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Vol. LXVI September 2014

THE

DHAKA LAW REPORTS

(A MONTHLY LAW JOURNAL)

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Ninth Issue

Cit 66 DLR (AD); 66 DLR etc

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Arbitration & Mediation

—*Justice Latifur Rahman**

Alternate Dispute Resolution (ADR) is gaining popularity all over the world, including developing countries like Bangladesh. Various forms of alternative dispute resolutions have been in existence in every society from time immemorial. Most human disputes can be profitably resolved outside the court room without unnecessary loss of time and money. ADR can be brought under two broad categories, namely (1) resolution of disputes outside the Court and (2) court-sponsored programs through which disputes may be resolved without a full trial.

Arbitration may be regarded as the fastest growing method selected by parties to resolve their disputes. It flows from the perception that arbitration is a faster and more economic way to resolve domestic and international commercial disputes.

I would like to emphasise that mediation as a form of ADR is an art. One cannot work as a successful mediator unless he or she learns the skill and technique of mediation. In that perspective, the training of Mediation is very important in Bangladesh where we talk of introducing mediation at all possible levels of our court system. We must try to understand at the initial stage the difference between mediation and arbitration. In mediation, a dispute is resolved through mutual consent of the parties; whereas in arbitration the arbitrator passes an award upon evidence presented by the parties.

Lord Woolf, a former Chief justice of UK in his report described mediation as a form of facilitation of disputes including family disputes, neighbour disputes, industrial and commercial relations.

In our country, since mediation is not in practice, Judges and lawyers who are selected as mediators must have some basic training as to how a dispute can be resolved quickly and within less expenses. For that we need special skill, we need education, training and experience in mediation procedures. I understand that in the United States of America, in many jurisdictions, mediation as an alternative dispute resolution has become a popular mechanism. While I was the Chief of Bangladesh, Mr Justice Clifford Wallace of USA, a retired Justice of the 9th Federal Circuit Court, told me that mediation was being practised in his country for more than 60 years. According to him, this mechanism has brought a great deal of success in reducing backlog of cases with good results.

I am confident that giving effective training to the judicial officers, lawyers and others, we can reap the benefit of mediation in our country. Benefits of mediation are manifold. Procedures can be modified to meet the needs of a particular case. One very important thing is the trust in the mediator. If the parties trust the mediator and take him in confidence then the dispute could be easily resolved. I am sure that the mediator, with some knowledge or expertise in the area of dispute, can settle disputes peacefully with less trouble.

From our common experience we have found that at times small disputes may be settled by negotiation between neighbours, friends and relations. In many cases better results have followed from such informal mediations than can be obtained through a formal court proceeding. Even big companies decide to mediate business disputes and claims as they do not like to prolong their litigations in court proceedings which is harmful to the interests of the business community.

Strictly speaking, mediating can include arbitration. The Arbitration Act, 2001 contemplates settlement of disputes. According to section 22 of the Arbitration Act, 2001, in the midst of an arbitration the parties can settle the matter and award may be passed on agreed terms in accordance with section 38 of the Act. This is really a compromise, in other words a mediation. Mediation is less expensive as it does not require the appointment of an attorney, parties and the mediator disposes the case quickly in a non-formal court procedure. Confidentiality is maintained in mediation.

*Former Chief Justice of Bangladesh

Mediation is also a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with the help of a mediator who is an expert in this method. The mediator knows the skill as to how the dispute between the parties can be resolved.

In arbitration, the arbitrator acts like a judge, but in mediation the dispute is resolved in an out of court settlement and it is less formal.

Mediation is very common in domestic disputes, such as, divorce, child custody, visitation. In developed countries like USA and Europe mediation is practised in almost all cases of contract and civil damage cases.

Mediation does not always result in a settlement. It may fail and then the parties can have recourse to law suits.

Arbitration in USA dates back to the eighteenth century; whereas mediation is referable to nineteenth century.

There is no scope of appeal in mediation, whereas in arbitration appeal is provided under the law. Mediation agreement is enforceable in a court of law.

We are in the midst of economic development when our institutions and procedures for dispute settlement must be made efficient, fair and business-friendly. We live in a global village and our business, commerce, trade and industry are extended throughout the globe and there is interchange and exchange of commerce and trade for the benefit of all the countries of the world. Today, no nation can live in isolation and in fact the frontiers of trade and commerce have extended the boundaries of nations. Hence it is profitable to settle commercial disputes quickly, outside the rigours of Strict Court Procedure.

I may mention that the Jurisprudential Concept and the philosophy relating to arbitration have undergone a great change due to free market economy throughout the world. Free-market economy presupposes freedom of the parties to transactions without state interference and statutory constrains as far as possible, which is true in case of domestic as well as international transactions. As Bangladesh is a developing country, it is entering into various international commercial transactions with different countries for its economic development. And hence the Bangladesh International Arbitration Center (BIAC) has a significant role to play in the context of "The Arbitration Act, 2001 and BIAC Arbitration Rules 2011. The international business community desires quick settlement of disputes instead of a lengthly judicial encounter. A foreign award is also enforceable in Bangladesh as if it were an award made on a matter referred to arbitration of Bangladesh.

The court's intervention is necessary when it is only indispensible.

I must put on record that in Bangladesh the period of conclusion of arbitration proceedings needs to be minimized; otherwise this method of dispute resolution will be meaningless and interest in it will decline.

In Srilanka, ADR is being practised both in Civil and Criminal jurisdictions.

At present Conciliation Board Act, 1958 is in force in Srilanka and in a reported decision of the Srilanka Supreme Court it was observed as follows:

> "The Act was intended to provide an expeditious and inexpensive means of settling disputes between the parties without the necessity of having recourse to the complicated process of law suit."

In India, Lok Adalat has been set up in several states under Legal Service Authority Act, 1987, and the People of India are getting positive benefits out of arbitration, In India, through ADR a large number of cases are being decided every year.

In Bangladesh, The Arbitration Act 2001 was enacted on 24th January, 2001, relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations including domestic arbitration. This new law has been made on the basis of UNCITRAL model law prepared by the United Nations Commission on International Commercial Arbitration. This enactment is a step forward in the matter of speedy disposal of commercial disputes and has ushered in an era of dispute settlement procedure.

While dealing with several arbitrations as Chairman, I found that the Arbitration Act, 2001 is a comprehensive law dealing with the subject of arbitration. But from my personal experience, I can also vouchsafe that the litigating parties at times do not get quick result of the arbitration as

the disposal of arbitration takes unusually long time. There are instances where arbitrations take 4(four) to 5(five) years from the passing of the award itself before a tribunal. I can cite one instance, where a Thai party in the arbitration left the arbitration due to delay in disposing the arbitral proceedings before me. The Thai party brought many equipment and accessories from Thailand after custom clearance. I do not know what had happened to those equipments and to that party. Late Dr. Mohammad Zahir Bar-at-Law was a lawyer in that case.

I may point out that the appeal procedure after the award has also become very lengthy in our country. Truly speaking, as the Arbitration Act, 2001 stands now, the jurisdiction and scope of appeal is very limited. But in many cases, the District Court/High Court Division entertain an appeal and in that process it takes a very long time for final adjudication upto the Appellate Division of the Supreme Court.

I may point out here that if an award is made under section 38 of the Act one can challenge the award on the grounds specified under section 43 of the Act. The grounds enumerated are, that a party to the arbitration agreement is under some legal incapacity; that the arbitration agreement is not valid under the law; that the applicant was not given any notice of the appointment of an arbitrator or of the arbitral proceedings or that he was prevented by sufficient reason from presenting his case before the tribunal, or that the award is made on matters not submitted to the arbitration tribunal; or that the composition of arbitration tribunal was not in accordance with the provisions of the Act. Further, when it is established to the satisfaction of the court that the subject matter of the dispute is not capable of settlement by arbitration under the law in force in Bangladesh; or that the award is *exfacie* opposed to the public policy or the law of Bangladesh and that the award is induced or procured by corruption or fraud.

These grounds are related practically to the Jurisdiction and procedure adopted by the tribunal; but not related to the merit of the case at all. The District Court/the High court Division in appellate Jurisdiction has no authority and power to entertain an appeal other than those grounds mentioned above. But I have noticed that the appellate courts in many cases enter into the merit of the case and thereby the appeal is wrongly admitted and final hearing and conclusion of it takes a very long time, contrary to the objective of the Arbitration Act. The appellate court cannot set-aside an award on the ground that a separate interpretation or opinion could be taken by the arbitrator differently on the merit of the case. The decision of the arbitral tribunal is final and the appellate court in many cases illegally sit as a court of appeal.

In the case of *KM Shafi Ltd. vs Government of Bangladesh, 1982 reported in BLD at page 111, and Bangladesh T & T Board vs Lili Enterprise Ltd., 50 DLR (AD)* at page *63*, the correct appellate jurisdiction against an arbitral award has been enunciated by the higher court. Before entertaining an appeal the appellate Court should Scrutinize section 43 of the Act.

I may point out here that in the United States of America, the scope of appeal is also very limited, FAA (Federal Arbitration Act) states four grounds of appeal: (1) The award is corrupt/fraudulent; (2) Arbitrators misconducted in the proceedings (3) where arbitrators are partial; and (4) where arbitrators exceeded their jurisdiction. Strictly speaking, close scrutiny will show that the above grounds are practically the same as contained in the Bangladesh Arbitration Act, 2001, which is referable to a point of law or if the award is found to be erroneous on the face of it by mere perusal.

Application for setting-aside the arbitral award under section 42 of the Arbitration Act 2001 on the grounds as stated under section 43 of the Act should be expedited by a forum which will exclusively deal with the matter arising out of arbitration proceeding. If the award is sustained in the proceeding for setting-aside the arbitral award, then the proceeding for enforcement of award is initiated under section 44 of the Act, where it has been stated that "The award shall be enforced under the Code of Civil procedure in the same manner as if it were a decree of the Court. "Court" means District Judge's Court and includes Additional District Judge's Court appointed by the government for discharging the functions of District Judge's Court, under the Act 2001 through Gazette notification. Therefore it seems that, the award is executable in the Court of the District Judge who is engaged in multifarious judicial functions as well as administrative functions, consequently it is impossible for him to give due attention to the execution proceeding and

the proceedings is unusually delayed causing much frustration to the decree holder.

In the background of my discussion, I will suggest to the Law Commission of Bangladesh to make an amendment in the Arbitration Act, 2001, to limit the period of arbitration itself to a reasonable period of time so that litigating public can reap the benefit of arbitration, and in the case of international commercial arbitration a company or a foreign party can repose confidence in the process of arbitration in Bangladesh.

Section 89A of the Code of Civil Procedure speaks of mediation, section 38B of the Code Speaks of Arbitration and section 89C of the Code says of mediation in appeal. This mediation at the appellate stage is a logical sequence, but the efficacy of the procedure is doubtful as the winning party is unlikely to agree to a settlement.

But till today, the efficacy of this amendment in the Code of Civil Procedure is not strictly followed neither by the lawyers nor by the litigating public. We must motivate the lawyers and judges for successful implementation of the scheme of mediation, otherwise it will be difficult to motivate the uneducated people of Bangladesh to switch over to this new system. This experiment of mediation needs support of the Bar and the Bench. It is necessary that right approaches be made for incorporating mediation in the legal culture of Bangladesh, bringing benefit to the litigant public of this country and relieving the legal system of a part of its burden.

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Parliament in Functions: British Experience

*—AK Roy**

ALTHOUGH Parliament has little power of initiating legislation, for this is in the hands of the Government, it still has important functions to perform-

1. It maintains the Government and enables a political party and its leaders to rule. But the Government is always kept aware that across the floor sits a "Shadow Cabinet." A possible alternative Government.

2. It is the main platform in the country. Cabinet Ministers must explain policy, argue the case for Bills, and comment on White Papers. Members of Parliament can put forward the views of their party, their constituents and themselves.

3. It provides the main opportunity for criticism of the Government. A Government must convince and persuade: it dare not coerce too often, or attempt to bully the House. An individual Minister can rarely for long conceal his ignorance or incompetence in the face of constant acute criticism.

4. It provides the main path to political distinction. Reputations are won and lost. A maiden speech of outstanding importance may be the first step to the Cabinet. Almost all Cabinet Ministers have had a long experience of Parliamentary life by the time they are appointed.

5. It approves all Bills and financial proposals.

The Members' Opportunities

Opportunity for obtaining information from or criticizing the Government takes several forms-

1. *Debates on Legislation*

The Second Reading of a Bill is the opportunity for criticizing the whole policy on which the Bill is based. The Government, facing strong criticism, may be forced to change its mind, as in 1948 on the death penalty in the Criminal Justice Bill, in 1953 on the Bill increasing salaries of judges, and on the Television Bill. Opposition is never valueless, for it may be as much directed at the electorate, in an attempt to sway opinion, as at the House itself.

2. *Question Time*

The hour spent on questions, on four days of the week, is a vital part of Parliamentary life. An M.P. can

*The writer is a Senior District and Sessions Judge on PRL.

now ask two oral questions a day, two days notice being required, or he can ask written questions. A question must relate to the public affairs with which Ministers are officially connected, to proceedings in Parliament, or to matters of administration for which they are responsible. A question must be framed to get information, although sometimes it also obtains ministerial opinion on a subject. For convenience, questions are grouped together in subjects so that the Ministers need not attend every day.

Supplementary questions, arising out of the answer or because of its unsatisfactory nature, may be asked. This ensures that the Minister will really understand the matter, and not merely rely on the brief prepared for him by his civil servants, if he is to deal with it with any confidence. The House is quick to discover whether the Minister is adept in assimilating information and giving it to the House, or whether he relies too heavily on his experts.

The Speaker, at his discretion, can refuse to allow certain questions to be put-questions on the Sovereign, those referring discourteously to a friendly foreign country, those on the details of the work of Public Corporations or on the exercise of the prerogative of mercy. No question canbe asked for the solution of a hypothetical proposition or contain arguments, imputations, or ironical or offensive expressions.

3. *Motions of Censure or of No Confidence*

These provide occasions on which either the whole policy of the Government or a particular part of it is challenged by the Opposition, defeat of the Government probably leading to its resignation. It is on these vital occasions that the House is seen in its most brilliant and attractive form.

An individual Minister can be attacked for deficiencies in his Department, and the severity of disapproval may force his resignation, as in July, 1954, when the Minister of Agriculture resigned over the Crichel Down affair.

4. *Adjournment Debates*

An adjournment debate is held at the end of every evening's sitting, and before each of the Parliamentary vacations. Every night, for half an hour before the House adjourns, an M.P. can raise an issue in which he is interested, to which a Government spokesman replies in a short speech. The vacation debates are more general in subject-matter and more Members participate, more serious criticisms of the Government being made.

5. *Motions moved by MPs*

Four half-days-two Mondays and two Wednesdays-for the consideration of MPs' motions have been added to the twenty Fridays already available for the business of MPs. These notions enable the opinion of the House to be obtained. In moving a motion MPs often act in the name of the whole party.

6. *Financial Business*

The twenty-six Supply Days and the other days spent on financial business also provide opportunities for criticism of the Government.

7. *The Queen's Speech*

Members can raise any subject in the general debate in reply to the Queen's Speech, though not all have the opportunity to speak.

8. *Committees*

The Standing and Select Committees of the House both provide opportunities for MPs to play a part in the process of legislation and of policy.

Criticism of Parliament

Critics of Parliament have not been lacking either in number or in vocal power, and they have suggested a number of difficulties-

1. Parliamentary control over administration is hardly effective. A question may be asked, but Parliament cannot cross-examine a Minister who may be furnished with a plausible answer by his civil servants.

2. The power of the political party is the strength behind Government, and its organization controls the robots who act in its interests. MPs become like sheep, their heads being counted as they enter the voting lobbies, tame and quiescent, supporting decisions made outside Parliament.

3. The real initiative in legislation and often in policy lies with the bureaucratic Civil Service which collectively possesses enormous power and seeks to maintain or expand it.

4. The amount and variety of legislation has increased to such a degree that the amateurs in Parliament are no longer capable of dealing with it adequately.

5. Parliament has no real control over finance: it really discusses the policy and not the figures involved, and even then it is unable to discuss all the Estimates because there is not sufficient time. The expenditure of vast sums of money is approved without any discussion.

6. The pressure of outside groups is formidable, both on Government policy and on the independence of MPs.

7. Procedure in the House is badly organized, partly archaic, and deplorably slow. (The occasion when Parliament passed forty-nine Bills in three weeks in 1939 is always forgotten by the critics.)

All of these criticisms contain a degree of validity, and have led to several suggestions for reform, which can be conveniently divided into three groups-devolution, departmental committees, and an industrial or social Parliament.

Devolution

This involves the creation of subordinate legislative bodies which would exercise certain functions now inadequately performed by Parliament, either by splitting the country into several areas, each with a separate legislature, or by allowing Scotland and Wales their own Parliaments as their nationalists demand.

But the division of authority involved in territorial devolution may lead to inefficiency, as the experience of federal regimes has shown, if the various Parliaments take dissimilar views on economic, social or political matters. Disputes may arise on the extent of jurisdiction that each body possesses, and on the division of powers, necessitating some tribunal to decide these differences. There would be some duplication of machinery and increased cost, a feature not pleasing to those who claim that expenditure on Government already too large.

It is significant that relations between Central and Local Government have, in recent years, taken the opposite form to that suggested, for several functions have been transferred from local authorities to central or other organizations.

Departmental Committees

The creation of Departmental Committees involves extending the committee system on lines comparable to those in foreign countries, where it plays a larger and more significant part, so that committees exist for every major function or Ministry. The advantages of such a system are-

1. A number of MPs would become specialists and knowledgeable in a particular field.

2. Members would be associated with the process of Government, making suggestions, criticizing proposed legislation or delegated legislation, and participating to some degree in the making of decisions.

3. It would afford an opportunity for important and independent activity of Members, free from the discipline of the Whips.

4. The time of the House itself would be saved.

The experience of other countries, however, has shown that committees, and especially their chairmen, may become more powerful than intended, sometimes challenging the Ministers themselves, altering the legislative programme at will, conducting investigations of members of the Executive, and destroying Government policy. Though, with the existing strong two-party system, there is no exact parallel with foreign countries, It is not unwise to notice the dangers present in the contemplated reform.

Industrial or Social Parliaments

Politicians as wide apart as Sir Winston Churchill and Sidney Webb have suggested a number of schemes for functional devolution, which are all concerned, whether called an Economic, Industrial or Social Parliament or Council, with the formation of a body of experts of some kind responsible for the examination of legislation or proposals of an economic or social character. The advantage of such a body would be-

1. It would be broadly representative of the industrial, professional and working interests in the country.

2. Its members would bring to it the knowledge and experience they have gained in their various occupations.

3. Experts, not politicians, would be examining proposals or legislation on subjects with which they were familiar, and about which they would be able to make suggestions.

