for appointment of Arbitrator and the party failure to appoint Arbitrator, the Arbitrator could not have proceeded *ex-parte* without express notice upon the other side disclosing the intention to do so. In delivering judgment in *Udaichand Pannalal vs Debibux Jewaram, 60 India Case 987, 47 Cal 951* Mookerjee, J held that

> "As regards the second point, reliance has been placed by the appellant upon the decision of *Gladwin vs Chilcote. (1841) 9 Dowl PC 559: 5Jur 749: 61RR 825.* That case is an authority for the proposition that is not justified in proceeding *ex-parte* without giving the party absenting due notice. It is advisable to give the notice in writing to each of the parties or their solicitors: and notice should express the arbitrator's intention clearly, otherwise the award may be set-aside, reference may be had to the cases of *Walter vs King, 9 Madd 60: 88ER 317; Wood vs Leake, (1806) 2 Ves (Jun) 412: 33 ER 156* and *Hall vs Anderson, (1840) 8 Dow PC 326.* There is no statutory rule, however, that if an arbitrator proceeds in that manner, the award made by him must be set-aside. In the absence of such an inflexible statutory provision, the procedure commenced in *Gladwin vs Chailcote (supra),* and the other cases mentioned can be regarded only as a rule of prudence and convenience.
>
> As Lord Denman, C.J., put it in *Scott vs Nandu, (1844) 6 QB 237: 8 Jur.114,* the law is that, if either party after the arbitrator has given him sufficient notice and proper opportunities of attending will not appear, the arbitrator may proceed in his absence. There is obvious good sense in the view that after notice he will then proceed *ex-parte,* if one of the parties absent himself without sufficient reason. But, let us assume that when an award has been made *ex-parte,* the absent party may *prima facie* be deemed to have been prejudicially affected thereby; surely, it is open to his adversary to rebut the presumption. If for instance, it is made falsely clear that notwithstanding the service of notice upon him, that in his absence the arbitration would proceed *ex-parte* he would have not had entered appearance, it cannot reasonably be urged that the omission to serve such notice has invalidated the award. The appellant has

contended that it is not open to the Court to take into account the subsequent conduct of the appellant, to determine, whether, at the time of the arbitration proceedings, he had or had not made up his mind not to join in them. His argument, in substance, is that this could not have affected the judgment of the arbitrator, that must limit ourselves to the arbitrator when he proceeded *ex-parte*, and hold that his omission to intimate to the absent party that the arbitration would proceed *ex-parte* is by itself sufficient to invalidate the award. We are clearly of opinion that this is not the proper test to be applied to determine the validity of the award in a case of this description. The true test is, has the complainant, who takes exception to the validity of the award, been in fact prejudiced by the omission of the arbitrator to serve the special notice on him? If it is established that, notwithstanding such warning, he would not have appeared before the arbitrator, he has really no grievance and cannot invite the Court to set-aside the award on account of the alleged defect in procedure"

10. Thus, in case of appointment of Arbitrator not ice of such appointment upon other party for the purpose is imperative because only upon such notice being given the right of each party to appoint Arbitrator arises but the right to appoint the sole Arbitrator arises only if there is failure or default on the part of other party to appoint his own Arbitrator within the statutory period as required under law and failure to give such notice renders very appointment of Arbitrator itself is illegal and imperative.

11. In the facts, circumstances and materials on record it appears that the award made by the sole Arbitrator is a nullity and without jurisdiction under the provisions of the Arbitration Act, 1940 which is applicable in the instant case. The award is, thus void and without jurisdiction.

12. Under the circumstances of the instant facts of tne case, the Court can also *suo moto* set-aside the award even without any objection as to the validity of the Arbitration award and thus, the Court has committed no illegality in setting aside the award.

13. In the case of *M/s. Concord Engineers and Construction Ltd. vs The Chief Engineer, Road and Highways Department, Government of the People's Republic of Bangladesh, Sarak Bhaban, PS Ramna, Dhaka* reported in *3 ADC 23* it has been held that

> "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 appellant on the face of the record and the Court should have taken 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."

14. In view of the above, the pleas that the application for setting-aside of the application under section 30 of the Arbitration Act, 1940 having been filed beyond 30 days of the service of notice, the award cannot be set-aside and appeal is liable to be dismissed are of no substance and such plea is a plea which is dying similar in the deep sea trying to save his life catching even a straw.

15. In view of the finding of materials that the award is *void ab initio*/and, as such, a nullity, the question of furnishing the statutory deposit as the pre-condition for application for setting-aside of the award pursuant to the proviso to section 33 of the Arbitration Act, 1940 for setting-aside the award is a myth and such requirement of law is not applicable in the peculiar facts and circumstances of this case.

For the reasons aforesaid, the appeal is allowed with cost.

Ed.

Appellate Division
(Criminal)

Nazmun Ara Sultana J
Muhammad Imam Ali J
Md Anwarul Haque J
Hasan Foez Siddique J

State.....Appellant

vs

Judgment
May 15th, 2013.

Hasen Ali Sheikh @ Hosen Ali Sheikh...
.....Respondent*

Partisan witness

Even assuming that it was a moon light night when the occurrence had taken place, court has to gauge the situation carefully. It is sound rule in appreciation of evidence of a partisan witness that if the testimony of such a witness is to be used as the sole basis of conviction it should be of such a caliber as to be regarded as wholly reliable. Even the evidence of a natural witness when enmity is admitted should be examined utmost care and caution. .....(14)

*Criminal Appeal Nos. 9-11 of 2002.

(From the judgment and order dated 21-7-1998 passed by the High Court Division in Death Reference No.23of 1994)

Corroboration

There was long run previous enmity between the parties, without any independent corroboration of the evidence the conviction was unsafe. .....(15)

Sohrawardi DAG instructed by Mvi Md Wahidullah, Advocate on-Record—For the Appellant.

Munsurul Haque Chowdhury, Senior Advocate instructed by Md Nawab Ali, Advocate-on Record—For the Respondents.

Judgment

Hasan Foez Siddique J: These appeals by leave at the instance of the State are directed against the judgment and order of acquittal passed by the High Court Division dated 21-7-1998 rejecting the Death Reference No.23 of 1994 and allowing the Criminal Appeals No.2199 of 1992, 2072 of 1994 and Jail Appeal No. 2267 of 1994 setting aside the judgment and order dated 31st October, 1994 passed by the Additional Sessions Judge, Bagerhat in Sessions Case No. 53 of 1992 convicting the respondents under section 302/34 of the Penal Code and sentencing the respondents Hosen Sheikh (Hosen) and Hashem Sheikh to death and Liaquat Sheikh, Kashem Sheikh, Hashem Ali Sheikh and Jamal Sheikh to suffer imprisonment for life and pay a fine of Taka 5,000, in default, to suffer RI for 3 months more.

2. The aforesaid 6 respondents and one Jinnat Khan were put on trial in the court of the Additional Sessions Judge, Bagerhat in Sessions Case No. 53 of 1992. They were charged under section 302/34 of the Penal Code. On 10-2-3990, at about 3-30 PM one Atul Chandra Sikder, a resident of village Ramnagar, PS Rampal, Bagerhat was alleged to have been murdered by the respondents which gave rise to the present case.

3. The prosecution case as found from the

evidence of PW 1 Rabin Chandra Sikder, the informant of the case and eye witness of the occurrence is that in the night following 10th February, 1990 at about 11-30 PM the PW 1, his father deceased Atul, mother, his 3 brothers and wife of his eldest brother were sleeping in their respective room of their dwelling hut. On hearing barking of dog the informant woke up and having coming out of his bed room found 15/16 persons approaching to his house on focusing torch light. Having have seen the persons he took shelter behind their temple shed and there from noticed that the accused person and others surrounded their dwelling hut wherein his father was sleeping. Hosen Sheikh and Hashem Sheikh in their hands had ram dao and choto dao respectively. Accused Hashem Sheikh and Jamal Sheikh had lathi and torch light in their hands. They breaking the door, entered into the room wherein his father was sleeping and focused the torch light towards the victim Atul. Accused Kashem Sheikh with a gun and Jinnat with a lathi and torch light stood in front of the door of the said room. Hosen Sheikh and Hashem Sheikh inflicted ram dao and dao blows on the person of informant's father who receiving blows died in the spot instantly. Thereafter, the accused persons fled away. The PW 1 became perplexed for few moments and thereafter raised alarm. On hearing hue and cry, witnesses Jotindra PW 8, Santosh PWs 6 and 2 other persons, namely, Udvob and Sudir, who had not been examined, rushed to the place of occurrence and saw and heard the occurrence. It has further been said that there were long run disputes between informant party and accused persons. The PW 1 lodged the FIR (Exhibit 1) at 14.10 hours on 11-2-1990.

4. PW 11 SI Fazlur Rahman went to the place of occurrence and took the matter for investigation. He had inquest the dead body of the victim and sent the dead body to the morgue for holding post-mortem examination through Constable Jitendra Nath Roy, the PW 3.

5. PW 2 Dr Rafiqul Alam held post-mortem examination of the dead body of victim and submitted report (Exhibit 2). PW 12 after completion of investigation submitted charge-sheet against the respondents and others under section 302/34 of the Penal Code.

6. At the trial, the prosecution examined 12 witnesses out of them PWs 1, 4 and 5 claimed themselves to be the eye witnesses of the occurrence. PW 7 claimed that he saw the accused Hosen, Hachem, Hashem and Kashem to leave the place towards west. Besides the aforesaid witnesses, PW 6 Santosh, PW 8 Jatindra, PW 9, Mukunda and PW 10 Horipada went to the house of the victim immediate after the occurrence hearing the hue and cry. Other PWs are official and formal witness.

7. The defence plea was that the respondents had been falsely implicated in the case out of previous enmity. The Trial Court convicted the respondents under section 302/34 of the Penal Code and sentenced Hosen Sheikh (Hossain) and Hashem Sheikh to death and the respondents Liakat Sheikh. Kashem Sheikh, Hashem Sheikh and Jamal Sheikh to imprisonment for life and pay a fine of Taka 5,000, in default, to suffer RI for 3 months. Against which the respondents preferred different appeals as mentioned above in the High Court Division and the High Court Division by the impugned judgment and order rejected the Reference and allowed all the appeals and acquitted the respondents. Being aggrieved by the judgment and order of the High Court Division the State filed Petitions for Leave to Appeal and Leave was granted to examine whether the High Court Division rightly rejected the evidence of PWs 4 and 5 only because their statements were not recorded by the Investigating Officer immediately after the occurrence or not; whether the High Court Division rightly rejected the evidence of PW I only because he was not corroborated by any other independent witnesses which in the opin-

ion of the High Court Division was very much necessary because of enmity; whether the High Court Division rightly discarded the-evidence of eye witnesses or not.

8. The prosecution apparently rest on the direct evidence given by PWs 1, 4 and 5 and PWs 6, 7, 8, 9 and 10 who went to the place of occurrence subsequent after the occurrence. Out of them PW 7 claimed that he identified the accused persons who were leaving the place of occurrence after commission of offence.

9. The learned Deputy Attorney-General appearing on behalf of the State has submitted that the direct and uniform evidence of as many as 3 eye witnesses have been discarded by the High Court Division without any good reason which has caused a manifest failure of justice.

10. Mr Munsurul Haque Choudhury supported the judgment of the High Court Division and contended that believing or not believing a witness is function of the High Court Division. The High Court Division upon proper scanning the evidence of PWs 1, 4 and 5 disbelieved them and thereby acquitted the respondents giving benefit of doubt.

11. Admittedly, the occurrence took place at 11 -30 PM on the night following 10-2-1990. PW 1 Rabin Chandra Sikder in his evidence said that his father victim Atul was sleeping in a room situated at extreme east of their 3 roomed dwelling hut. In the sketch map the Investigating Officer did not identify the place of occurrence specifically, PW 1 said in his evidence that they have got a temple shed which is situated at the south of their main dwelling hut. The distance between the said dwelling hut and temple shed is 15/16 cubits. They have got a cowshed situated at the north east side of the main hut. He said that hearing barking dog he went out to his room and took shelter behind the temple shed. He said "দেখি যে পশ্চিম দিকে ৪/৫ টি টর্চ নিয়ে ১৫/১৬ জন লোক বাড়ীর ভিতরে প্রবেশ করিতেছে এই দেখে আমি আমাদের মন্ডপ ঘরের আড়ালে চলে যাই এবং দেখি আসামী হোচেন, রাম দাও হাতে, আসামী হাসেম ছোট দাও হাতে, আসামী হাছেন টর্চ লাইট হাতে, আসামী জামাল টর্চ ও লাঠি হাতে, আসামী কাসেম বন্দুক হাতে ও আসামী জিন্নাত আমার বাবার ঘরে প্রবেশ করে। আসামী হোচেন রাম দাও দিয়া আমার বাবার মুখ মন্ডলে কোপ দেয়; আসামী হাসেম ছোট দাও দিয়া বাবার মুখে কোপ দেয়। তখন আমার বাবা নড়াচড়া করে সেখানেই মারা যায়। তারপর আসামীরা দ্রুত বের হয়ে ঘরের দক্ষিণ উত্তরে আইল দিয়ে পশ্চিম দিকে চলে যায়। আমি হতভম্ব হয়ে কিছুক্ষণ পরে চিৎকার করি। তাতে যতিন, সন্তোষ উদ্ভব ও সুধীর ঘটনাস্থলে আসেন এবং ঘটনা দেখেন এবং শুনেন।"

12. In his FIR he stated "চাদনী রাত থাকায় সকলে আবছা দেখা যাচ্ছিল। (He also stated)"আমি প্রানের ভয় মন্ডপ ঘরের আড়ালে পালাইয়া থাকিয়া আসামীদের টর্চের আলোতে সব ঘটনা দেখিতে পাই। কিন্তু ভয়ে হতভম্ভ হয়ে কিছুক্ষণ কথা বলিতে পারি না। আসামীরা চলিয়া গেলে আমি শোর চিৎকার পারিলে বাড়ীর সকলে জাগিয়া চিৎকার করে। ফলে প্রতিবেশী যতিন্দ্র নাথ মন্ডল, পিতা প্রিয় নাথ মন্ডল, সন্তোষ মন্ডল, পিং মৃত পাচুরাম মন্ডল, উদ্ভব মন্ডল পিং রতিকান্ত মন্ডল, সুধীর কুমার মন্ডল, পিং মৃত প্রিয় নাথ মন্ডল আর ও অনেকে ছুটিয়া আসিয়া ঘটনা দেখে ও শোনে।"

13 Mr Munsurul Hoque Chowdhury in his submission relied upon the words "কিন্তু ভয়ে হতভম্ব হইয়া কিছুক্ষণ যাবৎ কথা বলিতে পারি না। আসামীরা চলিয়া গেলে আমি শোর চিৎকার পাড়িলে বাড়ীর সকলে জাগিয়া চিৎকার করে।" He submits that from own admission of the PW 1 that he did not utter any words for few moments because he became perplexed and thereafter he raised alarm after departure of the accused persons from the place of occurrence. The other inmates of the house woke up and raised alarm. He submits that from the evidence of PW 1 it is apparent that PWs 4 and 5 woke up from the sleep after departure of the accused persons hearing hue and cry made by PW 1. He submits that the High Court Division disbelieved the testimony of PWs 4 and 5 because they were examined after 15/16 days of the occurrence inasmuch as the investigating officer went to the place of occurrence subsequent after lodging the FIR on 11-10-1990. He submits that there is no explanation as to why the PWs 4 and 5 have been examined after lapse of 15/16. Where witnesses are examined after a considerable lapse of time by the police, that suddenly is a circumstances that will have

to be taken into account to consider whether the evidence given by them before the court would be relied or not. Since there is no satisfactory explanation for examining PW 4 and 5 at a late stage, the High Court Division rightly discarded their evidence. Moreover, the evidence of PW 1 as quoted above that he being perplexed failed to utter any word for a moment and thereafter raised alarm and then the inmates of the house woke up. If we take this testimony of PW I along with the fact of non-exanimation of PWs 4 and 5 within shortest possible of time of the occurrence together definitely the same raises a doubt regarding the claim of PWs 4 and 5 that they saw the occurrence and identified the accused persons.

14. From the evidence of PW 1 it appears that he has claimed that seeing 15/16 persons who were going towards his house he took shelter behind his temple shed which is situated 15/16 cubits far from the place of occurrence and he witnessed the occurrence. He admitted that there was fleeting shadow and he identified the accused persons with indistinct light of moon and with the help of the focus of the torch of the accused persons. Even assuming that it was a moon light night when the occurrence had taken place, court has to gauge the situation carefully. It is sound rule in appreciation of evidence of a partisan witness that if the testimony of such a witness is to be used as the sole basis of conviction it should be of such a caliber as to be regarded as wholly reliable. The PW 1 did not say anything in his evidence that whether the accused persons focused their torch towards themselves or not. It is difficult to identify the accused person with the help of the focus of their torch light if torch is not focused towards them. Another aspect is that in the FIR, as quoted above and the evidence of PW 1 that he has stated that Jatin, Santosh, Udbhab and Sudhir rushed to the place of occurrence hearing hue and cry and saw and heard about the occurrence. Out of those 4 persons the prosecution did not examine Udbhab and Sudhir. Jatin is PW 8 who in his cross-examination has said- "ইহা সত্য নহে যে, আমি বাদীর বাড়ীতে গেলে বাদী আমাকে আসামী হাচেন, হোচেন, হাশেম, কাসেম জিন্নাত, জামাল ও লিয়াকতের নাম বলেছে। PW 6 Santosh Kumar Mondal in his Examination-in-chief said Rabindra "আমাকে কিছু বলেনি". From the testimonies of P.W, 6 and 8 it is clear that PW I did not disclose the name of the accused persons to these witnesses subsequent after the occurrence inasmuch as they went to the place of occurrence. Non-disclosure of the names of the accused persons subsequent after the occurrence to PWs 6 and 8, the fact that the PW claimed that he had identified the accused persons taking shelter behind the temple shed which is 15/16 cubits far from the place of occurrence and light was indistinct and in absence of evidence that the accused persons focused their torch light towards themselves it is difficult for us to accept evidence of PW 1 wholly reliable when enmity between parties is admitted. Even the evidence of a natural witness when enmity is admitted should be examined utmost care and caution. PW 7 claimed that he saw some of the accused persons when they were leaving the place. He is a witness by chance and he has not been cited as witness in the charge-sheet. In his evidence he has said "২ বৎসর আগে আমাদের মেয়ের সাথে বাদীরর ছোট ভাই রমেনের বিয়ে হয়েছে"। Since he is a relative of the PW 1 being a chance witness his testimony is to be viewed with suspicion.

15. In view of the admitted fact that there was long run previous enmity between the parties, our considered opinion is that the High Court Division rightly held that without any independent corroboration of the evidence of PW 1 the conviction of the respondents was unsafe.

16. Accordingly, we do not find any substance in the appeals.

In the result, the appeals are dismissed.

Ed.

Appellate Division
(Civil)

Md Muzammel Hossain CJ
Surendra Kumar Sinha J
Md Abdul Wahhab Miah J
Syed Mahmud Hossain J } Government of Bangladesh and others.....
.....Petitioners

vs

Md Aminul Islam and others
.....Respondents*

Judgment
July 29th, 2013.

Constitution of Bangladesh, 1972
Articles 102(2) and 111

As the writ-petitioners rendered service to the Board till February, 2003 they are surely entitled to get the salary and fringe benefits upto February, 2003 from January, 1998. The writ-respondents did not deny the facts asserted in the writ petition and thus the claim of the writ-petitioners that the Board received their services upto February, 2003 is an admitted fact. Impugned judgment and order was passed on 5-1-2011 and no order was passed by this Division staying operation of the same and we believe that by this time, the writ-respondents have included the writ-petitioners in the revenue set up of the Board as per the direction given by the High Court Division. .....(12)

Bangladesh vs Md Jahangir Hossain and 65 others, 51 DLR (AD) 148 ref.

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

Abdur Rob Chowdhury, Senior Advocate instructed Zahirul Islam, Advocate-on-Record—For the Respondents.

*Civil Petition for Leave to Appeal No.1855 of 2011.

(From the judgment and order dated the 5th day of January, 2011 passed by the High Court Division in Writ Petition No.4151 of 2003)

Judgment

Md Abdul Wahhab Miah J: This petition for leave to appeal has been filed by the writ-respondents(hereinafter referred to as the respondents) against the judgment and order dated the 5th day of January, 2011 passed by the High Court Division in Writ Petition No.4151 of 2003 making the Rule absolute with the direction upon them to include the writ-petitioners in the revenue set up of Cotton Development Board with continuity of service, salary and fringe benefits within 1(one) month from the date of receipt of the judgment and order.

2. The respondents, herein, as the petitioners (hereinafter referred to as the writ-petitioners) filed the said writ petition for a direction upon the respondents to absorb them "in the Revenue Sector and to make their service permanent under the Ministry of Agriculture."

3. The case of the writ-petitioners as stated in the writ petition was that the Executive Director of the Cotton Development Board (the Board), Dhaka, an organization under the Ministry of Agriculture, Government of the People's Republic of Bangladesh, invited application for appointment to different posts for its 'Integrated Cotton Development Project' by an advertisement published in the National Daily 'Bhorer Kagoj' on 19-3-1994. Accordingly, the writ-petitioners along with others applied for appointment to some of the said posts and a written test was held on 16-4-1995. The writ-petitioners were qualified in the written test and were asked to appear for viva-voce on 30-5-1905, in which they also came out successful and appointment letters were issued to them for joining their respective post on temporary basis for the tenure of the project. The writ-petitioners joined their services in the project within the specified dates. After joining in their respective post, the writ-petitioners continued their services in the project with all sincerity, honesty and integrity to the best satisfaction of

the authority concerned. Although the appointment of the writ-petitioners was for the tenure of the project, which expired on 30-6-1995, they were allowed to continue in their services till February, 2003 and the respondents received their services without any fresh appointment "as of other regular employees" of the Board. The Board made a proposal to the Ministry of Establishment for absorbing 237 posts from amongst 576 temporary posts of the said 'Integrated Cotton Development Project' in the revenue head and on the basis of the said proposal, the Establishment Ministry on different dates absorbed 175 of them in the revenue head. The standing committee of the Ministry of Finance in its meetings held on 1-8-1999 and 8-8-1999 agreed to absorb 117 posts in the revenue head. The said decision was communicated under Memo No. অম/অবি.উঃ২/কৃষি-৫(১)/৯১/৮৯ dated 30-8-1999 under the signature of the Senior Assistant Secretary, Ministry of Establishment. In order to absorb the writ-petitioners and others in the revenue head, the Ministry of Establishment directed to abolish 64 posts in the revenue head of the Board. The said letter was duly communicated to the Ministry of Agriculture by its office Memo No. সম/সও বা/টিম-৪(২)-কৃম-১৩৬/৯৫(অংশ)-৯০ dated 18-10-2000.

4. The Ministry of Establishment on 4-11-2000 made another fresh proposal for absorbing in the revenue budget, 28 more posts abolishing 49 posts of the 'Integrated Cotton Development Project'. Accordingly, the Board abolished the suggested 49 posts. In a meeting of the standing committee of finance division of the Ministry of Finance held on 12-1-2002, this proposal of the Ministry of Establishment was rejected on the observation that since 117 posts had earlier been absorbed in the revenue budget from the working man power of the 'Integrated Cotton Project' there was no 'scope' to consider that any other working man power of the project was left out for further absorption, i.e. the newly proposed 28 posts in the revenue head. The Ministry of Agriculture pursuant to the recommendations from the Board made several requests to the Ministry of Finance to shift the said 28 posts to revenue head and of late, the State Minister for Agriculture issued a letter to the Finance Minister under No. অঃ সঃ পত্র নং-কৃষি/তুলা-৩৮/২০০২/৫৩০ dated 29-11-2002 requesting him to take immediate effective step to transfer 28 persons employed in the completed project 'Integrated Cotton Development Project.' In the said letter, it was clearly stated that the said 28 posts were indispensable for the Board and the Ministry of Establishment also gave consent to transfer those posts to the revenue budget on the condition of abolishing 49 permanent vacant posts in the revenue budget of the Board. It was further stated that though the tenure of the project ended on 30-6-1995, the salary and other allowances of the persons employed in the said posts were given upto 1997 from the fund of the project allocated by the Ministry of Finance (অর্থ মন্ত্রণালয় থেকে প্রকল্প থেকে বরাদ্দ হতে) and since January, 1998 they were not being given any salary and allowances, i.e. for more than 4(four) years, they were living an inhuman life (মানবেতর জীবন যাপন করেছেন). The Minister, Ministry of Finance and Planning refused to absorb the writ-petitioners and 12 others in the revenue head, which was communicated to the Ministry of Agriculture. The Executive Director of the Board communicated the said decision of the Minister, Ministry of Finance to the writ-petitioners by his office Memo No.তুলা/প্রশা-১-এক-৬/৯৫-২০০২/৪৯৮(৪২) dated 19-2-2003. On 4-3-2003, the Executive Director of the Board by his letter vide Memo No. তুলা/প্রশা-১-এক-৬/৯৫-২০০২/৬১২ of the same date requested the Secretary, Ministry of Agriculture to absorb the writ-petitioners and 12 others in the revenue head of the Government considering the humanitarian aspect of those incumbents. In the letter, he explained the entire circumstances in that respect. The Ministry of Agriculture by a letter under Memo No. কৃষি-৪/তুলা-৩৮/২০০২/৭১ dated 17-3-2003 issued under

the signature of a Senior Assistant Secretary informed that the Ministry of Finance had refused to absorb the writ-petitioners in the revenue head of the Government. In the meantime, on 3-3-2003, the Executive Director of the Board by his Office Memo No. দতুলা/হিসাব-২৭/২০০০-০৩/৫৯২ of the same date requested the Secretary, Ministry of Agriculture for furnishing fund to pay the salaries to the writ-petitioners and with the Memo payment list of the writ-petitioners and other incumbents were annexed, wherefrom it appears that although the project ended on 30th June 1995, the Board took service from the writ petitioners and others and paid salaries and after 1998, the respondents did not pay salaries. On 13-4-2003, the Executive Director of the Board again requested the Secretary, Ministry of Agriculture to take steps for absorption of the writ-petitioners in the revenue set up.

5. In the writ petition, it was contended that the respondents took service of the writ-petitioners with the legitimate expectation that they would absorb them in the revenue head of the Government. The 28 posts and persons working against each of those posts were recommended for absorption in the revenue budget by the Board, the Ministry of Agriculture and the Ministry of Establishment i.e., by the executive authorities under whom they would work and, as such, these posts could not be abolished and the writ-petitioners working there could not be dislodged by a decision of the standing committee of the finance division, which is constituted with the executives of the Finance Ministry, in the face of judgment and order dated 27-5-1999 in Civil Petition for Leave to Appeal No.62-67 and several other leave petitions of 1998 and 1999 *(Secretary, Ministry of Establishment, Government of Bangladesh vs Md Jahangir Hossain and 65 others 51 DLR(AD) 148)* wherein it was held:

> ". . . if the executive prepares a list of persons of appointment in the service of the Republic without the backing of any law behind it and actually appoints some persons from the list, the others left out can come to the High Court Division not for enforcement of any legal right but for enforcement of their fundamental right".

6. And in such view of the matter, the finance division of the Ministry of Finance clearly violated the fundamental right of the writ-petitioners refusing "to shift them to Revenue Budget in discrimination with others in the same posting and so listed by the executives of the concerned authorities." On expiry of the tenure of the project for which the writ-petitioners were recruited on temporary basis, they were taken in the Board in different offices and they worked for the last 7(seven) years out of which 4(four) years without salary (writ-petitioners were paid salaries for three years from the lump grants to the Ministry of Agriculture) and their services have been considered as indispensable, therefore, a very reasonable and legitimate expectation developed in their minds that they would be absorbed ultimately in the same manner as is usually done in such cases.

7. The writ-petitioners issued notice upon the writ-respondents demanding justice, but they did not respond; hence they filed the writ petition.

8. Writ-respondent No.1, i.e. the Government of Bangladesh, represented by the Secretary, Ministry of Finance, contested the Rule by filing an affidavit-in-opposition contending, *inter-alia*, that after completion of the project the services of the project personnel automatically ended and no termination letter was required in that regard. The writ-petitioners continued with their work on their own with the hope that their posts will be transferred to the revenue budget. No "budget or vested right" was created in favour of the writ-petitioners for being absorbed in the revenue sector by the decision

dated 1-8-1999 and 8-8-1999. The meeting of the standing committee of the Ministry of Finance was held on 10-1-2002 which did not recommend transfer of the post of the writ-petitioners in the revenue set up and in that meeting, the Executive Director of the Board was also present. The writ-petitioners were allowed pay and allowances upto December, 1997 with the approval of the Ministry of Finance. The Ministry of Finance did not sanction money to pay the writ-petitioners further salary and allowances on the ground that their posts were not recommended for revenue set up. The Ministry of Finance took the decision according to the existing rules and there is no such mandatory rule to transfer all posts and manpower to the revenue set up after completion of the project. The writ-petitioners had no reason to feel aggrieved by the impugned letter. The writ petition was not maintainable. Therefore, the Rule was liable to be discharged.

9. On hearing the writ petition, the High Court Division by the impugned judgment and order made the Rule absolute with the following directions:

> "The respondents are directed to include the petitioners in the Revenue set up of Cotton Development Board with continuity of service, salary and fringe benefits within 1(one) month from the date of receipt of the judgment and order."

10. Heard Mr Rajik-al-Jalil, learned Deputy Attorney-General, for the writ-respondent-petitioners and Mr Abdur Rob Chowdhury, learned Counsel, entering caveat on behalf of the writ-petitioner-respondents.

11. From the impugned judgment and order, it appears that the High Court Division considering annexure-'J' to the writ petition observed that the Project Director by Memo dated 4-3-2003 had written a letter to the Secretary, Ministry of Agriculture stating in detail as to the justification of the service of 28 employees and recommended for their absorption in the revenue set up on humanitarian ground and also sought sanction of Taka 64-07 lac for giving salaries from January, 1998 to February, 2003. The High Court Division further considered annexure-'L' to the writ petition by which the Ministry of Agriculture by its Memo dated 17-3-2003 had informed the Executive Director of the Board that the Ministry of Finance expressed inability to take step to absorb 28 employees by letter dated 3-3-2003. Thereafter, the said Executive Director wrote another letter on 13-4-2003 giving more details and stating that as per decision of the Ministry of Establishment by letter dated 20-9-2003, the Director abolished 49 posts from revenue set up in order to accommodate 28 posts. The High Court Division also relied upon annexure-'N' to the supplementary affidavit, the project pro-forma wherein, it was specifically mentioned that after completion of the project on 30th of June, 1995, it would he transferred to the revenue set up. The High Court Division also considered annexure-'O' to the supplementary affidavit which clearly stated that the posts of a completed project started before 1-1-1997 shall be transferred to the revenue set up from next day of the completion of the project, but the posts in the project which was started after 1-7-1997 shall be created from the date of the Government order. The High Court Division further observed that from the materials, it was found that 392 employees of the project were absorbed in the revenue set up after its completion; the writ-respondents received the service from the writ-petitioners for about 7(seven) years till 2003 (it would be February, 2003) after the end of the project in 1995, but the writ-petitioners were paid salaries upto 1998 and thereafter, they rendered services "till 2003 with the sky high expectation" that they will be absorbed in the revenue set up. The High Court Division concluded by observing that from annexures-'N and 0', it appeared that a clear understanding was given to the writ-petition-

ers and others that their services would be transferred to the revenue set up and then came to the finding that "it has clearly been emerged from the materials that there were some sorts of promise given on behalf of the public authority but the Ministry of Finance overlooking all those promises had most unjustly rejected the recommendation of the Ministry of Establishment as well as the Ministry of Agriculture to absorb 28 posts in the revenue set up and such decision of the Ministry of Finance appears to have been made arbitrarily and without any reason or rhyme and such arbitrary decision cannot be sustained in law." In giving the above finding the High Court Division relied upon the observations made by this Division in the case of *Secretary, Ministry of Establishment vs Md Jahangir Hossain and 65 others (supra).*

12. Mr Rajik-al-Jalil, learned Deputy Attorney-General, appearing for the writ-respondent-petitioners could not assail the facts as noticed by the High Court Division and the observations made by it with reference to any material on record. Therefore, we find nothing wrong with the view taken by the High Court Division to the effect "We have no hesitation to hold that the petitioners' expectation of being absorbed in the service after satisfactory completion by 5 years service cannot but be said to be their legitimate expectation and in all fairness, they should be absorbed in their service" and in giving direction upon the writ-respondents to "include the petitioners in the Revenue set up of Cotton Development Board with continuity of service" within 1(one) month from the date of receipt of the impugned judgment and order. Therefore, no interference is called for by this Division with that portion of the direction given by the High Court Division in the impugned judgment and order (as quoted hereinbefore). But the direction given by the High Court Division so far as it relates to give "salary and fringe benefits" to the writ-petitioners is concerned that cannot be maintained altogether for the reason that admittedly, the writ-petitioners worked upto February, 2003, whereas the impugned judgment and order was passed on 5-1-2011 and if the direction of the High Court Division is given effect then they shall have to be paid salary and fringe benefits from March, 2003 till the pronouncement of the judgment in spite of their not being in service during that period and thereby they did not render any service to the Board. However, as the writ-petitioners rendered service to the Board till February, 2003 they are surely entitled to get the salary and fringe benefits upto February, 2003 from January, 1998 (admittedly the writ petitioners were paid the salaries and fringe benefits upto December, 1997). It may be stated that in paragraph 4 of the writ petition, it was stated to the effect "That although the appointment of the petitioners was for the tenure of the project which expired on 30-6-1995 but they were allowed to continue in their services till February, 2003 and the respondents received their services without any fresh appointment as of other regular employees of the Cotton Development Board." The writ-respondents did not deny the above quoted facts asserted in the writ petition and thus the claim of the writ-petitioners that the Board received their services upto February, 2003 is an admitted fact. It further appears that the impugned judgment and order was passed on 5-1-2011 and no order was passed by this Division staying operation of the same and we believe that by this time, the writ-respondents have included the writ-petitioners in the revenue set up of the Board as per the direction given by the High Court Division.

This leave petition is disposed of with the above modification of the direction of the High Court Division in respect of the salary and fringe benefits to be paid to the writ-petitioners.

Ed.

Appellate Division
(Criminal)

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

Judgment
March 13th, 2014.

Shah Alam (Md).....
.....Petitioner
vs
State, represented by the Deputy Commissioner, Chittagong and another.....
.....Respondents*

Negotiable Instruments Act (XXVI of 1881)
Section 138

Person who issued the cheque (accused-petitioner) having full knowledge about the fact that the cheque could not be encashed on the basis of his signature, issued the same with the malafide intention to frustrate the claim of the complainant.