4. Party discipline and automatic voting would be avoided, and the members of the body would be able to act in a more independent fashion.

Though these proposals have an

air of attractiveness, there are some difficulties that might arise-

1. Parliament would still be responsible for the proposed legislation examined, and might either ignore the suggestions of the new body if it were purely advisory, or become involved in a difficult political situation if the latter possessed larger powers and disagreed with it.

2. Parliament would retain control of finance, and thus ultimate control over policy.

3. The division of functions between Parliament and the new body might be as difficult as in the case of territorial devolution.

4. The organization and composition of the new body itself raises problems. It is not always clear who is to be chosen, who is to be represented or how the process of selection is to take place.

5. The disadvantage of experts is that they are experts in one field only: when not discussing their own particular speciality, they are no less the amateur than the present membership of Parliament.

6. The hope that the power of the party would be overcome might be in vain, for the operation of similar Councils on the Continent shows that normally representatives of industry vote one way, and representatives of labour vote the other, corresponding to Right and Left in Parliament.

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Miranda Rights—
A right to remain silent in custodial interrogation

*—Bodiuzzaman Khan**

In a US case (1) Earnesto A. Miranda a twenty three year-old indigent was convicted on the charge of kidnapping and rape of an eighteen year-old girl. The accused Miranda was identified in a police line-up as attacker and in the police officers interrogation, Miranda though not in initial stage, lastly admitted his guilt. After conviction, his attorney approached on the ground of Miranda's confession was coerced and the police had violated 5th Amendment (US Const) right. The Supreme Court granted the review alongwith 3 other similar cases to consider the admissibility of confession. The court verdict was given by Chief Justice Warren Earl Burger.

The court examined the earlier decided case *Escavado versus State of Illinois* (2). Alike those in the 3 cases there the police officers took the subject accused to custody and interrogated him for the purpose of obtaining confession. The police did not effectively advise him his right to remain silent or to consult his attorney. The police hand-cuffed him and took him to an interrogation room. While handcuffed for 4 hours standing the accused confessed. During the interrogation the accused was denied to consult his attorney who appeared in the police station. The prosecution even against the objection introduced the confession in the trial. The Federal Court held the confessional statement constitutionally inadmissible.

The judgment held that in Miranda's case alike in the case of Escabado their decision is not one innovation in the jurisprudence but an application of principle long recognized in their other settings and they only re-affirmed the principle of Escabado case. The Escabado case only was an application of the basic rights that are enshrined in the constitution, the judgment declared. The basic rights embodied in the 5th Amendment of the American Constitution are follows:-

Amendment 5 Rights of the Accused

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

*Advocate, Supreme Court.

nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The court held that the prosecution may not use the statements whether exculpatory or inculpatory stemming from the custodial interrogation of the defendant unless it demonstrates the use of procedural safeguard effective to secure the privilege against self incrimination. The measures required before any questioning the person must be warned that he has a right to remain silent that any statement he makes may be used as evidence against him and he has a right to the presence of attorney either retained or appointed. The defendant may waive effectuation of the rights provided the waiver is made voluntarily, knowingly and intelligently. If he wishes to consult attorney there shall be no questioning by the police. There may be accused volunteered in answering questions yet his right is not waived.

The court held that the accused is questioned while he is in custody which deprives him his freedom of action in any significant way. In all those cases effective earning at the out-set of the interrogation process was not given and questioning elicited from oral admissions as well as signed statements were admitted at their trials. The court found similar which includes (i) there had been incommunicado interrogation (ii) police dominated atmosphere and (iii) without full warning of constitutional rights.

The judgment held that the government - state or federal must accord the dignity and integrity of its citizens. The fruits of accusatory system are (i) fair-state-individual balance (ii) Government to shoulder the entire load (to prosecute) (iii) the respect of the inviolability of the human personality etc. In accusatory system if the government wants to punish an individual has to produce the evidence against him by its own labour, rather than by the cruel, simple, expedient of compelling it from the accused's own mouth.

The court also held that we are not unmindful of the burdens which law enforcement officials must bear often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. The court which protect individual right has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement.

Since Miranda case the accused's right under the 5th Amendment of US Constitution is colloquially termed as Miranda right; Miranda violation, Miranda advice and Miranda warnings in the subsequent judgments of the Federal Court. The similar constitutional provision is embodied in the Article 35(4) of our Constitution which runs below:

Article 35 (4) No person accused of any offence shall be compelled to be a witness against himself.

But the provision is not at all applied to the criminal trials. The accused's safeguard under section 164, 364 of the Code of Criminal Procedure, 1898 and Rule 467 of the PRB 1943 are in practice. Since the promulgation of the Constitution the provision is very much obligatory upon the law enforcers in all in-custody interrogation and in the same line binding upon the Magistrates before recording any confession of an accused. Miranda warnings if not tendered in any such cases effectively the records, confessions will be deemed inadmissible in the court of law. The Code of Criminal Procedure, the PRB should be amended in the line of the constitutional provision. Even in the present state, in the absence of any amendment in the CrPC/PRB, the constitutional provision is equally binding upon all because the constitution is the Supreme Law, none can have any plea to deny, disregard, by-pass by words or actions.

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*Ref:

1 & 2. 384, US 436, 86 S. Ct 1602 (1966); 378 US 478 (1964) Constitutional law & politics, By David M. O'Brien Vol. 2, 6 Ed. (P-1037)

3. American Government, Principles and Practice By Mary Jane Turner; Kenneth Switzer; Charlotte Redden.

ers. The court, after hearing both the parties and considering the facts and circumstances, passed the impugned order dated 11-8-2008 allowing the prayer of the opposite parties to be transposed as petitioners and rejecting the petitioners' prayer for withdrawal of the case and also transposing the petitioners as opposite parties.

3. Being aggrieved by and dissatisfied with that order of the court below the petitioners filed the above mentioned civil revision before the High Court Division and obtained rule. A Single Bench of the High Court Division ultimately, after hearing both the parties and considering the facts and circumstances, discharged that rule holding that the court below committed no illegality in rejecting the petitioners application for withdrawal of the succession case and allowing the opposite parties' prayer for being transposed as petitioners and also transposing original petitioners as opposite parties in that succession case by the impugned judgment and order. Being aggrieved, the petitioners have filed this present Civil Petition for Leave to Appeal.

4. Mr Fida M. Kamal, the learned Senior Advocate for the leave-petitioners has made submissions to the effect that order XXIII, rule 1 of the Code of Civil Procedure has provided the right to these leave-petitioners to withdraw their succession case and that the petitioners filed an application to withdraw their succession case and in that circumstances the court ought to have allowed that application for withdrawal of the succession case. The learned Advocate has argued that by rejecting the prayer of these petitioners for withdrawal of their succession case the court below committed illegality. The learned Advocate has made submissions to the effect also that the added opposite parties-who claimed themselves to be the heirs of late Mr AK Faizul Huq had scope to file a fresh succession case and in the circumstances the court below had no reason to transpose the added opposite parties as petitioners in the succession case filed by the present leave-petitioners. Mr Fida M Kamal has advanced argument to the effect also that there is no provision in any law for transposing the opposite parties as petitioners in any case and, as such, the transposition of the opposite parties as petitioners in the succession case of these leave-petitioners has been illegal. The learned Advocate has argued to the effect also that the succession case under Succession Act of 1925 being not a suit or even a miscellaneous proceeding the provisions of the Code of Civil Procedure are not applicable in this succession case and, as such, the impleading of the opposite parties in the succession case as per order I, rule 10 of the Code of Civil Procedure also has been illegal.

5. Mr Probir Niogi, the learned Advocate for the respondents has made submissions to the effect that there has been no violation of any provisions of any law at all in impleading the other heirs of late Mr AK Faizul Huq as opposite parties in this succession case and subsequently in transposing them as petitioners in that succession case. The learned Advocate has argued that the trial court, on consideration of the facts and circumstances, rightly added the other heirs of late Mr AK Faizul Huq as opposite parties in the succession case and subsequently transposed them as petitioners while the original petitioners wanted to withdraw from the said succession case and that the High Court Division, considering all these facts and circumstances, upheld the impugned order of the trial court rightly.

6. We have considered the submissions of the learned Advocates of both the sides and gone through the impugned judgment and order of the High Court Division and also that of the trial court.

7. It appears that these leave-petitioners filed the succession case without disclosing the fact that their predecessor late Mr AK Faizul Huq died leaving second wife and one son and one daughter by that second wife. But when the second wife and her children came to be added as parties in that succession case these leave-petitioners did not raise any objection and consequently they were added as opposite parties. Subsequently when the court fixed the case for hearing these leave-petitioners remained absent and consequently the court took evidence of one of the added opposite parties who also, as heirs

of late Mr Faizul Huq were claiming succession certificate. These leave-petitioners then appeared before the court and prayed for cross-examining that OPW 1 and the court allowed that prayer but ultimately the leave-petitioners did not cross-examine the OPW 1, rather they filed the application for withdrawal of the succession case. In that circumstances the court rejected the application of these leave-petitioners for withdrawal of the succession case and allowed the application of the added opposite parties to be transposed as petitioners and also transposed these leave-petitioners as opposite parties in that succession case by the order dated 11-8-2008. It appears that the High Court Division, on consideration of all these above facts and circumstances, upheld this order of the trial court holding that there has been no illegality in this order. We also find no illegality in the order dated 11-8-2008 passed by the trial court and also in the impugned judgment and order of the High Court Division upholding this order of the trial court.

8. Considering the facts and circumstances narrated above we do not accept the argument advanced from the side of the leave-petitioners that the trial court committed wrong and illegality by not allowing the leave-petitioners' prayer for withdrawal of the succession case. By the impugned order the trial court transposed these leave-petitioners as opposite parties in that succession and also transposed added opposite parties as petitioners in that succession case which, in effect, resulted in withdrawal of their succession case for these leave-petitioners. The argument of the learned Counsel for the leave-petitioners that there is no provision in law for transposing petitioner as opposite party and opposite party as petitioner in any proceeding-also is not correct. Though there is no clear provision mentioning the word 'transposition' but order I, rule 10(2) of the Code of Civil Procedure enables the courts to make such transposition, order I, rule 10(2) has empowered the courts to strike out name of any party, either plaintiff or defendant, improperly joined and also to add any persons-either as plaintiff or defendant-who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary for effectual and complete adjudication of the matter. Exercising this very power the courts can make transposition also of either of the parties of a suit or other proceeding to the other category of the parties and the courts also are doing so, and it has become a long practice now. Of course, generally the courts will not allow transposition of defendants as plaintiffs after striking the names of the original plaintiffs or after transposing them as defendants But in appropriate facts and circumstances as these are in the present case the courts should not be reluctant to make such transposition of the parties for the ends of Justice or to prevent abuse or the process or the court.

9. Mr Fida M Kamal has advanced argument to the effect also that Order I, rule 10 of the Code of Civil Procedure is not applicable in a succession case which is neither a suit nor a proceeding as mentioned in section 141 of the Code of Civil Procedure and, as such, the impleading of the added opposite parties in this succession case was illegal. But we do not accept this argument also of the learned Counsel. Section 141 of the Code of Civil Procedure has provided that the procedure provided in the Code of Civil Procedure in regard to suits shall be followed, as far as it can be made applicable in all proceedings in any court of civil jurisdiction. A succession case, in all consideration, is a proceeding in a court of civil jurisdiction. It needs to be mentioned here that these leave-petitioners themselves also filed the application for withdrawal of the succession case as per provision of the Code of Civil Procedure.

10. However, in the circumstances narrated above the court below did not commit any wrong or injustice at all in transposing the added opposite parties as petitioners and the petitioners as opposite parties in the succession case after rejecting the petitioners application for withdrawal of that succession case. The withdrawal of the succession case, if had been allowed, these leave-petitioners would not have been benefited in any way, rather the withdrawal of this succession case would require the added opposite parties to file a fresh succession case causing abuse of the process of court.

11. However, we find no merit in this Civil Petition for Leave to Appeal and hence it is dismissed.

Ed.

APPELLATE DIVISION
(Civil)

Syed Mahmud Hossain J
Md Imman Ali J
Md Anwarul Haque J

Judgment
January 5th, 2014.

Ali Garments Limited
.....Appellant
vs
Commissioner of Taxes.....Respondent*

Income Tax Ordinance (XXXVI of 1984)
Sections 160 and 161(2)

Under section 161(2) the High Court Division is required only to hear and decide the question of law raised and, thereafter, deliver its judgment stating the grounds on which the decision is founded.

With regard to the submission of learned Counsel for the appellant that the High Court Division itself could have formulated a point of law in the manner suggested, we are of the view that section 160 of the Ordinance does not provide for any such action. Clearly it is for the assessee to formulate any point of law and make the reference to the High Court Division in the prescribed form. Under section 161(2) the High Court Division is required only to hear and decide the question of law raised and, thereafter, deliver its judgment stating the grounds on which the decision is founded. .....(19)

Commissioner of Income Tax A-Range, Chittagong vs Harendra Kumar Shil, 34 DLR (AD) 298 ref.

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

Mahfuza Begum Assistant Attorney-General instructed by B Hossain, Advocate-on-Record—For the Respondent.

*Civil Appeal No. 279 of 2002

(From the judgment and Border dated 25th of March, 2001 passed by the High Court Division in Reference Application No. 43 of 1997)

Judgment

Md Imman Ali J: The Civil Appeal, by leave, is directed against the judgment and order dated 25-3-2001 passed by a Division Bench of the High Court Division in Reference Application No. 43 of 1997 rejecting the reference.

2. The facts of the case, in brief, are that the appellant filed return for the assessment year 1991-92 showing gross profit at the rate of 11.77%. Notice was served upon him, fixing date of hearing but he did not appear at the time of hearing and the Deputy Commissioner of Taxes took the matter for *ex-parte* hearing and held that the assessee intentionally avoided attending the case and made assessment under section 84 of the Income Tax Ordinance, 1984. The Deputy Commissioner of Taxes considered the audit report submitted by the company but found that supporting papers including vouchers have not been filed and made the assessment fixing 64.70% as the rate of gross profit.

3. Against the said order the appellant filed an appeal being IT Appeal No. 56/coy-2/94-95 and the same was heard by the Commissioner of Taxes (Appeal) who by his order dated 30-10-1995 reduced the gross profit to 25% and also allowed deduction of Taka 17,50,000 but rejected the claim for rebate of 60% as a garments manufacturer and exporter.

4. Against the said order the assessee appellant filed ITA No. 1831 of 1995-96 before the Taxes Appellate Tribunal. The Tribunal directed the revenue authority to accept the sale as disclosed by them and also reduced the rate of gross profit to 20% from 25% holding that the decision was taken by the appellate authority on compari-

son of records with parallel cases.

5. Against the said order the appellant filed an application under section 160 of the Income Tax Ordinance before the High Court Division stating that the Taxes Appellate Tribunal has illegally fixed gross profit at the rate of 20% instead of 11.77% the question of law under reference was couched in the following terms:

> "Whether in the facts and circumstances of the case the Taxes Appellate Tribunal was justified in directing adoption of gross profit at 20% in view of the fact that the petitioner's accounts are audited and verifiable, contrary to Income Tax Law and Procedure."

6. By the impugned judgment and order, the High Court Division rejected the reference application.

7. Against the said judgment and order dated 25-3-2001 the appellant filed a civil petition for leave to appeal.

8. Leave was granted to consider the following grounds:

I. Whether the High Court Division acted illegally in holding that no question of law arose for their decision in considering the reference formulated and placed before them;

II. Whether the respondent having not filed any affidavit-in-opposition in the reference application disputing the question of law as formulated nor suggesting any new question of law, the High Court Division acted illegally in holding that no question of law arose out of the order of the Tribunal; as such the reference application was not maintainable; and

III. Whether the High Court Division could itself have formulated the question referred by way of reference.

9. Mr Rafiq-ul-Huq, learned Senior Advocate appearing on behalf of the appellants made submissions in line with the grounds upon which leave was granted. He submitted that the High Court Division acted illegally in not considering that the Tribunal applied GP at the rate of 20% without taking into consideration the evidence on record when the misreading and non-consideration of evidence are questions of law and, as such, the appeal is liable to be allowed. The learned Advocate further submitted that the audit report was supplied containing a certificate from a Chartered Accountant certifying the correctness of the true income of the assessee, and, as such, the Tribunal was bound by the evidence given by the Appellant under section 82 of the Income Tax Ordinance and, as such, the High Court Division acted illegally in holding that no question of law had arisen in the reference application for their decision. He also submitted that the High Court Division acted illegally in not formulating any question of law as prayed for by the appellant. The learned Advocate lastly submitted that the question of law as formulated in the Reference Application does arise from the order of the Tribunal and, as such, the High Court Division acted illegally in holding that question of law does not arise for their decision in the instant Reference Application and the impugned judgment is liable to be set-aside and the appeal may be allowed.

10. Mrs. Mahfuza Begum, learned Assistant Attorney-General appearing on behalf of the respondent submitted that the High Court Division on perusal of the materials on record has rightly held that no question of law has been raised before it because the determination of the rate of gross profit is not a question of law. In support of her contention she referred to the decision in the Case of *Commissioner of Income Tax A-Range, Chittagong vs Harendra Kumar Shil* reported in *34 DLR (AD) 298*, where it was held that:

> "Determination of rate of gross profit for the particular year in respect of the particular

business or trade, is purely a question of fact, and that being so it could not be made a ground for making reference under section 66(1) of the Income-tax Act."

11. She further submitted that the question of fact does not require to be controverted by filing an affidavit-in-opposition. As there was no requirement to controvert the question of fact raised before the High Court Division, the Revenue Department did not file any affidavit-in-opposition and for non-filing of affidavit-in-opposition by the respondent, the appellant cannot be benefited in any manner. The learned AAG lastly submitted that the audit report was not accepted by the Deputy Commissioner of Taxes for want of supporting papers and the appellant having not furnished any supporting papers either before the Commissioner (Appeal) or the Tribunal, their claim for being assessed at the rate of 11.77% in respect of gross profit is not tenable and thus suggestion for reformulating the alleged question of law as claimed by the appellant does not arise.

12. During the course of hearing Mr. Rafique-ul-Huq, learned Senior Counsel submitted that the appellant supplied accounts certified by Chartered Accountants which under section 82 of the Income Tax Ordinance, 1984 is sufficient to deem the return as correct.

13. On the other hand, Mrs Mahfuza Begum, learned AAG submitted that the provisions of section 82 is only applicable if the certificate of the Chartered Accountants is furnished on the prescribed form under Rule 64A of the Income Tax Ordinance Rules, 1984.

14. We have considered the submissions of the learned advocates appearing for the parties concerned and perused the impugned judgment as well as other evidence and materials on record.

15. The relevant portions of section 160 of the Income Tax Ordinance provides as follows:

160 Reference to the High Court Division.—(1) The assessee or the Commissioner may, within 60(sixty) days from the date of receipt of the order of the Appellate Tribunal communicated to him under section 159, by application in the prescribed form, accompanied, in the case of an application by the assessee, by a fee of 100 (one hundred taka), refer to the High Court Division any question of law arising out of such order:

Provided further that the Board may, on an application made in this behalf modify or waive , in any case, the requirement of such payment.

[.....]

(4) on receipt of the notice on the date of hearing of the application, the respondent shall, at least seven days before the date of hearing submit in writing a reply to the application; and he shall therein specifically admit or deny whether the question of law formulated by the applicant arises out of the order of the Appellate Tribunal.

(5) If the question formulated by the applicant is, in the opinion of the respondent, defective, the reply shall state in what particular the question is defective and what is the exact question of law, if any, which arises out of the said order; and the reply shall be in triplicate and be accompanied by any documents which are relevant to the question of law formulated in the application and which were produced before the Deputy Commissioner of Taxes, the Inspecting Joint Commissioner, the Appellate Joint Commissioner, the Commissioner (Appeals) or the Appellate Tribunal, as the case may be, in the course of any proceedings relating to any order referred to in sub-section (2) (a) or (b) .

16. The High Court Division observed that no audited accounts and papers relating to the applicant's accounts were either before the Commissioner of Taxes (Appeal) or before the

Taxes Appellate Tribunal.

17. Having examined the reference application as well as the order of the Taxes Appellate Tribunal the High Court Division held that no question of law had arisen from the said order and the assessee-applicant had not been able to formulate any point of law. In this regard the learned AAG has referred to the decision in the case of *Commissioner of Income Tax A-Range, Chittagong vs Harendra Kumar Sil* reported in *34 DLP (AD) 298,* where it was specifically held that the determination of rate of gross profit is purely a question of fact and could not be made a ground for making reference. Since that was the only point of reference made by the appellant before the High Court Divison, we are constrained to agree with the submissions of the learned AAG that the respondents were not required to controvert the same by filing an affidavit-in-opposition. We also note that under sub-section (4) the respondents are required to specifically admit or deny whether the question of law formulated by the appellant arises out of the order of the Appellate Tribunal. Since in view of the above mentioned decision of this Division, no question of law arose in the reference the respondents were not required to admit or deny the reference. Similarly the question of reformulating the question referred by the applicant would only arise if the reference was indeed on a question of law.

18. We are of the view that the High Court Division correctly found that no question of law had arisen.

19. With regard to the submission of learned Counsel for the appellant that the High Court Division itself could have formulated a point of law in the manner suggested, we are of the view that section 160 of the Ordinance does not provide for any such action. Clearly it is for the assessee to formulate any point of law and make the reference to the High Court Division in the prescribed form. Under section 161(2) the High Court Division is required only to hear and decide the question of law raised and, thereafter, deliver its judgment stating the grounds on which the decision is founded.

20. In the instant case the High Court Division found that no question of law had arisen, which is fully in accordance with the decision reported in *34 DLR (AD) 298,* mentioned above.

We do not find any illegality or infirmity in the impugned judgment and order of the High Court Division, accordingly, the appeal is dismissed without however any order as to costs.

Ed.

APPELLATE DIVISION
(Civil)

Nazmun Ara Sultana J Syed Mahmud Hossain J Md Imman Ali J	Chittagong Steel Mills Ltd and another..... .....Appellants
	vs
Judgment April 23rd, 2014.	MEC, Dhaka & others .....Respondents*

Code of Civil Procedure (V of 1908)
Order XLI, rule 33

Neither the arbitrator nor the trial Court granted interest, the High Court Division in exercise of power conferred upon it under Order XLI, rule 33 of the Code can grant interest.

In the suit, interest was prayed for from 7-6-1995 which is the date of the pronouncement of the award till realization and this interest was neither pre-reference period interest nor pendente lite interest but future interest, i.e., from the date of award till realization of the money

*Civil Appeal No. 106 of 2004.

(From the judgment and order dated 13-1-2004 passed by the High Court Division in First Miscellaneous Appeal No.157 of 2001 and Civil Rule No.321(FM) of 2001).

and this prayer appears to be in accordance with justice and fairness. .....(18 & 17)

WAPDA vs Khanzada Md Abdul Haque Khan Khattak and Company, PLD 1990 SC 359 ref.

Quamrul Hoque Siddique, Advocate, instructed by Mvi. Md Wahidullah, Advocate-on-Record—For the Appellants.

Syed Amirul Islam, Senior Advocate, instructed by Sufia Khatun, Advocate-on-Record—For Respondent No.1.

None represented—Respondent Nos.2-5.

Judgment

Syed Mahmud Hossain J: This appeal by leave by the defendants-appellants is directed against the judgment and order dated 13-1-2004 passed by a Division Bench of the High Court Division in First Miscellaneous Appeal No.157 of 2001 and Civil Rule No.321 (FM) of 2001 dismissing the appeal and discharging the Rule and allowing the Cross Appeal/Objection No.5/2001 filed by the plaintiff-respondent No.1 granting interest on the Award amount @ 5% from the date of Award till payment.

2. The facts, leading to this appeal, in a nutshell, are that the respondent filed an application under sections 14/17 of the Arbitration Act,1940 in the Fifth Court of Subordinate Judge, Dhaka, stating, *inter alia*, that they were appointed as exclusive sales/commission agent for sale of different products of the appellant, Chittagong Steel Mills Ltd. (in short, the Mill) on the terms and conditions contained in an agreement dated 29-3-1994 for sale of CI Sheet, Billet and other goods of the Mill for a period up to June, 1995 and the respondent negotiated the sale transaction of the goods of the Mill with the defence department (Army) as a result of which the Mill received Taka 14.50 crores as advance payment and the respondent being entitled to get commission for the sale of the products @ 1% of the sale price of Taka 14.50 crores submitted their bill for a sum of Taka 14,50,000 as commission but the bill was refused by the Mill in violation of the terms of the agreement and thereafter the appellants completed delivery of the entire goods under the sale agreement with the Defence Service and thereby the respondent claimed to be entitled to get further amount of Taka 43,50,000 as commission @ 3% of the sale price amounting to Taka 14.5 crores and the Mill refused to make payment of the amount and there being thus a breach of the agreement, the respondent under the provisions of the agreement dated 29-3-1994 filed application before the Registrar of Metropolitan Chamber of Commerce and Industries, Dhaka for arbitration of the dispute praying for an award of Taka 58,00,000 with cost of arbitration and the Tribunal of Arbitrators gave the award dated 7-6-1995 for Taka 58,00,000 in favour of the respondent against the appellants with cost of Taka 10,100 and that thereafter the respondent as the plaintiff filed application under sections 14/17 of the Arbitration Act before the court below for passing a decree in terms of the award and to make the award as a Rule of the Court. The Mill filed objection but the Court below by order dated 28-3-2001 rejected the objection and thereby refused to setasidethe aforesaid award and made the award dated 7-6-1995 as a Rule of the Court.

3. Being aggrieved, the Mill preferred First Miscellaneous Appeal No.157 of 2001 before the High Court Division under section 39(vi) of the Arbitration Act, 1940. The respondent also filed Cross Appeal/Objection No.5/2001 claiming interest on the amount awarded. By the impugned judgment, the High Court Division dismissed the appeal affirming the decision of the Subordinate Judge in making the award a Rule of the Court and further allowing the Cross Appeal/Objection No.5/2001 of the respondent and thereby directing the Mill to pay interest on the award amount

of Taka 58,00,000 @ 5% per annum from the date of the award i.e. 7-6-1995 till realisation.

4. Feeling aggrieved by and dissatisfied with judgment and order dated 13-1-.2004 passed by the High Court Division, the defendants as the leave-petitioners moved this Division by filing Civil Petition for Leave to Appeal No.261 of 2004, in which, leave was granted resulting in Civil Appeal No.106 of 2004.

5. Mr. Quamrul Hoque Siddique, learned Advocate, appearing on behalf of the appellants, submits that the High Court Division awarded 5% interest per annum from the date of the award, i.e., from 7-6-1995 till payment of the amount of respondent-cross-objector, although the trial Court did not grant any interest. He further submits that the High Court Division erroneously came to a finding that cross objection as provided for under Order XLI, Rule 23 of the Code of Civil Procedure shall apply to a arbitration proceeding and relying on the said provision allowed the cross objection of the respondent by awarding 5% interest per annum from the date of the award, although the Code of Civil Procedure has no manner of application in an arbitration proceeding.

6. Mr Quamrul Hoque Siddiqui, however, did not raise any other ground although leave was granted on many grounds.

7. Mr Syed Amirul Islam, learned Senior Advocate, appearing on behalf of respondent No.1, on the other hand, supports the impugned judgment. He also relies upon a number of cases relating to awarding of interest.

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

9. At the very outset, it is necessary to go though the ground, on which, leave was granted which are as under:

> "First Miscellaneous Appeal No.157 of 2001 was filed by the petitioners under section 39(vi) of the Arbitration Act, 1940 against the order of the 5th Subordinate Judge passed in Title Suit No.183 of 1995 refusing to set-asidethe award in question, which is not an ordinary appeal under the Code of Civil Procedure and, therefore, the Cross Appeal No.5/2001 filed by the respondent praying for interest on the award amount, which was not allowed either by the Arbitrators nor by the Court below, was misconceived, untenable in law and outside the scope of section 39 of the Arbitration Act, 1940 and hence, the said Cross Appeal No.5/2001 of the respondent No.1 was not entertainable at all and the interest allowed by the High Court Division on the said award amount @ 5% per annum from the date of the award (i.e. 7-6-1995) till realization and could not be sustained in law and liable to be dismissed and therefore, the impugned judgment dated 13-1-2004 of the High Court division is liable to be set-aside. The findings of the High Court Division that the respondent (MEC Dhaka) made an additional prayer before the Arbitrators in paragraph 10 of their original petition before the Arbitrators under Clause 17 of the said agreement, wherein the claim of Taka 43.50 lakh equivalent to 3% of the sale price under subclause "General Commission Ka" of Clause 11 of the contract has been put forward as quoted in paragraph 7 of the judgment is without any basis or evidence or papers on record of the appeal in support of such finding in as much as no paper was filed by the respondent to show that such prayer was made before arbitrators subsequent to the presentation of the original application for arbitration on 11-12-94 and moreover the said respondent did not file any reply to the Memo of FMA nor filed any objection to the petition

Andhra Pradesh vs LVA Dikshitula, AIR 1979 SC 193, page 205. As such, when the application of the definition to a term in a provision containing that term makes it unworkable and otiose, it can be said that the definition is not applicable to that provision because of contrary context; as has been observed in *Special Officer and Competent Authority Urban Land Ceilings Hyderabad vs PS. Rao, AIR 2000 SC 843 page 844.*

27. Considering the use of words in the statute, its context, the collocation and the object of such words relating to the matter in question i.e., inquiry by the Commission, which is a fact finding process with a view to finding out the *prima facie* correctness of the allegation, "উক্ত অভিযোগের প্রাথমিক সত্যতা উদঘাটনের লক্ষ্যে," a clear analogy can be drawn to the effect that so far the schedule offence is concerned, it can only be investigated by the Commission; however, vide section 17 clause (ga) and 19(1) the Commission is authorized to enquire any complaint whatsoever on corruption," "দুর্নীতি সম্পর্কিত অভিযোগ" even if it is not covered in the schedule to the Ain, 2004.

28. It further appears on a close examination of the Anti Corruption Commission Rules, 2007 that before embarking upon an inquiry vide rule 3 (7) on the complaint so made, if the Commission finds *prima-facie* materials the "যাচাই বাছাই কমিটি" shall make recommendation considering the materials as placed before it, which provides as follows:

> ".....৩(৭) উপ-বিধি (৬) এর অধীন প্রস্তুতকৃত তালিকা সংশ্লিষ্ট জেলা কার্যালয়ের জন্য গঠিত যাচাই-বাচাই কমিটি কর্তৃক সুপারিশ প্রদানের তারিখ হইতে অনধিক সাত কার্যদিবসের মধ্যে উক্ত কার্যালয় উহার বিভাগীয় কার্যালয়কে অবহিত রাখিয়া কমিশনের প্রধান কার্যালয়ে প্রেরণ করিবে।"

29. Under rule 3(8) the said recommendation shall be placed before the Commission for approval and under rule 6(2) only after getting approval of the Commission those complaints shall be inquired into by the deputed officers of the Commission. The relevant provisions are quoted below:

> "৩(৮) উপ-বিধি (৭) এর অধীন তালিকা প্রাপ্তির দশ কার্যদিবসের মধ্যে কমিশনের সচিব কমিশনের প্রধান কার্যালয়ের জন্য গঠিত বাছাই কমিটির সুপারিশ সংগ্রহ করিয়া উক্ত সুপারিশসহ উক্ত অভিযোগসমূহের বিষয়ে সিদ্ধান্ত গ্রহনের জন্য দায়িত্বপ্রাপ্ত কমিশনারের নিকট উহা উপস্থাপন করিবেন।"
>
> "৬(২) উপ-বিধি (১) এর অধীন কমিশন কর্তৃক যে সকল অভিযোগের বিষয়ে অনুসন্ধানকার্য পরিচালনার জন্য সিদ্ধান্ত গ্রহন করা হয় সেই সকল অভিযোগ অনুসন্ধানের জন্য কমিশনের নিকট হইতে দায়িত্বপ্রাপ্ত কর্মকর্তার নিকট নির্দেশ আকারে প্রেরণ করিতে হইবে।"

30. Rule 7 further prescribes the time limit of inquiry and that vide rule 8 during the course of inquiry on the allegation of corruption the officer concerned may direct the person concerned "অভিযুক্ত ব্যক্তি" by issuing a notice in writing to place his oral or written explanation to counter the allegations; and on receipt thereof it will be kept with record. The said provision runs as under:

> "৮। অনুসন্ধানকার্য চলাকালে অভিযুক্ত ব্যক্তির শুনানী গ্রহণ।-(১) দুর্নীতি বিষয়ক কোন অভিযোগের অনুসন্ধান চলাকালে কমিশন বা কমিশন কর্তৃক ক্ষমতাপ্রাপ্ত কোন কমিশনার বা কর্মকর্তা যদি মনে করে যে, অভিযোগের সহিত সংশ্লিষ্ট ব্যক্তির বক্তব্য শ্রবণ করা প্রয়োজন তাহা হইলে অভিযুক্ত ব্যক্তিকে লিখিত নোটিশ প্রদান করিয়া নোটিশে উল্লিখিত সময়সীমার মধ্যে মৌখিক বা লিখিত বক্তব্য পেশ করিবার সুযোগ প্রদান করিতে পারিবে।
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> (২) উপ-বিধি (১) এর অধীন নোটিশ প্রাপ্ত ব্যক্তি তাহার বিরুদ্ধে আনীত অভিযোগ খন্ডন করিয়া নোটিশে নির্দেশিত সময়সীমার মধ্যে ব্যক্তিগতভাবে বা তাহার নিয়োজিত আইনজীবীসহ মৌখিক বা লিখিত বক্তব্য পেশ করিতে পারিবে এবং উক্তরূপে বক্তব্য পেশ করা হইলে সংশ্লিষ্ট কমিশনার বা কর্মকর্তা উহা সংশ্লিষ্ট নথিতে অন্তর্ভূক্ত করিবেন।"

31. In other words, the Commission maintains several check points before embarking upon

an enquiry considering the materials so have been placed before it.

32. In view of the above position of law (Act No. V of 2004 and the Rules, 2007) we have no manner of doubt to find that on the allegation of corruption on any subject matter as well as on the allegation of commission of schedule offences of the Act No. V of 2004 the Commissioner or the officers of the Commission entrusted with the power to enquire is empowered under section 19 of the Ain, 2004 read with rules 8 and 20 of the Rules, 2007 to direct the person, against whom a complaint is made, to appear before the Commission to give explanation either orally or in writing, with a view to rind out the correctness of the allegation.

33. In that view of the matter, issuance of the impugned order dated 4-10-2011 (Annexure-K) directing the petitioner and 4 (four) others to appear before the Commission to record their statements, does not suffer from any illegality requiring interference by this court.

34. Lastly, it is pertinent to note that departmental proceeding so initiated on the similar allegation under the respective service rules cannot be a bar to inquiry by the Commission under the Act No. V of 2004 towards finding the correctness of the said allegations.

35. Considering the facts and circumstances of the case; the observations and findings so made above we find no substance for consideration in the present Rule.

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

37. The order of stay granted earlier by this court is hereby vacated.

Ed.

HIGH COURT DIVISION
(Statutory Original Jurisdiction)

AFM Abdur Rahman J	Managing Director, Baghdad Vegetable Oil Industries Ltd .....Petitioner
Judgment January 11th, 2012.	vs
	Van Den Heghs and others.... .....Respondent*

Trade Mark Act (XIX of 2009)
Section 42

Provisions did not mention about the user of registered trade mark within the territory of Bangladesh yet the scheme and object of Act indicates that unless the registered trade mark is used within the territory of Bangladesh for the purpose of business by affixing the mark on the body of the product and marketing the same within the territory of Bangladesh, then the registered trade mark cannot be treated to have been in use within the meaning of section 71 of the Act. .....(17)

Moazzam Hussain, Advocate—For the Petitioner.

Judgment

AFM Abdur Rahman J: This application, under section 42 of the Trade Mark Act 2009, praying for a direction for removal of the registered Trade Mark No. 7685 and 7682, both in class No. 29 having Bengali inscription ডালডা (DALDA) from the register of Trade Mark, has been heard on contest and now disposed off by this judgment.

2. The petitioner asserts that it produces vegetable Ghee for quite a long time in its esteemed industry and adopted a Trade name consisting of the word ফ্রেশ ডালডা (FRESH DALDA) and applied for registration of the said trade name

*Trade Mark Application No. 2 of 2011.

ফ্রেশ ডালডা (FRESH DALDA) as trade mark before the Registrar of trade mark, the respondent No. 2, under application No. 49105 in class-29, on 20th November, 1996 which was published in Trade Mark Journal No. 187 in the month of February 1998 as advertised.