The cheque was not returned only on the ground that the signature of another account holder was necessary and that two grounds were assigned for dishonour of the cheque, (1) insufficient fund and (2) joint signatures required. 'The High Court Division held that it was clearly stated in the complaint that the accused-petitioner in his individual capacity asked for loan of Taka 50,00,000 and that the complainant extended the loan to the accused-petitioner accordingly and that the question of liability of the person holding joint account, even if any, was not material. The High Court Division then held that the person who issued the cheque (accused-petitioner) having full knowledge about the fact that the cheque could not be encashed on the basis of his signature, issued the same with the malafide intention to frustrate the claim of the complainant. .....(7)

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

None represented—Respondents.

*Criminal Petition for leave to Appeal No. 88 of 2011.

(From the judgment and order dated 6-2-2011 passed by the High Court Division in Criminal Miscellaneous Case No. 5391 of 2010.

The case reported in 63 DLR 137 has been affirmed by the above judgment)

Judgment

Syed Mahmud Hossain J: This criminal petition for leave to appeal is directed against the judgment and order dated 6-2-2011 passed by the High Court Division in Criminal Miscellaneous Case No. 5391 of 2010 discharging the Rule arising out of proceedings of Sessions Case No.1327 of 2009 corresponding to CR No. 552 of 2009 (Kotwali) under section 138 of the Negotiable Instrument Act now pending in the Court of Additional Mohanagar Sessions Judge, Third Court, Chittagong.

2. The relevant facts for the purpose of disposal of this criminal petition for leave to appeal, in a nutshell, are:

Respondent No. 2, Mohammad Kamal Uddin Chowdhury lodged a petition of complaint before the Chief Metropolitan Magistrate, Chittagong on 29-4-2009 against accused-petitioner Mohammad Shah Alam under section 138 of the Negotiable Instrument Act, 1881 alleging that while he had cordial relationship with the accused-petitioner, the latter received a loan of Taka 50,00,000 from the complainant with the promise to pay back the money within a few days. Subsequently, the accused-petitioner issued a cheque dated 2-2-2009 in favour of the complainant for repayment of the loan. When the cheque was presented for encashment at last on 5-2-2009, it was dishonoured for insufficiency of fund in the account of the drawer with an added remark that joint signatures were required. On 8-2-2009 at about 7-00 PM., the complainant personally approached

the accused-petitioner to get the amount of money for which the cheque was issued but the latter refused to pay. As such, on 25-2-2009, a legal notice was issued upon the accused-petitioner and it was duly received by him on 19-3-2009. But as the accused-petitioner did not pay the amount of the dishonoured cheque within the stipulated period, the petition of complaint was filed on 29-4-2009. The learned Additional Chief Metropolitan Magistrate, Chittagong took cognizance under section 138 of the Negotiable Instrument Act, 1881 and subsequently, it was transferred to Mohanagar Additional Sessions Judge, Third Court, Chittagong. When the case was pending before the said Court, the accused-petitioner preferred an application under section 561A of the Code of Criminal Procedure before the High Court Division and obtained Rule in Criminal Miscellaneous Case No.5391 of 2010.

3. The learned Judges of the High Court Division upon hearing the parties by the judgment and order dated 6-2-2011 discharged the Rule and vacated the order of stay granted earlier by this Court and also directed the trial Court to proceed with the case in accordance with law.

4. Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the leave petitioner has preferred this criminal petition for leave to appeal before this Division.

5. Mr Md Khurshid Alam Khan, learned Advocate, appearing on behalf of the leave petitioner, submits that Joint signatures are the vital issue in the instant case and that the allegation of dishonour of cheque on account of joint signatures does not constitute offence under section 138 read with section 141 of the Negotiable Instrument Act.

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

7. The High Court Division held that the cheque was not returned only on the ground that the signature of another account holder was necessary and that two grounds were assigned for dishonour of the cheque, (1) insufficient fund and (2) joint signatures required. 'The High Court Division held that it was clearly stated in the complaint that the accused-petitioner in his individual capacity asked for loan of Taka 50,00,000 and that the complainant extended the loan to the accused-petitioner accordingly and that the question of liability of the person holding joint account, even if any, was not material. The High Court Division then held that the person who issued the cheque (accused-petitioner) having full knowledge about the fact that the cheque could not be encashed on the basis of his signature, issued the same with the malafide intention to frustrate the claim of the complainant.

The aforesaid findings of the High Court Division having been made on proper appreciation of law and fact do not call for interference. Accordingly, this criminal petition for leave to appeal is dismissed.

Ed.

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the application is not disposed of within the said prescribed period the applicant has an option to prefer appeal to the Chancellor within 30 (thirty) days from the date of passing such order. Accordingly, he contends that since the University did not fulfill the requirements while making the application for approval of the respective course, as such disposing of the said application by UGC within the said prescribed period, does not arise at all.

14. Mr MI Farooqui, the learned Senior Advocate appearing with Ms. Nazneen Nahar, the learned Advocate on behalf of the respondent No. 4 contends that Bangladesh Bar Council is a statutory body regulated by the Bangladesh Legal Practitioners and Bar Council Order, 1972 (President's Order No. XLVI of 1972) and the Rules made thereunder where article 27 provides that a person shall be qualified to be admitted as Advocate if he fulfills, amongst others, the condition of obtaining a degree in law from any University situated within Bangladesh. Accordingly, he submits that since Darul Ihsan University is regulated by the Private University Act, 1992 and the University Grants Commission of Bangladesh Order, 1973 as such, starting 2 years LLB (Pass) Course by the University without taking due approval of UGC is itself without any law authority. Consequently, Bangladesh Bar Council has not committed any illegality by acting upon the memo dated 8-12-2010 (Annexure-E) issued by the UGC by not publishing the result of the petitioners of writ petition No. 613 of 2011.

15. Mr Mirza Ashraf Ali, the learned Advocate appearing on behalf of the respondent No. 11, the University, in writ petition No. 613 of 2011 and Mr Md Rezaul Islam, the learned Advocate appearing in writ petition No. 10065 of 2010 for the petitioner-University submit that the University authority duly submitted application on 21-8-2006 to the UGC with request to accord permission for opening 2 years LLB (Pass) course programme and also to approve its syllabus observing all due formalities under its memo No. 5(4)UG CIU/2004/7574. It has also been submitted that having received no reply from the UGC the University authority sent a letter of reminder on 30-10-2007 vide memo No. ৫(৪)দাইবি/আর/৯৪/পার্ট-৬/৮৫৮. UGC requesting for approval of the said programme on preferential basis. As there was no formal response from UGC till date the University following the Private Universities Act, 1992 as amended in 1998 and also the Private Universities Ordinance, 2008 started giving admission to the respective students in the said course.

16. The University Grants Commission of Bangladesh Order, 1973 (President's Order No. 10 of 1973) was promulgated for constitution of University Grants Commission of Bangladesh, for the purpose of, amongst others, assessing the needs in the field of the university education and formulate plans for the development of such education. Subsequently, "বেসরকারী বিশ্ববিদ্যালয় আইন ১৯৯২" (Act No. 34 of 1992) (in short, the Act of 1992) was promulgated in view of,

> "যেহেতু দেশে উচ্চ শিক্ষার ক্রমবর্ধমান চাহিদা পূরণ ও ব্যাপক সম্প্রসারণ, সর্বসাধারণের জন্য উচ্চ শিক্ষা সুলভকরণ এবং উহার মাধ্যমে দক্ষ জনগোষ্ঠী সৃষ্টির উদ্দেশ্যে বেসরকারী পর্যায়ে বিশ্ববিদ্যালয় প্রতিষ্ঠাকরণ অত্যাবশ্যক;
>
> এবং যেহেতু দেশের কতিপয় জনকল্যাণকামী ব্যক্তি, ব্যক্তি-গোষ্ঠী, দাতব্য ট্রাষ্ট ও প্রতিষ্ঠান বেসরকারী পর্যায়ে বিশ্ববিদ্যালয় প্রতিষ্ঠা ও পরিচালনা করতে আগ্রহী;
>
> এবং যেহেতু বেসরকারী পর্যায়ে বিশ্ববিদ্যালয় প্রতিষ্ঠাকরণকল্পে বিধান করা প্রয়োজনীয় ও সমীচীন;"

17. Section 6 of the Act, 1992 provides that without obtaining certificate (সনদপত্র) from the government no private university can be established or regulated, which runs as follows:

> "বেসরকরী বিশ্ববিদ্যালয় স্থাপনের জন্য সনদপত্রঃ (১) এই ধারার অধীন সরকারের নিকট হইতে প্রয়োজনীয় সনদপত্র অর্জন

না করিয়া কোন বেসরকারী বিশ্ববিদ্যালয় স্থাপন বা পরিচালনা করা যাইবে না।

(২) কোন বেসরকারী বিশ্ববিদ্যালয় স্থাপনে বা পরিচালনায় আগ্রহী উপ-ধারা (১) এর অধীন একটি সনদপত্র অর্জনের উদ্দেশ্যে সরকারের নিকট নির্ধারিত ফরমে আবেদন করিতে হইবে।

(৩) উপ-ধারা (২) এর অধীন কোন আবেদন পাওয়ার পর সরকার আবেদনকারীর নিকট হইতে বিষয়টি সম্পর্কে উহার বিবেচনায় প্রয়োজনীয় আরও তথ্য তলব করিতে পারিবে এবং আবেদনটি বিবেচনায় পর যদি সরকার এই মর্মে সন্তুষ্ট হয় যে, আবেদনকারী কোন বেসরকারী বিশ্ববিদ্যালয় স্থাপনের জন্য ধারা ৭ এর অধীন শর্তাবলী পূরণ করিয়াছেন তাহা হইলে একটি বেসরকারী বিশ্ববিদ্যালয় স্থাপনের জন্য বিধি দ্বারা নির্ধারিত ফরমে আবেদনকারীর অনুকূলে উপ-ধারা (১) এর অধীন একটি সনদপত্র প্রদান করিবে।

(৪) যদি সরকার এই মর্মে সন্তুষ্ট হয় যে আবেদনকারী একটি বেসরকারী বিশ্ববিদ্যালয় স্থাপনের জন্য ধারা ৭ এর অধীন শর্তাবলী পূরণ করিতে ব্যর্থ হইয়াছে, তাহা হইলে সরকার আদেশ দ্বারা আবেদনকারী কর্তৃক উপ-ধারা (২) এর অধীন দাখিলকৃত আবেদনটি নাকচ করিতে পারিবেঃ

তবে শর্ত থাকে যে, আবেদনকারীকে যুক্তিসংগত শুনানীর সুযোগ প্রদান না করিয়া অনুরুপ কোন আবেদন নাকচ করা যাইবে না।

(৫) উপ-ধারা (৪) এর অধীন কোন আবেদন নাকচ আদেশ দ্বারা সংক্ষুব্দ কোন ব্যক্তি, ব্যাক্তি-গোষ্ঠী, দাতব্য ট্রাস্ট বা প্রতিষ্ঠান উক্ত আদেশের তারিখ হইতে ৩০ (ত্রিশ) দিনের মধ্যে চ্যান্সেলারের নিকট উক্ত আদেশের বিরুদ্ধে আপীল করিতে পারিবেন এবং আপীলের উপর চ্যান্সেলারের সিদ্ধান্ত চূড়ান্ত বলিয়া গণ্য হইবে।"

18. To obtain the said certificate the University has to fulfill the terms and conditions as prescribed in section 7, particularly clause "ka", which states as under:

"(৭) **সনদপত্র অর্জনের শর্তাবলী**।–ধারা ৬ এর অধীন সনদপত্র অর্জনের জন্য কোন বেসরকারী বিশ্ববিদ্যালয়কে, অন্যান্যের মাঝে, নিম্নবর্ণিত শর্তাবলী পূরণ করিতে হইবে, যথাঃ–

(ক) উহার শিক্ষা কার্যক্রম সম্পর্কিত একটি পরিকল্পনা মঞ্জুরী কমিশন কর্তৃক পূর্বানুমোদিত হইতে হইবে;"

19. In other words, for obtaining certificate the University, amongst others, has to obtain prior approval of the respective curriculum from the University Grants Commission (UGC).

20. Section 15(1) further stipulates the requirement of having approval of UGC with regard to "শিক্ষাকার্যক্রম" of the "পরিকল্পনা, শিক্ষাক্রম, সিলেবাস ও শিক্ষার মান" of the University. Sub-sections (2) and (4) of section 15 prescribe the respective procedures, which is quoted below:

"(২) উপ-ধারা (১) এর অধীন অনুমোদনের জন্য মঞ্জুরী কমিশনের নিকট একটি আবেদন করিতে হইবে; এবং আবেদন প্রাপ্তির তারিখ হইতে ৬০ (ষাট) দিনের মধ্যে মঞ্জুরী কমিশন আবেদনটির উপর উহার সিদ্ধান্ত দান করিবে।

(৩).....

(৪) যদি চ্যান্সেলার উপ-ধার (৩) এর অধীন কোন আপীল প্রাপ্তির তারিখ হইতে ৬০ (ষাট) দিনের মধ্যে উহা নিষ্পত্তি করিতে ব্যর্থ হন তাহা হইলে আপীলটি মঞ্জুর হইয়াছে বলিয়া লওয়া হইবে।"

21. From the above provision of law it is apparent that without taking due approval of the UGC the University is barred from offering any course to the respective students.

22. In the present case, Darul Ihsan University for the first time applied to the UGC on 28-1-2006 (Annexure-3 of the affidavit-in-opposition) for approval of the 2 years LLB (Pass) Course programme and also for permission to open the said course, which was duly received by the UGC on the said date. However, vide memo dated 8-5-2007 (Annexure-1 of the affidavit-in-opposition) it appears that the University vide letter dated 23-1-2007 also made a prayer for approval of UGC as to the list of its respective teachers so appointed to conduct the said course. In reply thereto the UGC vide letter dated 8-5-2007(Annexure-1) contended, *inter-alia*,

"আপনার প্রস্তাবিত ২ বছর মেয়াদী প্রোগ্রামটি পরিচালনাকল্পে নিয়োজিত শিক্ষকবৃন্দের ২৩-১-২০০৭ তারিখে প্রেরিত তথ্যাদি কমিশন কর্তৃপক্ষের হস্তগত রয়েছে। কিন্তু শিক্ষক

নিয়োগের ক্ষেত্রে নিম্নবর্ণিত ঘাটতি থাকার কারণে উল্লেখিত প্রোগ্রামের সিলেবাসের ক্ষেত্রে কোন সিদ্ধান্ত গ্রহণ করা সম্ভব হচ্ছে না ঃ

(১) প্রয়োজনীয় শিক্ষাগত যোগ্যতা ও অভিজ্ঞতা না থাকা সত্ত্বেও ড. মোঃ আনসার আলী খানকে অধ্যাপক হিসেবে নিয়োগ দেখানো হয়েছে।

(২) সহযোগী অধ্যাপক আখতারুল কবীর এর শিক্ষাগত যোগ্যতার তথ্য অসম্পূর্ণ থাকায় এই পদের জন্য প্রয়োজনীয় যোগ্যতা তাঁর আছে কিনা তা বোঝা যাচ্ছে না। তাছাড়া তাঁর কোন প্রকাশনাও নেই।

(৩) খন্ডকালীন সহযোগী অধ্যাপক মোঃ ফয়জুল কবীর এর প্রয়োজনীয় শিক্ষকতার পূর্বাভিজ্ঞতা নেই।

(৪) জনাব আব্দুর রহমান হাওলাদারকে সহকারী অধ্যাপক হিসাবে নিয়োগ দেয়া হয়েছে। বিমকের নীতিমালা অনুযায়ী তাঁর শিক্ষাগত যোগ্যতা ও বিশ্ববিদ্যালয় পর্যায়ে শিক্ষকতার অভিজ্ঞতা নেই।

এমতাবস্থায়, কমিশনের নীতিমালা অনুযায়ী যথাযথ যোগ্যতা ও অভিজ্ঞতাসম্পন্ন প্রয়োজনীয় সংখ্যক শিক্ষক নিয়োগপূর্বক সংযুক্ত তালিকা ও ছক অনুযায়ী পূর্ণাঙ্গ তথ্যাদি কমিশন অফিসে প্রেরণ করার জন্য আপনাকে অনুরোধ করা হল। চাহিত তথ্যাদি না পাওয়া পর্যন্ত প্রস্তাবিত প্রোগ্রামের সিলেবাসের উপর কোন সিদ্ধান্ত গ্রহণ করা সম্ভব হবে না।"

23. On fulfilling the requirements no correspondences were made on behalf of the University, as is apparent from the record. However, with regard to seeking permission for opening 2 years LLB (Pass) Programme and approval of its syllabus no reply was made from UGC either. However, the University appears to have given repeated reminder on 30-10-2007, 29-1-2009 and 5-12-2010 respectively, but there was no response. Meanwhile, having received no reply the University started 2 years LLB (Pass) Course without the said approval. In this regard the contents of the letter dated 5-12-2010 (Annexure-2 of the affidavit-in-opposition) of respondent Nos. 7-10 is required to be looked into, which runs thus:

"বরাবর
চেয়ারম্যান
এ্যানরোলমেন্ট কমিটি
বাংলাদেশ বার কাউন্সিল
৩, শহীদ ক্যাপ্টেন মনসুর আলী সরণী
রমনা, ঢাকা-১০০০।

বিষয়ঃ বাংলাদেশ বার কাউন্সিলের সনদপ্রাপ্তির জন্য দারুল ইহসান বিশ্ববিদ্যালয় হতে এলএলবি (দু বছর) পরীক্ষায় উত্তীর্ণ শিক্ষার্থীদের অংশগ্রহণের অনুমতি দেয়ার জন্য আবেদন।

জনাব,
আসসালামু আলাইকুম।

উপরোক্ত বিষয়ে আপনার সদয় দৃষ্টি আকর্ষণকরতঃ জানানো যাচ্ছে যে, দারুল ইহসান বিশ্ববিদ্যালয় বাংলাদেশে উচ্চ শিক্ষার একটি স্বনামধন্য বিদ্যাপিঠ। ইউজিসি কর্তৃক অনুমোদিত গুরুত্বপূর্ণ কিছু বিষয় এ বিশ্ববিদ্যালয়ের পাঠক্রমের অর্ন্তভুক্ত। উল্লেখযোগ্য প্রোগ্রামগুলো হলো ইংরেজী ভাষা ও সাহিত্য, আইন, কম্পিউটার সায়েন্স এবং আইটিই, বিবিএ, এমবিএ, লাইব্রেরী সায়েন্স ইত্যাদি।

বিশ্ববিদ্যালয় মঞ্জরী কমিশন কর্তৃক এ বিশ্ববিদ্যালয়ের আইন বিভাগের ৪ বছর মেয়াদের এলএলবি (সম্মান) কোর্স সহ ১ বছর মেয়াদের এলএলএম কোর্স অনুমোদিত থাকলেও ২ বছর মেয়াদের এলএলবি কোর্স অনুমোদিত ছিল না। গত ২১-৮-২০০৬ তারিখে ২ বছর মেয়াদের এলএলবি প্রোগ্রামসহ এর সিলেবাস অনুমোদনের জন্য ইউজিসি বরাবর প্রস্তাব দাখিল করা হয় (পতাকা ক)। উপরোক্ত গত ৩০-১০-০৭ এবং ২৯-১-০৯ তারিখে তাগিদ পত্রের মাধ্যমে প্রস্তাবটি অনুমোদনের জন্য বিশেষভাবে অনুরোধ জানানো হয় (পতাকা খ, গ)। তাগিদপত্র দেয়া সত্বেও ২ বছর মেয়াদী এলএলবি কোর্স সম্পর্কে কোন উত্তর না পাওয়ায় এ বিশ্ববিদ্যালয়ের প্রয়াত ভাইস চ্যান্সেলর প্রফেসর মনিরুল হক এর নেতৃত্বে এ বিশ্ববিদ্যালয়ের একটি উচ্চ পর্যায়ের প্রতিনিধি দল ইউজিসি এর চেয়ারম্যান মহোদয়ের সাথে দেখা করে সংশ্লিষ্ট বিষয়ের সিলেবাস ও কোর্সটি অনুমোদনের জন্য অনুরোধ জানান। উক্ত অনুরোধের প্রেক্ষিতে ইউজিসির চেয়ারম্যান মহোদয় ২ বছর মেয়াদের এলএলবি কোর্স ও সিলেবাস অনুমোদনের আশ্বাস প্রদান করেন। যা হোক দারুল ইহসান বিশ্ববিদ্যালয় উপরোক্ত বিষয়ে কোন পত্র পায়নি। কাজেই ইউজিসি এ্যাক্ট অনুযায়ী ধরে নেয়া হয় যে, দুই বছর মেয়াদী এলএলবি কোর্স অনুমোদিত হয়েছে। (কপি সংযুক্তঃ প্রাইভেট ইউনিভার্সিটি এ্যাক্ট ১৯৯২ তারিখ ৯ই আগস্ট ১৯৯২ এর ১৫ নং ধারা পতাকা-ঘ)।

২০০৭ সালে এ বিশ্ববিদ্যালয়ে দুই বছর মেয়াদী এল.এল.বি কোর্স শুরু হয়। এ পর্যন্ত ৩টি ব্যাচের শিক্ষার্থীরা কোর্স সমাপ্ত করেছেন

এবং বর্তমানে সপ্তম ব্যাচ চালু আছে। ২৫-৪-২০১০ তারিখে একাডেমিক কাউন্সিল এবং ২৮-৬-২০১০ তারিখের সিন্ডিকেটের সভায় কোর্সটি অনুমোদন করা হয় তবুও একজন বিজ্ঞ আইনজীবির মতামত নেয়ার উদ্যোগ নেয়া হয়। বিজ্ঞ আইনজীবি তার মতামতে উল্লেখ করেন যে, যে সমস্ত শিক্ষার্থীরা সূত্রোক্ত বিষয়ের শিক্ষাকোর্স সফলভাবে সমাপ্ত করিয়াছেন তাঁহাদের বরাবরে সূত্রোক্ত বিষয়ের সার্টিফিকেট ইস্যু করিতে আইনগত কোন প্রকার বাধাঁ পরিলক্ষিত হয় না (পতাকা ঙ)।

এখানে উল্লেখযোগ্য, এ বিশ্ববিদ্যালয় হতে ইতোপূর্বে ২ বছর মেয়াদের এলএলবি কোর্স সম্পন্নকারী কয়েকজন ছাত্র বার কাউন্সিলে যথারীতি পরীক্ষা প্রদান পূর্বক আইন ব্যবসা সনদ অর্জন করেছে। উল্লিখিত অবস্থার প্রেক্ষিতে দারুল ইহসান বিশ্ববিদ্যালয়, ধানমন্ডি হতে যে সমস্ত শিক্ষার্থীরা সফলভাবে ২ বছর মেয়াদী এলএলবি কোর্স সমাপ্ত করেছেন তাঁহাদেরকে বার কাউন্সিলে যথারীতি পরীক্ষায় অংশ গ্রহণের অনুমতি প্রদানের জন্য আপনাকে বিশেষভাবে অনুরোধ জানানো হলো।

আমরা জানতে পেরেছি যে, ইউজিসি আপনাকে পত্র মারফত জানিয়েছে যে অত্র বিশ্ববিদ্যালয়ের এলএলবি (২ বছর মেয়াদী) কোর্স অনুমোদিত নয়। এ বিষয়ে আমরা ইউজিসির সাথে আলোচনা করে আগামী ২ (দুই) সপ্তাহের মধ্যে বিস্তারিত জানাতে পারবো। উক্ত ২ (দুই) সপ্তাহ সময় প্রদান করতে সবিনয় অনুরোধ করা হলো।"

24. From the above, it is evident that the University had started the 2 years LLB (Pass) Course in the year 2007 without due permission of UGC, admitted respective students including the petitioners, proceeded with the said Course with the syllabus not approved by the UGC and ultimately, on completion of the said course the University gave provisional certificates to the successful students and with the said certificates the petitioners had appeared in the Enrolment of Advocateship Examination, 2010.

25. The cause of action arose when Bangladesh Bar Council stopped publishing the result of the petitioners for the intervention of the UGC alleging, *inter-alia*, that in view of article 27(1) of the Bangladesh Legal Practitioners and Bar Council Order, 1972 the petitioners in writ petition No. 613 of 2011 did not obtain lawful degree in law from the University, for, the respective provisional certificate was no certificate in the eye of law since its course had not been approved by the UGC. Hence, they were disqualified to sit for the said examination. The University frankly admits the fact that the respective course was started without due permission and that there was no approval of syllabus, but for the same respective application was duly made to UGC on 28-1-2006 and that reminder was also given by the University, but the UGC remained silent. As such, in view of section 12(5) of the Ordinance No. 62 of 2008 since approval was deemed to have been given hence, the respective course was duly mandated as lawful.

26. Section 12 of the Ordinance No. 62 of 2008 in this regard is required to be looked into which provides as follows:

"অনুমোদিত ক্যাম্পাস।–(১) বেসরকারী বিশ্ববিদ্যালয় স্থাপন ও পরিচালনার নিমিত্ত প্রদত্ত সনদপত্রে সংশ্লিষ্ট বেসরকারী বিশ্ববিদ্যালয়ের অনুমোদিত ক্যাম্পাসের উল্লেখ থাকিবে।

(২) উপ-ধারা (১) এ উল্লিখিত ক্যাম্পাস ব্যতীত অন্য কোন স্থানে বেসরকারী বিশ্ববিদ্যালয়ের কার্যক্রম পরিচালনা করা যাইবে নাঃ

তবে শর্ত থাকে যে, সরকার কোন স্থায়ী সনদপ্রাপ্ত বেসরকারী বিশ্ববিদ্যালয় কর্তৃপক্ষের আবেদনের ভিত্তিতে, এই অধ্যাদেশ ও তদধী প্রণীত বিধির শর্তসমূহ পূরণ সাপেক্ষে, দেশের যে কোন স্থানে এক বা একাধিক বেসরকারী বিশ্ববিদ্যালয় স্থাপনের অনুমতি প্রদান করিতে পারিবে।

(৩) উপ-ধারা (২) এ যাহা কিছুই থাকুক না কেন, কর্তৃপক্ষ সংশ্লিষ্ট বেসরকারী বিশ্ববিদ্যালয়ের নতুন কোন বিভাগ, অনুষদ বা ইনস্টিটিউট চালু করিবার উদ্দেশ্যে একই শহরে অনুমোদিত ক্যাম্পাসের অতিরিক্ত অন্য কোন ক্যাম্পাস স্থাপন করিতে চাহিলে বিশ্ববিদ্যালয় মঞ্জুরী কমিশন কর্তৃক নির্ধারিত ফি প্রদান করিয়া উহার বরাবরে আবেদন করিতে পারিবে।

(৪) উপ-ধারা (৩) এ উল্লিখিত আবেদন প্রাপ্তির অনুর্ধ্ব ৯০ দিনের মধ্যে বিশ্ববিদ্যলয় মঞ্জুরী কমিশন প্রয়োজনীয় পরিদর্শন সম্পন্ন করিয়া পরবর্তী ৯০ দিনের মধ্যে উক্ত বিষয়ে প্রয়োজনীয় সিদ্ধান্ত প্রদান করিবে।

(৫) উপ-ধারা (৪) এ উল্লিখিত সময়সীমার মধ্যে বিশ্ববিদ্যালয় মঞ্জুরী কমিশন কর্তৃক কোন সিদ্ধান্ত

প্রদত্ত না হইলে সংশ্লিষ্ট আবেদনটি অনুমোদিত হিসাবে বিবেচিত হইবে।

(৬) উপ-ধারা (৪) এ উল্লিখিত সময়সীমার মধ্যে বিশ্ববিদ্যালয় মঞ্জরী কর্তৃক প্রদত্ত কোন সিদ্ধান্তে কোন ব্যক্তি সংক্ষুব্ধ হইলে উক্ত সিদ্ধান্ত প্রদানের তারিখ হইতে ৩০ (ত্রিশ) দিনের মধ্যে উহার বিরুদ্ধে চ্যান্সেলরের নিকট আপীল করা যাইবে এবং এতদবিষয়ে চ্যান্সেলরের সিদ্ধান্ত চূড়ান্ত বলিয়া গণ্য হইবে।"

27. On perusal of the said provision it appears that sub-section (5) contains consequential provision if decision is not given within the prescribed period. However, the facts remains that the said provision is applicable if prayer is made under sub-section (3) for "নূতন কোন বিভাগ অনুষদ বা ইনষ্টিটিউট চালু করিবার উদ্দেশ্যে.... অতিরিক্ত অন্য কোন ক্যাম্পাস স্থাপন করিতে চাহিলে;" not relating to giving approval of syllabus of the respective course. Rather, section 25 of the Ordinance states as under:

"**পাঠ্যক্রম কমিটি**।-(১) প্রত্যেক বেসরকারী বিশ্ববিদ্যালয়ের প্রত্যেক বিভাগের পাঠ্যক্রম কমিটি থাকিবে এবং উক্ত কমিটিতে বিভাগীয় সকল শিক্ষক ও অন্য বিশ্ববিদ্যালয়ের বিষয়ের ২ (দুই) জন বিশেষজ্ঞ সদস্য থাকিবেন এবং বিভাগীয় প্রধান পাঠ্যক্রম কমিটির সভাপতি হইবেন।

(২) বেসরকারী বিশ্ববিদ্যালয়ের প্রতিটি বিষয়, কোর্স এবং প্রোগ্রামের সিলেবাস বিশ্ববিদ্যালয় মঞ্জুরী কমিশন কর্তৃক অনুমোদিত হইতে হইবে এবং লিখিত অনুমোদনপত্র জারী হইবার পূর্বে সংশ্লিষ্ট বিষয়, কোর্স বা প্রোগ্রামে কোন ছাত্র-ছাত্রী ভর্তি করা যাইবে না।

(Emphasis given)

(৩) পাঠ্যক্রম কমিটি বিশ্ববিদ্যালয় মঞ্জুরী কমিশন কর্তৃক অনুমোদিত কোন বিষয়, কোর্স ও প্রোগ্রামের উল্লেখযোগ্য কোন পরিবর্তন বা পরিবর্ধন আনয়ন করিতে চাহিলে তদবিষয়ে বিশ্ববিদ্যালয় মঞ্জুরী কমিশনের নিকট, উহার যুক্তিসহ, আবেদন করিতে হইবে।

(৪) উপ-ধারা (৩) এর অধীন কোন আবেদন প্রাপ্তির ৯০ দিনের মধ্যে বিশ্ববিদ্যালয় মঞ্জুরী কমিশন সংশ্লিষ্ট বিষয়ে উহার সিদ্ধান্ত প্রদান করিবে।

(৫) উপ-ধারা (৪) এ উল্লিখিত সময়সীমার মধ্যে কোন সিদ্ধান্ত প্রদান না করা হইলে আবেদনটি অনুমোদিত হিসাবে বিবেচিত হইবে।"

28. The said Ordinance had not been ratified subsequently by the Parliament within time hence, it died its natural course. The Parliament, however, promulgated "বেসরকারী বিশ্ববিদ্যালয় আইন, ২০১০" (Act No. 35 of 2010) wherein vide section 53(1) the Act No. 34 of 1992 had been repealed. Vide sub-section (2) of section 53 the proceedings initiated and pending under the Act No. 34 of 1992 were saved deeming to have been taken under Act No. 35 of 2010. With the promulgation of Act No. 35 of 2010 on 18-7-2010 the private universities so had been established under the Act No. 34 of 1992 have to comply with the conditions as stipulated in the Act No. 35 of 2010.

29. Sections 24(3) and (4) of the Act No.35 of 2010 are relevant in this regard, which runs as follows:

"(৩) বেসরকারী বিশ্ববিদ্যালয়ের প্রতিটি বিষয় ও কোর্স বিশ্ববিদ্যালয় মঞ্জুরী কমিশন কর্তৃক অনুমোদিত হইতে হইবে এবং লিখিত অনুমোদনপত্র জারী হইবার পূর্বে সংশ্লিষ্ট বিষয় ও কোর্সে কোন শিক্ষার্থী ভর্তি করা যাইবে না।

(Emphasis given)

(৪) কমিশন কর্তৃক অনুমোদিত কোন বিষয় বা কোর্সের উল্লেখযোগ্য কোন পরিবর্তন বা পরিবর্ধন আনয়ন করিতে চাহিলে, পাঠ্যক্রম কমিটি তদবিষয়ে কমিশনের নিকট, উহার যুক্তিসহ, আবেদন করিবে।"

Section 35 (1) also states, *inter-alia*,

"প্রত্যেক বেসরকারী বিশ্ববিদ্যালয় উহার শিক্ষা কার্যক্রম সম্পর্কিত পরিকল্পনা বা শিক্ষাক্রম সম্পর্কিত বিষয়ে বিশ্ববিদ্যালয় মঞ্জুরী কমিশনের লিখিত অনুমোদন গ্রহণ করিবে;

তবে শর্ত থাকে যে, কোন প্রোগ্রাম বা কোর্স চালু করিবার ক্ষেত্রে, যদি অন্য কোন আইনের অধীন প্রণীত কোন বিধি-বিধানের অন্য কোন সংস্থার অনুমোদন গ্রহণ বাধ্যতামূলক হয়, তাহা হইলে উক্ত সংস্থার অনুমোদনও গ্রহণ করিতে হইবে।"

30. From the chronology of the statutes i.e. Act No. 34 of 1992, Ordinance No. 54 of 2008 and Act No. 35 of 2010, it is appearent that with-

out taking due approval of the UGC private university is barred from opening, expanding or even amending any course as well as its curriculum and syllabus. Most important of all, before obtaining the said approval no students can be admitted in the respective course. In view of the said legal position non-publication of result of the petitioners of writ petition No. 613 of 2011 by the Bangladesh Bar Council pursuant to memo dated 8-12-2010 issued by the respondent Nos. 9 and 10 on behalf of the UGC on the ground that neither there was any permission to open 2 years LLB Pass course nor due approval was taken as to its syllabus, cannot be termed as unlawful.

31. Moreso, since the University has failed to show that meanwhile upon fulfilling the due requirements of law it has made correspondences to UGC for permission to open 2 years LLB (Pass) course and for approval of the syllabus of the said course. As such, the prayer so made in writ petition No. 10065 of 2010 cannot be entertained.

32. But the facts remains that for the willful laches of the University authority the career of the respective students including the petitioners 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. In this regard section 35(7) of the Act No. 35 of 2010 provides, *inter-alia*, as under:

> "কোন কারণে কোন বেসরকারী বিশ্ববিদ্যালয়ে অচলাবস্থা দেখা দিলে কিংবা উহার স্বাভাবিক শিক্ষা কার্যক্রম ব্যাহত ও শিক্ষার্থীদের ক্ষতিগ্রস্ত হওয়ার আশঙ্কা দেখা দিলে, উক্ত বিশ্ববিদ্যালয়ের স্বাভাবিক শিক্ষা কার্যক্রম অব্যাহত রাখিবার স্বার্থে, চ্যান্সেলর কমিশন ও শিক্ষা মন্ত্রণালয়ের সুপারিশক্রমে, প্রয়োজনীয় আদেশ ও নির্দেশ দিতে পারিবেন এবং এতদবিষয়ে চ্যান্সেলরের সিদ্ধান্তই চুড়ান্ত বলিয়া গণ্য হইবে।"

33. The University so far had completed 7 (seven) batches of 2 years LLB (Pass) Course without obtaining due permission from the UGC. In view of the same the legal mandate of the said course so far the petitioners have completed, the provisional certificates they have obtained after completion of the said course and the respective examinations they have given at the Bangladesh Bar Council have now become uncertain. 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.