3. But as the registrar of Trade Mark did not respond to the next step of the application within a reasonable period, the petitioner filed a fresh application being No. 142233 on 26 April 2011, upon which the examiner of the trade mark registry certified that the registered Trade Mark No. 7685 and 7682 both in class-29 contained similar Trade name in Bengali word ডালডা (DALDA) and, as such, the petitioners application cannot be entertained. The petitioner, upon enquiry, found that the Proprietor of that mark ডালডা (DALDA), the respondent No. 1, obtained registration of the said trade mark ডালডা (DALDA) in the year 1958 in class-29 under No. 7685 and 7682 and obtained renewal of the same on 21-12-1976 and later on 21-4-2004 for consecutive 15 years from 1995 which having been expired and the said Trade Mark not being in use for a period of five years before one month of the filing of the petitioner's application, the trade mark ডালডা (DALDA) registered under No. 7685 and 7682 in class 29 has no use and, as such, required to be removed from the register of trade mark under the Provisions of section 42 (ka) and (kha) of the Trade Mark Act 2009 in order to facilitate the petitioners application registered.

4. The petitioner further asserts that due to superior quality of Banaspati (vegetable Ghee) marketed under his brand ফ্রেশ ডালডা (FRESH DALDA) the petitioner received popularity in the market due to its reputes and wide advertisement through various media and enough sale promotion measures were undertaken with the result that the Banaspati marketed under the trade name ফ্রেশ ডালডা (FRESH DALDA) become distinctive of the product. As a matter of fact the Banaspati manufactured by the petitioner, under the brand ফ্রেশ ডালডা (FRESH DALDA) is in great demand in the country as the consumer had a fascination for the Banaspati marketed under the Trade name ফ্রেশ ডালডা (FRESH DALDA) and, as such, the petitioner lead the market by paying huge amount in taxes and in VAT to the government. Since the petitioner's mark has not been admitted by the registrar of the trade mark for the reason due to the earlier registration of the trade mark ডালডা (DALDA) under the registered No. 7685 and 7682 in Class-29, the same is required to be removed on the ground of non-user in order to facilitate the petitioners trade mark to be registered under the same class for which the registrar of the Trade Mark was duty bound to remove the said mark ডালডা (Dalda) from the registrar and in his failure the petitioner preferred the instant application before this court.

5. The notice of the instant proceeding was duly served upon the respondent No. 1 VAN DEN BEGHS & JUGENS LIMITED by serving the same on the attorney of law for the respondent No. 1, Remphay and Sons Limited, Dhaka, Bangladesh, who obtained the renewal of the Trade Mark Nos. 7685 and 7682, both through manual and postal process.

But none appeared to oppose the application.

6. The learned Advocate Mr. Mohd. Moazzam Hussain, appearing on behalf of the petitioner argued that the petitioner is using the trade name/commercial mark ফ্রেশ ডালডা (FRESH DALDA) for his product of Banaspati marketed in Bangladesh since long for which it became a distinctive trade mark and the impugned mark ডালডা (DALDA) being distinctively dissimilar with the petitioners mark ফ্রেশ ডালডা (FRESH DALDA), the petitioner is entitled to obtain registration of his commercial mark as trade mark. But the registrar of Trade Mark most illegally did not allow the registration of the petitioners mark ফ্রেশ ডালডা (FRESH DALDA) on the ground that the

impugned Trade Mark ফ্রেশ ডালডা (Dalda) earlier registered under No. 7685 and 7682 in the name of respondent No. 1 is similar to petitioners mark which being misconceived decision, in as much as that the petitioners mark FRESH DALDA has distinctive dissimilarities with the registered mark ফ্রেশ ডালডা (Dalda), the petitioner is entitled to get the mark ফ্রেশ ডালডা (FRESH DALDA) registered upon removing the impugned trade mark ফ্রেশ ডালডা (DALDA) from the registrar of Trade mark.

7. The learned Advocate Mr. Mohd. Moazzam Hussain, argued that the petitioner is an aggrieved person against the existence of the registered Trade Mark ডালডা (Dalda) in the registrar of trade mark which being expired and not being in use for more than five years within the territory of Bangladesh, most illegally caused non-acceptance of the petitioner application for registration of the Trade name ফ্রেশ ডালডা (FRESH DALDA) as trade mark, but as no such product has been appearing in the markets within the territory of Bangladesh for long, the registered trade mark ফ্রেশ ডালডা (DALDA) is liable to be removed from the register for its non-user for more than five years and the petitioner mark is entitled to be registered as a distinctive trade mark as it become such due to the wide marketing of the product Banaspati under the commercial name ফ্রেশ ডালডা (FRESH DALDA). The learned Advocate Mr Mohammad Moazzem Hossain contends that the provisions of section 26(4) of the Trade Mark Act 2009 provides the meaning of use of registered trade mark indicating that not only the trade mark itself must be used within the territory of Bangladesh but also the product having the registered mark inscribed must be marketed within the territory of Bangladesh.

8. The learned Advocate Mr Mohd Moazzam Hussain further argued that the non-user of the Trade Mark ডালডা (Dalda) with the territory of Bangladesh appears from the fact that the proprietor of the same is not active in business with the product ডালডা (DALDA) within the territory of Bangladesh which is proved from the fact that no infringement suit has been filed against the petitioner although the petitioner has been in continuous use of the commercial mark ফ্রেশ ডালডা (FRESH DALDA) from the year 1995 within the territory of Bangladesh for the same product Banaspati and therefore the petitioner is entitled to obtain the registration of his mark ফ্রেশ ডালডা (FRESH DALDA) under the application as filed before the registrar of trade mark upon removing the registered trade mark ডালডা (DALDA) in the same class.

9. We have heard the learned Advocate, perused the materials on record.

The pertinent question to be addressed by this court is that whether the registered trade mark ডালডা (DALDA) is liable to be removed from the register of trade mark under the provision of section 42 of the Trade Mark Act 2009 on the ground of its non-user within the meaning of section 71 of the Trade Mark Act 2009 and also whether the trade mark ফ্রেশ ডালডা (FRESH DALDA) has its distinct dissimilarities with the registered trade mark ডালডা (Dalda).

10. The petitioner being the user of commercial mark ফ্রেশ ডালডা (FRESH DALDA) filed an application on 28th November, 1996 under the application No. 49105 in class-29 under the Trade Mark Act 1940 and Annexure-A, appended to the petition, reveals that the same was advertised in the Trade Mark Journal No. 187 in the month of February 1998. Later, on the alleged non-action by the registrar of trade marks, the petitioner further filed another application on 25th April 2011 as application No. 142233 under the new statute Trade Mark Act 2009 as reveals from Annexure-B appended to the petition.

11. But from Annexure-C it appears that the registrar of the trade mark upon finding that the similar mark ডালডা (DALDA) in Bengali has

already been registered under Registration No. 7685 and 7682, both in class-29, for which the registrar impliedly refused to register the Mark of the petitioner ফ্রেশ ডালডা (FRESH DALDA). The petitioner has now approached this court with a prayer for a direction upon the register to remove the mark ডালডা (DALDA) from the registrar of Trade Mark and to register the petitioner mark ফ্রেশ ডালডা (FRESH DALDA) on two fold ground that the (l) Registered Trade Mark DALDA ডালডা has not been in use for more than five years prior to one month of filing of the application and that (2) the mark ফ্রেশ ডালডা (FRESH DALDA) has distinctive dissimilarity with the trade mark ডালডা (Dalda) upon asserting that the non-user of the said Trade Mark ডালডা (Dalda) is apparent from the facts that no product of Banaspati with the registered trade mark ডালডা (DALDA) is marketed or available within the territory of Bangladesh and that despite the use of trade name ফ্রেশ ডালডা (FRESH DALDA) by the petitioner for long no infringement suit was filed against him by the registered proprietor of the trade mark ডালডা (DALDA) and, as such, the existence of the said trade mark hinders the petitioner's right to get its trade mark ফ্রেশ ডালডা (FRESH DALDA) registered under the provisions of Trade Mark Act 2009.

12. It has further been argued that the Provisions of section 26(4) and 71 of the Trade Mark Act indicates that the product, along with the registered Trade Mark is to be marketed within the territory of Bangladesh, in order to keep the mark in use, else the same will be treated as not in use.

13. These are the entire contention of the learned Advocate Mr Mohammad Moazzem Hossain arguing on behalf of the petitioner.

14. The provision of section 42 of the Trade Mark Act 2009, which deals in removal of registered Trade Mark from the registrar of trade mark, may be profitably examined;

ট্রেডমার্ক আইন ২০০৯
ধারা ৪২;

ট্রেডমার্ক ব্যবহার না করিবার কারন নিবন্ধন বহি হইতে কর্তন এবং সীমাবদ্ধতা আরোপঃ-(১) যদি কোন সংক্ষুব্ধ ব্যক্তি নিম্নবর্নিত কোন কারণে হাইকোর্ট বিভাগ বা নিবন্ধকের নিকট, নির্ধারিত পদ্ধতিতে আবেদন করেন, তাহা হইলে সংশ্লিষ্ট পণ্য বা সেবার নিবন্ধিত ট্রেডমার্ক নিবন্ধন বহি হইতে কর্তন করা যাইবে-

(ক) পণ্য বা সেবার ট্রেডমার্ক নিবন্ধনের আবেদনকারী বা ধারা ৪১ এর অধীনে গঠনাধীন কোম্পানীর সৎ উদ্দেশ্যে না থাকা সত্বেও, সংশ্লিষ্ট পণ্য বা সেবার ট্রেডমার্ক নিবন্ধন করা হইয়াছে এবং আবেদন দাখিলের পূর্ববর্তী ১(এক) মাস পর্যন্ত আবেদনকারী বা উক্ত কোম্পানী কর্তৃক উক্ত পণ্য বা সেবার ট্রেডমার্ক সৎ উদ্দেশ্য ব্যবহার করা হয় নাই; অথবা

(খ) ট্রেডমার্ক নিবন্ধিত হইবার পরবর্তী ৫(পাঁচ) বৎসর বা তদুর্ধ্ব সময় পর্যন্ত উক্ত পণ্য বা সেবার ট্রেডমার্ক আবেদনকারী বা কোম্পানী কর্তৃক সৎ উদ্দেশ্য ব্যবহার করা হয় নাই।

(২) নিম্নবর্ণিত ক্ষেত্রসমূহ ব্যতীত, ট্রাইবুনাল উপধারা (১) এ অধীন দাখিলকৃত কোন আবেদন প্রত্যাখান করিবে না, যদি-

(ক) ধারা ১০ এর অধীন আবেদনকারীকে অভিন্ন বা প্রায় সাদৃশ্যপূর্ণ পণ্য বা সেবার ট্রেডমার্ক নিবন্ধনের অনুমতি প্রদান করা হয়, অথবা

(খ) ট্রাইবুনালের নিকট প্রতীয়মান হয় যে, উক্ত পণ্য বা সেবার ট্রেডমার্ক, নির্দিষ্ট তারিখ বা মেয়াদের মধ্যে, আবেদনকারী বা কোম্পানী কর্তৃক সৎ উদ্দেশ্যে ব্যবহার করা হইয়াছে।

(৩) যদি কোন সংক্ষুব্ধ ব্যক্তি নিম্নবর্ণিত কোন কারনে হাইকোর্ট বিভাগ বা নিবন্ধনের নিকটে নির্ধারিত পদ্ধতিতে আবেদন করেন, তাহা হইলে ট্রাইবুনাল সংশ্লিষ্ট পণ্য বা সেবার নিবন্ধিত ট্রেডমার্কের ব্যবহার বন্ধ করিবার লক্ষ্যে সীমাবদ্ধতা আরোপ করিতে পারিবে-

(ক) পণ্য বা সেবার ট্রেডমার্ক বিক্রয়ের উদ্দেশ্য বা অন্যভাবে বাংলাদেশের কোন নির্দিষ্ট স্থান ব্যবসায়ের উদ্দেশ্য বা বাংলাদেশের বাহিরে নির্দিষ্ট কোন বাজারে রপ্তানি করিবার উদ্দেশ্য নিবন্ধিত হইয়াছে, কিন্তু

নিবন্ধিত হইবার পরবর্তী ৫(পাঁচ) বৎসর বা তদূর্ধ্ব সময় পর্যন্ত উক্ত পণ্য বা সেবার ট্রেডমার্ক আবেদনকারী বা কোম্পানী কর্তৃক সৎ উদ্দেশ্য ব্যবহার করা হয়।

(খ) ধারা ১০ এর অধীন একাধিক ব্যক্তিকে অভিন্ন বা প্রায় সাদৃশ্যপূর্ণ পণ্য বা সেবার ট্রেডমার্ক নিবন্ধনের অনুমতি প্রদান করা হইয়াছে এবং উহা বিক্রয়ের উদ্দেশ্য বা অন্যভাবে রপ্তানি করিবার উদ্দেশ্য ব্যবহার করা হয়।

(৪) উপ-ধারা ১ এর দফা (খ) বা উপ–ধারা (২) এর উদ্দেশ্য পূরণকল্প,, আবেদনকারী কর্তৃক ট্রেডমার্কের ব্যবহার না করাকে এইরুপ যুক্তি হিসাবে উত্থাপন করা যাইবে না যাহা-

(ক) বিশেষ পরিস্থিতির কারনে ঘটিয়াছে এবং

(খ) ব্যবসায় পরিত্যাগের ইচ্ছা বা ট্রেডমার্ক ব্যবহার না করিবার কারন ঘটে নাই।

15. The non-user of registered trade mark has been made a ground for its removal from the registrar of trade mark under the provision of section 42 of the trade mark Act 2009 and the phrase 'non-use' has been defined in section 71 of the trade mark Act 2009 which reads as follows;

ট্রেডমার্ক আইন, ২০০৯

ধারা-৭১; ট্রেডমার্ক এবং ট্রেড বর্ণনা ব্যবহারের (অসসর) অর্থ।-(১) কোন পণ্য বা সেবার ক্ষেত্রে, ট্রেডমার্ক, মার্ক বা ট্রেড বর্ণনা ব্যবহৃত হইয়াছে বলিয়া গণ্য হইবে, যদি কোন ব্যক্তি-

(ক) পণ্য বা সেবার ক্ষেত্রে, উহা ব্যবহার করেন;

(খ) যে মোড়কে পণ্য বা সেবা বিক্রয় করেন বা বিক্রয়ের জন্য উন্মুক্ত রাখেন অথবা বিক্রয়, বাণিজ্য বা উৎপাদনের উদ্দেশ্যে দখলে রাখেন, সেই মোড়কে উহা ব্যবহার করেন;

(গ) বিক্রয় বা বিক্রয়ের উদ্দেশ্যে উন্মুক্ত অথবা উৎপাদনের পর বিক্রয় বা ব্যবসায়ের উদ্দেশ্যে দখলে থাকা কোন পণ্য বা সেবা এমন কোন মোড়কে রাখেন, সংযুক্ত বা সংযোজন করেন যাহাতে ট্রেডমার্ক, মার্ক বা ট্রেড বর্ণনা ব্যবহার করা হইয়াছে;

(ঘ) কোন পণ্য বা সেবার ক্ষেত্রে, ট্রেডমার্ক বা মার্ক এমনভাবে ব্যবহার করেন, যাহার দ্বারা যুক্তিসঙ্গতভাবে প্রতীয়মান হয় যে, উক্ত পণ্য বা সেবায় যে ট্রেডমার্ক বা মার্ক ব্যবহার করা হইয়াছে, তাহা উক্ত ট্রেডমার্ক, মার্ক বা ট্রেড বর্ণনা দ্বারা চিহ্নিত বা বর্ণিত; বা

(ঙ) পণ্য বা সেবার ক্ষেত্রে, কোন চিহ্ন, বিজ্ঞাপন, চালান, ক্যাটালগ, ব্যবসায়িক চিঠি, বাণিজ্যপত্র, মূল্য তালিকা বা অন্য কোন বাণিজ্যিক দলিলে কোন ট্রেডমার্ক বা ট্রেড-বর্ণনা ব্যবহার করেন, এবং উক্ত ব্যবহৃত ট্রেডমার্ক বা ট্রেড বর্ণনা উল্লেখ করিয়া কোন অনুরোধ বা ক্রয়াদেশের ভিত্তিতে পণ্য বা সেবা অন্য কোন ব্যক্তির নিকট হস্তান্তর করেন।

(২) কোন ট্রেডমার্ক, মার্ক বা ট্রেড বর্ণনা পণ্য বা সেবার ক্ষেত্রে ব্যবহার করা হইয়াছে বলিয়া পণ্য হইবে, যদি উহা বুননকৃত, ছাপযুক্ত বা অন্য কোন প্রকারে উহাতে সংযোজিত বা সংলগ্ন করা হয়।

16. The provision of section 26(4) of the trade mark Act 2009 also deals with non-user of registered trade mark. The entire provision of section 26 reads as follows;

ট্রেডমার্ক আইন, ২০০৯
ধারা ৪২;

ধারা-২৬; ট্রেডমার্ক লঙ্ঘন।– (১) কোন ব্যক্তি নিবন্ধিত স্বত্বাধিকারী বা নিবন্ধিত ব্যবহারকারী না হওয়া সত্বেও, কোন পণ্য বা সেবার ক্ষেত্রে নিজ ব্যবসায় স্বতন্ত্র বা প্রতারনামূলকভাবে সাদৃশ্যপূর্ণ কোন ট্রেডমার্ক ব্যবহার করিলে, তিনি নিবন্ধিত ট্রেডমার্ক লঙ্ঘন করিয়াছেন মর্মে গন্য হইবেন।

(২) কোন নিবন্ধিত ট্রেডমার্ক লঙ্ঘিত হইবে, যদি উক্ত ব্যক্তি নিবন্ধিত স্বত্বাধিকারী বা নিবন্ধিত ব্যবহারকারী না হওয়া সত্বেও, নিজ ব্যবসায় নিম্নবর্ণিত ক্ষেত্রে এমন কোন মার্ক ব্যবহার করেন, যাহা–

(ক) ট্রেডমার্কটির সহিত অভিন্ন এবং যে পণ্য বা সেবায় উহার ব্যবহার করা হয়, তাহানিবন্ধিত ট্রেডমার্কের পণ্য বা সেবার সহিত সাদৃশ্যপূর্ণ,

(খ) ট্রেডমার্কের সহিত সাদৃশ্যপূণ্য এবং যে পন্য বা সেবায়

উহার ব্যবহার করা হয়

তাহা নিবন্ধিত পণ্য বা সেবার সহিত অভিন্ন বা

(গ) নিবন্ধিত ট্রেডমার্কের সহিত অভিন্ন এবং যে পণ্য বা সেবায় উহার ব্যবহার করা হয়, তাহা নিবন্ধিত ট্রেডমার্কের পণ্য বা সেবার সহিত অভিন্ন, এবং যাহার ফলে জনগন বিভ্রান্ত হইতে পারে এইরুপ আশংকা থাকে অথবা নিবন্ধিত ট্রেডমার্কের সহিত অনুরুপ মার্কের সম্পর্ক রহিয়াছে মর্মে ভুল ধারনার সৃষ্টি করে।