34. Meanwhile, the respondent government along with the UGC are hereby directed to take immediate steps towards closing of 2 years LLB (Pass) Course of the University since it is being continued till date without due permission and approval of the UGC and that the University will take necessary steps with regard to the students of the pending course.

35. Because of the avowed wilful and intentional negligence of the University the petitioners of writ petition No. 613 of 2011 have been immensely prejudiced which cannot be compensated by money. However, as a token of their mental satisfaction the University authority is hereby directed to pay costs of Taka 5 (Five) lakhs to each of the said petitioners under section 46(4) of the Act No. 35 of 2010 within a period of 30 (thirty) days and that the said costs is to be borne from its reserve fund (সংরক্ষিত তহবিল).

36. With the above observations both the Rules are disposed of.

Let a copy of this judgment and order be communicated to the Chancellor of the University, the Hon'ble President of the country, and also to the Secretary, Ministry of Education in order to take necessary substantive steps in the matter so that the life and career of the respective students will no more

become the subject of whim, caprice and reckless decision of the University in question which is run by the most highly qualified educated personnel of the country.

Ed.

High Court Division
(Special Original Jurisdiction)

Moyeenul Islam Chowdhury J
Md Ashraful Kamal J

Judgment
October 23rd, 2014.

Kazi Riazul Manir.....
.....Petitioner

vs

Anti-Corruption Commission reprsented by its Chairman, and others...Respondents*

Constitution of Bangladesh, 1972
Article 102(2)

***64 DLR (AD) 14* has ousted the jurisdiction of the writ Court to quash the proceedings of a criminal case unless the 'vires' of any law is found to have been challenged.** .....(10)

Mens Rea

Question of determination of the 'mens rea' or otherwise is a matter of evidence and trial and that cannot be pre-judged at this stage. .....(11)

Golam Nabi vs Anti-Corruption Commission, 65 DLR 181 and Chairman, Anti-Corruption Commission vs Enayetur Rahman, 64 DLR (AD) 14 ref.

Imranul Kabir, Advocate—For the Petitioner.

Md Khurshid Alam Khan, Advocate—For the Respondent No. 1.

Md Motaher Hossain (Sazu), DAG with Purabi Rani Sharma, AAG and Md Shafiquel Islam Siddique, AAG—For the Respondent Nos. 4 & 5.

*Writ Petition No. 569 of 2008.

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 initiation and continuation of the proceedings of Metro Special Case No. 25 of 2007/116(da) of 2007 arising out of Anti-Corruption Commission General Register Case No. 25 of 2007 corresponding to Motijheel Police Station Case No. 140 dated 29-3-2007 under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 and Rule 15 of the Emergency Power Rules, 2007, now pending in the 3rd Court of Special Judge, Dhaka should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

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

The petitioner is an Executive Engineer of Public Works Department (PWD) and he was posted at the Rajdhani Unnayan Kartipakkha (RAJUK) as Project Director on deputation. During his tenure as Project Director of the RAJUK, the Ministry of Housing and Public Works by its Memo No. শা-১০/১ এম-২/২০০০(খন্ড - ১)/৫৬ dated 27-1-2004 directed the Chairman of the RAJUK to send a report on the present market value of 13 (thirteen) houses and the said Ministry by its Memo No. শা-১০/১ এম-২/২০০(অংশ-৩)/১৪৮ dated 1-4-2004 also directed the Chairman to take necessary steps to sell out 16(sixteen) houses referred to in the said two memos respectively. Accordingly, the Chairman of the RAJUK formed a 6(six) Member Valuation Committee to report on the present market price of the houses vide RAJUK'S office order No. 37/2000 dated 27-4-2004 and the petitioner being the Project Director of the RAJUK was a Member of the Valuation Committee. In due course, the Valuation Committee deter-

mined the valuation of the houses in question and a valuation report was submitted to the Chairman of the RAJUK and subsequently it was forwarded to the Ministry of Housing and Public Works for necessary action. Thereafter after the approval of the Ministry of Housing and Public Works, the RAJUK Authority invited open tenders by way of paper publications on complying with necessary formalities and accepted the tenders and prepared a report thereon and forwarded it to the said Ministry for its decision. The sale process in respect of the houses was completed by the RAJUK Authority as directed by the Ministry. As such, the petitioner had no connivance in the sale process of the houses. Be that as it may, the petitioner came to know that a criminal case had been initiated against him and others with Motijheel Police Station being Motijheel Police Station Case No. 140 dated 29-3-2007 under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 and Rule 15 of the Emergency Power Rules, 2007. After investigation, the Anti-Corruption Commission submitted charge-sheet against the petitioner and others separately for sale of each of the houses under those laws. Thereafter, the Metropolitan Senior Special Judge, Dhaka took cognizance of the offence against the petitioner and others. At a subsequent stage, the Special Judge charged the petitioner and others with the offence punishable under sections 409/109 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947. Afterwards the petitioner challenged the initiation and continuation of the proceedings of Metro Special Case No. 25 of 2007/116 (da) of 2007 arising out of Anti-Corruption Commission General Register Case No. 25 of 2007 corresponding to Motijheel Police Station Case No. 140 dated 29-3-2007 under sections 409/109 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 by filing the Writ Petition and obtained the instant Rule.

3. Mr Imranul Kabir, learned Advocate appearing on behalf of the petitioner, submits that the petitioner was not in any way connected with the commission of the alleged offence; though admittedly he was one of the members of the Valuation Committee and as he had no 'mens rea' in the commission of the alleged offence, the proceedings of the criminal case pending against him are liable to be invalidated.

4. Mr Imranul Kabir also submits that as a public servant, the petitioner performed his official functions in good faith and, as such, no criminal liability can be attributed to him and that being so, the Rule should be made absolute.

5. Mr Imranul Kabir next submits that the initiation and continuation of the proceedings of Metro Special Case No. 25 of 2007/116 (da) of 2007, now pending in the 3rd Court of Special Judge, Dhaka are an abuse of the process of the Court and to secure the ends of justice, the proceedings of the case should be quashed.

6. *Per contra*, Mr Md Khurshid Alam Khan, learned Advocate appearing on behalf of the Anti-Corruption Commission-respondent No.1, submits that the Rule is not maintainable in law in view of the decision in the case of *Golam Nabi vs Anti-Corruption Commission and others* reported in *65 DLR 181* and in that decision, it has been clearly, categorically and unequivocally held that the jurisdiction of the writ Court to quash the proceedings of a criminal case is ousted unless the 'vires' of any law is found to have been challenged, regard being had to the 'ratio' enunciated in the decision in the case of the *Chairman, Anti-Corruption Commission vs Enayetur Rahman* reported in *64 DLR (AD) 14.*

7. We have heard the submissions of the learned Advocate Mr Imranul Kabir and the counter-submission of the learned Advocate Mr Md Khurshid Alam Khan and perused the Writ Petition, Supplementary Affidavit to the Writ

Petition and relevant Annexures annexed thereto.

8. From the facts and circumstances of the case, it transpires that the fate of the Rule is virtually dependent upon the 'ratio' enunciated in the decision in the case of the *Chairman, Anti-Corruption Commission and another vs Enayetur Rahman and others* reported in *64 DLR (AD) 14.* The 'ratio' of that decision in paragraph 7 runs as follows:

> "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 extraordinary jurisdiction to be converted into Courts of appeal or revision. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, that is to say, where vires of a statute is in question or where the determination is *mala fide* 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 requires that recourse may be had to Article 102(2) of the Constitution."

9. Indisputably, the facts leading to the issuance of the Rule do not attract any of the extra-ordinary situations that have been specified in the above paragraph of the decision reported in *64 DLR (AD) 14.*

10. In the decision reported in *65 DLR 181* relied upon by Mr Md Khurshid Alam Khan, it has been unmistakably held that the decision reported in *64 DLR(AD) 14* has ousted the jurisdiction of the writ Court to quash the proceedings of a criminal case unless the 'vires' of any law is found to have been challenged. Given this situation, it is crystal clear that the petitioner could have sought necessary remedies against the proceedings of the case pending against him which are available within the four corners of the relevant statute, that is to say, the Code of Criminal Procedure, 1898. So our conclusion is that the instant Rule is incompetent. On this point, we are at one with Mr Md Khurshid Alam Khan.

11. As to the submission of Mr Imranul Kabir that the petitioner had no 'mens rea' in the commission of the alleged offence and he merely acted as a member of the Valuation Committee of the RAJUK as a matter of course and in this perspective, no criminal liability can be attributed to him, we would like to say that the question of determination of the 'mens rea' or otherwise of the petitioner is a matter of evidence and trial and that cannot be pre-judged at this stage. If we, for the sake of argument, accept the above submission of Mr Imranul Kabir right now, that will amount to begging the question.

12. In view of the *'ratio decidendi'* in the decision reported in *64 DLR (AD) 14* adverted to above, the other submissions of Mr Imranul Kabir have no legs to stand upon and accordingly, those are discarded.

13. From the foregoing discussions and having regard to the facts and circumstances of the case, we hold that the instant Rule is incompetent and accordingly, it is discharged without any order as to costs.

14. The learned Special Judge is directed to proceed with the trial of the case in accordance with law and complete the same preferably within 1(one) year.

Communicate a copy of this judgment to the Court below at once for information and necessary action.

Ed.

High Court Division
(Criminal Appellate Jurisdiction)

Md Abdul Hye J
Krishna Debnath J

State.....Petitioner
vs
Md Akabbar Hossain @ Akabbar and another
.....Condemned-Prisoners*

Judgment
January 26th, 2014

Children Act (XXXIX of 1974)
Sections 2(f) and 6(1)

Accused Akabbar aged about 14 years at the time of his trial, was a child within the meaning of section 2(f) of the Act, and according to section 6(1) of the Act, no child shall be charged with, or tried for, any offence together with an adult. Two accuseds were admittedly adult and by the joint trial of a child with the adult, the whole trial has been vitiated. .....(42)

Abdul Khair vs State, 46 DLR 212, State vs Kalu Bepari, 43 DLR 249; Shiplu vs State, 49 DLR 53, Md Nasir alias Nasir vs State, 1989 BLD 502, Md Shamim vs State, 7 BLD 305, Abdul Momen Chowdhury alias Momen vs State, 47 DLR (AD) 96, Zaibar Ali Fakir vs State, 28 BLD 627, Kadu vs State, 190 BLD 236 and Asimon Begum vs State, 51 DLR (AD) 80 ref.

Md Moniruzzaman (Rubel), DAG with Abul Kalam Azad Khan, AAG and Md Shahidul Islam Khan, AAG—For the State. (In Crl A No. 4861 of 2008 with Jail Appeal No. 769 of 2008 with Jail Appeal No. 770 of 2008)

SM Shajahan with Md Muniruzzaman and Md Ashikur Reza Chowdhury, Advocates—For the Condemned-Prisoners.

Shaikh Azmol Hayat, Advocate—For the Appellant (In Criminal Appeal No. 6287 of 2008)

*Death Reference No. 69 of 2008.
Criminal Appeal Nos. 4861 & 6287 of 2008
Jail Appeal Nos. 769 & 770 of 2008

Judgment

Krishna Debnath J: This reference under Section 374 of the Code of Criminal Procedure, has been filed for confirmation of the death sentence of the condemned prisoners namely (1) Md Akabbar Hossain alias Akabbar and (2) Md Abdur Razzaque, passed by the learned Judge of Nari-o-Shishu Nirjatan Daman Tribunal, Sirajganj, in Nari-o-Shishu Case No. 764 of 2006 arising out of GR No. 183 (Sha) of 2006 corresponding to Shahjadpur Police Station Case No. 14 dated 17-6-2006 convicting the accused persons under section 7/30 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 read with section 302/201/34 of the Penal Code and sentencing them to death by hanging.

2. On the other hand, Criminal Appeal No. 4861 of 2008, Jail Appeal No. 769 of 2008 and Jail Appeal No. 770 of 2008 have been preferred by the condemned prisoners (1) Md Akabbar Hossain alias Akabbar and (2) Md Abdur Razzaque. Informant Dilip Kumar Shaha also preferred Criminal Appeal No. 6287 of 2008 against the acquittal of accused Md Zoinal Hossain which were taken together and heard along with the death reference.

3. The Prosecution case, in short, is that the informant Dilip Kumar Saha on 17-6-2006 at 10-35 hours lodged FIR with Shahjadpur Police Station stating *inter alia* that on 16-6-2006 at about 7-00 pm while informant and his wife Ila Rani Saha were busy in marriage ceremony of their niece in the neighbouring house then accused (1) Akabbar Hossain, (2) Md. Abdur Razzaque and (3) Md Zoinal Hossain kidnapped his daughter Dipa Rani aged about 8 years.

4. Subsequently victim Dipa died in the custody of accused Md Akabbar Hossain and her dead body was recovered on the basis of Akabbar's statement.

5. During investigation accused Akabbar Hossain made judicial confession, which was recorded by the Magistrate. On completion of investigation police submitted charge-sheet against three persons namely, (1) Md Akabbar Hossain alias Akabbar, (2) Md Abdur Razzaque and (3) Md Zoinal Hossain.

6. All the accused persons were charged under Section 7/30 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 along with sections 302/201/34 of the Penal Code which was read over to them and they pleaded not guilty and claimed for trial.

7. Upon consideration of the evidence on record, trial Court found 2(two) accused-persons namely, (1) Md Akabbar Hossain alias Akabbar and (2) Md Abdur Razzaque guilty of the offence under section 7/30 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 and 302/201/34 of the Penal Code and thereby sentenced them to death by hanging and acquitted accused Md Zoinal Hossain.

8. Prosecution examined 17 (seventeen) witnesses but the defence examined none. After closing the evidence of the prosecution all the condemned-prisoners including Md Zoinal Hossain were examined under section 342 of the Code to which they repeated their innocence.

9. Being aggrieved by and dissatisfied with the impugned judgment and order, the aforesaid convict-accused-appellants preferred the Criminal Appeals and Jail Appeals as stated above mainly on the grounds that the trial Court erred both in law and facts in passing the impugned judgment and order, that the impugned judgment and order of conviction and sentence is without jurisdiction and barred by section 6(1) and section 66(1) of the Children Act, 1974, that the deposition of prosecution witnesses and so-called confessional statement made by accused Md Akabbar Hossain was self contradictory, that the statement recorded under section 22 of the Nari-o-Shishu Nirjatan Daman Ain is not a confessional statement as per section 22 of the said Ain, that the prosecution failed to prove the time, date, place and manner of occurrence, that the framing of charge and examination of the accused persons under section 342 of the Code are defective, that having misconceived and misread the evidence on record as well as so-called confessional statement, the learned Judge of trial Court illegally convicted the accused persons and that at all events, the impugned judgment and order of conviction is liable to be set-aside.

10. We will now proceed to discuss the evidences.

11. PW-1 informant Dilip Kumar Saha narrated the FIR story. He is not an eye witness to the occurrence. He heard the occurrence from PW-2 Nikhil Chandra Karmaker.

12. PW-2 Nikhil Chandra Karmaker supported the FIR story and stated that on 16-6-2006 at 7-00 PM he saw that accused Akabbar, Razzaque and Zoinal were passing away with victim Dipa Rani. He further stated that dead body of victim Dipa was recovered on the basis of accused Akabbar's information.

13. PW-3 Badal Chandra Saha is brother of informant Dilip Kumar Saha. He supported the FIR story as it is. He further stated that he did not see the occurrence but he heard it from PW-2 Nikhil Chandra Karmaker.

14. PW-4 Shushil Chandra Karmaker also heard the occurrence from PW-2 Nikhil Chandra Karmaker.

15. PW-5 Jamuna Rani Karmaker stated that she saw that all the accuseds staying inside a cannel.

16. PW-6 Shangkari Rani Saha did not see occurrence but she also heard the occurrence from PW-2 Nikhil Chandra Karmaker.

17. PW-7 Rajib Saha heard from PW-2 Nikhil Chandra Karmaker that Akabbar, Razzaque and Zoinal kidnapped Dipa Rani.

18. PW-8 Gopal Chandra Saha also heard from PW-2 Nikhil Chandra Karmaker that accused Zoinal, Akabbar and Razzaque kidnapped Dipa.

19. PW-9 Ila Rani Saha is the mother of victim Dipa. She stated that PW-2 Nikhil Chandra Karmaker said that accused Akabbar, Razzaque and Zoinal kidnapped Dipa.

20. PW-10 Md Abdus Salam stated that in his presence police prepared seizure list.

21. PW-11 Bimal Kumar Saha supported the FIR story and stated that all the accuseds confessed in their presence that they kidnapped Dipa and killed her. He also stated that police prepared seizure list in his presence.

22. PW-12 Dr Shariful Haque Siddiki deposed that on 18-6-2006 he was attached to Sirajganj Sadar Hospital. On that date he received the dead body of Dipa Rani Saha through Constable No. 673 Md Azizul. During post mortem examination he found the following injuries:—

1. One sharp cutting injury on the anterior surface of the neck measuring about 4″× 2″× 3″(L × B × D)
2. One sharp cutting injury on the occipital region measuring 1″ × $^{1}/_{2}$″ × $^{1}/_{4}$″ (L x B x D)
3. One abrasion on the back of the neck inner size.
4. One sharp cutting injury on the lower end of the left thigh measuring about 2″ x 1″x upper bone (L x B x D)

23. In his opinion death was due to haemorrhage and shock resulting from above mentioned injuries which were ante-mortem and homicidal in nature.

24. He proved the Post-mortem Report and his signature thereon.

25. PW-13 SI Nikhil Chandra Mondal is the second Investigating Officer, who after scrutinizing all the papers connected with the instant case and observing all the formalities, submitted charge-sheet in the case under Section 7/30 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 and sections 302/201/ 379/411/212 177/34 of the Penal Code.

26. PW-14 Md Khorshed Alam, learned Magistrate recorded the statement of accused Akabbar Hossain on 19-6-2006 under section 22 of the Nari-o-Shishu Nirjatan Daman Ain and proved the same and his signature thereon.

27. PW-15 SI Subrata Kumar Saha is the Investigating Officer who investigated the case. He stated that during investigation he visited the place of occurrence, prepared the sketch map and proved the same. He stated that he recovered one golden chain and ring from the possession of accused Akabbar. He also stated that the statement of accused Akabbar Hossain was recorded by learned Magistrate under section 22 of the Nari-o-Shishu Nirjatan Daman Ain. In his cross-examination he says that none of the witnesses disclosed to him that Zoinal, Razzaque and Akabbar kidnapped Dipa.

28. It has been established by the evidence of PW-12 Dr Shariful Haque that Dipa was murdered on 16-6-2006 as alleged by the prosecution and this is not disputed by the defence. The material point which calls for determination is whether the appellants or any of them committed the said murder in furtherance of their common intention. PW-1 Dilip Kumar Saha, who lodged the FIR, is not an eye witness

to the occurrence. He heard the occurrence from PW-2 Nikhil Chandra Karmaker. PW-2 Nikhil Chandra Karmaker categorically said that he saw accused Akabbar, Razzaque and Zoinul kidnapping Dipa. PW-15 Sub-Inspector Subrata Kumar Saha, Investigating Officer stated that PW-2 Nikhil Chandra Karmaker did not say to him that PW-2 saw accused Akabbar, Razzaque and Zoinal kidnapping Dipa in his statement recorded under Section 161 of the Code of Criminal Procedure.

29. For ready reference, let us reproduce below the statement of accused Akabbar.

30. The statement of accused Akabbar recorded under section 22 of the Nari-o-Shishu Nirjatan Daman Ain is as follows:—

"শুক্রবার। ১৬-৬-২০০৬ তাং ছবি দেখতে যাই দিলীপ বাবুর বাড়ি। খবর আরম্ভ হওয়ার সময় বাড়িতে চলে আসি। দীপা ওদের বাড়িতে খারাইয়া ছিল। মাছ মারার কথা বলে দীপাকে নিয়ে বড় বাড়ির গলিতে আসি। জঙ্গলে আসি। তারপর জোড় করে জঙ্গলে নেই। চিৎকার দিলে দীপাকে কিল দিই। দাঁতে লাগে। গলায় মোড়ন দেই। লতাপাতা দিয়ে (জঙ্গল দিয়ে) ও দীপা অজ্ঞান হয়ে যায়। চেইন ও আংটি নিয়ে যাই। কানের জিনিস নেই। তা হারাইয়া যায়। এরপর চেইন গিলে খাই। আংটি গিলে খাই। আমাকে ডাক্তার খানায় নিয়ে পেট দেখে, ডাক্তার বলে যে পেটে তা আছে। পায়খানা করাইয়া আটিং ও চেইন পায়। পরের দিন পুলিশ ধরে আনে। বোনের বাড়ি যাই। অন্য বাড়ি আমি পালাইয়া ছিলাম। পুলিশ সেখান থেকে ধরে আনে। এরপর শাহজাদপুর থানায় আনে। কোর্টে পাঠায় আজকে। পরে বলে যে, দীপাকে ব্লেড দিয়ে পোজ দেই।"

31. Section 22 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 reads as follows:—

"ধারা ২২। (১) এই আইনের অধীন সংঘটিত কোন অপরাধের তদন্তকারী কোন পুলিশ কর্মকর্তা বা তদন্তকারী অন্য কোন ব্যক্তি কিংবা অকুস্থলে কোন আসামীকে ধৃত করার সময় কোন পুলিশ কর্মকর্তা যদি মনে করেন যে, ঘটনা সম্পর্কে ওয়াকেফহাল বা ঘটনাটি নিজ চোক্ষে দেখিয়াছেন এমন কোন ব্যক্তির জবানবন্দি অপরাধের ত্বরিত বিচারের স্বার্থে কোন ম্যাজিষ্ট্রেট কর্তৃক অবিলম্বে লিপিবদ্ধ করা প্রয়োজন, তাহা হইলে তিনি কোন প্রথম শ্রেণীর ম্যাজিষ্ট্রেটকে উক্ত ব্যক্তির জবানবন্দি লিপিবদ্ধ করিবার জন্য লিখিতভাবে বা অন্য কোনভাবে অনুরোধ করিতে পারিবেন।

(২) উপ-ধারা (১) এ উল্লিখিত ম্যাজিষ্ট্রেট ঘটনাস্থল বা অন্য কোন যথাযথ স্থানে উক্ত ব্যক্তির জবানবন্দি গ্রহণ করিবেন এবং উক্তরুপে গৃহীত জবানবন্দি তদন্ত প্রতিবেদনের সহিত সামিল করিয়া ট্রাইব্যুনালে দাখিল করিবার নিমিত্ত তদন্তকারী কর্মকর্তার বা ব্যক্তির নিকট সরাসরি প্রেরণ করিবেন।

(৩) যদি উপ-ধারা (১) এ উল্লিখিত কোন অপরধের জন্য অভিযুক্ত কোন ব্যক্তির বিচার কোন ট্রাইব্যুনালে শুরু হয় এবং দেখা যায় যে, উপ-ধারা (২) এর অধীন জবানবন্দি প্রদানকারী ব্যক্তির সাক্ষ্য প্রয়োজন, কিন্তু তিনি মৃত্যুবরণ করিয়াছেন বা তিনি সাক্ষ্য দিতে অক্ষম বা তাহাকে খুঁজিয়া পাওয়া সম্ভব নহে বা তাহাকে ট্রাইব্যুনালে হাজির করিবার চেষ্টা এইরুপ বিলম্ব, ব্যয় বা অসুবিধার ব্যাপার হইবে যাহা পরিস্থিতি অনুসারে কাম্য হইবে না, তাহা হইলে ট্রাইব্যুনাল উক্ত জবানবন্দি মামলায় সাক্ষ্য হিসাবে গ্রহণ করিতে পারিবে;

তবে শর্ত থাকে যে, শুধুমাত্র উক্ত সাক্ষীর উপর ভিত্তি করিয়া ট্রাইব্যুনাল অভিযুক্ত ব্যক্তিকে শাস্তি প্রদান করিতে পারিবে না।"

32. According to section 22 of the aforesaid Ain alleged statement of accused Akabbar is nothing but a statement of the witness and not a confessional statement as provided under section 164 of the Code of Criminal Procedure.

33. Mr Md Moniruzzarnan (Rubel), learned Deputy Attorney-General with Mr Abul Kalam Azad Khan and Mr Md Shahidul Islam Khan, learned Assistant Attorney-General appearing on behalf of the State submits that the learned Judge of the Trial Court rightly relied on the statement made by accused Akabbar Hossain under section 164 of the Code and the evidence of recovery of dead body, golden chain and ring arrived at a correct decision against accused Akabbar Hossain and Abdur Razzaque. Learned Deputy Attorney-General also referred the case of *Abdul Khair and three others vs State* reported in *46 DLR 212, The State vs Kalu Bepari* reported in *43 DLR 249.*

34. Mr SM Shajahan with Mr Md Muniruzzaman and Mr Md Ashikur Reza

Chowdhury, learned Advocates appearing on behalf of convict accuseds submit that the so-called confessional statement is not a confession at all and this type of confessional statement is not voluntary and true. They submit that PW-14 Md Khorshed Alam learned Magistrate deposed that he recorded accused Akabbar Hossain's statement under section 22 of Nari-o-Shishu Nirjatan Daman Ain which is not a confessional statement at all and this so-called confessional statement itself is contradictory one. There is no other direct or circumstantial evidence against the convict accused and thus the impugned judgment and order is liable to be set-aside. They further submit that impugned judgment and order of conviction and sentence is without jurisdiction and barred by sections 6(1) and 66(1) of the Children Act, 1974. They referred the case of *Shiplu and other vs State* reported in *49 DLR 53, Md Nasir alias Nasir vs State* reported in *1989 BLD 502, Md Shamim vs State* reported in *7 BLD 305, Abdul Momen Chowdhury alias Momen vs State* reported in *47 DLR (AD) 96, Zaibar Ali Fakir vs State* reported in *28 BLD 627, Kadu vs State* reported in *190 BLD 236* and *Asimon Begum vs State* reported in *51 DLR (AD) 80.*

35. Now, in view of submissions and counter submissions of the learned Advocates for the convict-accused-appellants as above, let us review the relevant evidence and materials on record and scan the attending circumstances of the case to arrive at a correct decision as to whether the learned Judge was justified in passing the impugned judgment and order of sentence.

36. Since the learned Advocates for the appellants mainly based their submissions on point of law and, as such, we need not go into the total discussion of the evidence on record. We firstly go to the evidence on record about the age of accused appellant Akabbar for the purpose of jurisdiction of the Court. It appears from lower Court's order No. 12 dated 15-3-07 that "তত্ত্বাবধায়ক জেলা কারাগার, সিরাজগঞ্জ এর ১৩-৩-২০০৭ তারিখের ৩৫১/১ (১) স্মারক মতে একটি চিঠি পাওয়া গেল। নথি পেশ করা হইল। দেখলাম। আসামী আকব্বরকে সেফ হোম বা উন্নয়ন কেন্দ্রে স্থানান্তরের অনুমতি দেওয়া হল। তদন্ত প্রতিবেদনের অনুলিপি জরুরী ব্যবস্থা গ্রহনের জন্য তত্ত্বাবধায়ক জেলা কারাগার, সিরাজগঞ্জ, বরাবর প্রেরন করা হোক।" It further appears from lower Court's order No. 14 dated 28-3-2007 that " "অদ্য চার্জ গঠন ও হাজতী আসামী আকব্বর হোসেন এর জামিনের দরখাস্ত শুনানীর জন্য ধার্য্য আছে এবং জামিন বাতিলের দরখাস্ত শুনানী। হাজতী আসামীকে হাজত হইতে উপস্থিত করানো হয় নাই। জামিনে মুক্ত আসামী (২) আঃ রাজ্জাক (৩) জয়নাল হোসেন হাজির আছেন। আসামী পক্ষ দরখাস্ত দ্বারা বর্নিত কারনে আসামী (১) আকব্বর হোসেন এর জন্য শিশু আদালতে বিচার করার জন্য প্রার্থনা করিয়াছে। বাদী রাষ্ট্র পক্ষ চার্জ গঠন সাপেক্ষে সময়ের প্রার্থনা করিয়াছে। শুনিলাম, প্রার্থনা মঞ্জুর করা হইল। আগামী ইং ২৫-৪-২০০৭ তাং চার্জ গঠন ও জামিন শুনানী ও জামিন বাতিলের দরখাস্ত শুনানী।" But it appears from lower Court's order No. 15 dated 25-4-2007 that the learned Judge without considering the age of accused Akabbar, framed charge against him under section 7/30 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 and section 302/201/34 of the Penal Code, jointly with the adult accuseds Abdur Razzak and Joinal Hossain.

37. Section 6 (1) of the Children Act, 1974 reads as follows:

6. "(1) Notwithstanding anything contained in section 239 of the Code or any other law for the time being in force, no child shall be charged with, or tried for, any offence together with an adult."

38. Section 66 (1) of the Children Act, 1974 reads as follows:

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

case, and shall record a finding thereon, stating his age as nearly as may be."

39. As per lower Court's order No. 12 dated 15-3-2007, it is admitted that accused Akabbar was a minor boy and he was sent to safe home as per direction of the Court. It further appears from order No. 14 dated 28-3-2007 that accused Akabbar filed an application for his trial in the Juvenile Court but the trial Court did not pass any order on that application and did not determine the age of accused Akabbar as per Provision of section 66 (1) of the Children Act, 1974.

40. It appears from the record that at the time of examination of accused Akabbar under section 342 of the Code of Criminal Procedure by the trial Court on 27-5-2008, the age of the accused appellant Akabbar is written as about 14 years. Furthermore, it appears from the examination of the accused Akabbar under section 342 of the Code, the trial Court did not attract that accused Akabbar confessed his guilt under section 164 of the Code or section 22 of the Nari-o-Shishu Nirjatan Daman Ain, 2000.

41. Section 2(f) of the Children Act, 1974 reads as follows:

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

42. So, it is clear that accused Akabbar aged about 14 years at the time of his trial, was a child within the meaning of section 2 (f) of the Children Act, 1974 and according to section 6 (1) of the Children Act, 1974, no child shall be charged with, or tried for, any offence together with an adult. In this case other two accuseds Razzaque and Zoinal were admittedly adults and by the joint trial of a child with the adult, the whole trial has been vitiated.

43. It appears from the record that accused Md Abdur Razzaque did not make any confession under section 164 of the Code of Criminal Procedure and accused Akabbar did not disclose his name in his so-called statement made under section 22 of the Nari-o-Shishu Nirjatan Daman Ain. Only PW-2 Nikhil Chandra Karmakar stated that he saw accused Akabbar, Razzaque and Zoinal were passing away with victim Dipa Rani but PW-15 Sub-Inspector Subrata Kumar Saha, Investigating Officer stated that PW-2 Nikhil did not disclose that he saw accused Akabbar, Razzaque and Zoinal kidnapping Dipa in his statement recorded under section 161 of the Code.

44. We find no credible evidence against Zoinal Hossain.

45. Under the Circumstances, in view of law mainly on the basis of section 2(f), 6(1) and 66 (1) of the Children Act, 1974 and of the evidence discussed above the orders are as follows:—

1) Death Reference No. 69 of 2008 is rejected.

2) Criminal Appeal No. 4861 of 2008, Jail Appeal No. 769 of 2008 and Jail Appeal No. 770 of 2008 are allowed.

46. Accordingly, let the appellants (1) Md Akabbar Hossain alias Akabbar and (2) Md Abdur Razzaque be set at liberty at once if they are not wanted in connection with any other case. 3) Criminal Appeal No, 6287 of 2008 is dismissed.

47. Let this order of rejection of the Reference be communicated to the Jail Authority for information and compliance.

48. Let a copy of this Judgment be for-

warded to the learned Judge of Nari-o-Shishu Nirjatan Daman Tribunal, Sirajganj, forthwith for necessary and due action in accordance with law.

Send down the Lower Court's record at once.

Ed.

High Court Division
(Special Original Jurisdiction)

Quamrul Islam Siddique J
Md Khurshid Alam Sarkar J

Judgment
August 11th, 2014.

SM Shah Jamal.....
.....Petitioner

vs

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

Constitution of Bangladesh, 1972
Article 102(2)

Entitlement to an accommodation is an integral part of the service condition of a Government servant inasmuch as his engagement in the service of the Republic endows him with the said entitlement of enjoying an accommodation facility at a nominal cost and, therefore, it is an irresistible conclusion of this Court that accommodation of a Government servant does clearly come within the purview of the "terms and conditions" of service of a person in the service of the Republic or a Statutory Public Authority. ...(5)

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

Entitlement to an accommodation of a Government servant is a legal right, not a fundamental right in the light of the fact that a Government servant's right to enjoyment of a Government accommodation is embodied in the Rules, not even in any statute and, thus, it is not a statutory right, not to speak of fundamental right. .....(13)

Constitution of Bangladesh, 1972
Article 117

When the Constitution confers jurisdiction upon the Administrative Tribunals by engraving the following words in Article 117 " .... tribunals to exercise jurisdiction in respect of matters relating to or arising out of ...." it equips and capacitates the Tribunal with octopusian grip to bring all the service related matters of the Government servants within its jurisdiction. .....(14)

Constitution of Bangladesh, 1972
Articles 102(5) and 117

Exclusion of any service related grievance from the jurisdiction of the Tribunal was not within the contemplation of the framers of the Constitution as they intended to confer a catch-all jurisdiction upon the Administrative Tribunal by inserting Article 117 against the backdrop of Article 102(5) to enable it to deal with all types of grievances which emanate from or are linked to and connected with the service of a Government servant. .....(18)

Constitution of Bangladesh, 1972
Article 102(5)

While this Court has persistently been showing its disinclination to issue any Rule in the service matters of the members of defence service because of the provision of the exception stipulated in the latter part of Article 102(5), there is no rationale for the same Court

*Writ Petition No. 242 of 2006.

to be inclined to entertain the judicial review applications filed by the Government servants given that they have been excluded from the jurisdiction of the judicial review by the very same provisions of the exception laid down in the same part of Article 102(5) of the Constitution. .....(9)

Emrul Kayes vs Bangladesh 19 BLC 76; Mujibur Rahman vs Bangladesh 44 DLR (AD) 111 and AKM Enayet Ullah vs Bangladesh, 18 BLC 679 ref.

No one appears—For the Petitioner.

Farhad Ahmed, DAG with Md Shafquat Hussain, AAG—For the Respondents.

Judgment

Md Khurshid Alam Sarkar J : This Rule was issued calling upon the respondents to show cause as to why the Memo No. 161/DA/Baradda/ABC/2005/300/5 dated 22-12-2005 signed by respondent No. 5 (annexure-E) shall not be declared to have been issued illegally and without lawful authority and, as such, is of no legal effect and, further, to show cause as to why section 4 of the Administrative Tribunals Act, 1980 should not be declared *ultra vires* the Constitution and/or pass such other or further order or orders passed as to this Court may seem fit and proper.