(৩) কোন ব্যক্তি কর্তৃক নিবন্ধিত ট্রেডমার্ক লঙ্ঘিত হইয়াছে বলিয়া গণ্য হইবে, যদি উক্ত ব্যক্তি, নিবন্ধিত ট্রেডমার্কের স্বত্বাধিকারী বা নিবন্ধিত ব্যবহারকারী না হওয়া সত্বেও, নিজ ব্যবসায় এমন কোন মার্ক ব্যবহার করেন, যাহা–

(ক) কোন নিবন্ধিত ট্রেডমার্কের সহিত অভিন্ন বা সাদৃশ্যপুণ্য হয়;

(খ) অন্য কোন পণ্য বা সেবার ক্ষেত্রে ব্যবহৃত হয় এবং যে পণ্য বা সেবার জন্য উক্ত মার্ক নিবন্ধিত হইয়াছে উহার সহিত সাদৃশ্যপূণ্য হয়; এবং

(গ) নিবন্ধিত ট্রেডমার্ক হিসাবে বাংলাদেশে সুপরিচিত এবং অবৈধ সুবিধা গ্রহনের উদ্দেশ্যে, যথার্থ কারণ ব্যতীত, উহা ব্যবহারের মাধ্যমে নিবন্ধিত ট্রেডমার্কের স্বাতন্ত্র্য বা সুনামের ক্ষতি করা হয়।

(৪) এই ধারার উদ্দেশ্য পূরণকল্পে, কোন ব্যক্তি কর্তৃক নিবন্ধিত ট্রেডমার্কের ব্যবহার, অর্থ–

(ক) পন্যের গায়ে বা মোড়কে মার্ক সংযুক্ত করা;

(খ) মার্ক ব্যবহার করিয়া কোন পণ্য প্রদর্শন, বিক্রয়ের নিমিত্ত বাজারে সরবরাহ, মার্কের অধীন সেবা প্রদানের প্রস্তাব করা বা মজুদ রাখা;

(গ) মার্ক সম্বলিত পণ্য আমদানি বা রপ্তানি করা;

(ঘ) বাণিজ্যিক লেনদেন সংক্রান্ত কাগজপত্র বা বিজ্ঞাপনে কোন মার্ক ব্যবহার করা।

(৫) যদি কোন ব্যক্তি নিবন্ধিত স্বত্বাধিকারী বা ব্যবহারকারী বা ব্যবহারের অধিকারপ্রাপ্ত ব্যক্তি কর্তৃক ক্ষমতাপ্রাপ্ত না হইয়া বা উহার ব্যবহার বৈধ নয় মর্মে জ্ঞাত হইয়া বা বিশ্বাস করিবার কারন থাকা সত্বেও তাহার পণ্য বা সেবার গায়ে, মোড়কে, বাণিজ্যিক বাগজপত্র বা পণ্য বা সেবার বিজ্ঞাপনে কোন নিবন্ধিত মার্ক ব্যবহার করেন, তাহা হইলে তিনি নিবন্ধিত ট্রেডমার্ক লঙ্ঘন করিয়াছেন বলিয়া গন্য হইবেন।

(৬) এই ধারার কোন বিধান কোন নিবন্ধিত স্বত্বাধিকারী বা ব্যবহারকারী বা ব্যবহারের অধিকারপ্রাপ্ত ব্যক্তিকে বা তাহাদের পণ্য বা সেবা সনাক্ত করিবার উদ্দেশ্যে কোন নিবন্ধিত ট্রেডমার্ক ব্যবহারের ক্ষেত্রে, কোন বাধা সৃষ্টি করে মর্মে ব্যাখ্যা করা যাইবে না, তবে উক্তরূপ ব্যবহার শিল্প বা ব্যবসা সংক্রান্ত বিষয়ে অসৎভাবে কোন ট্রেডমার্কের স্বাতন্ত্র্য বা সুনামকে ক্ষুন্ন করিলে, নিবন্ধিত ট্রেডমার্কেল লঙ্ঘন হইয়াছে বলিয়া গণ্য হইবে।

(৭) কোন ব্যক্তি সুপরিচিত মার্কের নিবন্ধিত স্বত্বাধিকারী বা নিবন্ধিত নিবন্ধিত ব্যবহারকারী না হওয়া সত্ত্বেও, নিম্নবর্ণিত ব্যবহারের মাধ্যমে উক্তরুপ সুপরিচিত মার্ক লঙ্ঘন করিয়াছেন বলিয়া গন্য হইবেন, যদি তিনি-

(ক) কোন পন্য সেবার বিষয়ে এমন কোন মার্ক ব্যবহার করেন, যাহা কোন নিবন্ধিত সুপরিচিত মার্কের পণ্য বা সেবার সহিত অভিন্ন বা সাদৃশ্যপূণ্য; বা

(খ) পণ্য বা সেবার বিষয়ে এমন কোন মার্ক ব্যবহার করেন, যাহা কোন নিবন্ধিত সুপরিচিত মার্কের সহিত অভিন্ন বা সাদৃশ্যপূণ্য না হওয়া সত্ত্বেও, পণ্য বা সেবার নিবন্ধিত সুপরিচিত মার্কটির মালিকের সহিত সম্পর্ক রহিয়াছে মর্মে ইঙ্গিত প্রদান করে এবং যাহারফলশ্রুতিতে উক্ত নিবন্ধিত সুপরিচিত মার্কটির মালিকের স্বার্থ ক্ষুন্ন হয় বলিয়া প্রতীয়মান হয়।

ব্যাখ্যা।–এই ধারার উদ্দেশ্য পুরণকল্পে, সুপরিচিত মার্ক অর্থ ধারা ১০ এ বর্নিত সুপরিচিত মার্ক।

(৮) নিবন্ধন বহিতে নিবন্ধিত কোন ট্রেডমার্ক লঙ্ঘনের জন্য দায়েরকৃত মামলায় বিবাদী আদালতকে এই মর্মে সন্তুষ্ট করিতে পারেন যে,–

(ক) উক্ত মার্কের ব্যবহার দ্বারা জনগনের বিভ্রান্ত বা প্রতারিত হইবার সম্ভাবনা নাই বা

(খ) উক্তরুপ মার্কের কোন পণ্য বা সেবার সহিত নিবন্ধিত মার্কের স্বত্বাধিকারী বা ব্যবহারকারীরা ব্যবসায়িক সম্পর্ক রহিয়াছে মর্মে ইঙ্গিত প্রদান করে না, তাহা হইলে, আদালত উক্ত মামলায় বাদীর অনুকুলে কোন

নিষেধাজ্ঞা বা অন্য কোন প্রকার প্রতিকার মঞ্জুর করিবে না।

17. Upon reading together the aforesaid provisions of section 42(1), section 71 and section 26(4) it transpires that although these provisions did not mention about the user of registered trade mark within the territory of Bangladesh yet the scheme and object of trade mark Act 2009 indicates that unless the registered trade mark is used within the territory of Bangladesh for the purpose of business by affixing the mark on the body of the product and marketing the same within the territory of Bangladesh, then the registered trade mark cannot be treated to have been in use within the meaning of section 71 of the trade nark Act 2009.

The question of non-user of Trade Mark, as has been provided in section 42 of the trade mark Act 2009, for the purpose of removal of a registered trade mark from the register of trade marks is a circumstances which ought to be inferred from the attending circumstances as available before the court. The petitioner asserted that there is no product available with the mark ডালডা (DALDA) within the territorial jurisdiction of Bangladesh and, as such, the mark is not in active use by the owner of the said registered trade mark and that fact is established by the fact of non-filing of any suit for infringement of trade mark against the petitioner.

It appears that the petitioner is using the commercial mark ফ্রেশ ডালডা (FRESH DALDA) since 1995. Annexure-E, which is a statement of sales figure, shows that the petitioner since 2006 up to 2011 obtained a sale proceed of its product Banaspati with commercial mark ফ্রেশ ডালডা (FRESH DALDA) at an amount of 6,596,255,427 and paid an amount Taka 860,381,140 in VAT which proves that the petitioner is using the mark in the Bangladeshi market, at least from the year 2006 widely as it has advertised the product by expending Taka 32,981,274 as claimed by the petitioner. But no such product under the registered trade mark ফ্রেশ ডালডা (DALDA) is available in the market of Bangladesh and the said evidence may be gathered from the fact that no infringement suit has ever been filed against the petitioner who is using the mark ফ্রেশ ডালডা (FRESH DALDA) for its similar product.

18. Therefore, this court is satisfied by inference that the registered trade mark ডালডা (DALDA) under the Trade Mark No. 7685 and 7582 has not been in use for last five years within the territorial jurisdiction of Bangladesh, although the proprietor of the said Trade Mark has obtained a renewal of the said trade mark for fifteen years earlier, but did not obtain any renewal of the trade mark Nos. 7685 and 7682 even after its expiry of 28-3-2002 causing the mark ডালডা (DALDA) of no legal implication or right to exit in the register of trade mark.

19. Further the commercial mark ফ্রেশ ডালডা (FRESH DALDA) has quite distinct dissimilarity with the registered trade mark ডালডা (DALDA) which has no scope to deceive the public at large for the mark ডালডা (DALDA) for which the petitioner has independent right to get the mark ফ্রেশ ডালডা (FRESH DALDA) registered as trade mark.

20. In view of the above reasoning and grounds this court finds that the register of Trade mark, the respondent No. 2, was not reasonable to impliedly refuse the petitioner to register its mark ফ্রেশ ডালডা (FRESH DALDA) as trade mark under the provision of trade mark Act 2009.

21. Therefore, this court finds that the instant application has merit, and accordingly the application is required to be allowed.

22. In the result the application is allowed.

The respondent No. 2 is directed to remove the Trade Mark ডালডা (DALDA) being Registration No. 7685 and 7682, both in class-29,

for the product Banaspati or vegetable Ghee, from the register of trade mark on the ground of non-user under the Provisions of section 42 of the trade mark Act 2009.

However, there shall be no order as to cost.

Ed.

HIGH COURT DIVISION
(Special Original Jurisdiction)

Md Anwarul Haque J
Md Akram Hossain Chowdhury J

Judgment
March 30th, 2011.

Faruk Abdullah.....
.....Petitioner
vs
Rhairman, Rajdhani Unnayan Kartipakha (RAJUK) and others....
.....Respondents*

Constitution of Bangladesh, 1972
Article 102(2)

Land in the city, purchased for educational institution for disabled or retarded children cannot be allowed to use for construction of commercial and residential building only to earn money on the plea of maintenance of the institution causing mischief to the institutions educational environment of the institution.

It will not be out of place to mention that disabled or retarded persons mentally or physically of a country have a right whatever the severity of their disability to have equal respect in the society and the state including our society must provide the opportunity for their survival with dignity. They must stand for their right; not favour. Now, it has become urgent need to turn our policies on disability into action and in particular, to concentrate equal opportunity for disabled person. .....(13)

Md Saiful Karim for Masood R Sobhan, Advocates—For the Petitioner.

Abdur Rahim for Mainul Hosein, Advocates—For the Respondent No. 5.

AQM Safiullah, Advocate—For the Respondent No. 1.

Judgment

Md Anwarul Haque J: On an application under article 102(2)(a)(ii) of the Constitution of the People's Republic of Bangladesh this Rule Nisi was issued calling upon the respondents to show cause as to why the respondent No.l, (RAJUK) shall not be directed not to accord sale/transfer permission and also not to approve any plan for the construction of any commercial/residential building in the property appertaining to holding No.4, Eskaton Garden, Dhaka by respondent No. 2 and 5 and/or such other or further order or orders passed as to this court may seem fit and proper.

2. In short, the case of the petitioner, for the purpose of disposal of the Rule is as follows:

Petitioner, being a father of one of the retarded child and a student of this educational institution run by Society for the Welfare of the Intellectually Disabled, Bangladesh (hereinafter referred to as SWID) which stands in the premises appertaining to holding No.4 Eskaton Garden, Dhaka. It is further stated that respondent No.2 National Executive Committee (NEC) of the SWID has taken up a decision to construct a commercial building with the help of the respondent No.5, Dom-Inno Developer under an agreement in the name of development of this institution and to make the institution financially solvent which can finance other Branches of instruction situated all over the country. It is further stated that the land in question has been purchased with the aid of a Norwegian NGO known as Norwegain Association of Mental Handicapped to the Society

*Writ Petition No. 544 of 2006.

for the Care and Education of the Mentally Retarded Children, and ultimately a school for Mental Retarded children was established in the year 1986 in 2(two) storied building with sufficient vacant space for the movement of Retarded children but all on a sudden respondent No.2 in connivance with respondent No.5 has advanced to take a decision to construct a high rising building for commercial and residential purpose in the vacant land which is being now used as a playground of the Retarded children; destroying the entire educational atmosphere there. On such submission on behalf of the retarded children the petitioner has filed this writ application where the rule was issued in the following language:

> "Let a Rule Nisi be issued calling upon the respondents to show cause as to why the respondent No. 1 Rajdhani Unnayan Kartipakha (RAJUK) shall not be directed not to accord sale/transfer permission to the respondent Nos.2 and 5 and also not to approve any plan for the construction of any building by the respondent Nos. 2 and 5 in respect of the property situated at 4 Eskaton Garden, Dhaka and/or such other or further order or orders passed as to this court may seem fit and proper."

3. On the other hand, respondent No.2, National Executive Committee (NEC), Society for the Welfare of the Intellectually Disabled (SWID), has filed affidavit-in-opposition alleging *inter alia* that in order to run the National Institution for retarded children along with other Branches they want to construct a building in a part of the land for income to meet up the recurring and non-recurring expenditure which is essential to maintain other branches of the main institution also since no foreign donation is always available and government is not also responding to take over the charges of these institution to meet up the expenditure as such, respondent No.2 and Respondent No.5, Dom-Inno Development Ltd. a developer firm, has been entered into an agreement to construct a high-rising building for the purpose of sale. Moreover respondent No.5 has also paid the cash amount of Taka 30,00,000 (Thirty Lakhs) to the respondent as an initial payment for the purpose of construction of high-rise-building for commercial and residential purpose without causing any harm to the interest of the retarded children in any way; so he should not be allowed to suffer loss in his business reputation in any way.

4. Respondent No.l, Rajdhani Unnayan Kartipakha (RAJUK) has also filed affidavit-in-opposition alleging that till now no plan has yet been submitted before the authorized officer as such, question of it's approval under section 3(1) of the Building Construction Act does not, at all, arise.

5. Mr Md Saiful Karim has made his appearance for Mr Masood R. Sobhan, the learned Advocate appearing on behalf of the petitioner, submits that though the petitioner has not exclusive interest over the Institution but yet he has come with the writ application in order to establish the right of the retarded Children who are entitled to have their education with honour and dignity in an open atmosphere. Mr Saiful Karim the learned Advocate further submits that the retarded students/children are entitled to have full and active support from the society like others with the security of their disability and also to have equal respect and opportunity with every one's support according to their needs. So they are also entitled to have their education like other who have got their own premises in the school having a play ground also. In the instant case SWID has purchased the spacious land with a building to establish a school for the retarded children with help of foreign aid but now the executive committee is going to use it commercially for earning which will go to stop the movement of the retarded student reading the school. In fact, this

attempt will go to change the academic environment of the institution.

6. Since the donor agency granted l(one) crore taka to purchase the land with building to secure the education of the Mentally Retarded Children of Bangladesh the local NGO respondent No.2 has got no authority to sell such land to the developer or to allow the developer, respondent No.5 to construct high rising building to use the same as commercial or residential purpose effecting the educational environment of the retarded children; as such, this petitioner has invoked the writ jurisdiction to protect the right of Mentally Retarded children since the property has been donated by International donor only to run an educational institution for them. In no way such property can be used as a source of earning because to run the institution money may be available but to keep congenial atmosphere for educational institution especially for retarded children vacant land is badly required which will not be available if respondent No. 5 is permitted to construct a high rising building for commercial and residential purpose where ultimately owner ship of the land will go to the purchaser of the flat. Moreover, Mr Karim has also tried to remind us that the Ministry of Education, respondent No.3 and 4 have also under-taken to provide financial support to meet up 80% expenditure of the Institution; as such, the land donated for Retarded Children should not be allowed to establish a business center for earning money. Mr Karim also submit that instantly respondent Nos.3 and 4 may be directed to provide the entire expenditure of the Institution if it so required but in no way the right of the retarded children to move out side the four walls of their class room can not be taken away by constructing a commercial building there. Now the court is duty bound to protect the interest of the retarded children and echo the voice of the petitioner who has come here not only his Retarded Children but also has come to protect the entire retarded Children of Bangladesh.

7. On the other hand, Mr Talukder Ayub Ali appearing on behalf of National Executive Committee (NEC) society for welfare for the intellectually Disabled (SWID) has come to forward to oppose the Rule alleging *interalia* that to meet up the monthly expenditure this respondent needs some liquid money; as such, this respondent has tried to open this way which is to be source of such money. Of course, in the midst of submission Mr Talukder Ayub Ali has conceded that 80% of the monthly expenditure is being provided by respondent No. 3 and 4 but the same is not sufficient and accordingly part of the land should be used as a source of income for the benefit of retarded Children.

8. Mr Abdur Rahim on behalf of his senior Mr Mainul Hosein the learned Advocate for the respondent No. 5 has opposed the Rule alleging *inter alia* that on the proposal of the respondent No.2 the Developer has entered into an agreement to construct a building for residential and commercial purpose in a part of the land belonging to respondent No. 2, on payment of Taka 30,00,000 (Thirty lakh in cash) with a permission to sell the apartment with proportionate land to third person; as such, respondent No. 5 can not be asked to stop such construction which will incur loss to his business and reputation also.

9. Mr AQM Safiullah the learned Advocate appearing on behalf of the RAJUK has simply pointed out that since no plan has yet been submitted for construction in the holding No. 4 Eskaton Garden, PS Ramna, Dhaka as required under section 3(1) of the Building Construction Act, 1952 the question of approval of such non-existent plan does not at all, arise.

10. On such submission we have perused this application meticulously. Considering the case as made out by the respective parties it has become clear and evident to us that one Norwegian Association for Mentally Retarded (NGO) persons donated Taka l (one) crore in order to pur-

chase the premises with the vacant land (20.534 katas) appertaining to holding No. 4 Eskaton Garden by virtue of deed in order to run an educational institution for retarded or disabled children of Bangladesh.

11. It is also admitted that in the year 1986 the respondent No.2 has started a specialized school for the disabled persons and still it is running there.

12. It is also admitted that besides the 4 storied school building some portion of vacant land is there for the movement of the retarded student which is indispensable for them. The petitioner in his Writ Petition in paragraph 7 has positively asserted that these disabled Children has also attended International Sports and also participated in the Olympic Game for Retarded person and won the prize in various types of game which is part of their educational curriculum. So the retarded children also requires a land which can be used as their play ground for their mental and physical development but deviating from such main object of the institution the respondent are going to construct a multistoried building therein for their alleged financial solvency. This is absolutely commercial idea which stands against the Educational environment for the Retarded person for whom donor has contributed the amount of one crore to purchase such land, mentioned above. Allowing respondent No.2 and 5 to construct a multistoried building there with the help of developer it will certainly go against the intention of the donor.

13. It will not be out of place to mention that disabled or retarded persons mentally or physically of a country have a right whatever the severity of their disability to have equal respect in the society and the state including our society must provide the opportunity for their survival with dignity. They must stand for their right; not favour. Now, it has become an urgent need to turn our policies on disability into action and in particular, to concentrate equal opportunity for disabled person. Taking the above view in mind we are to observe that the land in the city, purchased for educational institution for disabled or retarded children can not be allowed to use for construction of commercial and residential building only to earn money on the plea of maintenance of the institution causing mischief to the institution, educational environment of the institution. In fact, in no way the respondents can be allowed to make any type of construction within the Mentally Retarded Children school premises appertaing to holding No. 4 Eskaton road in order to protect the educational environment there which will be congenial to the Mental and Physical development of those Retarded children. However, if a financial assistance is required respondent Nos. 3 & 4 will have to look into the matter for the betterment of his institution. In fact, money may be collected to run the institution but land will not be available even at the cost of money if such acquired is allowed to sell through developer for commercial purpose.

14. With that view of the matter we find good substance in the rule and accordingly the Rule is to be made absolute.

15. In no way respondent Nos.2 or 5 or any other person can be allowed to construct a commercial building except the building as required for the betterment of the Retarded person to accommodate the school and their student. Keeping the adjacent land as their play ground.

16. In the result, the Rule is made absolute. The very attempt and agreement for construction of multistoried building in 4 Eskaton Garden Road is declared without lawful authority.

Let a copy of this order be sent to the concerned authority at once for information and necessary action.

Ed.

HIGH COURT DIVISION
(Statutory Original Jurisdiction)

Md Rezaul Hasan J

Sayem Sobhan and others.. .....Petitioners

vs

Judgment
February 17th 2013.

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

Companies Act (XVIII of 1994)
Sections 241 and 245

It was one time held that the power to winding up under clause-vi was a power only exercisable upon grounds of the same class as those specified in preceding clauses. But this view is not prevailed and the reasons for holding 'just and equitable' to winding up are not to be considered ejusdem generis with the reasons given in the preceding clauses of the section. .....(10)

Articles of Associations
Articles 48 and 49

The company cannot exist or run or be managed as a going concern by the existing board of directors, clearly divided into two groups and each group holding equal number of shares. .....(16)

Companies Act (XVIII of 1994)
Section 83

The provisions of section 83, requiring a company limited by shares or having a share capital, to hold the 'the statutory meeting' and to prepare "statutory report" is not applicable to a private company. .....(12)

Sections 241 and 245

A case of total dead lock in running and managing the affairs of the company as a commercial concern has been made out, on facts and from the circumstances revealed from the averments made by the parties as well as from the materials on record, and no device has been kept in these articles to over come such dead lock either by forming quorum or by using casting vote, while the intention for separation in both groups is obvious from the fact of filing this petition. .....(17)

Sections 241 and 245

Because of supervening impossibility resulted from and due to the total dead lock in managing the affairs of the company and owing to mis-management and withdrawal of money from the accounts of the company the allottees are not bound to further perform their obligations, with reference to the terms and conditions of the allotment letters issued in their favour and they are entitle to receive their entire money back. .....(23)

Loch vs John Blackwood Ltd. 1924 AC 783; Rajahmundry Electric Supply Corpn. vs Nageswara Rao, AIR 1956 SC 213; Bengal Water Ways Ltd. vs Rahimuddin Ahmed, 34 DLR (AD) 47 and Hind Overseas Private Ltd vs Raghunath Prashad Jhunjhunwall, AIR 1976 (SC) 565 ref.

Ahsanul Karim, Khairul Alam Chowdhury, Shamim Ahmed Mehed and Md Abu Taleb, Advocates—For the Petitioners.

TH Khan, Senior Advocate with Fida M Kamal, Advocate and Md Ziaul Haque, Advocate—For the Respondents.

*Company Matter No. 150 of 2012.

Judgment

This is an application under section 241 read with section 245 of the Companies Act, 1994 (the Act) for winding up of the respondent No.2 company, namely Jamuna Bashundhara Housing Development Limited, herein after referred as 'the company'.

2. Facts, in brief, leading to filing of this application and as stated therein are that the petitioner Nos.1 to 5 are members of same family. The petitioner Nos.1 to 5 represent the most renowned and prestigious business house of the country, namely-Bashundhara Group; that the respondent No.1 is Registrar of Joint Stock Companies and Firms. The respondent No.2 is Jamuna Bashundara Housing Development Ltd. The respondent Nos.3 to 7 are members of same family. The respondent No.8 is Banker of the respondent No.2 company; that the respondent No.2 company was incorporated in the year 2009 with the objects to carry on businesses, inter alia, of real estate, construction, housing, apartment project and housing facilities, developing land by earth filling and also by preparing layout for plots and selling those plots at home and at abroad. Certified copy of the Memorandum and Articles of Association of the respondent No.2 has been annexed to the petition as Annexure-A; that because of the wide spread reputation of Bashundhara Group, the respondent Nos. 3 to 7 approached the petitioners to establish a joint venture company. The petitioners, as a bona fide gesture, accepted their proposal. Since, two business groups have established the respondent No. 2 company, Article 4 classifies the petitioner Nos. 1 to 5 as Group-B share-holders, and the respondent Nos. 3 to 7, on the other hand, as Group-A shareholders, each group shall hold 50% of the total subscribed shares. Accordingly, both groups have formed respondent No. 2 Company under the name and style "Jamuna Bashundhar Housing Development Ltd ('the company' in brief). Articles 4 and 7 of the Articles of Association reads as follows:—

"4. Group of share holders:—

The share of the company is comprised of Group "A" and Group "B" shares. The shares of both the groups have the same status. The Group has been made for identification purpose of the shareholders as follows:—

Group-A

The following shareholders will be Group "A" shareholders:

1. Md Shamim Islam
2. Mrs Salma Islam
3. Shariat Tasreen
4. Monika Nazneen Islam
5. Sumaiya Islam

Group-B

The following shareholders will be Group "B" shareholders:

1. Sayem Sobhan
2. Mrs Aforza Begum
3. Sadat Sobhan
4. Safiat Sobhan
5. Safwan Sobhan

7. The share in the Company shall be held by the following group of shareholders:

Group- "A": 50%

Group- "B": 50%

7.1 The shares shall be under the disposal and control of the Board of Directors.

7.2 Any issue of further or new shares at any shall be made in such manner so as to preserve and maintain the respective percentage set out in Article 4.1. above;" that in the management of the respondent No.2 company, i.e in the board of directors, each group maintains equal strength. Article 39 states that each group shall represent five directors in the board of directors. Article 49 of the Articles of Association provides that at least two directors from each group shall constitute

quorum in the board of directors, Articles 39, 48 and 49 of the Articles of Association is quoted below:

"39. The member of Directors of the company shall be ten. Each group shall represent five directors.

48. No business shall be transacted at any meeting of the Board unless a quorum is present when the meeting proceeds to business.

49. 4(four) directors at least two from each group present personally will form the quorum for transaction of business at a meeting of the Board of Directors. All questions arising at any meeting of Directors shall be decided by majority of votes."; that the respondent No.2 company collected money from various persons for allotting plots. But due to mismanagement and reluctance of Group-A directors, the respondent No.2 company could not acquire enough land to allot to the persons from whom the respondent No.2 company collected installments. Due to irresponsible attitude of respondent Nos. 3 to 7, the petitioners' other companies and Bashundhara Group, which the petitioners represent, have been earning bad name. The respondent No.2 company is in total stand still situation. The respondent Nos.3 to 5 who are 50% shareholders and hold equal strength in the board and in the company is not cooperating to carry on the smooth business of the respondent No. 2 company. There is no likelyhood that the respondent No.2 shall regain its business. Hence, for the better interest of all concerned, the petitioners have filed this application for winding up of the respondent No.2 company. Considering all the facts and circumstances of the case, this Court maybe pleased to consider that winding up of the respondent No. 2 company is just and equitable; that the respondent No.2 company maintains two accounts with the respondent No.8 bank. The accounts are current Deposit Account being Account No.02333000379 and Short Notice Deposit Account being Account No. 02336000047. The balance as on 18-6-2012 in Current Deposit Account No. 02333000379 stands at Taka 7,02,507.50. The balance in other account being Short Notice Deposit No. 02336000047 as on 18-6-2012 stands on Taka 55,60,36,100.32. The petitioners and the respondent Nos.3 to 7 withdrew Taka 31 crore each. The petitioners intends to refund the said amount of Taka 31 crore to the respondent No.2 company as and when the liquidator directs, if any, is appointed in the instant case; that the respondent No. 2 company only acquired 20.3562 acres of land in various mouzas. The description of the said lands are narrated in details in the schedule of land below; that certain clients of the company declined to receive plots from the said company and rather requested the company to transfer the amount already deposited to the respondent No.9 company. The letters of such clients of the company have been annexed to the petition as Annexures "D" series; that apart, the respondent No.2 company is not doing any business, the respondent No. 2 company never held the statutory meeting, neither has held any AGMs as yet. Therefore, on this account as well this Court may be pleased to winding up the respondent No.2 company. Hence this application for winding up of the company.

3. The respondent Nos. 3-7 have appeared in this matter and filed an affidavit-in-opposition denying all the material allegations made in the petition and further stating, amongst other, that the real facts of the case are that Jamuna Group is a leading company of Bangladesh engaged into the business of spinning, weaving, garments manufacturing, electronics, distillery, housing development and construction of real estate building etc. Jamuna Future Park is one of the biggest shopping mall of Asia, which is an excellent and noble works of Jamuna Group. Bashundhara Group is also a leading company engaged into the business of housing development, construction, ship building, steel engineering etc; both of them have a very strong economic background and logistic supports in their respective fields of busi-

ness. In the year 2006, the founders of two groups i.e Mr Md Nurul Islam alias Babul, Chairman of Jamuna Group and Mr Ahmed Akbar Sobhan alias Shah Alam, Chairman of Bashundhara Group met in a friendship meeting and decided to start a joint venture housing project by amalgamating their respective lands lying in the project area nearby the 300 feet wide 'Dhaka-Purbachal Road', the project comprising about 2000 bighas of land of Dumni Mastul, Bauther, Barua, Barokau and Delna etc Mouzas. They also agreed to surrender their respective lands lying in their respective project. Consequently, they have entered into a Deed of Agreement on 17-10-2006, bearing Deed No.23549 dated 17-10-2006 registered with the Sub-Registry Office, Gulshan Dhaka. The project was initially proposed in the name and style of "NB Agricultures Ltd" (Jamuna Bashundhara Agricultures Ltd) in view of clause 5 of the Deed of the said Agreement. The project comprising of the same area of land were re-named as "Jamuna-Bashundhara Housing Development Ltd" and the project proposal was materialized by establishment of a company under the name and style of Jamuna-Bashundhara Housing Development Ltd (respondent No. 2), comprising the sand land of JB Agriculture Ltd and lay out plan was prepared for the self-same land in the name of Jamuna-Bashundhara Housing Development Ltd instead of JB Agriculture Ltd. The company was registered with the office of the Registrar of Joint Stock Companies and Firms Bangladesh, having registration No. C-77178 dated 10-5-2009; that the petitioner No.1 is authorized by the Articles of Association of the company for holding AGM or Board Meeting etc and he has taken a lot of signatures from the respondent No.3 regarding Board Meeting from time to time for opening Bank account and for business transactions and issuance of cheques for withdrawal of money from the Bank from time to time. A lot of properties have been procured at the instance of the petitioner No.1 in the name of the company and the grounds taken in the petition are not cogent grounds for winding up and, as such, the petition is liable to be rejected; that the parties to the agreement were agreed to transfer their respective lands to the project and accordingly Bank account was opened by taking the resolution of the Board of Directors and the Company maintains an account with the respondents No.8 in which there is a deposit of Taka 32 crores arising out of allotments of plots to 534 numbers of allotment holders. Besides, Jamuna Builders have 445 numbers of allotment holders, who will merge with the Joint Venture Project of Jamuna Bashundhara Housing Development Ltd. and the lands of the 'Bashundhara Group' and of the 'Jamuna Group' would be transferred to the project equally, against which Bashundharha Group has already taken a sum of Taka 31.00 crores from the common fund of the project and the Jamuana Group has also taken the same amount for giving equal lands to the project.

4. Besides 4 sets of applications have been submitted in this matter, namely- (1) Aminur Rahman Khan and others, (2) Kazi Shakhawat Hossain and two others (3) Global Multipurpose Co-operative Society Ltd. and 3 others (4) Md. Mossaraf Hossain. After hearing the applicants order has been passed to keep these applications on record.

5. The learned Advocate Mr Ahsanul Karim, appearing along with the learned Advocate Mr Shamim Ahmed Mehedi, Mr Khairul Alam Chowdhury and Mr Md Abu Taleb, Advocates, having placed the application and drawing my attention to other materials on record, firstly submits that there is a total dead lock in running and managing the affairs of the company and more so the share holder-directors are holding shares, in the company, in equal proportion. As a result, for lack of co-operation of respondent Nos. 3-7 a total dead lock has been created in convening or holding the meetings of the board of directors or the general meeting or to take any decision to run the business of the company. Next, refer-

ring to Articles 39, 48 and 49 of the Articles of Association, the learned Advocate submits that since the directors of Group-A are not attending the board meetings, so for lack of quorum as well for lack of majority in taking decision for want of support of the respondent Nos. 3-7 (Ground-A share holders) all affairs of the company now stands still and there is no hope to overcome this prevailing situation, as would be evident from paragraph No.10(e) of the affidavit-in-opposition wherein the respondent Nos.3-7 have also expressed their intention to buy off the shares of the petitioners instead of offering any concrete proposal or practical solution to overcome the dead lock. As such, the company has failed to proceed towards achieving any of its objects and there is a practical uncertainty that the company would at all be able to be run and be managed by these two groups of directors/share holders, holding equal shares and voting rights and having lack of trust or support between them, so that the objects for which the company has been formed can be actualized. Then, referring to paragraph No.7 of the petition, the learned Advocate submits that each group of directors/ share holders have withdrawn Taka 31,00,00,000 (Taka 62,0000000 in total) from the accounts of the respondent No. 2 company and this position has also been admitted by the petitioner as well as by the respondent Nos.3-7 in their affidavit-in-opposition. The learned Advocate continues that no dividend was recommended by the board of directors nor any divided was approved in any Annual General Meeting of the company and such withdrawal of money, by both group of directors alone is a ground that it will be just and equitable to wind up the company before it falls into further financil and management disaster to the great prejudice of the persons who have made applications and paid several installments to purchase plots from the respondent No. 2 Company. Although, he further submits, the petitioners have made clear promise, at paragraph No. 7 of the petition, that they are willing to refund Taka 31,00,00,000 to the account of respondent No. 2 company as and when the liquidator directs, if any, appointed in the instant case, but the respondent Nos. 3-7 (Group-A directors), although admitted to have received the same amount of money, vide their affidavit-in-opposition, but they did not make any such commitment to refund this amount of the money to the company, which is the money of the company and forming part of assets of the company. Hence, it reveals a clear risk to continue business with group-A share-holders and the group-B share-holders are not willing to expose themselves to the risk of misuse of the allottees money or of their own equity. The learned advocate also submits that, there exists a clear distrust in the mind of group-B share-holders as to whether they would take further risk by executing personal guarantees and/or by mortgaging their personal properties. The group-B share-holders apprehends loss of their good will as well, in continuing business with group-A share-holders. He strenuously submits that these kind of conducts has already frustrated the object for which the company has been formed and, as such, the company has, meantime, lost its substratum. Next, referring to the Annexures, particularly to those submitted alongwith the affidavit-in-opposition, the learned Advocate for the petitioner submits that these are not title deeds showing that the company has purchased any properties towards achieving its objects or for which it has received a huge amounts of money from the allottees. The mouza map or project plan etc, annexed to the affidavit-in-opposition, are not title deeds. Nor, he continues, any title deed could be annexed, to the affidavit-in-opposition to show that the company has allotted any plots to any of the allottees, although the company has been incorporate long back in the year 2009. As such it is evident that the company is not doing any business. The learned Advocate for the petitioner next submits that, mere operation of the Bank Account, either before or after presentation of the application, does not mean that the company is doing business

in as much as the company has various obligations to several parties, either to pay or to deposit monies and for that purpose the Bank Account can and should remain operative, but this fact alone does not mean that the company is doing business. He submits that even a person, who is not a business, for instance a govern servant, can operate a bank account, but for operating a bank account it cannot be said that he is doing business thereby. The learned Advocate thereafter submits that, since both Group of Directors are holding equal shares i.e at 50: 50 ratio in the company, one group of directors-share holder cannot compel the other group to consent to the proposal placed before the board or in any other meeting or to remain present in any meeting to constitute quorum required to transact any business in any meeting or to cast their vote in order to adopt any resolution that essentially requires majority votes. Hence, the learned Advocate has insisted that this is a clear case of dead lock being created in running and managing the affairs of the company and unless, in such a situation, the company is wound up by the court the money of the allottees, held by and paid to the company, would not be able to be returned to them and these are still debt of the company owed to the allottees because no plots could have been transferred to them as yet and there is no certainty that the required quantity of land could be purchased by the company. In support of his contention the learned Advocate has referred to the 4(four) sets of petitions for addition of parties in which the allottees stated that they have paid crores of Taka for allotments of plots by several installments, but they doubt allotment of any plot can be made by the company and prayed for their addition as parties, so that they can get back their moneys as creditors of the company. This desire or agony of the allottees deserve serious consideration. He then submits that the company has not filed any statutory report as required under the provisions of section 83 of the Act and it is duty of all members of the Board of Directors to ensure compliance of the provisions of law. But, in this case, owing to non-co-operation of the 'Group-A' share-holder directors, no statutory report could be submitted, nor any AGM could be called or held till now. He then submits that although the Joint Venture agreement dated 17-10-2006 has been referred to in the affidavit-in-opposition, but none of the joint venture parties are share holders in the company (respondent No. 2) and, as such, the said joint venture agreement has no relevance and cannot be referred to or relied upon in the mater of winding up of the respondent No. 2 (company). Next, the learned Advocate has referred to paragraph Nos.24 and 32 of the case reported in *34 DLR (AD) 1982: Bengal Water Ways vs Rahimudden* and submits that in view of the dead lock crated in running and managing the affairs of the company and there being lack of confidence in each group holding equal number of shares in the company, it is desirable and expedient that the relationship should be ended. The respondents No. 3-7 have proposed to buy off the shares of the petitioners and thereby they have expressed their clear intention not to continue the business together with the petitioners. Hence, there is no hope to break the dead lock. Besides, the respondent Nos. 3-7 having shown no intention to return Taka 31 crore withdrawn from account of the company, in the manner aforesaid, there is no hope that this company would be able to achieve its objects, rather it has already deviated from the object for which it has been established and uncertainty in refunding monies of the allottees is apparently visible. In this situation, the learned advocate emphasizes that, it would be just and equitable to wind up the company by the court under section 241 clause (VI) of the Act, otherwise further prejudice to the allottees, to the company and to the petitioners cannot be prevented.