2. No one appears to press this Rule on behalf of the writ petitioner when the item is called and taken up for hearing. As it transpires from the record that the instant Rule was issued on 5-1-2006 and, thereafter, the same was made ready for hearing on 31-1-2006 but till date the petitioner did not take any step for hearing of the Rule, so under the circumstances, this Court opted to dispose of the case on the basis of the statements made and grounds settled in the writ petition and the annexures appended thereto.

3. Mr Farhad Ahmed, the learned Deputy Attorney-General appearing for the respondents, submits that the instant Rule is liable to be discharged on the ground of maintainability of the writ petition as, according to him, the petitioner being a Government servant is debarred under Article 117 of the Constitution to invoke writ jurisdiction.

4. Succinctly, the facts of the case, as stated in the writ petition, are that the petitioner, as a Government servant, under the office of the Auditor and Comptroller General, was allotted the House No. B-55/F-18/(C-2) of Motijheel Colony on 4-6-1985 as per the entitlement provided in the Bangladesh Allocation Rules, 1982. Thereafter, by the impugned notice the allotment of the said house has been cancelled allotting the same to respondent No. 7. Hence, the Rule.

5. We have perused the writ petition, together with its Annexures. It is an admitted position that the petitioner is a Government servant and he is entitled to a Government quarter for his accommodation as per the provisions of the Bangladesh Allocation Rules, 1980. In other words, when a person is employed in a post in the service of the Republic, he becomes entitled to an accommodation under the provisions of the Bangladesh Allocations Rules, 1982 and until such accommodation is provided he is paid house allowance in lieu of accommodation. It follows that the petitioner's entitlement to an accommodation is an integral part of his service condition inasmuch as his engagement in the service of the Republic endows him with the said entitlement of enjoying an accommodation facility at a nominal cost and, therefore, it is an irresistible conclusion of this Court that accommodation of a Government servant does clearly come within the purview of the "terms and conditions" of service of a person in the service of the Republic or a Statutory Public Authority and, accordingly, we hold that the issue for

adjudication in the case at hand is a matter relating to and arising out of the terms and conditions of service of the petitioner.

6. Now, the pertinent question that comes up for consideration by this Court is whether this Court is competent to entertain an application under Article 102 in view of the clear bar imposed by Article 117 of our Constitution which runs as follows:—

> 117. (1) Notwithstanding anything hereinbefore contained, Parliament may by law establish one or more administrative tribunals to exercise jurisdiction in respect of matters relating to or arising out of-
>
> (a) the terms and conditions of persons in the service of the Republic, including the matters provided for in Part IX and the award of penalties or punishments;
>
> (b) .....
>
> (2) Where any administrative tribunal is established under this Article, no court shall entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of such tribunal;
>
> *(underlined by us).*

7. From a plain reading of the above Article, it is our clear understanding that the jurisdiction of this Court to entertain a writ petition of any Government servant about the matters "relating to or arising out of the terms and conditions of the service" has totally been ousted.

8. Our above understanding is buttressed up by the provisions of Article 102(5) of our Constitution which is reproduced below:

> Article 102(5). In this Article, unless the context otherwise requires, "person" includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which article 117 applies.

9. While this Court has persistently been showing its disinclination to issue any Rule in the service matters of the members of defence service because of the provision of the above exception stipulated in the latter part of Article 102(5), there is no rationale for the same Court to be inclined to entertain the judicial review applications filed by the Government servants given that they have been excluded from the jurisdiction of the judicial review by the very same provisions of the exception laid down in the same part of Article 102(5) of the Constitution. Whenever any member of the defence services approaches this Court under Article 102(2) of the Constitution, we normally decline to entertain the writ petition and ask them to go to the special forum as prescribed in the relevant statutes, namely, Army Act, 1952, Navy Ordinance, 1961 and Air Force Act, 1953, which govern the services of the defence forces, for redressing their grievances and if any member of the defence services invokes Article 102(1) of the Constitution in approaching this Court seeking enforcement of his fundamental rights triggered by disciplinary action taken against him, we outright reject such sort of petition as the same attracts the provisions of Article 45 of the Constitution. However, after exhausting the said special forum, this Court may admit a judicial review application in a rare of the rarest cases if the case is made out on the ground of coram-non-judice or malice-in-law since no law of the land, including the aforesaid statutes, provides for any forum of appeal. Therefore, whenever Government servants seek to redress their service-related grievance before this Court without challenging the vires of any law, this Court must remind them of the operation of Article 102(5) and the ouster clause engraved in Article 117 of the Constitution conveying to the petitioners the enormity of emphasis the Constitution framers

attached thereto and, accordingly, we should not only be reluctant to issue any Rule but outright reject the same in view of the incorporation of Article 117 in the Constitution in addition to Article 102(5). Furthermore, as the Administrative Tribunal has been created under the direct mandate of the Constitution to adjudicate upon the service-related matters of the Government servants and, more importantly, since the verdict of the Administrative Tribunal is not final, unlike the Tribunal set up for the members of the defence service, an aggrieved Government servant enjoys the opportunity of preferring an appeal before the Administrative Appellate Tribunal, it should be considered to be a better forum than the civil courts and the other Tribunals created merely under the mandate of a statue.

10. Thus, upon a minute reading of Article 102(5) in tandem with Article 117, we hold that this Court lacks its jurisdiction in entertaining an application by any Government servant with regard to any grievance relating to the issue of Government accommodation as the same is directly linked with his/her service conditions.

11. Apart from impugning the action of the respondents as to cancellation of the petitioner's accommodation, the petitioner has also challenged the vires of section 4 of the Administrative Tribunals Act, 1980 on the ground that section 4 of the Administrative Tribunals Act, 1980 is violative of fundamental rights as guaranteed by the Constitution as it purports to cover the matters relating to allotment of quarters of the Government employees, albeit allocation of house is not a matter of the terms and conditions of service of a Government servant.

12. Upon perusing the facts of the case and the impugned section 4 of the Administrative Tribunals Act, 1980, this Court does not find any reason to declare the said law to be *ultra vires* inasmuch as for declaring a law unconstitutional, the impugned law requires to be inconsistent with any provision of the Constitution as heralded in Article 7(2) of our Constitution or to be violative of fundamental rights as mandated by Article 26 of the Constitution. The power of this Court in declaration of a piece of legislation to be unconstitutional or *ultra vires* has eloquently been discussed in the case of *Emrul Kayes vs Bangladesh 19 BLC 76* wherein the Second Part of section 4(1)(a) of the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978 was challenged on the ground of being contradictory to the provisions of Articles 27, 29, 31 and 147(2) of the Constitution and, after a thorough scrutiny of the facts of the case and upon examining the celebrated cases of our jurisdiction and foreign jurisdiction, the impugned law was declared to be unconstitutional. However, there being no such inconsistency in the law impugned here in the case at hand, we declare that the impugned section 4 of the Administrative Tribunals Act, 1980 is intra vires the Constitution.

13. We find that the attack on the constitutionality of section 4 of the Administrative Tribunals Act, 1980 was made in a sporting-chance manner in an endeavor to overcome the issue of maintainability on the ground of violation of fundamental rights as, from a minute perusal of the facts of the case and the impugned law, it appears that the allegation of violation of the petitioner's fundamental right is nebulous inasmuch as entitlement to an accommodation of a Government servant is a legal right, not a fundamental right in the light of the fact that a Government servant's right to enjoyment of a Government accommodation is embodied in the Rules namely, Bangladesh Allocations Rules, 1982, not even in any statute and, thus, it is not a statutory right, not to speak of fundamental right. In dealing with the complaints by the litigants alleging violation of

their fundamental rights, this Division should be mindful as to whether the said allegation does at all come within the coverage of fundamental rights as has been observed by his Lordship MH Rahman J, as he then was, in the celebrated case of *Mujibur Rahman vs Bangladesh 44 DLR (AD) 111* (relevant para 49) that

> "An aggrieved person may, out of desperation or just for taking a sportive chance in the summary writ jurisdiction, allege contravention of some fundamental right which may turn out to be frivolous or vexatious or not even remotely attracted in his case. The Court is, however, to be on guard so that the great value of the right given under Article 102(1) is not frittered away or misused as a substitute for more appropriate remedy available for an unlawful action involving no infringement of any fundamental right".

14. In contrast to the petitioner's case, from a minute reading of section 4 of the Administrative Tribunals Act, 1980, we find that the Legislature never contemplated that section 4 of the said Act will be in conflict with the scheme of Article 117 of the Constitution. Thus, provisions of section 4 of the Administrative Tribunals Act must be taken as complementary, as opposed to contradictory or derogatory, to the provisions of Article 117 of the Constitution. When the Constitution confers jurisdiction upon the Administrative Tribunals by engraving the following words in Article 117 ".....tribunals to ..." exercise jurisdiction in respect of matters relating to or arising out of ...." it equips and capacitates the Tribunal with octopusian grip to bring all the service related matters of the Government servants within its jurisdiction.

15. It is pertinent to mention here, albeit as obiter dictum, that members of this Bar most often take a plea that the word 'inaction' or 'failure' of the concerned authority in passing any order or making any decision or taking any action has not been mentioned in section 4(2) of the said Act, therefore, until an order is passed or decision or action is taken, a Government servant does not become competent to approach the Administrative Tribunal concerned. However, in our way of perusal and scrutiny of the entire Administrative Tribunals Act, 1980, including its Preamble and the impugned section 4, we find that the above situation can easily be overcome by making an application to the concerned authority and, then, approaching the Administrative Tribunal, if the said authority does not pass any order, or make any decision or take any action pursuant to the aforesaid representation filed.

16. The rule of statutory interpretation suggests that if there appears any ambiguity in any statutory provision, which requires interpretation, one should search for the intention behind the enactment of the said statute and look into the historical legislative developments. In Special Reference No. 1 of 2002 (2002) 8 SCC 237 it was observed that

> "15. One of the known methods to discern the intention behind enacting a provision of the Constitution and also to interpret the same is to look into the historical legislative developments, Constituent Assembly Debates or any enactment preceding the enactment of the constitutional provision."

17. It is now appropriate for us to have a look at the Preamble of the Administrative Tribunals Act, 1980, which is quoted below:

> Whereas Article 117 of the Constitution provides, *inter alia*, that Parliament may by law establish one or more Administrative Tribunals to exercise jurisdiction in respect of matters relating to or arising out of the terms and conditions of service of persons in the service of the Republic or any statutory public authority;

18. The purpose of the enactment of the

Administrative Tribunals Act, 1980 is to give effect to the provisions of Article 117 of the Constitution and the said Article mandates for setting up a special forum for the Government servants with an aim to expeditiously disposing of the service related matters of all kinds. Exclusion of any service related grievance from the jurisdiction of the Tribunal was not within the contemplation of the framers of the Constitution as they intended to confer a catch-all jurisdiction upon the Administrative Tribunal by inserting Article 117 against the backdrop of Article 102(5) to enable it to deal with all types of grievances which emanate from or are linked to and connected with the service of a Government servant.

19. Thus, non-incorporation of the words "failure to act" or "inaction of the concerned authority" in section 4 of the Administrative Tribunals Act, 1980 does not make a Government servant incompetent to approach the Administrative Tribunal, otherwise the position of section 4 shall amount to curtailing the jurisdiction of the Administrative Tribunal conferred by Article 117 of the Constitution.

20. In the case of *AKM Enayet Ullah Vs Bangladesh, 18 BLC 679* (relevant Para 42 & 43) the power and jurisdiction of the Administrative Tribunal has been elaborately discussed and in view of the fact that the dictum of the same is in operation as of today inasmuch as the same has not been overruled by the Appellate Division, we are not inclined to deviate from the *ratio decidendi* of the above decision and, accordingly, we find that the present writ petition is not maintainable and the Rule is liable to be discharged on the ground of maintainability alone without embarking upon the other aspects of the case and, thus, we do not fancy to delve into its substantial issue as we leave it for an unbiased examination by the Administrative Tribunal, in the event that the petitioner approaches the said forum as a consequence of the disposal of the instant Rule.

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

Ed.

High Court Division
(Special Original Jurisdiction)

Moyeenul Islam Chowdhury J
Md Ashraful Kamal J

Mir Mosharraf Hossain.... .Petitioner

vs

Anti-Corruption Commission reprsen-ted by its Chairman and others...Respondents*

Judgment
October 23rd, 2014.

Constitution of Bangladesh, 1972
Article 102(2)

***64 DLR (AD) 14* has ousted the jurisdiction of the writ Court to quash the proceedings of a criminal case unless the 'vires' of any law is found to have been challenged.** .....(10)

Mens rea

Question of determination of the *'mens rea'* or otherwise is a matter of evidence and trial and that cannot be pre-judged at this stage. If for the sake of argument, the submission is accepted right now, that will amount to begging the question. .....(11)

Chairman, Anti-Corruption Commission vs Enayetur Rahman, 64 DLR (AD) 14 and Golam Nabi vs Anti-Corruption Commission, 65 DLR 181 ref.

Imranul Kabir, Advocate—For the Petitioner.

Md Khurshid Alam Khan, Advocate—For the Respondent No. 1.

*Writ Petition No. 2103 of 2008.

Md Motaher Hossain (Sazu), DAG with Purabi Rani Sharma, AAG and Md Shafiquel Islam Siddique, AAG—For the Respondent Nos. 2, 3 & 6.

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 initiation and continuation of the proceedings of Metro Special Case No. 25 of 2007/116(da) of 2007 arising out of Anti-Corruption Commission General Register Case No. 25 of 2007 corresponding to Motijheel Police Station Case No. 140 dated 29-3-2007 under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 and Rule 15 of the Emergency Power Rules, 2007, now pending in the 3rd Court of Special Judge, Dhaka should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

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

The petitioner is a public servant and in the month of November, 2003, he was posted at the Rajdhani Unnayan Kartipakkha (RAJUK) as Secretary on deputation. Subsequently, on 5th March, 2005, he was made Member (Finance) of the RAJUK and served the RAJUK till 13th September, 2005. During his tenure as Secretary of the RAJUK, the Ministry of Housing and Public Works by its Memo No. শা-১০/১ এম-২/২০০০(খন্ড-১)/৫৬ dated 27-1-2004 directed the Chairman of the RAJUK to send a report on the present market value of 13 (thirteen) houses and the said Ministry by its Memo No. শা-১০/১ এম-২/২০০০(অংশ-৩)/১৪৮ dated 1-4-2004 also directed the Chairman to take necessary steps to sell out 16(sixteen) houses referred to in the said two memos respectively. Accordingly, the Chairman of the RAJUK formed a 6(six)-Member Valuation Committee to report on the present market price of the houses vide RAJUK'S office order No. 37/2000 dated 27-4-2004; but the petitioner being the Secretary of the RAJUK was not initially included in the Valuation Committee. However, due to vacancy in the post of Director (Land), the petitioner was in additional charge of Director (Land), RAJUK and, as such, he was made a formal member of the Valuation Committee. In due course, the Valuation Committee determined the valuation of the houses in question and a valuation report was submitted to the Chairman of the RAJUK and subsequently it was forwarded to the Ministry of Housing and Public Works for necessary action. Thereafter after the approval of the Ministry of Housing and Public Works, the RAJUK Authority invited open tenders by way of paper publications on complying with necessary formalities and accepted the tenders and prepared a report thereon and forwarded it to the said Ministry for its decision. The sale process in respect of the houses was completed by the RAJUK Authority as directed by the Ministry. As such, the petitioner had no connivance in the sale process of the houses. Be that as it may, the petitioner came to know that a criminal case had been initiated against him and others with Motijheel Police Station being Motijheel Police Station Case No. 140 dated 29-3-2007 under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 and Rule 15 of the Emergency Power Rules, 2007. After investigation, the Anti-Corruption Commission submitted charge-sheet against the petitioner and others separately for sale of each of the houses under those laws. Thereafter, the Metropolitan Senior Special Judge, Dhaka took cognizance of the offence against the petitioner and others. At a subsequent stage, the Special Judge charged the petitioner and others with the offence punishable under sections 409/109 of the Penal Code

and section 5(2) of the Prevention of Corruption Act, 1947. Afterwards the petitioner challenged the initiation and continuation of the proceedings of Metro Special Case No. 25 of 2007/116(da) of 2007 arising out of Anti-Corruption Commission General Register Case No. 25 of 2007 corresponding to Motijheel Police Station Case No. 140 dated 29-3-2007 under sections 409/109 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 by filing the Writ Petition and obtained the instant Rule.

3. Mr Imranul Kabir, learned Advocate appearing on behalf of the petitioner, submits that the petitioner was not in any way connected with the commission of the alleged offence; though admittedly he was one of the members of the Valuation Committee and as he had no 'mens rea' in the commission of the alleged offence, the proceedings of the criminal case pending against him are liable to be invalidated.

4. Mr Imranul Kabir also submits that as a public servant, the petitioner performed his official functions in good faith and, as such, no criminal liability can be attributed to him and that being so, the Rule should be made absolute.

5. Mr Imranul Kabir next submits that the initiation and continuation of the proceedings of Metro Special Case No. 25 of 2007/116(da) of 2007, now pending in the 3rd Court of Special Judge, Dhaka are an abuse of the process of the Court and to secure the ends of justice, the proceedings of the case should be quashed.

6. *Per contra,* Mr Md Khurshid Alam Khan, learned Advocate appearing on behalf of the Anti-Corruption Commission-respondent No. 1, submits that the Rule is not maintainable in law in view of the decision in the case of *Golam Nabi and another vs Anti-Corruption Commission and others* reported in *65 DLR 181* and in that decision, it has been clearly, categorically and unequivocally held that the jurisdiction of the writ Court to quash the proceedings of a criminal case is ousted unless the 'vires' of any law is found to have been challenged, regard being had to the 'ratio' enunciated in the decision in the case of the *Chairman, Anti-Corruption Commission and another vs Enayetur Rahman and others* reported in *64 DLR (AD) 14.*

7. We have heard the submissions of the learned Advocate Mr Imranul Kabir and the counter-submission of the learned Advocate Mr Md Khurshid Alam Khan and perused the Writ Petition, Supplementary Affidavit to the Writ Petition and relevant Annexures annexed thereto.

8. From the facts and circumstances of the case, it transpires that the fate of the Rule is virtually dependent upon the 'ratio' enunciated in the decision in the case of the *Chairman, Anti-Corruption Commission and another vs Enayetur Rahman and others* reported in *64 DLR (AD) 14.* The 'ratio' of that decision in paragraph 7 runs as follows:

> "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 extraordinary jurisdiction to be converted into Courts of appeal or revision. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, that is to say, where vires of a statute is in question or where the determination is *mala fide* 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 requires that recourse may be had to Article 102(2) of the Constitution."

9. Indisputably, the facts leading to the issuance of the Rule do not attract any of the extra-ordinary situations that have been specified in the above paragraph of the decision reported in *64 DLR (AD) 14.*

10. In the decision reported in *65 DLR 181* relied upon by Mr Md Khurshid Alam Khan, it has been unmistakably held that the decision reported in *64 DLR (AD) 14* has ousted the jurisdiction of the writ Court to quash the proceedings of a criminal case unless the 'vires' of any law is found to have been challenged. Given this situation, it is crystal clear that the petitioner could have sought necessary remedies against the proceedings of the case pending against him which are available within the four-corners of the relevant statute, that is to say, the Code of Criminal Procedure, 1898. So our conclusion is that the instant Rule is incompetent. On this point, we are at one with Mr Md Khurshid Alam Khan.

11. As to the submission of Mr Imranul Kabir that the petitioner had no 'mens rea' in the commission of the alleged offence and he merely acted as a member of the Valuation Committee of the RAJUK as a matter of course and in this perspective, no criminal liability can be attributed to him, we would like to say that the question of determination of the *'mens rea'* or otherwise of the petitioner is a matter of evidence and trial and that cannot be pre-judged at this stage. If we, for the sake of argument, accept the above submission of Mr Imranul Kabir right now, that will amount to begging the question.

12. In view of the *'ratio decidendi'* in the decision reported in *64 DLR (AD) 14* adverted to above, the other submissions of Mr Imranul Kabir have no legs to stand upon and accordingly, those are discarded.

13. From the foregoing discussions and having regard to the facts and circumstances of the case, we hold that the instant Rule is incompetent and accordingly, it is discharged without any order as to costs.

14. The learned Special Judge is directed to proceed with the trial of the case in accordance with law and complete the same preferably within 1 (one) year.

Communicate a copy of this judgment to the Court below at once for information and necessary action.

Ed.

High Court Division
(Special Original Jurisdiction)

Farah Mahbub J
Kazi Md Ejarul Haque Akondo J } Fahria Akter....Petitioner

vs

Judgment
April 24th, 2014. } Government of Bangladesh and others.....
.....Respondents*

Constitution of Bangladesh, 1972
Article 102(2)

Money Laundering Protirodh Ain (VIII of 2009)
Section 15

The Petitioner had alternative forum under section 15 of the Act to make a prayer for release of the property and that the provision being part of special law has mandatory effect. Without invoking the forum filing application under Article 102 of the Constitution challenging the order about 2(two) years after cannot go to sustain the contention of the petitioner in the eye of law. Moreover, no explanation whatsoever has been given in the writ petition as to delay in filing the writ petition. .....(9)

*Writ Petition No. 3168 of 2013 .

Md Mehedi Hasan Chowdhury, Advocate—For the Petitioners.

Shah Mohammed Zahurul Haque, Advocate—For the Respondent No. 2.

Judgment

Farah Mahbub J: In this Rule, issued under Article 102 of the Constitution of the people's Republic of Bangladesh, the respondents have been called upon to show cause as to why Memo No. DMSJ/60(3)/C dated 22-5-2011 issued by the learned Divisional Special Judge, Dhaka alleging attachment of the property in question being Flat No.B-2 measuring an area of 2280 sft along with a car parking space situated at Baig Regency, Plot No.10, Block-CWN(c), Road No. 39, Gulshan, Dhaka should not be declared to have been passed without lawful authority and hence, is of no legal effect.

2. Facts, in brief, are that on 13-12-2010 the petitioner had entered into an agreement with one Md Arshad Hossain, son of Late Anowar Hossain of Village-Sultangonj para, (Eidgah Lane), Bogura to purchase Flat No.B-2 measuring an area of 2280 sft along with a car parking space situated at Baig Regency, Plot No.10, Block-CWN(c), Road No.39, Gulshan, Dhaka for a consideration of Taka 3,30,00,000 (Taka three crore and thirty lakhs). However, as per the said agreement the petitioner had to pay an amount of Taka 30,00,000 (Taka thirty lacs) on the date of signing of the said agreement(Annexure-B). Subsequently, on receipt of the entire consideration money on 26-12-2010 said Md Arshad Hossain had handed over the physical possession of the flat in question to the petitioner and had informed the same vide office letter dated 26-12-2010 to the Managing Director of Asset Developments and Holdings Limited (Annexure-C). Later, as per the rules of the Asset Developments and Holdings Ltd. (in short, the Company) the petitioner and said Md Arshad Hossain jointly had filled up form reconfirming the name of the petitioner as allottee before registration and for obtaining utilities connection (Annexure-D). However, vide registered mail dated 1-1-2011 the said Company informed the President and General Secretary of Baig Regency Complex Common Management Association regarding the transfer of ownership of the flat in question along with a car parking space in favour of the petitioner (Annexure-E). Subsequently, through registered mail dated 2-1-2011 the said company had informed the petitioner to pay registration cost to the tune of Taka 9,98,605 within 31-1-2011 for registration of the said flat in her name. The company through registered mail dated 21-3-2011 also had informed the petitioner to pay balance registration cost for an amount of Taka 4,58,170. The company through registered mail dated 5-4-2011 further informed the petitioner to pay balance registration cost of an amount of Taka 7,32,850 since recently RAJUK had increased land value (Annexure-F-F(2) respectively).

3. While the petitioner was awaiting registration of the said flat in her name Dhanmondi Police Station Case No. 10 dated 29-4-2011 was lodged by the Anti-Corruption Commission (in short, the Commission) against said Md Arshad Hossain, under section 2(Ka) and 4(2) of the Money Laundering Act, 2009 (in short, the Act, 2009) read with section 2(Tha)(Oa)(AA) of the Act, 2009. Subsequently, vide Memo No. 9763 dated 18-5-2011 the Assistant Director of the Commission filed an application under sections 10(1) and 14 of the Act, 2009 before the respondent No.3 attachment of the petitioner's flat along with other property belonging to said Md Arshad Hossain (Annexure-G). Vide Memo No. DMSJ/60(3)/C dated 22-5-2011 the respondent No. 3 allowed the said prayer. The petitioner accordingly, filed

an application to the respondent No.2 stating the facts with a prayer to release the flat in question from attachment, which was received on 25-6-2012 by the said respondent but of no result. Hence, the application.

4. Mr Md Mehedi Hasan Chowdhury, the learned Advocate appearing for the petitioner submits that on 26-12-2010 i.e., prior to making the said application for attachment said Md Arshad Hossain has informed the Asset Developments and Holdings Limited regarding entering into an agreement with the petitioner, which has been duly accepted by the said company and took the steps for registering the said flat in the name of the petitioner. As such, the order of attachment passed by the respondent No.2 being not tenable in the eye of law, it is liable to be declared to have been passed without any lawful authority and hence, is of no legal effect.

5. Mr Shah Mohammed Zahurul Haque, the learned Advocate appearing on behalf of the respondent No. 2 by filing an affidavit-in-opposition mainly contends that in connection with Dhanmondi Police Station Case No.10 dated 29-4-2011 the learned Metropolitan Senior Special Judge, Dhaka, had attached the same in exercise of power as provided under sections 10(1) and 14 of the Money Laundering Act, 2009 (in short, the Act, 2009. In this regard, Mr Hoque further submits that challenging the order of attachment any 3rd party other than the accused person is entitled to invoke section 15 of the Act to get back his right, title and interest and that under section 16 of the said Act has the opportunity to prefer appeal against the said order. Accordingly, he submits that without availing the said forum filing of the present writ petition and obtaining the present Rule is not maintainable.

6. In reply, Mr Chowdhury, the learned Advocate appearing for the petitioner submits that the impugned order dated 22-5-2011 had been passed by the respondent No.3 and that in view of section 15 of the Act, 2009 he had the opportunity to pray for release of the flat in question within 30 (thirty) days of passing the said order. However, since the petitioner has failed to invoke the said forum within the period so has been prescribed therein; hence, the petitioner was left with no other option but to agitate her grievance by filing the instant writ petition on 13-3-2013 and has obtained the present Rule and the order of stay on 1-4-2013. Moreover, he goes to argue that the legislature having used the word "পারিবেন" gives it discretionary effect i.e., the person interested if willing/desire may invoke the said provision. As such, on the said count this Rule cannot be knocked down on the ground of maintainability.

7. Admittedly, one Md Arshad Hossain was the owner of the property in question from whom the petition claimed to have purchased the same for a consideration of Taka 3,30,00,000 and that having paid Taka 30,00,000 an unregistered bainama had been executed by the said owner on 13-12-2010 in favour of the petitioner. However, said Arshad Hossain having been implicated in Dhanmondi Police Station Case No. 10(4) 2011 under sections 2(Ka), 4(2) of the Money Laundering Act, 2009 (in short, the Act, 2009 read with section 2(Tha) (Oa)(AA) of the Act, 2009 on the prayer of the Anti-Corruption Commission dated 18-5-2011 (Annexure-G) so made under sections 10(1) and 15 of the Act the Adalat concern i.e. respondent No. 3 had attached the property in question along with other properties of the said accused vide order dated 22-5-2011 (Annexure-A).

8. The contention of the petitioner is that having entered into a contract i.e. bainama on 13-12-2010 prior to attachment hence, the same

cannot be the subject matter of attachment under sections 10(1) and 14 of the Act.

9. However, the legal position is that petitioner had alternative forum under section 15 or the Act to make a prayer for release of the said property and that the provision being part of special law has mandatory effect. As such, without invoking the said forum filing application under Article 102 of the Constitution challenging the impugned order dated 22-5-2011 passed by the respondent No.3 about 2(two) years after cannot go to sustain the contention of the petitioner in the eye of law. Moreover, no explanation whatsoever has been given in the writ petition as to delay in filing the present writ petition.

10. At this juncture, Mr Chowdhury, the learned Advocate for the petitioner submits that since he has no forum to agitate his grievance under section 15 of the Act, 2009 as such, for the cause of justice and equity he may be allowed to make a prayer invoking the said provision of law.

11. However, considering the context of the case the petitioner is at liberty to make her prayer before the Adalat concern under section 15 of the Act, 2009.

12. Accordingly, having found no substance for consideration this Rule is liable to be discharged.

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

Ed.

High Court Division
(Special Original Jurisdiction)

Syed Md Dastagir Husain J
Mamnoon Rahman J

Judgment
December 13th, 2006.

Ahsan Ali (Md) and another.....Petitioners

vs

Anti-Corruption Commission and others.....Respondents*

Anti-Corruption Commission Act (V of 2004)
Section 35

The Commissions activity cannot be suspended in The name of framing of Rules as the same is not a condition precedent. As per section 35 of the Act the officers of *'the Bureau'* are vested with the Commission and till absorption in other government department they are the officers of the commission and can be used by the Commission as and when necessary for the implementation of its activities and continuation. .....(14)

State of Uttar Pradesh vs Basti Sugar Mills Co. Ltd., AIR 1961 SC 420 ; Md Aminul Haque Helal vs Justice Sultan Hossain Khan, 15 BLT 35 = 11 BLC 349 ref.

Khandkar Mahabub Uddin Ahamed, Omar Sadat, Advocates—For the Petitioner.

Mahmudul Islam and Probir Neogi Advocates—For the Respondents.

Judgment

Mamnoon Rahman J: Both these Rules were heard together and disposed of by this single judgment as they do involve similar facts as well as of law. The short facts relevant of the disposal of both the writ petitions are that: the

*Writ Petition No. 1692 of 2006 with Writ Petition No.7428 of 2005.

petitioners are law abiding citizen of the country and public servant and after obtaining excellent academic qualification they entered into the service of the then, 'Bureau of Anti-Corruption' created under the Act of 1947 and served there with sincerity and honesty. The petitioners in both the writ petitions challenged certain notifications namely notification dated 26-2-2005, notification dated 11-5-2005, notification dated 29-6-2005 notification dated 7-9-2005 as well as notification dated 2-10-2005 issued by the Anti-Corruption Commission exercising the power conferred under Anti-Corruption Commission Act namely Act 5 of 2004; The case of the petitioners are that being a new law namely, the Anti-Corruption Commission Act', (Act 5 of 2004) every action under the said law are to be taken as per the Rules time to time framed by the Commission in consultation or with the prior approval of the government as the same are mandatory requirement as per the provisions of the said Act. The main contentions of the petitioners are that the commission without framing the Rules as per the provisions laid down in the said Act issued the impugned notifications which violates the fundamental rights of the petitioners as guaranteed under the Constitution as well as gross violation of law and, as such, the petitioners are highly prejudiced for such action and, as such, the impugned notifications are liable to be declared illegal and without any lawful authority.

2. The respondent No.l entered appearance by filing affidavit-in-opposition. The case of the respondent No.l is that the contentions are raised in the writ petitions are complete misinterpretation of the provisions of Anti-Corruption Commission Act (Act V of 2004) and the other contentions as raised are not relevant for the disposal of the writ petitions. The further case of the respondent No.1 is that sections 35 and 32 of the said Act vested ample power upon the commission to frame Rules time to time and it is not a condition precedent that prior Government approval is sine-quanon for giving any affect of any action by it, namely the Commission.

3. Mr Khandaker Mahbub Uddin Ahmed, Senior Advocate and Mr Omar Sadat, the learned Advocates appearing on behalf of the petitioners submits that the impugned notifications are illegal, unlawful and arbitrary as no Rules has yet been framed under section 34 of the Act and, as such, the respondent No.l exceeded its power conferred under section 20(2) and 35(2) of the said Act by issuing the impugned notification which resulting arbitrary actions on behalf of the respondents. The learned Advocates submits that the administrative structure of the commission are governed by section 30 of the said Act and in view of that matter the impugned notifications as issued by the respondent No. 1 are illegal, malafide and are of no legal effect. The learned Advocate for the petitioner referred several sections including 16(4) of the said Act where it has been clearly stipulated that the appointment and the service condition of the employees of the commission shall be guided by the, 'Rules' framed time to time in accordance with law and in the absence of the same the commission cannot proceed without the administrative approval of the government. The learned Advocate further referred section 34 wherein it has been stipulated that the commission after approval of the President frame the Rules by publishing the same in the official gazette and in the absence of the same any action taken by the commission under sections 20(2) and 35(2) of the said Act, is illegal and malafide without lawful authority.

4. Mr Mahmudul Islam, the learned Advocate appearing on behalf of the respondent No.l opposes the rule and placed the affidavit-in-opposition before us. He submits that the preamble of the Act itself stipulates that the commission shall be an independent commission which is the very intention of the legisla-

tures and, as such, commission shall not be debarred from functioning in the name of governmental approval and the provisions regarding framing of Rules are mere formalities and not a binding one. In support of his contention he referred a case reported in AIR (1961) 578. By placing section 35 of the Act he categorically stated that by this section the 'bureau' under the Act of 1947 has been dissolved and everything of the said 'bureau' is thereby vested upon the commission and the commission after following the provisions laid down in the said Act issued the impugned notifications which reqires no interference by this Court. Regarding the malafide action as raised by the learned Advocates for the petitioners. Mr Islam submits that these are questions of fact which cannot be decided by this Court exercising the power conferred under Article 102 of the Republic.

5. We have heard the learned Advocates for the contesting parties, perused the application, the relevant laws, the affidavit-in-oppositions and the decision as referred to.

6. The prevention of corruption is not a new concept in our country. Considering the emerging corruption, mischief's as well as others issues after the second World War the then Government took decision to frame a law, namely, 'the Prevention of Corruption Act, 1947' for the said purpose. The said Act was enacted with a preamble indicating its intent and purpose which are evident in the following words embodied in the statement of objects and reasons warranting such enactment—

> "The scope for bribery and corruption of public servants had been enormously increased by war-conditions and though the war is now over, opportunities for corrupt practices will remain for considerable time to come. Contracts are being terminated large amounts of Government surplus stores are being disposed of; there will for years be storage of various kinds requiring imposition of controls, and extensive schemes of post-war reconstruction, involving the disbursement of very large sums of Government money, have been and are being elaborated. All these activities offer wide scope of corrupt practices and seriousness of the evil and possibility of its continuance or extension in future are such as to justify immediate and drastic action to stamp it out."