6. The learned Counsel Mr TH Khan appearing along with Mr Fida M. Kamal and Mr Md Ziaul Haque, learned Advocates, on the other hand, having placed the affidavit-in-opposition

and drawing my attention to the materials on record, submits that a mere perusal of the petition, filed by the petitioner, would show that no case for winding up has either been stated nor been made out in the petition. Then, categorically referring to clauses (1) to (VI) of section 241, of the Act, the learned Advocate for the respondent Nos.3-7 submits that none of the clauses is applicable to the facts and circumstances of the case stated in the petition or from the documents annexed therewith. Besides, the ground 'just and equitable' should be considered alongwith other grounds narrated in clause (I) to (V) of section 241 of the Act. Clause (VI), the learned advocate submits, empowering this court to pass an order of winding up on the ground of "just and equitable", should not be considered by the court unless any of the other grounds, stated in clauses (I) to (V), is found to exists. While containing their submissions, the learned Advocate for the respondents has drawn my attention to the statement of accounts of Bank Asia, annexed to the affidavit-in-opposition as Annexure-III, and has shown that the bank account is being operated since 1-2-2009 and that it was operated on 15-7-2012 i.e before filing of the application and also on 5-8-2012 i.e. after filing this application as well. As such, the learned lawyer for the respondents, strenuously argued that it is not at all true that the company is not doing any business as alleged. Rather, instance of operation of the Bank Account before and after filing of this application clearly shows that the company is doing business and it is fully functional. Suppressing all these facts the petitioners have filed this application with malafide intention and, as such, this petition is liable to be rejected on this count alone. The learned Advocate for the respondents further submits that the company has received monies from several allottees and it should be allowed to perform its obligation by allowing it to continue as a going concern, so that the interest of the allottees is not prejudiced and that the company can survive as a going concern, particularly when there is a good prospect of this company doing real estate business. The learned Advocate for the respondents has also referred to the project plan and Mouza map which is to be acquired by the company for achieving its object i.e. for allotment of plots pursuant to the allotment letters issued to the several allottees. The learned Advocate further submits that it is duty of the petitioner No.1, who is the Managing Director, to call the Annual General Meeting or to submit the statutory report and in case of default, if any, it should be the responsibility of the petitioners for which the company should not be allowed to suffer or be ordered to be wound up. The learned Advocate for the petitioner, in conclusion, submits that clause (VI) of section 241 refers to the courts discretion or power to pass an order on the ground of 'just and equitable' and that this refers to equity as a ground for passing winding up order. Hence, in order to maintain the application under clause (VI) of section 241, the petitioner themselves should have come in clean hands. But the facts stated in the affidavit-in-opposition and as pointed out in the course of submissions clearly shows that the petitioners have not come in clean hands. On these grounds the learned advocate for respondents submits that this petition is liable to be dismissed.

7. On query made from the Bench, the respondent sides has confirmed that both Group-A and Group-B directors/shares holders of the company, each has withdrawn Taka 31,00,00,000 from the account of the company, although no dividend was declared by the Board or approved in any AGM and that this money is company's money.

8. Heard the learned Advocates, perused the petition filed under section 241 read with section 245 of the Act, the supplementary affidavit, the affidavit in opposition and the documents annexed thereto.

9. Let the supplementary affidavits filed by the petitioner do form part of the substantive peti-

tion/application.

10. I have taken for consideration, at first, as to whether clause (vi) of section 241 of the Act can be considered separately or independently of the clauses (I) to (V) of section 241of the Act as a ground for passing an order of winding up by the court, if the facts and circumstances of the case so justify. Then, having considered several authorities on this point I find that, it was one time held that the power to winding up under this clause (clause-vi) was a power only exercisable upon grounds of the same class as those specified in preceding clauses [Ref: Exparte Spackman, (1849) 1 Mac & G170; Suburban Hotel Co. Re, (1867) 2 Ch App 737; Anglo-Greak Steam Co. Re, (1866) 2 EQ1]. But this view is not prevailed and the reasons for holding 'just and equitable' to winding up are not to be considered ejusdem generis with the reasons given in the preceding clauses of the section. In the case reported in In re Yenidje Tobacco Co. (1916) 2 Ch 426 Cozens Hardy, MR, observed as follows:

> "It has been urged upon us that although it is admitted that the just and equitable clause is not to be limited to cases ejusdem generis, it has nevertheless been held, according to the authorities, not to apply except where the substratum of the company has gone or where there is a complete deadlock. Those or two instances which are given, but I should be very sorry, so far as my individual opinion goes, to hold that they are strictly the limits of the 'just and equitable' clause, as found in the Companies Act. I think that, in a case like this, we are bound to say that circumstances which would justify the winding-up of a partnership between these two by action are circumstances which would induce the court to exercise its jurisdiction under the 'just and equitable' clause and to wind-up the company." *(underlining is mine)*

11. In the same case at page 435 Warrington, LJ., observed as follows, as regards the ejusdem generic rule; "That opinion (the opinion previously pre-veiling) has long been abandoned. These views have been confirmed by the Judicial Committee of the Privy Council in a more recent judgment *[Loch vs Johnblackwood, 1924 AC 783],* in the course of which the authorities were carefully reviewed. This judgment is a very important and leading one ..... . It must therefore now be taken as established that the just and equitable clause confers upon the court a separate ground of jurisdiction to make-up to winding-up order. The order under this clause rests upon the opinion of the Court to be formed on the circumstances of the case whereas the previous clauses each prescribe certain definite conditions and are quite different in character. The court will not be fettered in forming its opinion under this clause (i.e. clause-VI) by the necessity of finding the existence of facts analogous to those which constitute the previous grounds. The aforesaid Privy Council case in *Loch vs John Blackwood Ltd. 1924 A.C 783*, has been considered and followed in a recent case decided by the Supreme Court, vide *AIR 1956 SC 213: Rajahmundry Electric Supply Corpn. vs Nageswara Rao. Besides,* the law is thus stated in Halsbury's Laws of England, 3rd Edition, Vol.6, p.534, para 1035: "The words 'just and equitable' in the enactment specifying the grounds for winding-up by the court are not to be read as being ejusdem generis" with the preceding words of the enactment. This law has been cited to and relied upon in *AIR 1956 SC 213: Rajahmundry Electric Supply Corporation Ltd vs A. Nageshwara Rao.* In our jurisdiction, in the case reported in *34 DLR (AD) 47*, at paragraph No.32, the apex court has held that, "there cannot be any precise definition or inflexible formula of the principle just and equitable clause. Whether or not there are equitable consideration for the application of the principle, must necessarily depend upon the facts and circumstances of the case and the judicial discretion of the court." As such, having considered the authorities cited I hold that clause (vi) of section

241 of the Act is not to be considered with the reasons given in preceding clauses (i) to (v), in passing an order of winding up on the ground 'just and equitable'.

12. Then adverting my attention to another contention as to whether clause (ii) of section 241 of the Act is applicable in this particular case. I have considered the provisions of section 83 of the Act and I find that the provisions of section 83, requiring a company limited by shares or having a share capital, to hold the 'the statutory meeting' and to prepare "statutory report" is not applicable to a private company, as has been rightly submitted by the learned Advocate for the respondents.

13. Next, considering that the Articles of Association of the company, vide Articles 39, 48 and 49, quoted in paragraph No.4 of the petition (and as recorded herein above) as well as contained in Annexure-A to the petition (Memorandum & Articles of Association), I find that both groups of share holders, namely petitioners No. 1-5 forming group-B and the respondent Nos.3-7 forming group-A share holders, are holding shares in equal proportion, i.e. 5(five) share holders forming Group-A are totally holding 50,000 shares, each holding 1,000 shares, and 5 (five) shares holders forming Group-B are holding 50,000 shares in total, each holding 1,000 shares, out of 1,00,000 (One Lakh) shares, as has been shown against the names of the subscribers to the Memorandum & Articles of Association. In this back ground, I have looked into the provisions of Articles 39, 49. These 3(three) Articles read as follows:—

> "39. The member of Directors of the company shall be ten. Each group shall represent five directors.
>
> 48. No business shall be transacted at any meeting of the Board unless a quorum is present when the meeting proceeds to business.
>
> 49. 4(four) directors at least two from each group present personally will form the quorum for transaction of business at a meeting of the Board of Directors. All questions arising at any meeting of Directors shall be decided by majority of votes."
>
> *(underlining is mine).*

14. Now, apparently group-B share holders, holding 50% shares in the company, has filed this petition for winding up alleging that non-cooperation of group-A share holders, holding the rest 50% of share. Therefore, in this situation, according to the submission made on behalf of the petitioner, no quorum could be formed, no decision could be arrived at or adopted on majority basis, hence no business could be done and that there no possibility to implemt the objects for which the company has been formed and that even no board meeting or AGM can be called or held on behalf of the company. I find substance in the submission, advanced on behalf of the petitioner, that Group-A share holders, holding 50% shares, cannot be compelled by the other group of the share holders (i.e. Group-B) to consent to or to pass an agenda which one group considered material or important to achieve the object for which the company has been formed.

15. Besides, Article 49 of the Articles of Association prescribed that at least two directors from each group of the directors shall remain personally present to form the quorum to transact any business and that, as per Article 49, the decision in any meeting of the board of directors shall be decided by majority of the votes, whereas there is no provisions for any casting vote, in the Articles of the Association. As such no meetings of the board of directors or any general meetings, for want of quorum, can be held or called for non co-operation of other group of directors, namely respondent Nos.3-7, as alleged, and that there is no certainty that quorum will be present or that any decision can be carried out by the majority of the votes as per Articles 48 and 49. Indeed, I find no material on record to think or presume otherwise. This contention of the learned advocate of

the petitioner gets support from the statements made in at clause-(e) of paragraph No.10 of the affidavit in opposition, wherein allegations has been made that "the petitioner No. 1 is not providing necessary informations or documents to the contenting respondent with bad intention to create misunderstanding between the two groups of Directors and, as such, contesting respondents have decided to buy off the shares of the petitioners to run the company in accordance with law and the respondent No.3 is ready to take over the charge of the Managing Director of the company in view of the Article 61 of the Articles of Associations".

16. As such, I find that the admitted position is that the parties are not willing to continue or to do business together and that the provisions have been made in Article 48 and 49 in a way, by omitting the provision for casting vote, that there is no way out of the dead lock created, as has been alleged in this case, in the process of taking any decision upon forming quorum in the manner provided for under Articles 48 and 49. Hence, I am of the considered opinion that the company cannot exist or run or be managed as a going concern by the existing board of directors, clearly divided into two groups, namely Group-A and Group-B and each group holding equal number of shares.

17. Moreover, the fact of keeping no provision for casting vote, in my view, is a glaring instance of distrust between the two groups and is responsible for creating a total dead-lock situation in running and managing the affairs of the company as a commercial concern. As such, from absence of the materials on record to draw any inference to the contrary, I find that a case of total dead lock in running and managing the affairs of the company as a commercial concern has been made out, in this case, on facts and from the circumstances revealed from the averments made by the parties as well as from the materials on record, and no device has been kept in these Articles to over come such dead lock either by forming quorum or by using casting vote, while the intention for separation in both groups is obvious from the fact of filing this petition by Group-B and from the allegations made in clause (e) of paragraph No. 10 of the affidavit in opposition by Group-A shareholders.

18. In this respect I should refer to the decision reported in Company Cases, Vol. 52 page-36: *Virendra Sing Bhandari vs Nandalal Bhandari & Sons Ltd.,* wherein it has been held that, "principle of dissolution of partnerships can be applied to dead lock among members of the private company and that in such situation the company should be wound up". Besides in our jurisdiction, in the case reported of the *34 DLR (AD) 47: Bengal Water Ways Ltd. vs Rahimuddin Ahmed,* at paragraph No. 24, it has been held that "No doubt deadlock in the affairs of the company by itself, has not been made a ground under section 162 of the Companies Act, for winding up a company, but clause (vi) provides that if the court is of opinion that it is just and equitable that the company should be wound up, the court may wind up a company". Then, at paragraph No. 32 of the same judgment, it has been held that, "there cannot be any precise definition or inflexible formula of the principle of 'just and equitable' clause. Whether or not there are equitable considerations for the application of the principle, must necessarily depend upon the facts and circumstances of each case and the judicial discretion of the Court. ..... . Where there is lack of confidence in each other, the partnership cannot simply work and in that case it is desirable and expedient that the relationship should be ended." The apex court then, at paragraph No. 23 of said case has held that "the long line of decisions from the courts down to the Supreme Courts of the sub-continent tend to show that the principles applicable in the case of dissolution of partnership equally applied in the case of winding up of a private limited company and to treat the case of a private limited company more or less as a partnership". It is to be

noted here that clause (VI) of section 162 of the Companies Act, 1913 is now clause (VI) of section 241 of the Companies Act, 1994.

(underlining is mine).

19. Again, in the case reported in *AIR 1976 (SC) 565: Hind Overseas Private Ltd vs Raghunath Prashad Jhunjhunwalla,* (at paragraph No. 32) it has been held that "Besides, it is only when share holding is more or less equal and there is a complete case of dead lock in the company on account of lack of probity in management of the company and there is no hope or possibility of smooth and efficient continue of the company as commercial concern there may arrived a case of winding up on just and equitable ground".

(underlining is mine).

20. I respectfully agree with these views cited above and find these views applicable in the facts and circumstances of this case.

21. Considering the facts that admittedly both groups of share holders have withdrawn an amount of Taka 62 crore, each group Taka 31crore, from the fund of the company (which forms the part of asset of the company), when there was no board meeting recommending any dividend to be distributed amongst the share holders and there was no AGM approving distribution of any dividend, this ground alone is sufficient to invoke application of clause-(VI) of section 241 of the Act on the ground of mismanagement of the affairs of the company by the directors. In the case reported in *AIR 1956 (SC) 213: RES Corpn Ltd. vs Nageshwara Rao,* it has been held at paragraph No. 8 that, "The words "just and equitable" in S. 162 (vi) are not to be construed 'ejusdem generis' with the matters mentioned in cls. (i) to (v) and, therefore, whether mismanagement of the directors is a ground for a winding up order under S. 162(vi) becomes a question to be decided on the facts of each case. Where nothing more is established then that the directors have misappropriated the funds of the company, an order for winding up would not be just or equitable, because if it is a sound concern such an order must operate harshly on the rights of the shareholders. But if, in addition to such misconduct, circumstances exist which render it desirable in the interests of the share-holders that the company should be wound up, there is nothing in section 162(vi) which bars the jurisdiction of the court to make such an order". I also find the view expressed in *AIR 1956 (SC) 213* applicable in the facts and circumstances of this case as I have found and recorded the circumstances of total dead lock created in this case, in addition to mismanagement or misconduct of both group of directors in withdrawing Taka 62 crores, each group admittedly taking Taka 31 crore from the account of the company. Moreso, Group-B share holders have expressed their intention to refund the money to the account of the company, vide paragraph No. 7 of the petition, while Group-A has made no such commitment, though they also admitted to have received the equivalent amount.

22. Besides, I have considered alongside the applications for addition of parties. I find that there specific assertion of making payment of several instruments since 2010, against several plots, raising the figure above croes of taka, but no allotment of any plot could have been made to this applicants, as yet, and out of their anxiety they have submitted these 4 sets of application to add them as parties to this proceeding, so that, as claimants, they can get back their money invested in the company with the hope of getting allotment of the plots allotted to them, since they see no prospect of allotment of any plot.

23. Then referring to Annexure-D series, annexed to the petitions, I am not inclined to consider the grounds taken in these applications in deciding the merit of this application with reference to clause (vi) of section 241 of the Act, in as much as this is not an application filed by the creditors for voluntarily winding up of the company. But, significance of these 4 sets of applica-

tions lie in taking into consideration the interest and intention of the creditors (they are creditors of the company since no plot has yet been transferred to or registered in their name). However, I am of the view that because of supervening impossibility resulted from and due to the total dead lock in managing the affairs of the company and owing to mis-management and withdrawal of money from the accounts of the company as recorded above, the allottees are not bound to further perform their obligations, in this particular case, with reference to the terms and conditions of the allotment letters issued in their favour and they are entitle to receive their entire money back.

24. Before parting of, I should record that no doubt a petition filed with malafide intention or in a case where petitioner has not come before this court in clean hands, the petition should not be allowed. But in view of the facts and circumstances of this case, recorded herein above, I consider this ground as not tenable and not attracted in this case.

Hence, in the facts and circumstances of this case and the decisions quoted and consulted herein above, I am of the considered view that it will be just and equitable to pass an order of winding up of the respondent No. 2 (company). I find merit in this application.

In the result this petition is allowed and the company is hereby wound up as per provisions of clause (vi) of section 241 of the Act.

(A) Accordingly it is ordered—

(1) that the petitioner or his advocate shall send to the Registrar of Companies a notice of this order, in Form No. 18, to enable him to notify the Official Receiver about this judgment and order, as required by Rule 75 of the Companies Rules, 2009.

(2) that the Official Receiver and learned advocate Mr Akheruzzaman, a member of the Supreme Court Bar, having his law chamber named THE LAW FOCUS, Apt. C2, House 3G, Road 104, Gulshan-2, Dhaka, are hereby permanently appointed as "the Official Liquidators of Jamuna Bashundhara Housing Development Ltd," (herein after referred to as the company in liquidation), as per Rule 76 of the Companies Rules, 2009. The Official Receiver shall be the Official Liquidator and advocate Mr Akhaturuzzaman shall act as the Additional Official Liquidator. The words 'Official Liquidator' when used singly shall not refer to 'Additional Official Liquidator'.