7. The aforesaid Act came into the operation in 1947 and the same exists till framing of the new Act, namely, the Act No. V of 2004 i.e. Anti-Corruption Commission Act, 2004. Further in the preamble of the Act of 2004, it has been stated as follows:

> "দেশে দুর্নীতি এবং দুর্নীতিমূলক কার্য প্রতিরোধের লক্ষ্যে দুর্নীতি এবং অন্যান্য সুনির্দিষ্ট অপরাধের অনুসন্ধান এবং দণ্ড পরিচালনার জন্য একটি স্বাধীন দুর্নীতি দমন কমিশন প্রতিষ্ঠা এবং আনুষঙ্গিক বিষয়াদি সম্পর্কে বিধানকল্পে প্রণীত আইন। যেহেতু দেশে দুর্নীতি এবং দুর্নীতিমূলক কার্য প্রতিরোধের লক্ষ্যে দুর্নীতি এবং অন্যান্য সুনির্দিষ্ট অপরাধের অনুসন্ধান এবং তদন্ত পরিচালনার জন্য একটি স্বাধীন দুর্নীতি দমন কমিশন প্রতিষ্ঠা এবং আনুষঙ্গিক বিষয়াদি সম্পর্কে বিধান করা সমীচীন ও প্রয়োজনীয়।"
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> *(underlined by us)*

8. So from the preamble of the Act, the intention of the legislature is very much clear which in our view is that the legislature feels that the abolished Prevention of Corruption Act, 1947 is not an effective one because of the interference by the executives in different ways and therefore, the legislatures of our country exercising the power conferred under the Constitution of the People's Republic of Bangladesh framed the new law, namely Act V of 2004 empowering the Commission to work widely and independently into the matter relating to prevention of corruption. From the plain reading of the Act, 2004, it appears that it is not a conditional legislation as has been submitted by the learned Advocates for the petitioner, rather the same is an independent Act which is

a special law. The new Act is a complete Code regarding prevention of corruption which prescribes provisions for its formation, operation, appointment of commissioners, power of investigation, prosecution and to take any decisions for the purposes as initiated in 1947 and lastly in 2004. From the plain reading of the Act, it appears that there is specific provision which provides that when the Act shall came into force. This clearly shows that it is not a conditional legislation. Furthermore, section 3 (2) of the Act 2004 stated "এই কমিশন একটি স্বাধীন ও নিরপেক্ষ কমিশন হইবে।" In the case of *Md Aminul Haque Helal vs Mr Justice Sultan Hossain Khan & ors* reported in *15 BLT 35= 11 BLC* the High Court Division also observed as follows, "Section 3(2) Moreover provides "এই কমিশন একটি স্বাধীন ও নিরপেক্ষ কমিশন হইবে।" Leaving no doubt as to its independence."

9. A statute is not to be interpreted merely from the loxicographer's angle. The Court must give effect to the will and in-built policy of the Legislature as discernible from the object and scheme of the enactment and the language employed therein. It is well settled that the meaning which words ought to be understood to hear is not be ascertained by any process akin to speculation used in the context in which they occur that context including any other phrase in the Act which may throw light on the sense in which the makers of the Act used the words in dispute.

10. From the plain reading of the said Act, it appears that obviously there are provisions for framing of Rules but considering the Act in general, we do not find anything which states that without framing Rules, the Act cannot be made operative rather section 35 of the Act stipulated that immediately after abolition of the then 'Bureau' all the powers and functions shall vest in the Commission and though there are words 'subject to sub-section 2 in section 35' we do not find anything which stipulates that without following the same the Commission cannot use the officers of the defunct Bureau in implementing any object of the Commission.

11. It has been earlier stated that the petitioners in the instant writ petition has not challenged the vires of law, rather challenged certain actions of the Commission contained in the notifications issued by the Commission. On perusal impugned notifications it appears the Commission vested certain powers upon some officers as per section 20 of the Act as well as retain certain officers of the bureau in the Commission and also requested the Government to withdraw some of them as per section 35(2) of the Act. Sections 20 and 35 of the Act 5 of 2004 runs as follows:

> ২০। তদন্তের ক্ষমতা–(১) ফৌজদারী কার্য্যবিধিতে যাহা কিছুই থাকুক না কেন, এই আইনের অধীন ও উহার তফসিলে বর্ণিত অপরাধসমূহ কেবলমাত্র কমিশন কর্তৃক তদন্তযোগ্য হইবে।
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> (২) উপ-ধারা (১) এ উল্লিখিত অপরাধসমূহ তদন্তের জন্য কমিশন, সরকারী গেজেটে প্রজ্ঞাপন দ্বারা, উহার অধস্তন কোন কর্মকর্তাকে ক্ষমতা প্রদান করিতে পারিবে।
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> (৩) উপ-ধারা (২) এর অধীন ক্ষমতাপ্রাপ্ত কর্মকর্তার, অপরাধ তদন্তের বিষয়ে, থানার ভারপ্রাপ্ত একজন কর্মকর্তার ক্ষমতা থাকিবে।
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> (৪) উপ-ধারা (২) ও (৩) এর বিধান সত্ত্বেও, কমিশনারগণেরও এই আইনের অধীন অপরাধ তদন্তের ক্ষমতা থাকিবে।
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> ৩৫। বাংলাদেশ ব্যুরো অব এন্টি-করাপশন এর বিলুপ্তি, ইত্যাদি–(১) আপাততঃ বলবৎ অথবা কোন আইনে যাহা কিছুই থাকুক না কেন, "বাংলাদেশ ব্যুরো অব এন্টি-করাপশন" অতঃপর উক্ত ব্যুরো বলিয়া অভিহিত-
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> (ক) ধারা ৩ এর অধীন কমিশন প্রতিস্থিত হইবার তারিখে বিলুপ্ত হইবে;
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> (খ) বিলুপ্ত হইবার সংগে সংগে উক্ত ব্যুরোর আওতাধীন সরকারের সকল সম্পদ, অধিকার, ক্ষমতা এবং সুবিধাদি কমিশনে ন্যস্ত হইবে; এবং
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> (গ) উক্ত ব্যুরোর কর্মকর্তা কর্মচারী উপধারা (২) বিধান সাপেক্ষে কমিশনের কর্মকর্তা কর্মচারী বলিয়া গণ্য হইবেন এবং সরকার কর্তৃক নির্ধারিত বেতন ভাতা এবং কমিশনের পরামর্শক্রমে সরকার কর্তৃক নির্ধারিত চাকুরীর অন্যান্য শর্তাধীনে চাকুরীতে নিয়োজিত থাকিবেন।
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> (২) উপ-ধারা (১) এর বিধান সত্ত্বেও, কমিশন, তৎকর্তৃক নির্ধারিত

পদ্ধতিতে, যাচাই বাছাই করিয়া ব্যুরোর বিদ্যমান কর্মকর্তা বা কর্মচারীগণের মধ্যে যাহাদিগকে কমিশনের চাকরির জন্য উপযুক্ত মনে করিবে তাহাদিগকে কমিশনের চাকুরীতে বহাল রাখিবে এবং অবশিষ্ট কর্মকর্তা ও কর্মচারীগণকে প্রত্যাহার করার জন্য সরকারকে অনুরোধ করিবে এবং উক্ত রুপে অনুরোধ হইলে, সরকার উক্ত কর্মকর্তা কর্মচারীগণকে প্রত্যাহার করিয়া নিবে।

12. The legal intendment is that each and every clause has been inserted for some useful purpose, and, when rightfully understood has some practical operation; each word, it has been said, must be presumed to have been carefully chosen and intentionally placed, though it had been hammered into place. Every word must be given effect to and no word as a general rule should be rendered meaningless of inoperative. The Court must lean in favour of a construction which will render every word operative rather than that which makes some words idle or nugatory. It has already been decided that this is not a conditional legislation; rather it is an independent one and section 38 of the said Act endorses such view which runs as follows:—

"রহিতকরণ ও হেফাজত (১) এই আইন বলবৎ হইবার তারিখে the Anti-Corruption Act, 1957 (Act XXVI of 1957) অতঃপর উক্ত Act বলিয়া উল্লিখিত, এবং the Anti-Corruption (Tribunal) Ordinance, 1960 (Ordinance No. XVI of 1960) অতঃপর উক্ত Ordinance বলিয়া উল্লিখিত, রহিত হইবে।

(২) উক্ত এ৳ হিত হওয়া সত্ত্বেও, এই আইনের অধীন কমিশন প্রতিষ্ঠিত না হওয়া পর্যন্ত উক্ত এক্ট এর কার্যকারিতা, যতদুর সম্ভব, এমনভাবে অব্যাহত থাকিবে যেন উক্ত এক্ট রহিত হয় নাই।

(৩) উক্ত এক্ট রহিত হইবার অব্যবহিত পূর্বে উক্ত এক্ট এর অধীন কোন অভিযোগের অনুসন্ধান, তদন্ত, মামলা দায়েরের অনুমোদন নিস্পত্তির অপেক্ষাধীন থাকিলে এই আইনের বিধান অনুযায়ী উক্ত অনুসন্ধান, তদন্ত এবং অনুমোদন কমিশন কর্তৃক সম্পন্ন করিতে হইবে।

(৪) উক্ত অর্ডিনেন্স রহিত হইবার অব্যবহিত পূর্বে অর্ডিনেন্স এর অধীন গঠিত ট্রাইব্যুনাল কোন মামলা নিস্পত্তির অপেক্ষাধীন থাকিলে উহা তাৎক্ষনিক সংশ্লিষ্ট এলাকার এখতিয়ার সম্পন্ন।

13. The intention of legislation is clear from the preamble and the contents of the Act itself. The intention of the legislature in the instant case shows that the legislature intents to empower the Commission to proceed independently to implement its objectives exercising the constitutional authority. Admittedly, the case referred to by respondent No. 1 reported 1961 AIR 578 applicable in the instant case. If the legislatures have any intention to restrict the application of law, there must be guideline to that effect. In the aforesaid case their lordships observed as follows:-

"There are many reasons why it is difficult to accept this argument that the existence of Rules is a condition precedent to the exercise of the power of search and seizure under section 37(2) of the Income-tax Act. The first reason is that the words are not 'subject to Rules made' but 'subject to any Rules made'. Then if only one rule is made regulating say only the hours of search, that would justify the exercise of the whole power of search and seizure which may still remain objectionable according to Mr Sanyal independently of the regulated hours of search. That seems to indicate that search and seizure would be regulated by Rules, if any, are made in that behalf but not that the power itself will remain suspended unless such Rules are made. To make the Rules a condition precedent to the exercise of the power to search and seize will lead also to anomalous result because Rules may be changed from time to time. The situation will be odd indeed for instance, if some Rules were made when search and seizure were ordered but while they were pending these Rules were replaced or suspended. What is the effect then on pending search and seizure? Secondly, the words "any Rules made in that behalf" mean not merely made already but also those to be made in future. The language in this respect may be contrasted with the language in section 10(7) of the Income-tax Act

which uses the words "in accordance with the Rules contained in the Schedule to this Act". It is on this ground that the Supreme Court decision in AIR 1960 SC 430 may be distinguished because the words there were "except and in accordance with" (see pages 432 and 438 of the said Report AIR 1960 (SC) 430). The words 'subject to any Rules made' are not unusual words in statutes and if the intention was to prevent exercise of the power of search and seizure before making of any rules, Parliament could have used suitable words like "except and in accordance with Rules".

14. In view of the above discussion and from the plain rending of the provision of section 35 we are of the view that the commissions activity cannot be suspended in name of framing of Rules as the same is not a condition precedent. This is also the view taken by us in Writ Petition No.4648 of 2005 disposed earlier. It appears that as per section 35 of the Act the officers of 'the Bureau' are vested with the Commission and till absorption in other government department they are the officers of the commission and can be used by the Commission as and when necessary for the implementation of its activities and continuation. It further appears that the Commission has already framed the Rules for implementation of section 35(2) and send it to the government for approval long be fore and ultimately the same has been published in the official gazette in the year 2005. The petitioners cannot claim to be absorbed in the Commission as of right. It is the Commission to decide whom it want to retain or not. Furthermore, the said Rules are not condition precedent, rather the respondent No.1 categorically stated that all the actions were taken after framing of the Rules by the commission itself and after sending formal proposal to the Government. Furthermore we are of the view that as per section 35(2) of the Act the Commission requires no formal approval of the government as because of the word "তৎ কর্তৃক নির্ধারিত পদ্ধতিতে" In the case as referred hereinabove (AIR 1961) it has been further observed that;

> "It is a well-established rule of interpretation that courts should try to construe a statue, wherever possible, so as to avoid a conflict between its various provisions and to preserve its constitutionality *(Vide State of Uttar Pradesh vs Basti Sugar Mills Co. Ltd. (AIR 1961 SC 420 at P.426)"*

15. It is also well-settled that where that language of a statue in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence (Maxwell on the Interpretation of Statutes', 10th Edition, 1953, page 229).

16. Considering all the provisions of law specially the provisions laid down in sections 3, 16, 18, 20, 34, 35, and 38 of the Act of 2004, we are of the view that the contentions raised by the petitioners are not sustainable in law as we do not find any such restriction made by our legislatures in the instant case. In such circumstances, we do not find any illegality in the issuance of annexures B, B(1), B(2) B(3) & S by the Commission exercising the power conferred under section 20 (2) as well as 35(2) of the Act of 2004.

Considering the facts and circumstances, provisions of law and the case as referred to, we find no substance in these writ petitions. Accordingly, the Rules in Writ Petition No.1692 of 2006 and Writ Petition No.7428 of 2005 are discharged without any order as to cost.

Ed.

High Court Division
(Special Original Jurisdiction)

Moyeenul Islam Chowdhury J
Bhabani Prasad Singha J

Judgment
September 15th, 2014.

Nahar Hasan....Petitioner
vs
Government of the People's Republic of Bangladesh represented by the Secretary, Ministry of Local Government, Rural Development and Co-Operatives & others .....R espondents*

Constitution of Bangladesh, 1972
Article 102

It can interfere with the findings of a Court of facts under its extraordinary jurisdiction under Article 102 only if it can be shown that the Court has acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/ facts causing prejudice to the petitioner or it has acted malafide or in violation of the principle of natural justice. .....(9)

Village Court Ordinance (LXI of 1976)
Section 5(1)

Where members required under this section to be nominated are not nominated within the prescribed time, the Village Court shall, without such members, be deemed to have been validly constituted and the trial shall proceed accordingly. .....(10)

Government of Bangladesh vs Md Jalil, 15 BLD (AD) 175 = 49 DLR (AD) 26;

Md Shamim-ul-Alam and Sheikh Hasan Ali, Advocates—For the Petitioner.

Md Motaher Hossain (Sazu), DAG with Purabi Rani Sharma, AAG and Khairun Nessa, AAG—For the Respondent Nos. 1 & 2.

Md Abdus Salam Mondal, Advocate—For the respondent Nos. 3-6.

*Writ Petition No. 6978 of 2005.

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 impugned judgment and order dated 20-7-2005 passed by the respondent No. 3 in Case No. 452 dated 29-8-2004 (evidenced by Annexure-C to the Writ Petition) should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. Facts relevant to the disposal of the Rule may be, briefly, stated as follows:

The petitioner is a permanent citizen of Bangladesh having her residence at village Uttarkhan Master Bari, Shahi Moszid, Police Station Uttara, District-Dhaka. Anyway, on 29-8-2004, the respondent Nos. 5 and 6 submitted a petition of complaint to the respondent No. 3 alleging, *inter-alia*, that the petitioner had constructed a gate as well as a wall on a piece of land that was being used as a thoroughfare. On the self-same date (29-8-2004), the respondent No. 3 issued a notice upon the petitioner to appear before him with all relevant documents on 2-9-2004 and accordingly, the petitioner appeared before him on that date. At the time of hearing of the matter on 2-9-2004, the petitioner produced all the relevant documents before the respondent No. 3 in support of her title to and possession in the piece of land; but the respondent No. 3, in alleged violation of the provisions of section 5 of the Village Courts

Ordinance, 1976 (since repealed), rendered the impugned judgment and order dated 20-7-2005 curtailing the fundamental right of the petitioner to the enjoyment of her property as contemplated by Article 42 of the Constitution. Hence the Rule.

3. Mr Shamim-ul-Alam, learned Advocate appearing on behalf of the petitioner, submits that the Village Court which rendered the impugned judgment and order was coram-non-judice in view of the fact that the petitioner was not afforded any opportunity of nominating her two members in the prescribed manner as provided by Sub-section (1) of section 5 of the Ordinance and as the Village Court was coram-non-judice, the impugned judgment and order passed by the Village Court is a nullity in the eye of law.

4. Mr Md Shamim-ul-Alam further submits that it is crystal clear from Annexure-E, dated 26-8-2005 annexed to the supplementary affidavit dated 2-2-2011 that the respondent No. 3 again notified the parties on 26-8-2005 calling upon them to appear before him on 1-9-2005; but strangely enough, the respondent No. 3 passed the impugned judgment and order on 20-7-2005, that is to say, long before hearing of the matter on 1-9-2005 and this virtually amounted to putting the cart before the horse and in this regard, the bad faith of the respondent No. 3 is very much apparent on the face of the record and as he was actuated by malice, the impugned judgment and order cannot be sustainable in law.

5. *Per contra,* Mr Md Abdus Salam Mondal, learned Advocate appearing on behalf of the respondent Nos. 3-6, contends that the respondent No. 3 being unaware of the provisions of the relevant law passed the impugned judgment and order.

6. Mr Md Abdus Salam Mondal also contends that the petitioner failed to nominate her two members as required by Sub-section (1) of section 5 of the Village Courts Ordinance, 1976 at her own peril and that being so, the petitioner cannot turn round and agitate at this stage that she was not called upon by the respondent No. 3 to nominate her two members as required thereunder and Sub-section (5) of section 5 of the Ordinance provides that where members required under this section to be nominated are not nominated within the prescribed time, the Village Court shall, without such members, be deemed to have been validly constituted and the trial shall proceed accordingly.

7. We have heard the submissions of the learned Advocate Mr Md Shamim-ul-Alam and the counter-submissions of the learned Advocate Mr Md Abdus Salam Mondal and perused the Writ Petition, Supplementary Affidavit to the Writ Petition, Affidavit-in-Opposition and relevant Annexures annexed thereto.

8. At the outset, we would like to point out that this is a writ of certiorari. The scope of a writ of certiorari, it is well-settled, is very limited. The High Court Division exercising power under Article 102 of the Constitution does not function as a Court of Appeal and, as such, it is not required to make determination of facts on its own in a writ of certiorari. It can interfere with the findings of a Court of facts under its extra-ordinary jurisdiction under Article 102 only if it can be shown that the Court has acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/facts causing prejudice to the petitioner or it has acted malafide or in violation of the principle of natural justice. This view is underpinned by the decision in the case of the *Government of Bangladesh vs Md Jalil* reported in *15 BLD (AD) 175 = 49 DLR (AD) 26.*

9. Sub-section (1) of section 5 of the Village Courts Ordinance does not cast any duty upon the respondent No. 3 to call upon the parties concerned to nominate their respective members in the prescribed manner for resolution of their dispute. From a bare reading thereof, it seems to us that the parties to the dispute are required to nominate their respective members in the prescribed manner of their own motion. In case of their failure in this respect, the provisions of Sub-section (5) of section 5 of the Ordinance will come into play. Sub-section (5) of section 5 of the Ordinance provided that where members required under this section to be nominated are not nominated within the prescribed time, the Village Court shall, without such members, be deemed to have been validly constituted and the trial shall proceed accordingly. In this perspective, the failure of the petitioner to nominate her two members as required by Sub-section (1) section 5 of the Ordinance will not debar the Village Court from proceeding with the trial of the case. That being the legal position, no exception can be taken to the constitution of the Village Court.

10. However, it is not the case of the contesting respondents that they also failed to nominate their two members in the prescribed manner for resolution of the dispute. In the absence of any such statement in the Affidavit-in-Opposition, it can be safely held that the contesting respondent Nos. 5 and 6 nominated their members in the prescribed manner as required by Sub-section (1) of section 5 of the Ordinance. But curiously enough, the impugned judgment and order dated 20-7-2005 does not contain the signatures of the members nominated by the respondent Nos. 5 and 6. What we are driving at boils down to this: the impugned judgment and order was rendered only by the respondent No. 3 which is illegal on the face of it.

11. There is no gainsaying the fact that the notice dated 26-8-2005 (Annexure-E) was issued calling upon the parties concerned to appear before the respondent No. 3 with all their relevant documents on 1-9-2005; but strangely enough, the impugned judgment and order was admittedly rendered by the respondent No. 3 on 20-7-2005, that is to say, long before the date of hearing of the matter before the respondent No. 3 on 1-9-2005. It transpires that Mr Md Shamim-ul-Alam has rightly submitted that this amounted to putting the cart before the horse. Given this scenario, we have no hesitation in holding that the impugned judgment and order dated 20-7-2005 stands vitiated by malafides or bad faith and that bad faith is writ large on the record itself. Precisely speaking, the impugned judgment and order is a classic case of bad faith on the part of the respondent No. 3.

12. By the way, we feel tempted to say that malafides or bad faith is a question of fact; but where malafides or bad faith is apparent on the face of the record, this Court can take notice thereof and arrive at appropriate findings on its basis in this summary proceeding under Article 102 of the Constitution.

13. As we have already observed that malice or bad faith is apparent on the face of the record and as bad faith has vitiated the impugned judgment and order dated 20-7-2005, we need not go into the merit of the case.

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

15. Accordingly, the Rule is made absolute without any order as to costs. The impugned judgment and order dated 20-7-2005 passed by the respondent No. 3 in Case No. 452 dated 29-

8-2004 (Annexure-C to the Writ Petition) is declared to be without lawful authority and of no legal effect.

Communicate a copy of this judgment to the respondent No.3 for information and necessary guidance.

Ed.

High Court Division
(Special Original Jurisdiction)

Quazi Reza-ul-Hoque J

Anisul Haq (Md).....
.....Petitioner

vs

Government of the People's Republic of Bangladesh and others
.....Respondents*

Judgment
November 21th, 2013.

Constitution of Bangladesh, 1972
Article 102(2)

Legitimate Expectation—It is a legitimate and legal expectation of the petitioner that after receiving money the lease deed for the extra land be executed and registered without any delay. Doctrine of legitimate expectation imposes in spirit a duty on public authority to act fairly by taking into consideration all relevant factors relating to such legitimate expectations. .....(25)

AKM Kawser Ahmed vs Bangladesh, 65 DLR 377 ref.

Kazi Waliul Islam, Advocate—For the Petitioner.

Md Waliul Islam, Advocate—For the Respondents.

Judgment

Quazi Reza-ul Hoque J: The instant Rule was issued on 27-3-2005 calling upon the respondents to show cause as to why they should not be directed to execute and register the required Lease Deed in respect of 01 (one) Katha 6 Chhatak and 27 square feet of land, subsequently allotted and possession of which has been delivered to the petitioner against payment of the consideration amount of Taka 2,18,334 as required by RAJUK vide Memo No. RAJUK/ESTATE/2998 Stha: dated 6-8-1990 (annexure-G), inspite of submission of the required stamp papers and other papers and documents asked for by the RAJUK, (annexure-J), within a reasonable period and why the respondents shall not be directed to refund the proportionate amount of money in respect of the 31 square feet of land (annexure-H-1), which area found to be less than the area mentioned in the allotment letter (annexure-G), and /or such other or further order or orders passed as to this Court may seem fit and proper.

2. The facts as has been detailed by the petitioner, in short, in the petition are that the petitioner having no land or house of his own applied to the then Dacca Improvement Trust for allotment of a residential plot at Uttara Model Town. Accordingly he was allotted with plot No. 30, Road G of Sector 5, measuring more or less 230 square yards of land of Uttara Model Town vide Memo. No. DIT/UTT/R/696-P dated 17-2-1977 (annexure-A).

3. The petitioner as per condition of the allotment letter and prevailing rules deposited the lease money with the respondent No.1. The Lease Agreement was executed and registered by the respondent on 10-12-1981, wherein the area of land has been shown to be 439 square yards and 1 square feet more or less (annexure-B).

4. While taking the measurement of the petitioner's allotted plot No. 30, Road 6, Sector 5, it was detected that the plot contains an excess area of land than it was actually allotted to the petitioner. The increased area was found

*Writ Petition No. 1665 of 2005.

to be 159 square yards and 1 square feet. The final measurement certificate dated 8-4-1901, the date on which possession was delivered to the petitioner of the entire area measuring 439 square yards 1 square feet, which also included the excess area (annexure- C).

5. Thereafter on the basis of final measurement, the Estate Office of respondent No. 1 issued Memo No. DlT/EC/3229 dated 19-9-1981 requesting the petitioner to deposit Taka 14,917 only for the excess area included in the earlier allotted plot of the petitioner (annexure-D), and the petitioner as per direction of the above mentioned memo of the respondent deposited the amount at the Janata Bank, RAJUK Branch, Dhaka on 1-10-1901 vide receipt No.12963 (annexure- E).

6. The plot with its excess area subsequently added to it and possession Delivered to the petitioner is situated on the border-end of Sector-5 on the Northern end. This plot was not raised, leveled with earth filling and the approach road was also not constructed, as such, the petitioner although got the plan for construction of a house approved by the respondents could not start construction. To make the plot ready by earth filling, leveling and approach road construction the petitioner made repeated approaches to respondent Nos.1 to 3, but without any result. The petitioner had to suffer and is going to face heavy financial loss because by this time the price of building construction materials have gone up by several times. At the time of allotment of the plot the petitioner was 35 years old and he was in active serviced and now he is 62 years old and already retired from his service. Due to intentional negligence of the respondents the petitioner has been made to suffer both mentally and financially. The petitioner is thus entitled to get reasonable and adequate compensation for the loss and sufferings caused to the petitioner (annexure- F, F-l, F-2, F-3, F-4 and F-5).

7. In the meantime respondent No. 1 took decision for expansion of Uttara Model Town towards the North and other directions. In the process the respondents expanded Sector 14 to the North of the petitioner's plot in Sector No. 5. This Plot No. 30 of Sector 5 thus became a border Plot. Under such circumstances and road alignment and due to creation of Sector 14 another piece of land measuring an area of 1 katha 7 Chhatak 13 square feet of land of irregular shape adjacent to the petitioner's plot became useless as this area of land with its physical situation could not be amalgamated with any other plot and under such circumstances officers of the respondent No. 1 asked the petitioner to make formal prayer for allotment of this, irregular slice of land and accordingly respondent No. 1 issued allotment letter vide Memo No. RAJUK/Estate/2774-L dated 6-8-1998 to the petitioner with a direction to make deposit of Taka 2.10,334 only by 30-8-1990 (annexure- G).

8. The petitioner as per direction deposit of Taka 21,8334.00 vide pay order No. 4931361 dated 12-8-1990 at Sonali Bank, RAJUK Branch, Dhaka (annexure- 1), and made a formal prayer for execution and registration of lease deed in respect of the land allotted to the petitioner as per order contained in annexure- H. The possession of this extra area of 1 katha 7 chattak and 13 square feet was made over to the petitioner on 20-2-2000 but in actual physical measurement there was shortage of 31 square feet of land and the petitioner is entitled to get refund proportionately for this area that was found short (annexure-H and H-1).

9. The petitioner is thus entitled to get lease document, for the extra land allotted to him vide allotment letter of 6-8-1998 (annexure-G). The petitioner cannot submit fresh plan for building construction without completion of this formality of execution and registration of lease Deed for this extra land, which is part of

the petitioner's allotted Plot No. 30, Road 6, Sector 5, Uttara Model Town. The petitioner thus made repeated visits in the office of respondent No. 1 and met all officials' concerned but excepting verbal assurance nothing was done to complete the lease agreement and the petitioner is kept in a hanging tense position. The three copies of written representation submitted by the petitioner to the respondent Nos. 1, 2 and 3 on 5-2-2004 remained unyielding [annexure-1, 1 (1) and 1-(2)].

10. The petitioner having failed to get the Lease Deed in respect of the land from the respondents in spite of repeated verbal requests, personal visits and written representations failed to obtain the Lease Deed and has been suffering for several years submitted the stamped and typed Lease Deed before respondent No. 3 as per their direction (annexure-J).

11. Under the circumstances the petitioner having found the normal door of relief closed to him because of willful, arbitrary whimsical actions of the respondents served a Demand of Justice Notice through his lawyer on 22-2-2004 (annexure- K, K-1 and K-2).

12. The respondent No. 1 contested the Rule by filing an affidavit-in-opposition contending inter-alia that the burden of proof lies upon the petitioner. The Uttara Model Town, Sector No. 5, Road No, 6 and plot No. 30 was allotted in favour of the petitioner and during delivery of possession an extra portion of land measuring 1 katha 7 chattaks and 13 square feet was also allotted in favour of the petitioner vide memo No. 2774 dated 6-8-1990, however, subsequently the extra allotment was cancelled through Genera Board Meeting when it revealed that initial report of Surveyors and Kanongoos are wrong, and incorrect since there is no extra land for this purpose vide Board Meeting No. 6 of 2003.

13. Originally Rajdhani Unnayan Kartripakha (RAJUK formerly DIT allottee) to the petitioner a piece of land measuring more or less 280 square yards at plot No. 30. Road No. 6, Sector No. 5. Uttara, Dhaka vide letter of allotment dated 17-2-1077. Subsequently when the land was actually measured physically it was found that the land, was increased to 159 Square Yds. As such, during delivery of possession the petitioner was given 280 sq. yds. plus 159 sq. yds, and 1 sq. ft., which on calculation in terms of Katha comes to 5 and a half kathas of laud. The RAJUK by their official procedures issued subsequent letter of allotment for the increased lands of 159 Sq. yds. and 1 Sq. ft. and also realized salami by way of installments. After all these a deed of lease for a period of 99 years was executed and registered between the petitioner and the respondent No. 1 vide deed dated 24-12-1981.

14. After completion of the assignments as above the occasion of creating of Sector No. 14 at Uttara adjacent to Sector No. 5 from which the petitioner was allotted the lands, arose and after making road alignment it was noticed by surveyors of kanongoos that an area of 1 katha 7 chattaks. 13 Sq. fts. of land adjacent to the petitioner's plot became excess in accordance with the measurement prepared by the Surveyors and the Kanongoos of RAJUK. So RAJUK decided to allot such portion of land to the petitioner further vide memo No. 2774 dated 6-8-1998 but subsequently when an anomaly/irregularity was detected in the measurement of the Surveyors and Kanongoos the said allotment was cancelled through a competent Board Meeting vide meeting No. 6 of 2003 held on 23-7-2003. The allotment of land measuring 1 Katha 13 chattaks and 1 sq. ft. as conveyed under Memo No. 2774 dated 6-8-1998 was absolutely done upon wrong measurement/calculation by the Surveyors and Kanongoos for which departmental action was taken against those surveyors and kanaongoos. The respondent is very much remorseful for such wrong allotment upon wrong calculation

of the sub-ordinates. Excluding this portion of land there is no dispute in between the parties which is clear from the writ petition.

15. Mr Kazi Waliul Islam, the learned Advocate for the petitioner submitted that the petitioner got the allotment letter for his excess area of land allotted to him by the opposite party (annexure- G). This allotment letter is a valid document creating right and interest of the petitioner in the land in question. By not executing and registering the Lease Deed the respondents acted illegally and it affects the petitioner's right to property, as such, the respondents are under obligation to honour those fundamental rights of the petitioner as per Article 42 of the Constitution of the People's Republic of Bangladesh.

16. He further submitted that the petitioner on obedience to the direction contained in the allotment letter deposited the demanded lease money of Taka 2,18,334.00, within the fixed date (annexure- H-1). After that the transaction is a complete one and the Respondents are under obligation to execute and register the lease deed in favour of the petitioner. By not doing the same they have acted in violation of the fundamental right of the petitioner as guaranteed under Article 31 of the Constitution.

17. He again submitted that after issuing allotment letter and accepting lease money and making over delivery of possession of the leased out properly to the petitioner, the petitioner has become the lawful owner of the, property and the respondent cannot refuse execution and registration of the lease deed. The petitioner is thus entitled to protect his right through Court as per Article 3 of the Constitution.

18. Mr Islam, further submitted that the petitioner having received delivery and possession of the property long back could, not proceed towards making construction on the plot by getting the plan for such construction approved under the building construction Act because of intentional delay and refusal of the petitioner in executing; and registering the lease deed in his favour by the respondents for which the petitioner is entitled to get adequate compensation from, the respondents.

19. He further submitted that the respondents since 1998 has kept this matter hanging causing intentional financial loss and harassment to the innocent petitioner, as such, the Rule deserves to be made absolute with the sought direction upon the respondents to execute and register the lease deed in favour of the petitioner.

20. Mr Mel. Waliul Islam, the learned Advocate appearing for the respondent No. 1 submitted that Originally Rajdhani Unnayan Kartripakkha (RAJUK) formerly DIT allotted to the petitioner a piece v of land measuring more or less 280 square yards at plot No. 30, Road No. 6, Sector No. 5, Uttara, Dhaka vide letter of allotment dated 17-2-1977. Subsequently when the land was actually measured physically it was found that the land was increased to 159 square yard. And at the time of delivery of possession the petitioner was given 200 sq. yds. plus 159 sq. yds. Plus a sq. ft., which on calculation in terms of Katha comes to 5 and a half kathas of land. The RAJUK by their official procedures issued subsequent letter of allotment for the increased lands of 159 Sq. Yds. And 1 Sq. Ft. and also realized salami by way of installments. After all these a deed of lease for a period of 99 years was executed and registered between the petitioner and the respondent No. 1 vide deed dated 24-12-1981.

21. He further submitted that after completion of the assignments as above at the lime of developing Sector No. 14 at Uttara adjacent to Sector No. 5, from which the petitioner was allotted the lands, arose and after making road alignment it was noticed by surveyors of

kanongoos that an area of 1 katha 7 chattaks, 13 sq. fts of land adjacent to the petitioner's plot became excess in accordance with the measurement prepared by the Surveyors and the Kanongooa of RAJUK. So RAJUK decided to allot such portion of land to the petitioner further vide memo No. 2774 dated 6-8-1998 but subsequently when an anomaly/irregularity was detected in the measurement of the Surveyors and Kanongoos the said allotment was cancelled through a competent Board Meeting vide meeting No. 6 of 2003 held on 23-7-2-003.

22. He again submitted that the allotment of land measuring 1 katha 13 chattaks and 1 sq. ft. as conveyed under Memo No. 2774 dated 6-8-1998 was done absolutely upon a wrong measurement/calculation by the Surveyors and Kanongoos for which departmental action was taken against those surveyors and knaongoos. The respondent is very much remorseful for such wrong allotment upon wrong calculation of the sub-ordinates. Excluding this portion of land there is no dispute in between the parties which is clear from the writ petition.

23. On perusal of the submissions of the learned advocates of the both the parties and the available documents, it is apparent that the and in dispute is a strip of land, which in fact will not constitute any new plot rather that may be used for some other collateral purpose. On calculation, whether be it right or wrong, the respondents after measurement allotted the same in favour of the petitioner long 35 years ago, and received lease money from him. Now they have come with new plea that the measurement was wrong, if so, yet this strip of land is not going to be used for any other purpose but the respondents are without any valid reason delaying the process of execution and registration of the lease deed, which the petitioner may legitimately claim, since money against the same has already been received by them.

24. The respondents did not contain a single piece of paper showing that the allotment of the extra land has been cancelled, as such, such plea of wrung measurement and delaying the process is nothing hut colourable exercise of power causing misery to innocent people and the instant case is glaring example of the same.

25. It is a legitimate and legal expectation of the petitioner of the petitioner that after receiving money the lease deed for the extra land be executed and registered without any delay. In *AKM Kawser Ahmed vs Bangladesh, 65 DLR 377,* it was observed *inter-alia* that:

The doctrine of legitimate expectation imposes in spirit a duly on public authority to act fairly by taking into consideration all relevant factors relating to such legitimate expectations.....

26. In result, the Rule is made absolute. The respondent No. 1, i.e RAJUK is hereby directed to execute and register the Lease Deed in respect of 1(one) Katha 6 Chhatak and 27 square feet of land, subsequently allotted and possession of which has been delivered to the petitioner against payment of the consideration amount of Taka 2,18,334 as required by RAJUK vide Memo No. RAJUK/ESTATE/2998 Stha: dated 6-8-1998 (annexure-G) within three (3) months of receiving this Judgment and Order.

There is no order as to cost.

Send a copy of this order to the concerned authority immediately.

Ed.

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24 Mr Abul Kalam Azad Khan
25 Ms Jesmin Sultana (Shamsad)
26 Mr Swapan Kumar Das
27 Ms Mahmuda Parveen (Popy)
28 Ms Zannatul Ferdoushi (Rupa)
29 Ms Rahima Khatun
30 Mr Khondker Modarresh Elahi
31 Mr Gazi Md Mamunur Rashid
32 Mr Md Jahangir Alam
33 Mr Kazi Bazlur Rashid
34 Mr Md Ali Jinnah
35 Mr Md Eunus Ali
36 Mr Arobinda Kumar Roy
37 Mr Shafquat Hussain
38 Mr Atiqul Haque
39 Mr Md Mozammal Haque Rana
40 Mr SM Quamrul Hasan
41 Mr Md Jashim Uddin
42 Mr Md Mahabub-ul-Alam
43 Mr Samarendra Nath Biswas
44 Ms Sharmina Haque
45 Mr Sukumar Biswas
46 Ms Nurun Nahar
47 Mr ARM Hasanuzzaman Uzzal
48 Ms Shahida Begum
49 Mr Saikat Basu
50 Mr Pratikar Chakma
51 Mr Abdur Rokib (Montu)
52 Mr KM Masud Rumy
53 Mr Md Khalilur Rahman
54 Mr Md Jaber
55 Mr Md Ensan Uddin Sheikh
56 Mr Titus Hillol Rema
57 Mr Md Zakir Hossain (Ripon)
58 Ms Shahida Khatoon
59 Mr Md Asaduzzaman
60 Mr Sk Shaifuzzaman (Zaman)
61 Ms Khairun Nessa
62 Mr Kazi Ebadoth Hossain
63 Mr Dipayan Chandra Saha
64 Mr Shafiquel Islam Siddique
65 Mr ASM Fazle Rabbi Khan
66 Mr Shahidul Islam Khan
67 Ms Towhida Khatoon (Rina)
68 Mr KM Mahmudul Karim
69 Mr Md Yousuf Mahmud Morshed
70 Ms Yesmin Begum (Bithi)
71 Ms Monzu Naznin (Rosy)
72 Mr Md Ashaque Momin
73 Mr Md Aminur Rahman Chowdhury
74 Ms Beadura Ansary
75 Ms Sucharita Sen Gupta
76 Mr Bahauddin Ahmed
77 Mr Md Abdur Rahman Howlader
78 Mr Bibhuti Bhuson Biswas
79 Mr Md Monowar Hossain
80 Mr Md Nurul Haque
81 Mr Mian Md Shamim Ahsan
82 Mr Md Abdul Bari
83 Mr Md Sohrawardi
84 Mr Md Motiur Rahman Howlader
85 Ms Bilkis Fatema
86 Ms Anwara Khanam
87 Ms Yeadia Zaman
88 Mr Md Osman Goni Khan
89 Ms Nusrat Jahan
90 Ms Samira Tarannum Rabeya
91 Ms Delwara Begum Bela
92 Mr MA Kamrul Hasan Khan (Aslam)
93 Mr Sadhan Kumar Banik
94 Mr Shamsuddoha Talukder
95 Mr Sarup Kanti Deb

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19 BLC (AD) 98 — Abdul Momen Bhuiyan vs District Judge, Dhaka reversed the judgment and order dated 21-7-2011 passed by the High Court Division in Writ Petition No.6385 of 2010 by Civil Petition for Leave to Appeal No. 2228 of 2011.

19 BLC (AD) 123 — Harun-or-Rashid vs Gulaynoor Bibi reversed the judgment and order dated 11-4-2005 passed by the High Court Division in Civil Revision No.3951 of 2003 by Civil Appeal No. 94 of 2007.

19 BLC (AD) 178 — State vs Tajel Sheikh @ Md Tajul Sheikh partially reversed the judgment and order dated the 22nd day of February, 2010 passed by the High Court Division in Criminal Appeal No.2005 of 2000 by Criminal Appeal N0.26 of 2011.

19 BLC (AD) 192 Mati alias Md Matiar Rahman vs State reversed the judgment and order dated 1st July, 2002 passed by the High Court Division in Criminal Appeal No. 303 of 1987 by Criminal Appeal No. 51 of 2003.

19 BLC (AD) 303 State vs Md Manzurul Alam reversedthe judgment and order dated 3rd of May, 2005 passed by the High Court Division in Criminal Miscellaneous Case No. 5650 of 2003 by Criminal Appeal No. 27 of 2006.

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Administrative Tribunal Act, 1980
(VII of 1981)

Section 4—The writ-petitioner is a Government servant and her whole grievance is that she was not being given promotion as Headmistress of the primary school counting her seniority from the date of her appointment like the other persons who were appointed along with her on the same date. The proper forum for redressing her grievance was the Administrative Tribunal under section 4 of the Act. *Government of Bangladesh vs Mukul Begum (Civil) 19 BLC (AD)* 188

Section 4—Claim of seniority and promotion of the writ-petitioner definitely falls within the terminology "of the terms and conditions of his service" as used in section 4 of the Act the Administrative Tribunal had the absolute jurisdiction to look into the matter including the question of discrimination as envisaged in Article 29 of the Constitution. *Government of Bangladesh vs Mukul Begum (Civil) 19 BLC (AD)* 188

Anti-Corruption Commission Act
(V of 2004)

Section 17(T)(ঘ)—One of the functions of the Commission is to prescribe the procedure as to the sanction to be given by it in respect of the enquiry, investigation and filing of a case in relation to corruption. Neither in clause (ক) nor in clause (ঘ) of section 17, any difference has been made about the offences under the Ain, 2004 or the offences under other laws mentioned in the schedule to the Ain. *Kaisor-uz-Zaman (Md) vs State, represented by the Deputy Commissioner, Sylhet (Criminal) 19 BLC (AD) 101*

Section 20(1)—The moment the Ain, 2004 came into force, the police had lost its jurisdiction to continue with the investigation of the case and was legally obliged to stop the investigation of the case and send the same to the Commission to complete the investigation by it and submit the report accordingly. *Kaisor-uz-Zaman (Md vs State, represented by the Deputy Commissioner, Sylhet (Criminal) 19 BLC (AD) 101*

Sections 26, 27, 32 and 38(3)—Section 409 of the Code was in the schedule to the Act, 1957, it was a part of it and had to be treated as an offence under the Act. Sub-section (3) of section 38 of the Ain, 2004 was applicable in respect of the investigation of offence under section 409 of the Code. Offences mentioned in the schedule to the Ain, 2004, be it an offence as contemplated in sections 26 and 27 thereof, or the offences under other laws as mentioned therein, section 32 of the Ain, 2004 shall be applicable. *Kaisor-uz-Zaman (Md vs State, represented by the Deputy Commissioner, Sylhet (Criminal) 19 BLC (AD) 101*

Section 27(1)—Notice issued under section 26(1) by the Secretary of the Commission was without jurisdiction. But, for this reason the High Court Division cannot set-aside the conviction of the accused in respect of an offence under section 27(1) of the Ain High Court Division acted illegally in setting aside the conviction of the accused in respect of offence under section 27(1) of the Ain. The judgment and order of the High Court Division so far as it relates to setting aside the conviction and sentence under section 27(1) of the Ain, is set-aside. The matter is remanded to the High Court Division to dispose of the appeal on merit afresh. *Anti Corruption Commission vs Aman Ullah Aman (Criminal) 19 BLC (AD) 239*

Section 32—If the accused can really show that no sanction was accorded by the Commission before submission of the charge-sheet against him; then the trial Court shall definitely consider the same in the light of the relevant provisions of the Ain, 2004. *Anti-Corruption Commission vs Dr Md Rezaul Haque Chowdhury alias Dr Md Rezaul Karim (Criminal) 19 BLC (AD) 160*

Anti-Corruption Commission Rules, 2007

Rule 13(1)(2)—Report submitted by the police under section 173 of the Code on the basis of which the learned Special Judge took cognizance of the offence against the petitioner was not a report in the eye of law, there is no other alternative but to get the case investigated afresh by the Commission. *Kaisor-uz-Zaman (Md vs State, represented by the Deputy Commissioner, Sylhet (Criminal) 19 BLC (AD) 101*

Rule 13(1)(2)—Bidhi 13(1) of the Bidhimala, has clearly provided that prior sanction of the Commission or the authorized Commissioner of the Commission shall be necessary in case of submission of report in the competent Court (উপযুক্ত আদালতে) in case the allegation(s) of the commission of any mentioned in the schedule to the Ain, 2004 is proved against any person after completion of investigation. Sub-bidhi (2) of bidhi 13 has clearly provided that no Court shall take cognizance of an offence for trial if a copy of sanction given by the Commission or by the Commissioner as the case may be is not filed as a proof of such sanction against any person. *Kaisor-uz-Zaman (Md vs State, represented by the Deputy Commissioner, Sylhet (Criminal) 19 BLC (AD) 101*

Arbitration Act

(X of 1940)

Section 17—When the Court acts *suo motu* no question regarding making of deposit can arise. *Suo motu* power of the Court to invalidate an award can be exercised when there is a patent illegality or voidness. Under section 17 of the Act, the Court had ample power to go into the question of the validity of the award

without any objection being filed by any of the parties to the arbitration. *Project Director, PL vs A Latif Company Ltd (Civil) 19 BLC (AD) 199*

Section 9(b)—In case of appointment of arbitrator, notice of appointment upon other party for the purpose is imperative because only upon such notice being given the right of each party to appoint arbitrator arises but the right to appoint the sole arbitrator arises only if there is failure or default on the part of other party to appoint his own arbitrator within the statutory period as required under law and failure to give such notice renders every appointment of arbitrator itself is illegal and imperative. *Government of Bangladesh vs MOL Enterprise Inc. (Civil) 19 BLC (AD) 305*

Section 30—The pleas that the application for setting-aside of the application under section 30 of the Act, having been filed beyond 30 days of the service of notice, the award cannot be set-aside and appeal is liable to be dismissed are of no substance and such plea is a plea which is dying similar in the deep sea trying to save his life catching even a straw. *Government of Bangladesh vs MOL Enterprise Inc. (Civil) 19 BLC (AD) 305*

Artha Rin Adalat Ain

(VIII of 2003)

Section 33—Under the Ain, the Artha Rin Adalat was empowered to raise money for payment of the total amount by way of mortgage or lease or private sale of the property with the permission of the Court. The expression, 'the amount of the decree may be raised' used in sub-rule (1) means the total decretal amount and not an amount which could not satisfy the decree, and no Court can grant such permission unless the entire debt can be realized by private alienation. This provision should be read subject to the provision of sub-rule (3). *Agrani Bank vs Anwarul Bashir Khan (Civil) 19 BLC (AD) 120*

Civil Rules and Orders

Rule 388(2)—Communication of arrival of the case record from the High Court Division to the learned Advocates of the pre-emptor was not a sufficient compliance with the direction of the High Court Division. What's more, in the absence of pendency of any proceeding in the Court below, fresh initiation thereof in the Court below must be intimated to the parties to the proceeding and not their learned Advocates. *Ibrahim Khalique @ Ibrahim Salik vs Ayesha Bibi (Civil) 19 BLC (AD) 153*

Code of Civil Procedure

(V of 1908)

Section 11—Order VII, rule 11—The plea of *res judicata* is to be decided after framing an issue to that effect. There is no scope for application of section 11 of the Code for rejection of plaint. *Shahjahan Siraj (Md) vs Md Rafique Quoraishi (Civil) 19 BLC (AD) 143*

Section 98—Proviso—The word 'may' in the proviso cannot be read as equivalent to 'shall'. It is discretionary as no consequence has been provided for not stating the point of law upon which the learned Judges differed. The word 'shall', however, is used in the proviso in respect of hearing of the appeal by the Third Judge, who shall resolve only the law point, on which, the learned Judges differed. *Shajahan Mia (Md) vs Government of the People's Republic of Bangladesh (Civil) 19 BLC (AD) 194*

Section 107—Section 107 of the Code enjoins the appellate Court all or any of the powers conferred on a trial Court. The powers of the High Court Division sitting on appeal under section 107 are the same as that of the trial Court. This power has been given to the appellate Court with a view to minimize the harassment of the parties to the litigation and also to reduce the docket. *Dream Land Properties Ltd vs Hazi Abdul Wazed (Civil) 19 BLC (AD) 211*

Section 115—Order VII, rule 11(d)—Order VII, Rule 11 Clause (d) is not available for rejection of a plaint under section 11 of the Code. The plea of *res judicata* as contained in section 11 of the Code can be resolved at the trial after framing an issue and cannot be decided from a reading of the plaint. *Rawshan Jamil vs Md Adiluzzaman (Civil) 19 BLC (AD) 129*

Section 115(1)—Summary disposal of a revision application giving full relief to the petitioner without issuing Rule and thus giving no opportunity to the other side(s) of being heard is not permissible. *Aman Ullah Chowdhury vs Bulbul Lalitkala Academy (Civil) 19 BLC (AD) 170*

Section 115(1)—We record our strong disapproval and dismay at the failure of the High Court Division in not giving any consideration on the question of possession of the suit plot which was a very fundamental issue in a suit for declaratory decree concerning an immovable property and particularly when the appellate Court gave finding that the plaintiffs were not in possession of the suit plot. *(Per MA Wahhab Miah J, majority) Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD) 241*

Section 115(1)—The limits of the jurisdiction of the High Court Division are well defined by a long course of judicial decisions; when the aid of the High Court Division is invoked on the revisional side is done because it is a superior Court and it can interfere for the purpose of rectifying error of the courts below which has occasioned a failure of justice. Section 115(1) circumscribes the limit of that jurisdiction. *(Per SK Sinha J, minority) Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD) 241*

Section 151—The inherent power is to be exercised in very exceptional circumstances. This power cannot be exercised disregarding the specific provision of law. *Harun-or-Rashid vs Gulaynoor Bibi (Civil) 19 BLC (AD) 123*

Section 151—When there is specific provision in the Code for a matter to be decided a Court should not exercise the inherent power to dispose of the matter. *Harun-or-Rashid vs Gulaynoor Bibi (Civil) 19 BLC (AD) 123*

Section 151—The main scope for section 151 of the Code furnishes the legislative recognition of the well-established principle that every court has inherent power to act *ex debito justitiae* to do that real and substantial justice between the parties or to prevent abuse of the process of the court for which it exists. *Ex debito justitiae* according to equity, justice and good conscience is concerned with sound judicial principle and fundamental laws and judicial procedure. *Harun-or-Rashid vs Gulaynoor Bibi (Civil) 19 BLC (AD) 123*

Order VI, rule 17—Prayer for amendment cannot be allowed after more than twelve years of knowledge. *(Per SK Sinha J, minority) Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD) 241*

Order VI, rule 17—Amendment of the plaint can be allowed when the proposed amendment will not change the nature, feature

and character of the suit. If any party is aggrieved by the order passed by the trial Court, he may seek necessary relief invoking the specific provision of law before the competent Court. *Harun-or-Rashid vs Gulaynoor Bibi (Civil) 19 BLC (AD)* 123

Order VI, rule17 *read with* sections 115 and 151—When a court has passed an order under Order VI, rule 17 read with section 151 of the Code any person aggrieved by that order may prefer a revisional application under section 115 of the Code before the High Court Division. Section 151 contemplates the inherent power of the court, in addition and complementary to the powers expressly governed under the Code. *Harun-or-Rashid vs Gulaynoor Bibi (Civil) 19 BLC (AD)* 123

Order VII, rule 3—Order VII, rule 3 of the Code has clearly mandated that where the subject matter of the suit is immovable property, the plaint shall contain a description the property sufficient to identify it and in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers. *(Per MA Wahhab Miah J, majority) Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD)* 241

Order IX, rule 4(2)—The vokalatnama remains valid unless cancelled with the leave of the Court by the client or Advocate or until the client or the Advocate dies or until all proceedings in the suit are ended so far as regards the client. As soon as the all proceedings under Order IX, rule 13 came to an end, all proceedings in relation to the pre-emption case shall be deemed to have come to an end and the vokalatnama executed by the pre-emptor shall be deemed to have been terminated or lost its efficacy according to sub-rule (2) of rule 4 of Order III of the Code of Civil Procedure. *Ibrahim Khalique @ Ibrahim Salik vs Ayesha Bibi (Civil) 19 BLC (AD)* 153

Order XIV, rule 2—What it follows is in appellable cases Courts below should, as far as may be practicable, pronounce their opinion on all the issues joined together whether they are related to fact or law or mixed question of fact and law unless the issues of law relate to the maintainability of the suit which goes to the root of the litigation and raises the question of jurisdiction of the Court to try the dispute. *Nurul Majid Mahmood Humayun vs Brigadier General Kazi Mahmud Hassan PSC (Retd) (Civil) 19 BLC (AD)* 89

Order XXI, rule 83(1)—Under the Ain, the Artha Rin Adalat was empowered to raise money for payment of the total amount by way of mortgage or lease or private sale of the property with the permission of the Court. The expression, 'the amount of the decree may be raised' used in sub-rule (1) means the total decretal amount and not an amount which could not satisfy the decree, and no Court can grant such permission unless the entire debt can be realized by private alienation. This provision should be read subject to the provision of sub-rule (3). *Agrani Bank vs Anwarul Bashir Khan (Civil) 19 BLC (AD)* 120

Order XXXIX, rule 2(3)—High Court Division corrected the mistake committed by the trial Court and imposed punishment as provided in Order XXXIX, rule 2(3) of the Code.*Abdul Gaffar (Md) vs Kuti Miah (Civil) 19 BLC (AD)* 174

Code of Criminal Procedure

(V of 1898)

Section 35A—The period during which he suffered in jail hajat before the order of conviction and sentence passed by the Sessions Judge shall be deducted from his sentence of imprisonment. *State vs Tajel Sheikh @ Md Tajul Sheikh (Criminal) 19 BLC (AD)* 178

Section 35A—The period of time spent by the accused in custody during pendency of the trial would be deducted from his total sentence. *Rokia Begum alias Rokeya Begum vs State (Criminal) 19 BLC (AD)* 204

Section 161—Evidence of an otherwise credit-worthy witness cannot be discarded merely because it was not available in the statement of witness recorded under section 161 of the Code. *(Per SK Sinha J, minority) Yasin Rahman @ Rahman Yasin @ Titu vs State (Criminal) 19 BLC (AD)* 8

Section 161—Statement recorded under section 161 of the Code is not a substantive evidence. Mere delay in recording the statements of the witness under section 161 of the Code, cannot be considered fatal if the evidence adduced by them in court appears to be credible after sifting. *Shahjahan Khalifa vs State (Criminal) 19 BLC (AD)* 95

Section 161(1)—Former statement of a witness to furnish corroboration can be proved only if it was made 'at or about the time' when the fact took place as a means of safeguarding against fabrication of false evidence. If the time for reflection passes between the event and the subsequent statement, the latter is not only useless, it may be really dangerous to allow its admission. *(Per SK Sinha J, minority) Yasin Rahman @ Rahman Yasin @ Titu vs State (Criminal) 19 BLC (AD)* 8

Section 173—Report submitted by the police under section 173 of the Code on the basis of which the learned Special Judge took cognizance of the offence against the petitioner was not a report in the eye of law, there is no other alternative but to get the case investigated afresh by the Commission. *Kaisor-uz-Zaman (Md vs State, represented by the Deputy Commissioner, Sylhet (Criminal) 19 BLC (AD)* 101

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) 19 BLC (AD)* 292

Section 376—Length of period by now can be taken as one of the reasons to commute the sentence of death to one of *imprisonment for life. Rokia Begum alias Rokeya Begum vs State (Criminal) 19 BLC (AD)* 204

Sections 439 and 561A—An order passed by the Sessions Judge or Additional Sessions Judge, as the case may be, under section 439A of the Code is not amenable to the revisional jurisdiction of the High Court Division under section 439 of the Code. *Joaharul Islam (Md) vs State (Criminal) 19 BLC (AD)* 5

Section 509A—Post-Mortem Report—Post-

mortem report is just like any other corroborative evidence and it cannot be accepted as a conclusive proof as to the cause of death of a deceased and a Court can discard the opinion of the doctors if it contradicts the ocular evidence adduced in the case which appears to be credible, cogent and trustworthy and the doctors concerned failed to hold the autopsy properly and gave fanciful opinion. *State vs Tajel Sheikh @ Md Tajul Sheikh (Criminal) 19 BLC (AD)* 178

Section 561A—Even if any order was passed by the learned Magistrate, the said order was revisable under section 439A of the Code of Criminal Procedure by the learned Metropolitan Sessions Judge. The accused-respondent without exhausting the said forum directly moved the High Court Division a petition under section 561A of the Code of Criminal Procedure. The High Court Division is not invested with any appellate or alternative power under section 561A of the Code of Criminal Procedure. *State vs Md Ariful Islam @ Arif (Criminal) 19 BLC (AD)* 82

Section 561A—The power under this section is a special extraordinary one, the main aim and object of which is to save the people from any agony of the abuse of the process of the Court and also is designed to do substantial justice. The High Court Division exceeded its jurisdiction in making the direction in exercise of inherent powers. *State vs Md Ariful Islam @ Arif (Criminal) 19 BLC (AD)* 82

Section 561A—This Court, time and again, has held that entertainment of an application under section 561A of the Code for quashing of a criminal proceeding when trial already commenced and witnesses have been examined is not desirable, but as it appears that the High Court Division failed to consider this apparent legal aspect in quashing the proceedings. In that view of the matter, the High Court Division ought not to have entered into the merit of the application. *Anti-Corruption Commission vs Dr Md Rezaul Haque Chowdhury alias Dr Md Rezaul Karim (Criminal) 19 BLC (AD)* 160

Section 561A—Trial had already commenced before the filing of the application for quashing the proceedings and 18(eighteen) witnesses were already examined. The filing of the application before the High Court Division for quashing the proceedings does not appear to us *bona fide. Anti-Corruption Commission vs Dr Md Rezaul Haque Chowdhury alias Dr Md Rezaul Karim (Criminal) 19 BLC (AD)* 160

Section 561A—Whether the accused had involvement with the occurrence as alleged by the prosecution or not is a question of fact and that has to be decided by the trial Court through sifting of evidence to be adduced by the prosecution. *Anti-Corruption Commission vs Dr Md Rezaul Haque Chowdhury alias Dr Md Rezaul Karim (Criminal) 19 BLC (AD)* 160

Section 561A—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) 19 BLC (AD)* 303

Constitution of Bangladesh, 1972

Article 102(2)—After the election has been held the only way to challenge the same is by way of filing an election petition before the Election Tribunal. *Kartic Das Gupta vs Election Commission of Bangladesh (Civil) 19 BLC (AD) 113*

Article 102(2)—Writ-petition in question could not be termed as a public interest litigation. The first and primary duty of the writ Bench is to see whether writ petition itself is maintainable in law or whether the writ petitioner has go-any interest in the matter which if not protected he shall suffer injury. *Kartic Das Gupta vs Election Commission of Bangladesh (Civil) 19 BLC (AD)* 113

Article 102(2)—Where the government has taken a policy for leasing out the vessels in open auction, the Court will not interfere with the matters of government policy. In such situation the courts of law have to be very wary and must exercise their jurisdiction with circumspection for, they must not transgress into the realm of policy making unless the policy is inconsistent with the Constitution and the laws or the action is arbitrary, irrational or in abuse of power, the Court will not interfere with the matters. *Monowarul Huq vs Secretary, Ministry of Ports, Shipping & BIWTC (Civil) 19 BLC (AD) 148*

Article 102(2)—When no affidavit-in-opposition was filed before the High Court Division denying or controverting the case of the writ-petitioners, the High Court Division had no option but to accept the case of the writ-petitioners. *Government of Bangladesh vs Md Gazi Shafiqul (Civil) 19 BLC (AD)* 163

Article 102(2)—Writ-Petitioner has obtained a decree declaring his title in the suit land from a competent court of law and that decree still stands. The government though filed a suit challenging the decree but that suit has already been dismissed. In the circumstances, so long the decree declaring the plaintiff's title in the land in question stands the writ-respondents are bound to mutate the land in question in the name of the writ-petitioner and also to accept rent from him. *Government of Bangladesh vs Md Abu Hasan Raju (Civil) 19 BLC (AD)* 236

Article 102(2)—Forgery being a serious question of fact cannot be decided in a summary proceeding under Article 102 of the Constitution. *Rajdhani Unnayan Kartipakha (RAJUK) vs SM Fareedul Islam (Civil) 19 BLC (AD)* 213

Article 102(2)—Since fraud vitiates everything and basically is a question of fact and requires strict proof on the production of proper evidence and such exercise can only be done by the Civil Court. *Rajdhani Unnayan Kartipakha (RAJUK) vs SM Fareedul Islam (Civil) 19 BLC (AD)* 213

Article 102(2)—Question of practising fraud in executing and registering a sale deed in respect of a plot of land is a serious question of fact which can only be thrashed out on evidence to be produced by the contending parties in a properly constituted suit and it is definitely the domain of the Civil Court to decide such fact but not RAJUK or its officials. *Rajdhani Unnayan Kartipakha (RAJUK) vs SM Fareedul Islam (Civil) 19 BLC (AD)* 213

Article 102(2)—Question of practising fraud in executing and registering a sale deed in respect of a plot of land is a serious question of fact which can only be thrashed out on evidence to be produced by the contending parties in a properly constituted suit and it is definitely the domain of the Civil Court to decide such

fact but not RAJUK or its officials. *Rajdhani Unnayan Kartipakha (RAJUK) vs SM Fareedul Islam (Civil) 19 BLC (AD)* 213

Articles 102(2) and 111—As the writ-petitioners rendered service to the Board till February, 2003 they are surely entitled to get the salary and fringe benefits upto February, 2003 from January, 1998. The writ-respondents did not deny the facts asserted in the writ petition and thus the claim of the writ-petitioners that the Board received their services upto February, 2003 is an admitted fact. Impugned judgment and order was passed on 5-1-2011 and no order was passed by this Division staying operation of the same and we believe that by this time, the writ-respondents have included the writ-petitioners in the revenue set up of the Board as per the direction given by the High Court Division. *Government of Bangladesh vs Md Aminul Islam (Civil) 19 BLC (AD)* 314

Articles 103(3) and 140(2)—Judgment of the High Court Division is modified and the writ petitioners claim for absorption in the revenue set up will be considered by the petitioners in the light of the guidelines given by this Division. *Government of Bangladesh, represented by the Secretary, Ministry of Education vs Md Abul Kalam Azad (Civil) 19 BLC (AD)* 3

Article 104—The subject matter of the case not only presents an occasion to but also demands exercise of this power by this Division for the avowed purpose of protecting the appellants from the unnecessary hassle of criminal proceeding as there was no material to prosecute them. We are inclined to set-aside the judgment passed by the High Court Division in exercise of our power under Article 104 of the Constitution and that the proceeding against the appellants including others, if any, shall be deemed to have been quashed. *Mahboobur Rahman vs Md Kayser Parvej (Milon) (Criminal) 19 BLC (AD)* 231

Article 104—This Division previously exercised the power of doing complete justice under 104 of the Constitution. The subject matter of the instant case represents an occasion to and demands exercise of this power by this Division for the purpose of protection of the dwelling house of the petitioners. *Abdul Momen Bhuiyan vs District Judge, Dhaka (Civil) 19 BLC (AD)* 98

Article 104—It is a fit case to invoke the power conferred upon this Court under article 104 of the Constitution to do complete justice in a case by allowing the prayer for amendment of the plaint made before this Court without entering into the niceties of law as to the amendment. *(Per MA Wahhab Miah J, majority) Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD)* 241

Article 104—It is the fundamental principle of law that statutory provisions of law cannot override the constitutional provisions. If a valuable right is accrued to the other side this fact should not be ignored in invoking power of complete justice. *Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD)* 241

Article 104—Complete Justice—Power of doing complete justice is not to be exercised frequently but sparingly. One should not lose sight of the fact that doing complete justice does not contemplate doing justice to one party by ignoring statutory provision and thereby doing complete injustice to the other party by depriving him the benefit of law. *(Per SK Sinha J, minority) Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD)* 241

Article 103(3)—It should be remembered that Article 103(3) does not confer a right of appeal upon a party but merely vests a discretion in this Division to interfere in exceptional cases. The apex Court should interfere with finding of fact with great caution and circumspection. *(Per SK Sinha J, minority) Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD)* 241

Article 111—Though a decision of this Division on section, or on any question of law will bind all court including the High Court Division, there is nothing which prevents this Division from departing from a previous decision if it is convinced of its error and its baneful effect on the general interests of the public. The use of precedent as an indispensable foundation upon which to decide what is the law on the point under consideration. *(Per SK Sinha J, minority) Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD)* 241

Articles 117 and 29—Claim of seniority and promotion of the writ-petitioner definitely falls within the terminology "of the terms and conditions of his service" as used in section 4 of the Act the Administrative Tribunal had the absolute jurisdiction to look into the matter including the question of discrimination as envisaged in Article 29 of the Constitution. *Bangla desh vs Mukul Begum (Civil) 19 BLC (AD)* 188

Contract Act

(IX of 1872)

Section 73—When an employer commits breach of contract, the contractor is entitled to claim damages. Section 73 of the Act provides for compensation of the party aggrieved by the breach of the contract. *Project Director, PL vs A Latif Company Ltd (Civil) 19 BLC (AD)* 199

Section 73—The Arbitrator's defiance of the obvious policy enshrined in the provision of section 73 of the Act is so blatant that the Court may be justified in coming to the conclusion that the arbitrator was biased which became known only when the award was passed. *Project Director, PL vs A Latif Company Ltd (Civil) 19 BLC (AD)* 199

Criminal Law Amendment Act

(XL of 1958)

Section 10—Notice issued under section 26(1) by the Secretary of the Commission was without jurisdiction. But, for this reason the High Court Division cannot set-aside the conviction of the accused in respect of an offence under section 27(1) of the Ain High Court Division acted illegally in setting aside the conviction of the accused in respect of offence under section 27(1) of the Ain. The judgment and order of the High Court Division so far as it relates to setting aside the conviction and sentence under section 27(1) of the Ain, is set-aside. The matter is remanded to the High Court Division to dispose of the appeal on merit afresh. *Anti Corruption Commission vs Aman Ullah Aman (Criminal) 19 BLC (AD)* 239

Criminal Trail

Accused is presumed to be innocent unless hIs guilt is proved beyond reasonable doubt. An accused-person is under no obligation to offer evidence and he is merely on the defensive and owes no duty to anyone but himself. He is at liberty, as to the whole case to rely on the witnesses of the case for the prosecution, and no inference unfavourable to him can properly be drawn because he takes one course rather than the other. *(Per SK Sinha J, minori-*

ty)Yasin Rahman @ Rahman Yasin @ Titu vs State (Criminal) 19 BLC (AD) 8

Cruelty to Women (Deterrent Punishment) Ordinance (LX of 1983)

Sections 4(Kha) and 10—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) 19 BLC (AD) 292*

Customs Act
(IV of 1969)

Section 139—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) 19 BLC (AD) 303*

Evidence Act
(I of 1872)

Section 8—Absconding—Appellant absconded soon after the murder of Jibran Tayyabi and remained absconding for a long period of several years. Abscondence by itself is not always an incriminating matter, for, even an innocent person sometimes absconds to avoid harassment by police. But in this case the abscondence of appellant, son of a very rich industrialist immediate after the murder of Jibran Tayyabi and his remaining absconding for a long period of about 13 years do not support at all that he absconded and remained absconding for such a long period to avoid harassment by police. *(Per Nazmun Ara Sultana J, majority) Yasin Rahman @ Rahman Yasin @ Titu vs State (Criminal) 19 BLC (AD) 8*

Section 8—Motive—Though motive is not always necessary to prove murder but if it is proved it indicates the high degree of probability and provides a link in the chain to connect the accused with the murder. Motive is not always necessary to prove murder, but it if is established it would be a corroborative circumstance leading to the complicity of the accused in the offence. *(Per Nazmun Ara Sultana J majority) Yasin Rahman @ Rahman Yasin @ Titu vs State (Criminal) 19 BLC (AD) 8*

Section 90—The documents are old documents of 50 years back and there is no evidence that the defendants willfully suppressed the documents from production in court. *Lutful Karim vs Shahidullah (Civil) 19 BLC (AD) 84*

Section 114(e)—Onus to prove fraud is squarely upon the party who alleges it and a registered document has a presumption of correctness under clause (e) of section 114 of the Act and it needs judicial decision. RAJUK has not been vested with such judicial power. *Rajdhani Unnayan Kartipakha (RAJUK) vs SM Fareedul Islam (Civil) 19 BLC (AD) 213*

Section 114(g)—The doctrine of benefit of doubt can apply and an inference of guilt can be drawn only if the prove facts are wholly inconsistent with innocence, and consistent only with guilt. *(Per SK Sinha J, minority) Yasin Rahman @ Rahman Yasin @ Titu vs State (Criminal) 19 BLC (AD)* 8

Section 145—Even an illiterate person is not immune from the process of law with regard to the contradiction by a previous statement because section 145 makes not the slightest difference whether the witness is literate or illiterate. *(Per SK Sinha J, minority) Yasin Rahman @ Rahman Yasin @ Titu vs State (Criminal) 19 BLC (AD)* 8

Interpretation of Statute

The intention of the legislature must be sought from the statute taken as a whole. In arriving at the true meaning of any particular phrase or words employed in the statute it must not viewed in an isolated manner from the context, it must be viewed in its whole context, the title, the preamble and all other related parts of the statute. *Dr Abdullahel Bari vs Md Rahat Chowdhury (Criminal) 19 BLC (AD)* 167

Jetty Rule

Rule 70—Realized amount is a deposit and in the lawful custody of the Port Authority and, as such, the question of limitation relating to refund under rule 70 of the Jetty Rules does not arise at all and the claim for refund cannot be treated as barred by limitation. *James Finaly Plc. Chittagong vs Government of Bangladesh (Civil) 19 BLC (AD)* 79

Limitation Act

(IX of 1908)

Section 91—Article 91 of Act provides the limitation of 3 years for cancellation or setting aside an instrument from the date of knowledge. Such amendment would certainly cause serious prejudice to the defendant because the claim is barred. *Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD)* 241

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, Government of the People's Republic Bangladesh, Dhaka (Civil) 19 BLC (AD)* 294

Local Government (Pourashava) Act

(LVIII of 2009)

Section 19(2)(Jha)—In order to be a valid candidate for the Pourashava election, the petitioner must not be a defaulter on the date of submission of the nomination paper. The petitioner is a defaulter within the meaning of section 19(2) (Jha) of the Act. *Taposh Malaker vs Bangladesh, represented by the Secretary, Ministry of LGRD (Civil) 19 BLC (AD)* 1

Negotiable Instruments Act

(XXVI of 1881)

Sections 13 and 138(1)—Cross-cheque/account payee cheque is a cheque as contemplated in section 138(1) of the Act but only changes its normal character by ceasing its negotiable character but it does not lose its character as negotiable instrument as defined in section 13 of the Act. *Dr Abdullahel Bari vs Md Rahat Chowdhury (Criminal) 19 BLC (AD) 167*

Sections 13 and 123A(2)(a)—Clause (a) of section 123A(2) is absolutely dependent on clause (b) when the cheque is an "account payee" one; since in clause (a) only word "negotiable" has been used not the words "negotiable instruments" as defined in section 13 of the Act. *Dr Abdullahel Bari vs Md Rahat Chowdhury (Criminal) 19 BLC (AD) 167*

Section 138—If a holder or the payee gets hold of a dishonoured cheque by any illegal means the drawer of the cheque shall have the liberty to take such defence during the trial. *Sahab Uddin (Md) vs State (Civil) 19 BLC (AD) 86*

Section 138—Person who issued the cheque (accused-petitioner) having full knowledge about the fact that the cheque could not be encashed on the basis of his signature, issued the same with the malafide intention to frustrate the claim of the complainant. *Shah Alam (Md) vs State, represented by the DC, Chittagong (Criminal) 19 BLC (AD) 319*

Section 138(1)—*"Any cheque"*—Since the "account payee cheque" mentioned in the complaint-petition has not lost its character as negotiable instrument, the same can be easily brought within the mischief of "any cheque" employed in section 138(1) of the Act because cheque includes "account payee cheque" also. *Dr Abdullahel Bari vs Md Rahat Chowdhury (Criminal) 19 BLC (AD) 167*

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) 19 BLC (AD) 303*

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) 19 BLC (AD) 303*

Penal Code

(XLV of 1860)

Sections 43 and 57—Sentence of *"imprisonment for life"*—Sentence of "imprisonment for life" as used in Bangladesh is utterly a misnomer; indeed it appears to be an erroneous interpretation. The way it has been interpreted, the word "life" does not bear its normal linguistic meaning. In other words, a person sentenced to imprisonment for life does not necessarily spend his life in prison, although section 45 of the Code defines "Life" as the life of a human being unless the contrary appears from

the context. The given interpretation has been arrived at with the aid of section 57 of the Code, which provides that in calculating fraction of terms of punishment, imprisonment for life shall be reckoned as equivalent to rigorous imprisonment for 30 (thirty) years. A person sentenced to imprisonment for life will be released after spending a maximum of $22^1/_2$ years in prison. *Rokia Begum alias Rokeya Begum vs State (Criminal) 19 BLC (AD) 204*

Section 304, Part I—A sentence of imprisonment of twenty years under the first part of section 304 of the Code is palpably erroneous. If life imprisonment is not awarded, the maximum term of imprisonment that may be imposed upon conviction of an offence under the first part of section 304 of the Code cannot exceed ten years. *Mati alias Md Matiar Rahman vs State (Criminal) 19 BLC (AD) 192*

Section 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 (Criminal) 19 BLC (AD) 292*

Section 409—Section 409 of the Code was in the schedule to the Act, 1957, it was a part of it and had to be treated as an offence under the Act. Sub-section (3) of section 38 of the Ain, 2004 was applicable in respect of the investigation of offence under section 409 of the Code. Offences mentioned in the schedule to the Ain, 2004, be it an offence as contemplated in sections 26 and 27 thereof, or the offences under other laws as mentioned therein, section 32 of the Ain, 2004 shall be applicable. *Kaisor-uz-Zaman (Md vs State, represented by the Deputy Commissioner, Sylhet (Criminal) 19 BLC (AD) 101*

Public Procurement Ain (XXIV 0f 2006)

Clause 60(3)(CA)—The Review Panel constituted by the CPTU is part and parcel of the public Procurement Ain, 2006 and Public Procurement Bidhimala, 2008 and the decisions of review body cannot be ignored or avoided by BTRC. *Bangladesh Telecommunication Regulatory Commission ("BTRC") vs KM Alam & Co. (Civil) 19 BLC (AD) 134*

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(I of 1877)

Section 42—The documents are old documents of 50 years back and there is no evidence that the defendants willfully suppressed the documents from production in court. *Lutful Karim vs Shahidullah (Civil) 19 BLC (AD) 84*

Section 54—Suit for Permanent Injunction —Failure to prove title by the plaintiff in a suit for permanent injunction cannot disentitle him to a decree for permanent injunction if he can prove his possession. *Mohsin Sarker (Md) vs Majeda Khatun (Civil) 19 BLC (AD) 139*

Sections 39 and 42—Distinction between suit for declaration and cancellation—The distinction between a suit for declaration that the instrument is not binding on the plaintiff and a suit for cancellation of an instrument is that when the plaintiff seeks to establish a title to himself and cannot establish that title without removing an obstruction such as, a decree or a deed to which he has been a party, then he

must get that decree or deed cancelled or declared void. If the deed in respect of the suit plot stands even though the plaintiff is not a party, the defendant's title does not extinguish and in that case the plaintiff's title to in the suit plot will be clouded. *(Per SK Sinha J, minority) Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD) 241*

Voluntary Social Welfare Agencies (Registration and Control) Ordinance

(XLVI of 1961)

Section 9—None of the circumstances and conditions stated in section 9 was prevailing and in that circumstances the registration authority had no power to dissolve the existing governing body of the samity and to form an ad-hoc committee and, as such, the formation of ad-hoc committee and the subsequent election of the governing body held by that ad-hoc committee and also the elected governing body of the samity were all illegal and all the activities of that ad-hoc committee were illegal. *Aysha Siddiqua vs Fazilatunnesa (Civil) 19 BLC (AD) 117*

Words and Phrases

Award—Court is competent to set-aside an award where there is an error of law apparent on the face of award. *Project Director, PL vs A Latif Company Ltd (Civil) 19 BLC (AD) 199*

Circumstantial Evidence—Evidence of PWs 33 and 37 along with the exhibit 16 the breakup of mobile phone of appellant have proved that on the date of occurrence appellant had as many as 16 mobile phone calls with another absconding accused. This fact also has corroborated the confessional statement of accused Zahid Hussain @ Kiron who stated in his confessional statement that the accused Alamgir was engaged to keep watch on the movement of deceased Jibran Tayyabi and to give those informations to other accused-persons over mobile phone. *(Per Nazmun Ara Sultana J majority) Yasin Rahman @ Rahman Yasin @ Titu vs State (Criminal) 19 BLC (AD) 8*

Civil Imprisonment—Civil imprisonment of 4 (four) days will be proper and accordingly, the defendants are sentenced to suffer civil imprisonment for 4 (four) days. *Abdul Gaffar (Md) vs Kuti Miah (Civil) 19 BLC (AD) 174*

Corroboration—There was long run previous enmity between the parties, without any independent corroboration of the evidence the conviction was unsafe. *State vs Hasen Ali Sheikh @ Hosen Ali Sheikh (Criminal) 19 BLC (AD) 310*

Deed—A clause of a lease deed has to be read as a whole and not in the divisive manner and cannot just be given a too mechanical or too technical meaning or interpretation. The lessor being a statutory body cannot be given the latitude to take the benefit of a part of a term of a clause which benefits it at the woes of the lessee without complying or fulfilling with the other part of the clause. *(Per MA Wahhab Miah J, majority) Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD) 241*

Ejusdem Jeneris—The expression 'other tax' would not include VAT because of the doctrine of *ejusdem generis* applicable in interpretation of statutes and documents. This doctrine is not only applicable in construction of statutory terms but also applicable in respect of terms used in contracts and other non-statutory terms. *Secretary, Ministry of Land vs Las Nur Miah (Civil) 19 BLC (AD) 145*

Fairness—Law requires that authority exercising action of cancellation of lease deed and transfer permission must always act with fairness. *(Per MA Wahhab Miah J, majority) Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD)* 241

Falsus in uno, falsus in omnibus—Testimony of a witness should not be believed if the witness on some material fact omitted by him in his examination-in-chief by showing that the witness has lied as to that fact is closely analogous to, and, in a sense' merely an application of 'impeaching a witness's credit by a previous inconsistent statement. *Yasin Rahman @ Rahman Yasin @ Titu vs State (Criminal) 19 BLC (AD)* 8

Observations—High Court Division was not also correct in observing that "a Civil Surgeon should not be implicated for alleged theft committed at a store, which remains under the control of a store keeper, not under the direct control of a Civil Surgeon, "as such, observation is absolutely based on guess and surmises. *Anti-Corruption Commission vs Dr Md Rezaul Haque Chowdhury alias Dr Md Rezaul Karim (Criminal) 19 BLC (AD)* 160

Partisan witness—Even assuming that it was a moon light night when the occurrence had taken place, court has to gauge the situation carefully. It is sound rule in appreciation of evidence of a partisan witness that if the testimony of such a witness is to be used as the sole basis of conviction it should be of such a caliber as to be regarded as wholly reliable. Even the evidence of a natural witness when enmity is admitted should be examined utmost care and caution. *State vs Hasen Ali Sheikh @ Hosen Ali Sheikh (Criminal) 19 BLC (AD)* 310

Police Force—Serious allegation regarding a member of the disciplined force, who was entrusted with protection of the public and who allegedly himself became the perpetrator against the public, cannot be set at naught for technical defects in the departmental inquiry and proceedings. *Bangladesh, represented by the Secretary, Ministry of Home Affairs vs Md Bazlur Rashid (Civil) 19 BLC (AD)* 157

Stare decisis—*Stare decisis* is a legal principle by which Judges are obliged to respect precedents established by prior decisions. Courts should generally abide by precedent and not disturb settled matters. This is necessary for the administration of justice otherwise the lower courts and the High Court Division will be confused in determining any particular issue in a suit or a matter. There should be consistency in the opinion of this Division on any particular issue. Stare decisis is one of the fundamental doctrines of common law systems. This doctrine is also referred to as the doctrine of precedent. Stare decisis requires Judges to follow precedent and apply the law as they find it or to justify their deviation from the established rule. In majority of cases, there will be no justification for divergence; the Judge will be obliged to apply the law as it is. This is why stare decisis is the foundation of the judicial obligation to apply occasional law. *(Per SK Sinha J, minority) Anwarul Huq vs Iqbal Ahmed (Civil) 19 BLC (AD)* 241

Voter List—Because of wrong description of a voter or wrong inclusion of a person in the voter list, the existing voter list shall not be rendered invalid, so election of the Pourashavas could very much be held under the old voter list prepared in 2007. *Kartic Das Gupta vs Election Commission of Bangladesh (Civil) 19 BLC (AD)* 113

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Order VII, rule 11(d)—An employee, when terminated with stigma and for removing the stigma suit is maintainable even the service condition is governed by master and servant rule. *Bangladesh Commerce Bank Ltd. vs Md Nasir-ur-Zaman (Civil) 19 BLC 71*

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Section 374—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) 19 BLC* 705

Sections 374 and 376—Condemned-prisoner was aged about 28 years when he was examined under section 342 CrPC. The record indicates that the condemned-prisoner is not a hard criminal, he cannot be at all characterised to be a menace to the society. Taking an account of aggravating and mitigating circumstances, ends of justice will be met if death sentence is altered to one of imprisonment for life. *State vs Nurul Kabir (Criminal) 19 BLC* 25

Sections 410 and 561A—Since there is efficacious relief in preferring the appeal with a prayer for condonation of delays of any day under section 5 of the Act, the very filing of a petition under section 561A of the Code for quashing the conviction and sentence of the petitioner passed by Sessions Judge is not at all maintainable. *Abdul Kader Bepary vs State (Criminal) 19 BLC* 183

Section 439—Question of *'mens rea'* of an accused cannot be gone into in a criminal revision under section 439 of the Code. That is essentially a matter of evidence and trial. *Basiratun Naher vs State and other (Criminal) 19 BLC* 1

Section 439—Appeal is a statutory right. It cannot be denied by assigning such flimsy reasons as has been done in the case. Even under Rule 11 of the EPR 2007, the Appeal by the convicts was guaranteed, and in such appeal the provisions of the Code were made applicable by virtue of Rule 12. Since we are exercising power under section 439 of the Code, we cannot but to hold that the impugned judgment is vitiated not only by non-application of mind, but also for violation of several provisions of the Code of Criminal Procedure. It cannot sustain in the eye of law. *Saiful Islam Firoz (Md) vs State, represented by the Deputy Commissioner, Dhaka (Criminal) 19 BLC* 205

Section 498—Anticipatory Bail—As the record of the case in hand is unusually lying with the Court of the Chief Judicial Magistrate, the accused-petitioners had no scope to surrender to the concerned Tribunal with a prayer for bail and, as such, the application for anticipatory bail is maintainable in the prevailing factual as well as procedural aspects of the case. *Shahjahan (Md) vs State (Criminal) 19 BLC* 372

Section 498—The accused-petitioner is a patient of transitional carcinoma of ureter and kidney (Rt) and he has already received seven cycle chemotherapy. The present accused-petitioner has been suffering from the deadly disease like transitional carcinoma (cancer). The accused-petitioner is entitled to bail on health ground as he has been suffering from deadly disease like cancer. *Mahfuz Ali vs State, represented by the DC, Chittagong (Criminal) 19 BLC* 454

Section 561A—If the allegations in FIR and finding in the charge sheet are taken in their face value and accepted in their entirety, no *prima facie* charge is made out against the accused petitioners. *Kazi Khairuzzaman vs State (Criminal) 19 BLC* 51

Section 561A—This sort of interference is nothing but illegal harassment amounts to high handedness of the police and creation of anarchy amongst the passengers travelling from one city to another city within the country and apparently an attempt of the police personnel to make themselves illegally benefited. *Shahadat Hossain (Md) vs State (Criminal) 19 BLC* 125

Section 561A—Whether the petitioner had any *'mens rea'* or not in the commission of the alleged offence is a question of fact and that can only be gone into during the trial of the case. *Jahangir Hossain Molla vs State (Criminal) 19 BLC* 167

Section 561A—In order to constitute an offence under section 415 of the Code the deception by the accused is must and such deception must be also from the initial stage of the transaction but in the instant case since the accused made a payment of Taka 38,820 to complainant in two installments, so, it is difficult for us to hold that the accused had an initial intention to deceive the complainant rather there appears part payment in the transaction. The allegations of the complainant are accepted in its entirety the same do not constitute any offence under sections 420 and 406 of the Code. *Khandaker Nazrul Islam Khokan vs Mustaba Kuli Khan (Criminal) 19 BLC* 211

Section 561A—The petitioner being a child ought to have been dealt with in accordance with the Act. Having not done so we hold that the trial, conviction and sentence passed therein which has been challenged in this Rule, without jurisdiction. *Kalimuddin alias Karimuddin (Md) vs State, represented by the Deputy Commissioner (Criminal) 19 BLC* 338

Companies Act
(XVIII of 1994)

Section 3—In an appropriate case, this court, in appointing auditor, may exercise its inherent jurisdiction, for ends of justice, particularly when the inaction, neglect of duty or malafide on the part of concerned authority/regularity body is apparent from the materials on record. *MA Quasem Member vs Registrar of Joint Stock Companies (Statutory Original) 19 BLC* 456

Section 233—Title of the section can be looked into, in aid of interpretation, only when there is any ambiguity in the contents of the section. *Mosharraf Hossain (Md) vs Saad Securities Limited (Statutary Original) 19 BLC* 35

Companies Rules, 2009

Rules 8—In an appropriate case, this court, in appointing auditor, may exercise its inherent jurisdiction, for ends of justice, particularly when the inaction, neglect of duty or malafide on the part of concerned authority/regularity body is apparent from the materials on record. *MA Quasem Member vs Registrar of Joint Stock Companies (Statutory Original) 19 BLC* 456

Companies Profit (Workers Participated) Act (XII of 1968)

Section 2(f)—Applicants who had participated in the profits of the Company in their capacity as 'workers' in accordance with the Act of 1968, had acquired a vested right to participate in the Company's profits, which has not

been taken away by an express 'provision of law. *Mehdi Hassan (Md) vs Government of Bangladesh (Spl Original) 19 BLC* 472

Constitution of Bangladesh, 1972

Articles 27, 29, 39 and 147(2)—It transpires from the chronology of the facts of fixation of the amount of house allowance that before 1990 when there was only 20-30 High Court Judges, there was hardly any shortage of bungalow type houses for the Judges and the provision regarding payment of money as was fixed as house allowance before 1990 was not so unreasonable as it stands today. *Emrul Kayes (Md) vs Government of the People's Republic of Bangladesh (Spl Original) 19 BLC* 76

Articles 27 & 31—Equality before law and Protection of equal law—"Equality before law" should not be taken in its absolute sense to hold that all persons are equal in all respects irrespective of their different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess and others may lack. By the term 'protection of equal law', it is not meant that all persons or things are equal in all cases, rather it is to mean that the persons similarly situated should be treated alike. Provisions of equal protection, guarantees that similar people will be dealt with in a similar way and people different circumstances will be treated in a dissimilar way. *Emrul Kayes (Md) vs Government of the People's Republic of Bangladesh (Spl Original) 19 BLC* 76

Article 31—A law will be violative of Article 31 if the Court finds that it is so demonstrably unreasonable or arbitrary that the members of Parliament acting as reasonable men could not pass that law. *Emrul Kayes (Md) vs Government of the People's Republic of Bangladesh (Spl Original) 19 BLC* 76

Articles 31, 32 and 102(2)—The failure of the Government to take steps in violation of fundamental right of foreign prisoners which have been guaranteed in Articles 31 and 32 of the Constitution. *Rana Singha vs Government of Bangladesh (Spl Original) 19 BLC* 601

Article 40—To do lawful business or trade subject to restriction of law is one of those provisions which cannot be curtailed or throttled in any manner by any authority. *Eastern Money Changer vs Bangladesh Bank (Spl Original) 19 BLC* 417

Article 44 and 102—The right to enforce a fundamental right under Article 44 is another fundamental right which gives the petitioners right to move even though their application was rejected by the Settlement Court on the ground of limitation. *Nazrul Islam Mollah (Md) vs Chairman, 1st Court of Settlement (Spl Original) 19 BLC* 379

Article 102—The power of the passport authority to renew the old handwritten passport or to issue new handwritten passport or MRP on surrender of the old handwritten passport is not fettered by or conditioned upon police report. Nor mere pendency of criminal cases or submission of charge-sheet against the applicant seeking renewal of his old handwritten passport by a new hand-written passport/ MRP by surrender of his existing handwritten passport can be a valid ground for refusal or withholding the new handwritten passport or MRP. *Abdul Matin Sarker vs People's Republic of Bangladesh (Spl. Original) 19 BLC* 186

Article 102—Petitioners deserve the same treatment on the ground of their reasonable and legitimate expectation to consider their case on

the same way according to the settled principle and proposition of law governing the subject. *Firoza Begum and 87 others vs People's Republic of Bangladesh (Spl Original) 19 BLC* 509

Article 102 —The petitioners with the passage of time has developed in their mind a legitimate and reasonable expectation that their fate will find out a positive way ie they would be absorbed in the revenue budget of the Dhaka City Corporation. *Firoza Begum and 87 others vs People's Republic of Bangladesh (Spl Original) 19 BLC* 509

Article 102—Petitioners from the year 1988 up till now have been diligently and persistently trying to establish their claim on the basis of reasonableness. The petitioners were given assurance from time to time, as it appears from the different Annexures, which we have mentioned earlier that their services would be absorbed in the revenue Budget. Even in the highest body of the Government "ECNEC" a positive decision was taken to absorb the petitioners and others standing on the same footing in the revenue budget as per rules and regulation.*Firoza Begum and 87 others vs People's Republic of Bangladesh (Spl Original) 19 BLC* 509

Article 102—Contract Agreement—Even the method of payments of contract price indicates that permanent equipments and materials were purchased from the contractor in Korea and from other foreign countries and the payment by way of L/C's were made in Korea which accrues as income to the contractor in Korea and not in Bangladesh. *Hyundai Engineering Co. Ltd vs National Board of Revenue (Spl Original) 19 BLC* 615

Article 102—Doctrine of reasonableness is based upon a rationale which cannot be undermined by avoiding responsibility entrusted with the respondents. All these days the petitioners were moving from pillar to post to settle their reasonable and legitimate expectations that they would be absorbed in the revenue budget of the Dhaka City Corporation failing which they have come before this Court. *Firoza Begum and 87 others vs People's Republic of Bangladesh (Spl Original) 19 BLC* 509

Article 102—It can interfere with the findings of a Court of facts under its extraordinary jurisdiction under Article 102 only if it can be shown that the Court has acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/facts causing prejudice to the petitioner or it has acted malafide or in violation of the principle of natural justice. *Nahar Hasan vs Government of the People's Republic of Bangladesh (Spl Original) 785*

Article 102(2)—Order to entitle a person to ask for performance of a public duty by Mandamus, it is necessary to show that he has a legal right for claiming such performance, apart from the fact that he is interested in the performance of the duty. *Kazi Md Akhtar-uz-zaman vs Bangladesh (Spl. Original) 19 BLC* 148

Article 102(2)—One could only avail oneself of the forum by way of Mandamus for enforcement of any legal right or to redress the violation thereof. *Kazi Md Akhtar-uz-zaman vs Bangladesh (Spl. Original) 19 BLC* 148

Article 102(2)—Judicial review—When a tribunal with limited Jurisdiction reaches a wrong conclusion as to the width of its powers then this Court sitting in judicial review must be able to correct that situation. *Airtel Bangladesh Ltd vs Chairman, First Labour Court, Dhaka (Spl Original) 19 BLC* 517

Article 102(2)—Entertaining writ petitions the High Court Division would assume the functions of the Labour Court upon gratuitous-

ly extending the jurisdiction of the High Court Division causing congestion in this Division which is already overwhelmingly overburdened with huge backlog of cases although there is a statutory forum to seek remedy, given the exceptional scenario of these cases, writ is maintainable. *Abdul Malek (Md) vs Government of the People's Republic of Bangladesh (Spl Original) 19 BLC* 7

Article 102(2)—A question which is a pure question of law connected with the interpretation of the provision of an International treaty (Convention) made by way of agreement in between two sovereign countries, cannot be raised, considered or disposed off by way of arbitration. The provision of the Convention or any law related to it can only be interpreted by High Court Division. *Hyundai Engineering Co. Ltd vs National Board of Revenue (Spl Original) 19 BLC* 615

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) 19 BLC* 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) 19 BLC* 723

Article 102(2)—*64 DLR (AD) 14* has ousted the jurisdiction of the writ Court to quash the proceedings of a criminal case unless the 'vires' of any law is found to have been challenged. *Kazi Riazul Manir vs Anti-Corruption Commission Spl Original)* 759

Article 102(2)—*64 DLR (AD) 14* has ousted the jurisdiction of the writ Court to quash the proceedings of a criminal case unless the 'vires' of any law is found to have been challenged. *Mir Mosharraf Hossain vs Anti-Corruption Commission (Spl Original)* 773

Article 102(2)—The Petitioner had alternative forum under section 15 of the Act to make a prayer for release of the property and that the provision being part of special law has mandatory effect. Without invoking the forum filing application under Article 102 of the Constitution challenging the order about 2(two) years after cannot go to sustain the contention of the petitioner in the eye of law. Moreover, no explanation whatsoever has been given in the writ petition as to delay in filing the writ petition. *Fahria Akter vs Government of Bangladesh (Spl Original)* 776

Article 102(2)—Entitlement to an accommodation is an integral part of the service condition of a Government servant inasmuch as his engagement in the service of the Republic endows him with the said entitlement of enjoying an accommodation facility at a nominal cost and, therefore, it is an irresistible conclusion of this Court that accommodation of a Government servant does clearly come within the purview of the "terms and conditions" of service of a person in the service of the Republic or a Statutory Public Authority. *SM Shah Jamal vs Government of Bangladesh (Spl Original)* 768

Article 102(2)—Legitimate Expectation—It is a legitimate and legal expectation of the peti-

tioner that after receiving money the lease deed for the extra land be executed and registered without any delay. Doctrine of legitimate expectation imposes in spirit a duty on public authority to act fairly by taking into consideration all relevant factors relating to such legitimate expectations. *Anisul Haq (Md) vs Government of the People's Republic of Bangladesh (Spl Original)* 788

Article 102(2)—A licensee is now entitled to a show cause notice and a reasonable opportunity of being heard before suspension. The order of suspension has been vitiated by both the defects, namely lack of show-cause notice followed by reasonable opportunity of being heard and non-mentioning of any period for suspension. *Badar Box Industries Limited vs Commissioner of Customs (Bond), Customs Bond (Spl Original) 19 BLC* 411

Article 102(2)(a)(i)(ii)—Promissory Estoppel—The principles of approbate and reprobate envisage that once a party takes a stand which ends in some kind of compromise and also acts on the compromise, such a party cannot be allowed to take a contrary stand unless the earlier stand is against all known principles of law. *HKD International (CEPZ) Ltd vs Bangladesh Export Processing Zones Authority (BEPZA) (Spl. Original) 19 BLC* 298

Article 102(2)(a)(i)(ii)—The core demand of the petitioners is one of *"restitutio in integrum"*, that is, one of placing the aggrieved petitioners in the situation as by law ought to have been allowed to operate and prevail to their benefit at the material time had no prejudice been sustained by them by the inability of the respondents to meet their own obligations mandated under the law. *Nuran Nabi vs Government of Bangladesh (Spl. Original) 19 BLC* 311

Article 102(5)—While this Court has persistently been showing its disinclination to issue any Rule in the service matters of the members of defence service because of the provision of the exception stipulated in the latter part of Article 102(5), there is no rationale for the same Court to be inclined to entertain the judicial review applications filed by the Government servants given that they have been excluded from the jurisdiction of the judicial review by the very same provisions of the exception laid down in the same part of Article 102(5) of the Constitution. *SM Shah Jamal vs Government of Bangladesh (Spl Original)* 768

Articles 102(5) and 117—Exclusion of any service related grievance from the jurisdiction of the Tribunal was not within the contemplation of the framers of the Constitution as they intended to confer a catch-all jurisdiction upon the Administrative Tribunal by inserting Article 117 against the backdrop of Article 102(5) to enable it to deal with all types of grievances which emanate from or are linked to and connected with the service of a Government servant. *SM Shah Jamal vs Government of Bangladesh (Spl Original)* 768

Article 112—Observation—The Court of Wards though legally bound to follow the decision according to Article 112 of the Constitution but time and again they are harassing the people claiming title over the "projabily property", either by issuing Memorandum or by other ways and means and thereby also wasting the courts valuable time. It is high time to caution the Court of Wards, Bhawal Raj Estate and also the Land Reform Board to abstain from creating such situation on frivolous issues and thereby pushing the public to the Court. *Hamdu Miah vs Government of Bangladesh, represented by the Secretary, Ministry of Land (Spl. Original) 19 BLC* 262

Article 117—When the Constitution confers jurisdiction upon the Administrative Tribunals by engraving the following words in Article 117 " .... tribunals to exercise jurisdiction in respect of matters relating to or arising out of ...." it equips and capacitates the Tribunal with octopusian grip to bring all the service related matters of the Government servants within its jurisdiction. *SM Shah Jamal vs Government of Bangladesh (Spl Original)* 768

Contempt of Courts Act

(XII of 1926)

Sections 2 and 3—Observations—Inordinate delay of in implementing the positive order of this Division is unpardonable and tantamounts to contempt of court. It would be expected that sense will prevail upon the contemner and in future they shall never repeat this sort of disobedience of the court's order. Failure of which would be severely dealt with a dire consequence. *Abul Kalam Azad (Md) vs Dewan Zakir Hossain (Spl Original) 19 BLC* 591

Criminal Law Amendent Act

(XL of 1958)

Section 10(1A)—Suo Motu Rule—Suo-motu Rule be issued so far as it relates to discharging accused persons from the charges should not be set-aside and why they should not be proceeded with trial in accordance with law. *Engineer Abdul Wadud vs State (Criminal) 19 BLC* 468

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) 19 BLC* 730

Customs Act

(IV of 1969)

Section 13—The authority, suspended petitioner's license without mentioning any period of suspension. The authority imposing punishment is required to give the person a reasonable opportunity of being heard before a punishment is imposed even though no such provision is provided by statute-unless such opportunity is expressly excluded by the statute in clear terms. *Badar Box Industries Limited vs Commissioner of Customs (Bond), Customs Bond (Spl Original) 19 BLC* 411

Section 156(1), Clause 24(II)—International Trade and Practice—The carrier is

entitled to 1% ocean allowance as inevitable loss while carrying bulk cargo like oil/tallow and, as such, the shortage of 5.984 is well covered by 1% ocean allowance allowed as per international trade and practice. *Novorossiysk Shipping Company USSR vs Lever Brothers Bangladesh Ltd(Civil) 19 BLC* 344

Section 196D—Since the High Court Division's ordinary appellate power includes the power to send the case back on remand and that power having not been clearly and unequivocally ousted by the relevant provisions of the Act, the High Court Division is empowered to send the case back on remand, if it feels necessary, in disposing of an appeal preferred before it. *Bureau Veritas (Bivac) vs Customs, Excise and VAT Appellate Tribunal (Spl Statutory) 19 BLC* 55

Section 196G—Although not specifically mentioned under Section 196G of the Act, the High Court Division, in the exercise of its appellate power as the second the appellate forum, has also the power to send the case back to the lower authorities on remand. *Bureau Veritas (Bivac) vs Customs, Excise and VAT Appellate Tribunal (Spl Statutory) 19 BLC* 55

Druto Bichar Tribunal Ain

(XXVIII of 2002)

Section 6—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) 19 BLC* 723

Emergency Powers Ordinance

(I of 2007)

Sections 2 and 4—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) 19 BLC* 723

Emergency Powers Rules, 2007

Rules 11 and 22—Appeal is a statutory right. It cannot be denied by assigning such flimsy reasons as has been done in the case. Even under Rule 11 of the EPR 2007, the Appeal by the convicts was guaranteed, and in such appeal the provisions of the Code were made applicable by virtue of Rule 12. Since we are exercising power under section 439 of the Code, we cannot but to hold that the impugned judgment is vitiated not only by non-application of mind, but also for violation of several provisions of the Code of Criminal Procedure. It cannot sustain in the eye of law. *Saiful Islam Firoz (Md) vs State, represented by the Deputy Commissioner, Dhaka (Criminal) 19 BLC* 205

Rule 18—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) 19 BLC* 723

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) 19 BLC* 723

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

Section 2(v)—A person does not cease to be a worker only because he is a employed in a supervisory capacity. It has to be established that he exercises function mainly of a managerial and administrative nature. *Mehdi Hassan (Md) vs Government of Bangladesh (Spl Original) 19 BLC* 472

Sections 18(4)—Personal hearing ought to have also been given through the inquiry to the petitioners who did not seek such hearing as the same is envisaged under sub-Section (4) of Section 18 in some circumstances and in that hearing they ought to have been given the opportunity to cross-examine the victims. *Abdul Wahab & anr vs Chairman, First Labour Court (Spl Original) 19 BLC* 59

Section 18(1)(4)—When sub-section (1) of section 18 provides for personal hearing if such prayer is made, sub-section 4(a) provides for inquiry which may in some particular cases should include *'personal hearing'* as well although not specifically mentioned therein. Inquiry as an eyewash cannot be the contemplation of the Legislature. Although personal hearing in an inquiry, if not sought by the delinquent worker, is not provided specifically by sub-Section (4) of Section 18, depending on the facts and circumstances of a particular case the Domestic Tribunal should read therein the words *'personal hearing'* as a mandatory requirement in particular when the allegations themselves do not confirm the identity of the delinquent workers. *Abdul Wahab & anr vs Chairman, First Labour Court (Spl Original) 19 BLC* 59

Evidence Act

(I of 1872)

Section 8—Absconding—Abscondence is only a supporting circumstance to be considered along with the incriminating evidence, if any, on record connecting them with the commission of the offence. As there is no reliable substantive evidence on record connecting them with the commission of the offence, their mere abscondence will not help the prosecution in any way. *Goni Mollah vs State (Criminal) 19 BLC* 676

Section 30—Confession of a co-accused is not substantive evidence in the sense that conviction on that alone must stand and section 30 has merely given the Court a discretion to call it an aid inappropriate case. It can be used only for lending assurance and is to be merely an element in considering the evidence in the case.

If there is no other evidence or if the other evidence in the case is insufficient to establish the case against the accused, the confession cannot be taken into consideration against the co-accused. *State vs Md Wazed Ali (Criminal) 19 BLC* 386

Section 32(1)—Dying declaration—Declaration in Part—Declaration made by the victim being incomplete, no one can tell what he was about to add. It is a declaration in part and it is a serious error to admit a dying declaration in part. Alleged dying declaration being an incomplete one is not a dying declaration within the meaning of sub-section (1) of section 32 of the Act. *Goni Mollah vs State (Criminal) 19 BLC* 676

Sections 101 and 106—Legal evidence in a criminal trial is the evidence of the incriminating facts and circumstances of involvement of the accused in the commission of offence inevitable pointing to their guilty as the perpetrators incompatible with the plea of their innocence. In view of the proved facts and circumstances of the case which do not constitute any legal evidence moral conviction should not be substituted in place of the legal evidence.*Abul Kashem vs State (Criminal) 19 BLC* 195

Section 114(g)—Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. This doubt is not an imaginary doubt. Benefit of doubt to the accused would be available provided there is supportive evidence on record. For creating doubt or granting benefit of doubt, the evidence is to be such which may lead to such doubt. The law would fail to protect the community, the society, if fanciful possibilities is admitted, thus, deflecting the course of justice." *Aku Gazi vs State (Criminal) 19 BLC* 529

Section 114(g)—There cannot be conviction for trafficking narcotics on mere suspicion or presumption. The case is absolutely a case of no evidence but the Court below without any legal evidence convicted the accused in moral view. Legal evidence, in a criminal trial, is the evidence of the incriminating facts and circumstances of involvement of the accused in the commission of the offence inevitably pointing them guilty as the perpetrators which is incompatible with the plea of their innocence. Moral conviction should not be substituted in place of the legal evidence. *Rokeya Begum vs State (Criminal) 19 BLC* 554

Section 115—Even if the petitioner, like other share-holders, enjoyed benefits from such illegality, he, or other share-holders, cannot be estopped from taking recourse to the writ petition as the doctrine of estoppel does not apply against statute. *Mofizul Islam (Md) vs Secretary, Ministry of Law, Justice and Parliamentary Affairs (Spl Orrginal) 19 BLC* 653

Section 122—There is no presumption of law that the wife and husband constitute one person for the purpose of the criminal law. If the wife, removing the husband's property from his house does so with dishonest intention, she is guilty of theft. *Abdul Mazed Vaaty (Md) @ Yusuf Vatt vs State (Criminal) 19 BLC 189*

Section 122—The depositions/statements of PW-73, relating to the communication made to her by the accused-petitioner during subsisting their marriage, if any, will be inadmissible in evidence. *Abdul Mazed Vaaty (Md) @ Yusuf Vatt vs State (Criminal) 19 BLC* 189

Section 162—Section 162 of the Evidence Act gives a wide power to the court to summon any person as a witness to produce a document in his possession or power, whatever objection he may have in producing the document. *Juboraj Goula vs State (Criminal) 19 BLC* 119

Gas Marketing Regulations, 2004

Clause 17—Neither *vires* of a statute nor a statutory provision has been challenged. Without exhausting the alternative forum of arbitration, writ petition is not maintainable. *Sajid Washing and Dying Limited vs Government of Bangladesh and other (Spl Original) 19 BLC 502*

Income Tax Ordinance

(XXXVI of 1984)

Sections 17 and 52—The binding treaty, as made in between these to sovereign state, Bangladesh and Korea since exempted its business enterprise from payment of income tax in the other contracting state, the contractor writ petitioner has correctly raised objection against the deduction of 5% AIT from the contract price for the sell of permanent equipments and materials. *Hyundai Engineering Co. Ltd vs National Board of Revenue (Spl Original) 19 BLC 615*

Sections 17(b) and 18—This provision has also exempted a non-resident company from calculating its total income only with the Bangladesh part and not to include the off shore part of the income. *Hyundai Engineering Co. Ltd vs National Board of Revenue (Spl Original) 19 BLC 615*

Section 52—Advance Income Tax—Since the contractor writ petitioner is exempted from payment of income tax, the payment which were made by the GTCL as AIT at source was not payable at all and accordingly refundable to GTCL and, as such, no question of deducting the same from the bills of contractor writ petitioner arises at all. Therefore any such deducted amount is also refundable to the contractor-writ-petitioner as the contractor is not liable to pay the same. *Hyundai Engineering Co. Ltd vs NBR (Spl Original) 19 BLC 615*

Sections 83A(5) and 93—There was scope for re-opening of a case by the DCT/the ACT under section 93 of the Ordinance for the relevant assessment year. However, re-opening must be on definite information regarding concealment. The ACT ought to have given an information to the assessee about the concealment of income as required under section 83A(5) of the Ordinance so as to enable the assessee to controvert such allegations of concealment. *Shahidul Islam (Md) vs Assistant Commissioner of Taxes, (Spl Original) 19 BLC 397*

Insurance Act

(IV of 1938)

Section 47B(1)(2)—Interest under sub-section (1) shall be payable for the period during which the failure continues and shall be calculated at monthly rates at the rate of five percent higher than the prevailing bank rate. *Monir Hossain, Globe Metal Industries vs Rupali Insurance Company Ltd (Civil) 19 BLC 549*

Interpretation of Statute

It is the Court's responsibility to look into the intention of the Legislature behind the black words of the statute. *Shamsunnahar vs Bangladesh (Spl Original) 19 BLC 67*

—Whether a particular piece of delegated legislation confers excessive power on the delegate has to be determined with reference to the specific provisions contained in the relevant statute conferring the power to make the Rule, Regulation, etc. and also the object and purpose of the Act as can be gathered from various provision of the enactment. *Nurul Imran Chisty vs State (Spl. Original) 19 BLC 320*

Limitation Act

(IX of 1908)

Section 5—Since there is efficacious relief in preferring the appeal with a prayer for condonation of delays of any day under section 5 of the Act, the very filing of a petition under section 561A of the Code for quashing the conviction and sentence of the petitioner passed by Sessions Judge is not at all maintainable. *Abdul Kader Bepary vs State (Criminal) 19 BLC* 183

Sections 5 and 12—Government is the biggest/largest litigant who has GP, PP lot of AGPS and APPS with a handful of hands to look after the proceeding. Delay may be for one two months or 3 months for different official performances but when it goes a long way that it itself speak negligence and lack of bona fide which can not be condoned. *Tahamina Amin Chowdhury vs Deputy Commissioner, Chittagong (Civil) 19 BLC* 239

Section 12—A litigant shall get the period from the date the decree is signed until it was made ready for delivery. Application for copy must be made before the period of appeal expired. If the application for copy of the decree is made when the period of limitation for appeal had already run out, the appellant is not entitled to exclude time under section 12 of the Act in obtaining copy of the decree. *Tahamina Amin Chowdhury vs Deputy Commissioner, Chittagong (Civil) 19 BLC* 239

Article 30, First Schudule—Article 30 of the First schudule of the Act prescribed the time limit 1 (one) year for bringing any suit against a carrier for compensation for loss or injury to goods. Suit being measurably time barred. *Meghna Petroleum Ltd. vs Thakur Shipping Company Limited (Civil) 19 BLC* 306

Article 113—Cause of action for a suit for specific performance of a contract arise when the executant of agreement for sale refuses to act in accordance with the terms of the agreement. The period of limitation for suit for specific performance of a contract is three years from date of refusal. *Sheikh Ahmed Sowdagar vs Ahmed Nur (Civil) 19 BLC* 595

Article 144, First Schudule—Adverse Possession—Whenever the plaintiff claims title by adverse possession he is duty bound to prove that his possession was adverse and hostile against the real owner for more that 12 years within the knowledge of the real owner and others. *Mina Begum vs Joj Miah (Civil) 19 BLC* 422

Local Government (Municipality) Election Rules, 2010

Rule 39(2)—The allegations of irregularity or improper counting of ballots have not been pleaded adequately and specifically and the evidence adduced by the election petitioner regarding improper counting of ballots of each of the Polling Centres are insufficient and the allegations are not at all proved. Both the Tribunals acted unlawfully in passing the order of inspection and recounting the ballot papers inasmuch as the respondent No.7 failed to establish the factual foundation of it by adducing sufficient evidence bringing specific allegation of improper counting of each of the polling centres. *Afzal Hossain (Md) vs Government of Bangladesh. (Spl Original) 19 BLC* 230

Local Government (Union Parishad) Act (XLI of 2009)

Section 22(3)—The requirement of the 180 day disposal period is indeed of strict application and that the requirement of such disposal demands that this be unqualifiedly adhered to.

It also becomes incumbent upon tribunal to keep strictly within that prescription and to secure the public interest by so disposing of duly within the prescribed period the question whether the election has been affected materially in any adverse manner with any or either of the parties contributing to such state of affairs. *Ataur Rahman Manik (Md) vs Pir Md Mojnu Miah (Civil) 19 BLC* 432

Local Government (Union Parishad) Election Rules, 2010

Rule 61(4)—The requirement of the 180 day disposal period is indeed of strict application and that the requirement of such disposal demands that this be unqualifiedly adhered to. It also becomes incumbent upon tribunal to keep strictly within that prescription and to secure the public interest by so disposing of duly within the prescribed period the question whether the election has been affected materially in any adverse manner with any or either of the parties contributing to such state of affairs. *Ataur Rahman Manik (Md) vs Pir Md Mojnu Miah (Civil) 19 BLC* 432

Mailing Operator and Courier Service Rules, 2011

Rule 6—Rule 6 has provided a forum of representative capacity of the mailing operators/ courier service in the form of advising upon sitting with the postal department and give proper advice by which the interest of the petitioners can be protected under the Rule. *Nurul Imran Chisty vs State (Spl. Original) 19 BLC* 320

Money Laundering Protirodh Ain (VIII of 2009)

Sections 2(Ta) and 4(2)—This sort of interference is nothing but illegal harassment amounts to high handedness of the police and creation of anarchy amongst the passengers travelling from one city to another city within the country and apparently an attempt of the police personnel to make themselves illegally benefited. *Shahadat Hossain (Md) vs State (Criminal) 19 BLC* 125

Section 4(2)—The law relates to Money Laundering does not provide any provision to make investigation by the police in case of any offence committed under the Act, rather the Anti-Cor-ruption Commission is authorized to make such investigation. *Shahadat Hossain (Md) vs State (Criminal) 19 BLC* 125

Section 15—The Petitioner had alternative forum under section 15 of the Act to make a prayer for release of the property and that the provision being part of special law has mandatory effect. Without invoking the forum filing application under Article 102 of the Constitution challenging the order about 2(two) years after cannot go to sustain the contention of the petitioner in the eye of law. Moreover, no explanation whatsoever has been given in the writ petition as to delay in filing the writ petition. *Fahria Akter vs Government of Bangladesh (Spl Original)* 776

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) 19 BLC* 698

Muslim Marriages and Divorce (Registration) Rules, 2009

Rule 11—Question of revocation of license will come into play only on the allegation of misconduct as defined in Rule 11 of the Rules,

2009. *Mahmodul Hasan (Md) vs Government of Bangladesh (Spl Original) 19 BLC* 464

Rule 8—The word "তথ্য" correspond to the information as provided under Rule 8 of the Rules, 2009. Since government has not alleged violation of Rule 8 on the allegation of submitting forged DO letter, which does not regulate the appointment of a Nikah Registrar cannot be cancelled within the framework of Rules, 2009, the license of the petitioner as a Nikah Registrar cannot be knocked down on that count only. *Mahmodul Hasan (Md) vs Government of Bangladesh (Spl Original) 19 BLC* 464

Narcotics Control Act

(XX of 1990)

Section 19, Table 1(b)—The quantity of heroine was not at all ascertained. Without ascertaining the quantity of heroine the conviction is illegal and not sustainable. *Shahidur Rahman @ Shahid vs State (Criminal) 19 BLC 514*

Nari-o-Shishu Nirjatan Daman Ain

(VIII of 2000)

Section 9(1)—Since a child under the age of sixteen is not in a position to give consent to sexual inter-course or sodomy, the sodomy committed by a man even on a consenting male-child will also come under the mischief of rape punishable under section 9(1) of the Ain. The criminal proceeding in such cases must be instituted and proceeded against the perpetrator-man under the provisions of the Ain. *Abdus Samad (Md) alias Badsha vs State (Criminal) 19 BLC* 171

Section 11(kha)—The allegation of torture does not mean causing hurt. The vague and unspecific allegation of torture made in the First Information Report does not attract an offence. *Umme Kulsum @ Zinat Ara vs Shahidul Islam (Criminal) 19 BLC* 17

Sections 18—The Ain provides that the Tribunal established under the Ain can order an investigation into any offence under the Ain and the investigating officer is accountable only to the Tribunal ordering the investigation or to his controlling officer as to properly and diligently completing the investigation within the stipulated time. *Shahjahan (Md) vs State (Criminal) 19 BLC* 372

Sections 19(1)(2)(3)(4), 22(2)(1), 27(1)—Court of Judicial Magistrate being not empowered to take cognizance of any offence under the Ain it has no jurisdiction of the Court of original jurisdiction to do anything in connection with any case under the Ain as it does into performing its functions in relation to any or all of the situations or stages of the proceedings of a case under the Code. *Shahjahan (Md) vs State (Criminal) 19 BLC* 372

Section 28—Mere mentioning of the words 'person aggrieved' in an observation under paragraph-13 has no bearing or any manner of application in the issue either raised in *MK Malaker's case* or in the present case. The disagreement of the said Bench in *MK Malaker's case* with the decision of *Feroza Begum's case [40 DLR 161]* was not in fact based on the ratio decidendi, or even obiter made, by the Appellate Division in *Abdul Halim's case*. In so far as such reliance on the Appellate Division's ratio to disagree with the decision in *Feroza Begum's Case* is concerned, the decision in *MK Malaker's* case is per-incuriam. The decision in *Fefoza Begum's Case, 40 DLR 161,* is the correct proposition of law and the same is supported by the ratio emerged from the decision of the Appellate Division in *Fazar Ali's case, 43 DLR (AD) 129. Shajeda Begum vs State (Criminal) 19 BLC* 294

Negotiable Instruments Act

(XXVI of 1881)

Section 138—The amount covered by the cheque nor any higher or lesser amount of the cheque and if the demand is made for a lesser amount or for a bigger amount not covered by the cheque, which was dishonoured the prosecution case must fail. *Belal Uddin (Md) vs Md Lutfor Rahman (Criminal) 19 BLC* 604

Non Agricultural Tenancy Act

(XXIII of 1949)

Section 24(10)—Plaintiff did make the immediate demand, that is, he did perform the ceremony of talabe mowasibat immediately on coming to know of the sale and also talab-i-ishad in presence of witnesses, which the PWs univocally proved. Moreover, section 24(10) of Non Agricultural Tenancy Act and section 96(17) of the State Acquisition and Tenancy Act speak that right of pre-emption under Muhammadan Law shall prevail which cannot be defeated by these statutory laws.*Rokeya Begum vs Advocate Abdul Awal and ors (Civil) 19 BLC 274*

Passport Order

(PO 9 of 1973)

Articles 6 & 7—The power of the passport authority to renew the old handwritten passport or to issue new handwritten passport or MRP on surrender of the old handwritten passport is not fettered by or conditioned upon police report. Nor mere pendency of criminal cases or submission of charge-sheet against the applicant seeking renewal of his old handwritten passport by a new hand-written passport/MRP by surrender of his existing handwritten passport can be a valid ground for refusal or withholding the new handwritten passport or MRP. *Abdul Matin Sarker vs People's Republic of Bangladesh (Spl. Original) 19 BLC 186*

Penal Code

(XLV of 1860)

Section 109—Question of *'mens rea'* of an accused cannot be gone into in a criminal revision under section 439 of the Code. That is essentially a matter of evidence and trial. *Basiratun Naher vs State and other (Criminal) 19 BLC* 1

Section 109—Whether the petitioner had any 'mens rea' or not in the commission of the alleged offence is a question of fact and that can only be gone into during the trial of the case. *Jahangir Hossain Molla vs State (Criminal) 19 BLC* 167

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) 19 BLC* 723

Section 302—Suspicion or doubt however strong it might be cannot take place of evidence

or there be slightest doubt as to the involvement of the accused in the crime., he cannot be convicted. *Abul Kashem vs State (Criminal) 19 BLC* 195

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) 19 BLC* 705

Section 406 *read with* **420**—Since it is a case of business transaction and no initial deception to pay the amount is found the same is to be considered as a case of civil nature which cannot be allowed to bring within the criminal jurisdiction causing abuse of the process of the court. *Shajahan Chowdhury (Md) vs State (Criminal) 19 BLC* 5

Section 408—Since violation of rule 4 by not sending the FIR to the Commission for investigation has been mandated as directory by the Appellate Division and since alleged commission of offence under section 408 of the Code, being a schedule offence has to be investigated by the Commission in view of section 20 of the Act as such, issuance of the order by the Investigating Officer of the Commission to appear before it to assist the investigation, is mandated as lawful. *Saidul Haque Shamim (Md) vs Anti-Corruption Commission (Spl. Original) 19 BLC* 201

Section 415—In order to constitute an offence under section 415 of the Code the deception by the accused is must and such deception must be also from the initial stage of the transaction but in the instant case since the accused made a payment of Taka 38,820 to complainant in two installments, so, it is difficult for us to hold that the accused had an initial intention to deceive the complainant rather there appears part payment in the transaction. The allegations of the complainant are accepted in its entirety the same do not constitute any offence under sections 420 and 406 of the Code. *Khandaker Nazrul Islam Khokan vs Mustaba Kuli Khan (Criminal) 19 BLC* 211

Pre-Shipment Inspection Rules, 2002

Rule 13(2)(3)—Sub-rule (3) of Rule 13 provides that in determining the price, the PSI agent shall obtain information from the exporter in light with the valuation agreement and the said information should be attached to the CRF certificate concerned. If it appears to the concerned PSI agent that the price of the goods has been under-invoiced, it may increase the price in its certificate. However, before such increase, the exporter has to be given proper opportunity to explain the reasons for declaring the lower price in the invoice and, in that case, the PSI agent must attach such explanation behind such enhanced price in the CRF certificate upon receiving all information from the exporter. *Commissioner of Customs, Chittagong vs Customs, Excise & VAT (Spl Statutory) 19 BLC 439*

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) 19 BLC* 749

Registration Act

(XVI of 1908)

Section 47—A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. *Raihan Nazrul vs Abul Khair (Civil) 19 BLC* 289

Section 53(A)—The Registrar/Sub-Registrar has been given a guideline as to which property can be registered and which property cannot be registered. If the Registrar/Sub-Registrars are restrained by the two impugned Memos at the instance of the Manager, Court of Wards, even if the criteria of section 53A is fulfilled, it would be an unwarranted interference by an unauthorized person in the lawful function of the Registrar/sub-Registrar which is not permitted under the law. Nor the respondents have any right to issue such direction upon respondents and the Registrar, under the law, is not obligated to abide by such illegal directions issued by unauthorized persons. *Hamdu Miah vs Government of Bangladesh, represented by the Secretary, Ministry of Land (Spl. Original) 19 BLC* 262

Specific Relief Act

(I of 1877)

Section 9—Plaintiffs may have some subsisting interest in suit Khatian as co-sharer. But their exclusive possession over the suit land as claimed in the schedule to the plaint and dispossession therefrom could not be proved by credible evidence for the purpose of obtaining a decree under section 9 of the Act. *Abdullah Hel Baki (Md) vs Rahima Khatun (Civil) 19 BLC* 592

Section 42—The nature of the dispute is entirely a civil dispute and it can only be resolved by a competent civil court. There is no provision in the Companies Act to file any declaratory suit under which the plaintiff could seek reliefs he claimed in the suit and these reliefs are only available under section 42 the Act. *AHM Kamruzzaman Khan vs Registrar, Joint Stock Companies & Firms (Civil) 19 BLC* 18

Section 42—A person can enforce his substantive right, even though time barred, it there are other legal remedies available for the enforcement of the same. *Nargis Aktar vs Md Jalaluddin (Civil) 19 BLC* 505

State Acquisition & Tenancy Act,

1950 (XXVIII of 1951)

Section 96—Pre-emption—A year-to-year lessee under the Government cannot defeat the right of pre-emption of the contiguous land-holders. *Chandu Sheikh (Md) vs Aynal Sheikh (Civil) 19 BLC* 427

Section 96—Both the parties separated their joma by mutating their names in respect of the case land and, as such, the pre-emptor lost his right for pre-emption. *Harun-ur Rashid (Md) vs Rashed Harun (Civil) 19 BLC* 645

Section 96(17)—Plaintiff did make the immediate demand, that is, he did perform the ceremony of talabe mowasibat immediately on coming to know of the sale and also talab-i-ishad in presence of witnesses, which the PWs univocally proved. Moreover, section 24(10) of

Non Agricultural Tenancy Act and section 96(17) of the State Acquisition and Tenancy Act speak that right of pre-emption under Muhammadan Law shall prevail which cannot be defeated by these statutory laws.*Rokeya Begum vs Advocate Abdul Awal and ors (Civil) 19 BLC 274*

Section 144—After final publication of the records under the Revisional Survey and the Dhaka City Survey in the names of the predecessors in interest of the petitioners and the respondents having not taken any step against the same till date by producing any evidence to prove that the entries in those records are incorrect, the law clearly provides that the names of the predecessors in interests of the petitioners recorded in those surveys are presumed to be correct. *Hamdu Miah vs Government of Bangladesh, represented by the Secretary, Ministry of Land (Spl. Original) 19 BLC* 262

Supreme Court Judges (Remuneration and Privileges) Ordinance (XI of 1978)

Section 4(1)(a)—We declare the second part of Section 4(1)(a) of the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978 in the language of " .....and until such residence is provided, a judge shall be paid a residence allowance of Taka 26,600 per month" void for being the same ultra vires of Articles 27, 29, 31 and 147(2) of our Constitution. *Emrul Kayes (Md) vs Government of the People's Republic of Bangladesh (Spl Original) 19 BLC* 76

Transfer of Property Act (IV of 1882)

Section 10—Even the owner of the property cannot impose any condition upon the transferee, in his transfer deed prohibiting its transfer and enjoyment by the transferee, as it violates the principle of 'rule against perpetuity'. *Hamdu Miah vs Government of Bangladesh, represented by the Secretary, Ministry of Land (Spl. Original) 19 BLC* 262

Section 52—Section 52 of Act protect the right of a transferee that pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent. It operate in a suit where the rights to immovable property are involve and transaction is subject to the decree of the Court. *Raihan Nazrul vs Abul Khair (Civil) 19 BLC* 289

Section 52—When plaintiffs purchased the suit property in 1987 when the suit of defendant was pending as such, the transaction in favour of plaintiffs during continuation of the suit is hit by doctrine of lis pendency. Transaction of the plaintiffs is hit by section 52 of the Act i.e. lis-pendency and the plaintiffs of the suit will be abide by the decree passed against their vendor and by virtue of the decree the suit land was transferred to defendant No.1 from the date of execution of bainama i.e. from 1985 as such, when the suit land was transferred to the plaintiffs, plaintiffs did not acquire any title but only they purchased litigation on some paper transaction.*Raihan Nazrul vs Abul Khair (Civil) 19 BLC* 289

Section 150—Under a Lease Agreement if any outstanding remains due to the non-payment of rent, there will be rent liability and not loan liability and thus in this case, lease will not be considered as a Rin and the Artha Rin Adalat does not have the appropriate jurisdiction to decide matter. *Anudip Autos Ltd vs Ministry of Law Justice and Parliamentary Affairs and ors (Spl Original) 19 BLC* 610

Value Added Tax Act

(XXII of 1991)

Section 2(থথ) and 14(2)—On a combined reading of both the SRO and the definition of 'বাণিজ্যিক আমদানীকারক' as envisaged in the VAT Act itself and thereafter if in juxtaposition we compare the order impugned against we can safely hold that the same is *exfacie* illegal and not sustainable under the facts and circumstances of the case. The petitioner has not changed the nature, character and other traits of the imported air craft in question and also did not sell or transfer it to any person so as to attract section 2(থথ) of the VAT Act. By exercising the power under section 14(2) of the Act the respondents have already considered and did not impose any ATV on the imported Aircraft of Novo Aircraft Limited. So there is no earthly reason why the petitioner standing on the same footing should be discriminated on the same issue. *HG Aviation Limited vs National Board of Revenue (Spl Original) 19 BLC* 598

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) 19 BLC* 702

Village Court Ordinance

(LXI of 1976)

Section 5(1)—Where members required under this section to be nominated are not nominated within the prescribed time, the Village Court shall, without such members, be deemed to have been validly constituted and the trial shall proceed accordingly. *Nahar Hasan vs Government of the People's Republic of Bangladesh (Spl Original)* 785

Words and Phrases

Abandonment—Mere temporary or occasional absence of physical possession shall not of itself suffice to treat the property as abandoned. *Nazrul Islam Mollah (Md) vs Chairman, 1st Court of Settlement (Spl Original) 19 BLC 379*

Bank Guarantee—Bank guarantee is a guarantee which the concerned financial institution gives ensuring payment on the failure of the incumbent bank concerned to make payment within the prescribed period of time. *Amigo Bangladesh Ltd vs Bangladesh (Spl Original) 19 BLC* 667

Cognizance—Unless cognizance is taken of the offence against him, his subsequent trial, if any, canot be sustainable in law inasmuch as the learned Tribunal Judge did not *prima-facie* hold that there was commission of any offence by him. In such a situation, the trial of the accused shall stand vitiated. *Masumur Rahman @ Masum @ Ahmed vs State (Criminal) 19 BLC* 559

Convention—Since the payment relating to the sell is being made by way of international documentary credit, commonly made through Bank Letter of credit, this method of sell implies that the moment the permanent equipments and materials boarded the vessel in Korea, the conclusion of sell transaction occurs and the responsibility of the seller ended on that point. *Hyundai Engineering Co. Ltd vs National Board of Revenue (Spl Original) 19 BLC* 615

Corroboration—There is no hard and fast rule that the evidence of partisan or interested

or relative witnesses cannot be accepted without corroboration from independent witnesses. But if their evidence is found to be reliable and unblemished, it can be acted upon without corroboration from any independent source. The testimony of the alleged eye-witnesses ought to have been corroborated by disinterested, non-partisan and independent witnesses. Question of reliance on the interested, relative and partisan witnesses is out of the question. *Goni Mollah vs State (Criminal) 19 BLC* 676

Custody of Victim—Safe Custody—When the victim is minor then her custody with the mother is the safe custody than that of the Jail custody. *Rizia Khatoon vs State (Criminal) 19 BLC* 609

Damage—No damage is found to have been occurred during the course of carrying of the goods for which defendant No.1 and 2 as a carrier can be held responsible. *Sadharan Bima Corporation vs Ceylone Shipping Corporation (Civil) 19 BLC* 176

Duty of Judge—Duty of a Judge is to look for the truth while the duty of disclosing the truth to the Judge lies with the rest of the world. So if the witnesses fail to divulge the truth to the Judge during the trial of the case for some reason or other, then justice becomes a casualty. In such a situation, the Judge feels hapless and helpless. *Goni Mollah vs State (Criminal) 19 BLC* 676

Indemnity Bond—If any connivance or manipulation of Indemnity Bond is found to have been made; the same can be brought within the mischief of criminal offence but the same cannot be made responsible to the others like guarantor or mortgager as required in the loan agreement. *Dong Sung Shipping Company Ltd vs Janata Bank (Civil) 19 BLC* 45

Inherent Power—This court, in exercise of its inherent jurisdiction and power, can give consequential relief as well. *Mosharraf Hossain (Md) vs Saad Securities Limited (Statutary Original) 19 BLC* 35

International Treaty—The arbitration, though shall be held under the prevailing Bangladesh statute 'Arbitration Act 2006', nevertheless, it does not empower any arbitrator to interpret any provision of an international treaty, the job which is entrusted with the High Court Division, subject to appellate order passed by the Appellate Division. *Hyundai Engineering Co. Ltd vs National Board of Revenue (Spl Original) 19 BLC* 615

Legitimate Expectation—A promise made in the shape of a statement of policy or a procedure regularly adopted by the authority may give rise to what is called 'legitimate expectation', that is, expectation of a kind which the Court now enforces. Legitimate expectation gives the applicant sufficient "locus standi" for judicial review. The doctrine operates in the domain of public law and in an appropriate case constitutes substantive as well as procedural rights. The statement or practice giving rise to the legitimate expectation must be sufficiently clear and unambiguous, and expressed or carried out in such a way as to show that it was intended to be binding. *Kazi Md Akhtar-uz-zaman vs Bangladesh (Spl. Original) 19 BLC* 148

Mens Rea—Question of determination of the *'mens rea'* or otherwise is a matter of evidence and trial and that cannot be pre-judged at this stage. *Kazi Riazul Manir vs Anti-Corruption Commission Spl Original)* 759

Mens rea—Question of determination of the *'mens rea'* or otherwise is a matter of evidence and trial and that cannot be pre-judged at

this stage. If for the sake of argument, the submission is accepted right now, that will amount to begging the question. *Mir Mosharraf Hossain vs Anti-Corruption Commission (Spl Original) 773*

Observations—Observations made by the Appellate Division in paragraph 16 in the decision reported in *53 DLR (AD) 1* do not appear to have any applicability to the facts and circumstances of the present case in so far as the belated disclosure of the names of the assailants of the victims are concerned. *Goni Mollah vs State (Criminal) 19 BLC 676*

Observations—Brutal murders are being committed even in broad daylight by professional killers and hired goons. But in most cases, the killers get off scot-free either because of lack of evidence or because of the star witnesses' obliging statements made in favour of the defence in fear or because of bungling of investigation of those cases by the Investigating Officers concerned. In this way, a culture of impunity has been created in this country to the detriment of the rule of law. *Goni Mollah vs State (Criminal) 19 BLC 676*

Pre-emption—The statutory right of pre-emption of the pre-emptor cannot be thwarted by mere verbal assurance unless other facts and circumstances clearly make out a case of estoppel, waiver and acquiescence. The right of pre-emption of the pre-emptor cannot be skirted round by mere invocation of their verbal assurance as above. *Chandu Sheikh (Md) vs Aynal Sheikh (Civil) 19 BLC 427*

Projabily Property—Property enlisted/ shown in the "projabily property" Gazette are the properties of "projas" who have been accepted as "owners" and the "rent receiving" interest whatsoever it had therein, of the Zamindars all vested to the Government by operation of SAT Act, 1950.*Hamdu Miah vs Government of Bangladesh, represented by the Secretary, Ministry of Land (Spl. Original) 19 BLC 262*

Service Benefits—Petitioners who have already completed 60 years of their age during the pendency of these Rules, shall get all their back salaries and other service benefits as per law. *Abdul Malek (Md) vs Government of the People's Republic of Bangladesh (Spl Original) 19 BLC 7*

Ullage Survey Report—In the event of conflict between 2 reports one by ullage survey report and the other by shore tank survey report the ullage survey report must prevail over the shore tank survey report. *Novorossiysk Shipping Company USSR vs Lever Brothers Bangladesh Ltd(Civil) 19 BLC 344*

Waiver—It is now a well settled principle that if any party by disregarding the arbitration clause institutes a suit, the other party must raise objection before filing of the written statement, otherwise that would be deemed as an waiver of the condition. *World Trade Shipping Corporation, New York vs Sonat International Inc. (Civil) 19 BLC 302*

Witness Protection Act—The reluctance and unwillingness of the witnesses to disclose the truth before the Courts in criminal trials due to threats and evil influence of money power, muscle power and political power, an Act like. The Witness Protection Act' may be enacted by the Legislature. In this regard, the Government will have to play a pro-active role if it wants to salvage the criminal justice delivery system from its near collapse.*Goni Mollah vs State (Criminal) 19 BLC 676*

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Anti-Corruption Commission Act (V of 2004)

Section 35—The Commissions activity cannot be suspended in The name of framing of Rules as the same is not a condition precedent. As per section 35 of the Act the officers of 'the Bureau' are vested with the Commission and till absorption in other government department they are the officers of the commission and can be used by the Commission as and when necessary for the implementation of its activities and continuation. *Ahsan Ali (Md) vs Anti-Corruption Commission (Spl Original)* 779

Constitution of Bangladesh, 1972

Article 102—It can interfere with the findings of a Court of facts under its extraordinary jurisdiction under Article 102 only if it can be shown that the Court has acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/ facts causing prejudice to the petitioner or it has acted malafide or in violation of the principle of natural justice. *Nahar Hasan vs Government of the People's Republic of Bangladesh (Spl Original)* 785

Article 102(2)—*64 DLR (AD) 14* has ousted the jurisdiction of the writ Court to quash the proceedings of a criminal case unless the 'vires' of any law is found to have been challenged. *Kazi Riazul Manir vs Anti-Corruption Commission reprsented by its Chairman (Spl Original)* 759

Article 102(2)—Entitlement to an accommodation is an integral part of the service condition of a Government servant inasmuch as his engagement in the service of the Republic endows him with the said entitlement of enjoying an accommodation facility at a nominal cost and, therefore, it is an irresistible conclusion of this Court that accommodation of a Government servant does clearly come within the purview of the "terms and conditions" of service of a person in the service of the Republic or a Statutory Public Authority. *SM Shah Jamal vs Government of Bangladesh (Spl Original)* 768

Article 102(2)—*64 DLR (AD) 14* has ousted the jurisdiction of the writ Court to quash the proceedings of a criminal case unless the 'vires' of any law is found to have been challenged. *Mir Mosharraf Hossain vs Anti-Corruption Commission represented by its Chairman (Spl Original)* 773

Article 102(2)—Legitimate Expectation—It is a legitimate and legal expectation of the petitioner that after receiving money the lease deed for the extra land be executed and registered without any delay. Doctrine of legitimate expectation imposes in spirit a duty on public authority to act fairly by taking into consideration all relevant factors relating to such legitimate expectations. *Anisul Haq (Md) vs Government of the People's Republic of Bangladesh (Spl Original)* 788

Article 102(2)—The Petitioner had alternative forum under section 15 of the Act to make a prayer for release of the property and that the provision being part of special law has mandatory effect. Without invoking the forum filing application under Article 102 of the Constitution challenging the order about 2(two) years after cannot go to sustain the contention of the petitioner in the eye of law. Moreover, no explanation whatsoever has been given in the writ petition as to delay in filing the writ petition. *Fahria Akter vs Government of Bangladesh (Spl Original)* 776

Article 102(5)—While this Court has persistently been showing its disinclination to issue any Rule in the service matters of the members of defence service because of the provision of the exception stipulated in the latter part of Article 102(5), there is no rationale for the same Court to be inclined to entertain the judicial review applications filed by the Government servants given that they have been excluded from the jurisdiction of the judicial review by the very same provisions of the exception laid down in the same part of Article 102(5) of the Constitution. *SM Shah Jamal vs Government of Bangladesh (Spl Original)* 768

Articles 102(5) and 117—Exclusion of any service related grievance from the jurisdiction of the Tribunal was not within the contemplation of the framers of the Constitution as they intended to confer a catch-all jurisdiction upon the Administrative Tribunal by inserting Article 117 against the backdrop of Article 102(5) to enable it to deal with all types of grievances which emanate from or are linked to and connected with the service of a Government servant. *SM Shah Jamal vs Government of Bangladesh (Spl Original)* 768

Article 117—When the Constitution confers jurisdiction upon the Administrative Tribunals by engraving the following words in Article 117 " .... tribunals to exercise jurisdiction in respect of matters relating to or arising out of ...." it equips and capacitates the Tribunal with octopusian grip to bring all the service related matters of the Government servants within its jurisdiction. *SM Shah Jamal vs Government of Bangladesh (Spl Original)* 768

Money Laundering Protirodh Ain (VIII of 2009)

Section 15—The Petitioner had alternative forum under section 15 of the Act to make a prayer for release of the property and that the provision being part of special law has mandatory effect. Without invoking the forum filing application under Article 102 of the Constitution challenging the order about 2(two) years after cannot go to sustain the contention of the petitioner in the eye of law. Moreover, no explanation whatsoever has been given in the writ petition as to delay in filing the writ petition. *Fahria Akter vs Government of Bangladesh (Spl Original)* 776

Children Act (XXXIX of 1974)

Sections 2(f) and 6(1)—Accused Akabbar aged about 14 years at the time of his trial, was a child within the meaning of section 2(f) of the Act, and according to section 6(1) of the Act, no child shall be charged with, or tried for, any offence together with an adult. Two accuseds were admittedly adult and by the joint trial of a child with the adult, the whole trial has been vitiated. *State vs Md Akabbar Hossain @ Akabbar (Criminal)* ... 762

Village Court Ordinance (LXI of 1976)

Section 5(1)—Where members required under this section to be nominated are not nominated within the prescribed time, the Village Court shall, without such members, be deemed to have been validly constituted and the trial shall proceed accordingly. *Nahar Hasan vs Government of the People's Republic of Bangladesh (Spl Original)* 785

Mens rea—Question of determination of the 'mens rea' or otherwise is a matter of evidence and trial and that cannot be pre-judged at this stage. If for the sake of argument, the submission is accepted right now, that will amount to begging the question. *Mir Mosharraf Hossain vs Anti-Corruption Commission reprsented by its Chairman (Spl Original)* 773

Mens rea—Question of determination of the *'mens rea'* or otherwise is a matter of evidence and trial and that cannot be pre-judged at this stage. *Kazi Riazul Manir vs Anti-Corruption Commission reprsented by its Chairman (Spl Original)* 759

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