(3) that both group of shares holder are hereby directed to refund Taka 31 crore, each, to the account to be opened by the Official Liquidators, within 60 days, and to submit affidavit of compliance within one week thereafter.

(4) that the persons who have filed applications for addition of parties may submit their claim to the Official Liquidator, with copy to Additional Official Liquidator, alongwith adequate proof, so that their claim should be considered and settled accordingly by making payment to them or to their nominated/ authorized persons, giving top priority, subject only to the claims of secured creditor, if any, provided that they had no knowledge that the allottees of the plots have acquired equitable title to the lands of the company, if any, mortgaged to them.

(B) The Official Liquidator is hereby directed—

(i) to advertise, as required by Rules 76 and 133, the order of liquidation to submit claims giving 14 days time,

with adequate proof (vide Rules 133 to 147), from the claimants, if any, in two national daily news papers, one in English and another in Bangla, in the locality where the registered office or the principal place of business of the company is situated.

(ii) to inform this order of winding up by issuing notice upon the company, as required by Rule 77 (since company is not the petitioner and did not appear in this matter).

(iii) to open a bank account with Sonali Bank, Supreme Court Branch, or in any other schedule Bank in the name and style "Official Liquidators of Jamuna Bashundhara Housing Development Ltd. (in liquidation)", as required by Rule 103. The account shall be opened, maintained and operated under joint signatures of the Official Liquidator and the Additional Official Liquidator.

(iv) to maintain all books, records and accounts as required under the provisions of the Companies Act and the Rule 110 of the Companies Rules, 2009 showing all assets and liabilities of the company and to be jointly signed by both the liquidators, in token of proof the correctness of particulars, contents and/or entries recorded or made therein.

(v) to submit quarterly reports of the accounts of the company, duly signed by both liquidators, to the court, till it's dissolution is ordered by this court.

(vi) to exercise the powers and discretion, vested in him under section 262 of the Act with due regard being had to interest of the company, its creditors and contributories and subject to the control of the court.

(vii) to prepare and to furnish before this court a list of all contributorlares, under joint signature of both liquidators (subject to this court's right to rectify the same, if so required according to law)

(viii) to submit statement/report, further and/or supplementary statement/report under joint signature of both liquidators, to this court, as required by section 259 of the Act, read with Rules 119 and 120, as soon as practicable upon receiving the statement of affairs to be filed under section 258 (since winding up order is made).

(ix) to take into custody of the Official Liquidator all movable (by marking an inventory) and immovable properties of the company, if any, including the title deeds and to dispose of the same, upon prior consultation by and between both the liquidators, as permitted by section 262 of the Act, with prior sanction of this court (vide Rules 168 to 170), and to use the sale proceeds, if any, towards settling the liabilities of the petitioner company, if any, in the manner prescribed by Rules 148 to 162 and regard being had to the provisions of section 325 concerning preferential payment as well as to show separately the list of secured creditors (if any), the allottees, the employees and the unsecured creditors, if any, giving their name, full particulars and the amount of their claim, in tabular forms, subject to receiving adequate, reliable and genuine proof. They shall, to that end, submit application accordingly under joint signature of both liquidators, for disbursement of the assets, to allow the cost and expenses incurred and also showing the assets and liabilities as well as

the cash if any, at hands, and to show 5% commission payable to the government.

(C) The company is directed to submit verified statements of affairs in duplicate, signed by the Chief Executive Officers (or MD) or the chief Financial Officer/Head of Accounts (if any) to the aforesaid official liquidators, as required under the provisions of section 258 of the Act, within 21 (twenty-one) days from the date of winding up order or from the date of sending this record to company section, whichever is occurred later, the original statement shall be sent to the Official Liquidator and the duplicate to the Additional Liquidator.

(D) The company or its Managing Director or the CEO or the Chief Financial Officer shall furnish, to both the Lequidators, the name of the bankers of the company, giving account numbers, enclosing statement of accounts, name of the signatories and also enclosing authenticated copies of the resolution regarding operation of the bank accounts, within the time limit prescribed in the proceeding paragraph.

(E) The persons named at preceding paragraph No. (D) and/or the official in charge of the estate stores, stocks and other properties, as the case may be, of the company shall give particulars of and handover all title deeds of immovable and movable properties of the company (if any) to the Official Liquidator, and one set of photocopies of the same to the Additional Official Liquidator, within the same time limit prescribed in the preceding paragraph.

(F) Since the official liquidators are permitted by law to take into custody all assets and properties of his company, as per provisions of section 262, so the concerned bank manager(s) and the Managing Director(s), in which the company (in liquidation) is/are directed to open bank account in the name and stayle "Official Liquidators of Jamuna Bashundhara Housing Development Ltd (in liquidator)" and to hand over specimen card, forthwith on demand being made, to the official liquidators to transfer the amount to the account to be opened and maintained by the official liquidators, on their signing necessary papers, and also to hand over cheque book to the Official Liquidator, so that the official liquidators can bear all necessary cost and expenses incurred in the process of winding up and to pay the salaries, rents, bills, wages etcetra, if any. All cheques/shall be account payee cheques, be signed jointly by both liquidators, and a copy of this judgment shall also be submitted, by the liquidator, to the concerned bank/banks.

(G) The petitioner company shall submit an affidavit of compliance as regards compliance of the directions Nos. (C) to (E) above, within one week thereafter.

(H) The Company, the members of the board, all share-holders/contributors are hereby restrained to operate bank accounts (subject only to the directions given hereinafter to deposit Taka 5,00,000), to remove or transfer or encumber any moveable or immovable properties of the company including, but not limited to, the vehicles, equipments, furnitures, fittings, machineries electra of the company and not to remove any documents without leave of the court. However, the official liquidators, shall have discretion to keep in safe custody (jmma) any property of the company, if they consider fit and proper; but upon taking written inventory and undertakings to be signed by the jimmadar in presence of witnesses, preferably from the concerned parties or from independent persons, as they may consider fit.

(I) The official Liquidators shall follow and comply with all such provisions as are laid down in the Act and the Rules, and as are applicable in the process of winding up and they shall be jointly and severally responsible for the default, if any, committed in the process of winding up. They shall not withdraw any amount more than that as may be required to meet or pay the lawful and rea-

sonable cost and expenses, salaries, bills, rents, taxes or duties, fees etc and/or to settle the lawful claims and/or to distribute the surplus assets amongst the cortributories, if any, as per law and rules, and with prior sanction of the court.

(J). They (the liquidators) shall bring, in writing, to the knowledge of the court all facts that are material to ensure compliance of the provisions of law and of the Rules as well as to protect interest of the creditors/allottees, claimants, contributories and the company, as the case may be.

(K) All courts, subordinate to this court, authorities, officer-in-charge of the local police station and his superior authority (the Assistant Commissioner, Deputy Commissioner and the IGP, as the case may be) is hereby directed, forthwith and on request being made to him/them, to render all assistances to the official liquidators in performing his/their functions and in exercising his/their powers and duties as per law and in the implementation this judgment and order as well as to ensure maintenance of law and order at the concerned places and or offices, if so required, as the case may be

The matter of the dissolution of the company will be considered only after receiving and considering the statements/affidavit of facts and/or compliance to be submitted by the official liquidator, pursuant to the directions given above.

The remuneration of the Official Liquidator and of the Additional Official Liquidator, as per provisions of section 256 read with Rule 131, is initially fixed at Taka 2,50,000 to be paid to each of them from the asset of the company and the signatories, from both 'A' and 'B' groups who are operating the bank account(s) of the company is directed to deposit Taka 5,00,000 to the account mentioned above, within 1(one) week, and to submit an affidavit of compliance within the next week thereafter, subject to which this order will be effective. It is also directed that the liquidators shall submit to this court, intimation, within two days, of their entering into office and shall be entitled to receive 33% of their remuneration thereupon. The rest of their remuneration shall be withdrawn in such manner and to such extent as the court shall, upon receiving their application, order.

Let a copy of this judgment and order be sent to the Official Receiver and another copy to the Additional Official Liquidator.

Ed.

HIGH COURT DIVISION
(Special Original Jurisdiction)

Mirza Hussain Haider J
Md Khurshid Alam Sarkar J

Judgment
February 5th, 2014.

Concord Pragatee Consortium Limited .....Petitioner

vs

Bangladesh Power Development Board and others.....
.....Respondents*

Constitution of Bangladesh, 1972
Article 102(1)(2)

The fundamental difference between two sub-Articles of Article 102 of the Constitution is that while Article 102(1) can be invoked directly if an aggrieved person can make out a case of infringement of fundamental rights, however, in order to qualify to be an applicant under Article 102(2), the aggrieved person must satisfy the Court that *'there is no other equally efficacious remedy'* to redress his grievance. .....(27)

Constitution of Bangladesh, 1972
Article 31

In order to invoke Artcle 31 of the Constitution there must be a clear case of not

*Writ Petition No. 2782 of 2013.

treating the petitioner as per law inasmuch as there may be violation of law in dealing with the petitioner's matter but it is not capable of attracting Article 31 of the Constitution, for instances, (i) when a worker is not treated by his employer, he is to seek redress in the Labour Court, (ii) when a person's property is refused illegally to be mutated by the Assistant Commissioner of land, he is to appeal before the ADC, (iii) when a government servant is declined to enjoy his service benefits, he is to approach Administrative Tribunal and so on.

.....(29)

Article 40

Article 40 being a qualified right its violation can be agitated only when an aggrieved person shall make out a successful case that despite the fact that the law, by which one's profession or business is to be dealt with, has declared a right to enjoy something but due to the authority's particular action, omission, decision or order she has been deprived of the same. .....(29)

Article 102(2)

Jurisdiction under Article 102(2), as a whole, is known as an extraordinary jurisdiction and the same is to be availed of only when there is *'no other equally efficacious remedy'* available. The framers of the Constitution have intended that the people, at first, must search for and approach an appropriate legal forum other than the Constitutional Court. It is only then the Constitutional Court should be availed of when the citizen will find that the state has not created any legal forum for them for vindication of their right and getting the desired remedy. Thereafter, subject to the *'satisfaction'* of this Court, a writ petition may be entertained.

The words employed in the Article that 'if satisfied' strongly suggests that the 'special original jurisdiction' of the High Court Division may be invoked only upon the satisfaction of the High Court Division as to the non-availability of the 'other equally efficacious remedy. .....(32)

Article 102(2)

The clear and unambiguous words of our Constitution 'if satisfied' mandates this Court to undertake the scrutiny as to the competency of invoking this 'special original jurisdiction' before issuance of any Rule given that carrying out of the examination thereto after issuance of a Rule may cause sufferings for the parties of the case in addition to wasting valuable time of this Court in the event of discharging the Rule on this ground. .....(32)

Public Procurement Act (XXIV of 2006)
Sections 29 and 30
Public Procurement Rules, 2008
Rule 56(11)

In an open tender under Rule 56(11) of the PPR, 2008 ("দূর্নীতি বা চক্রান্তমুলক কার্যকলাপ সম্পর্কে সন্দেহ হইলে") if there is any suspicion of any malafide activities in the process of any public procurement and under Rule 56(12) of the PPR, 2008 ("ত্রুটিপূর্ণ বা অন্যায়ভাবে চুক্তি সম্পাদন করা হইয়াছে বলিয়া ধারনা করিবার সঙ্গত কারন থাকিলে") if there is reason to believe that the contract has been sealed unfairly, anyone can take recourse to sections 29 and 30 of the PPA, 2006.

In an open tender if the Tender Evaluation Committee fails to perform its duty in accordance with the provisions of the PPA, 2006, PPR, 2008 and instruction stipulated in the Tender Document, then, anyone who suffers loss or is

likely to suffer loss can lodge a complaint against the purchaser to the administrative authority at first and, then, to Review Panel if aggrieved by the administrative authority's decision. .....(43 & 44)

Public Procurement Act (XXIV of 2006)
Section 30
Public Procurement Rules, 2008
Rules 56 and 60

From a plain reading of the Rules 59 and 60, it appears that the forum created by the statute namely PPA, 2006 under section 30 of the same is amply empowered to adjudicate upon any sort of complaint or grievance related to arising out of procurement by a public body with the public money inasmuch as there are abundant provisions for passing interim order restraining the purchasing entity from entering into the contract until disposal of the complaint or appeal. .....(46)

Public Procurement Act (XXIV of 2006)
Section 4

Section 4 of the PPA, 2006 heralds that it is a special law having overriding effect on other laws and the Review Panel being constituted with 3 (three) highly knowledgeable adjudicators, one having experience from the field of administration, one from judiciary and the third one from technical field of relevant procuring staff, the forum appears to be one of the most competent and best forum any statute has ever created in our country for speedy and complete disposal of complicated grievances. .....(48)

Ratio decidendi

***Ratio decidendi* of two cases have lost their force so far as it relates to the issue of maintainability of a writ petition on the grievance of public procurement after the enactment of the PPA, 2006 and, as such, the same is not applicable in the case at hand.** .....(56)

Malafide

In order to successfully make out a case on the basis of malafide, the petitioner is required to categorically state the grudge against her, if any, or to produce the proof/evidence of naked favour by the respondents to another party. Allegations of malafide on vague or general terms is beyond the scope of consideration by this Court. .....(59)

Constitution of Bangladesh, 1972
Article 102(1)(2)

This Court in past has never hesitated or shall not be shaky in future to entertain writ petitions in fit and proper cases, for example, where an action taken or order passed by a Government or any statutory body or even any Constitutional body is ex facie illegal, malafide, or the same suffers from malice-in-law or quorum non-judice in carrying out its functions within administrative capacity, inspite of the existence of other alternative forums. .....(61)

ArtConstitution of Bangladesh, 1972
Article 102(1)(2)

Review Panel is equally efficacious forum for adjudication of the grievance of the petitioner, the Rule is liable to be discharged only on the ground of maintainability without embarking upon other issues under the law of contract for examination. .....(75)

India AIR 1979 (SC) 1628, M/S Kasturi Lal vs State

of J&K AIR 1980 (SC) 1992; Ruhul Amin vs Freedom Fighters Welfare Trust 51 DLR 208; Agrogami Engineers Limited vs Bangladesh Bank, 45 DLR 134; Hyundai Corporation vs Sumikin Bussan, 54 DLR (AD) 88; Tata Cellular vs Union of India AIR, 1996 (SC) 11; Comptroller Auditor General vs KS Gallathan, AIR 1987 (SC) 537; Harminder Singh vs Union of India, AIR 1986 (SC) 1527; Jyothi Krishna Engineers vs State Bank of Hyderabad, AIR 1993 (AP) 327; Chowdhury Mahmud Hassan vs Bangladesh, 54 DLR 537; Sharping MSS Ltd vs Bangladesh, 39 DLR (AD) 85; Abdul Rouf vs Abdul Hamid, 17 DLR (SC) 515; Khondoker Mostaque Ahmed vs Bangladesh, 34 DLR (AD) 222; Khandaker Ehteshamuddin Ahmed vs Bangladesh, 33 DLR (AD) 154; AFM Shah Alam vs Mujibul Haq, 41 DLR (AD) 68; Asaduzzaman vs Bangladesh, 42 DLR (AD) 153; Kushtia Sugar Mills Ltd vs Chairman Labour Court, 49 DLR 237; Superintendent Engineer, RHD vs Md Eunus and Brothers (Pvt.) Ltd, 31 BLD (AD) 1; Bangladesh Power Development Board vs Asaduzzaman Sikder, 9 BLC (AD) 1; Nuruddin vs Manager, Titas Gas Transmission and Distribution Company Ltd, 18 BLD (AD) 273= 3 BLC (AD) 231; Shamsunnahar Salam vs Mohammad Wahidur Rahman, 51 DLR (AD) 231; State of Orissa vs Harinarayan, AIR 1972 (SC) 1816; State of UP vs Vijay Bahadur Singh, 1982 2 SCC 365; Union of India vs BW Ram, AIR 1971 (SC) 2295; Farzana Haque vs University of Dhaka, 42 DLR 262; Mujibur Rahman vs Bangladesh, 44 DLR (AD) 111; BTCL vs CPTU, 18 BLC 98; Abdur Rouf vs Abdul Hamid Khan, 17 DLR (SC) 515; Begum Lutfunnessa vs Bangladesh 42 DLR (AD) 86; Nesar Ahmed vs Bangladesh 49 DLR (AD) 111; Bangladesh vs Sayeda Chand Sultana, 51 DLR (AD) 24; Hyundai Corporation vs Sumikin Bussan Corporation, 54 DLR (AD) 88; Ekushey Television vs Chowdhury Mahmud Hassan, 54 DLR (AD) 130; Tata Cellular vs Union of India, AIR 1996 (SC) 11; Sharping MSS 39 DLR (AD) 85; Khandaker Mostaque Ahmed vs Bangladesh, 34 DLR (AD) 223; Jamil Huq vs Bangladesh, 34 DLR (AD) 125; Kh. Ehteshamuddin Ahmed vs Bangladesh, 33 DLR (AD) 154; RAJUK vs Abdur Rouf Chowdhury, 61 DLR (AD) 28; ACC vs Enayetur Rahman, 64 DLR (AD) 14 and Government of Bangladesh vs M Anwar Hossain, 32 BLD (AD) 36 =16 BLC (AD) 155 ref.

Akhtar Imam with Rashna Imam and Reshad Imam, Advocates—For the Petitioner.

Murad Reza, Addl. AG with Md Al Amin Sarkar, DAG—For Respondent No. 4.

Razik Al Jalil, Advocate—For Respondent Nos. 1, 2&3.

Dr. Shahdeen Malik with Kawser Ahmed, Advocates—For Respondent No.5.

Judgment

Md Khurshid Alam Sarkar J: This Rule was issued calling upon the respondents to show cause as to why the impugned decision taken by respondent Nos. 1 and 4 upon showing the petitioner's financial proposal to be non-responsive in relation to the tender under reference No. 2781-BPDB(Sets)/Dev-205/2011 for engineering, design, manufacturing, inspection, supply, installation, erection, testing & commissioning of Chapai Nawabganj 100 MW ±10% Power Plant (HFO fired Engine Generating Sets.) Project on turnkey basis in Amnura, Chapainawabganj, Bangladesh, shall not be declared to have been taken without lawful authority and of no legal effect and, further, to show cause as to why respondent Nos. 1 and 4 shall not be directed to declare that the petitioner's financial proposal is responsive as well as the lowest and thereby to award the tender under reference No. 2781/2011 BPDB(Shct.)/Dev-205/ 2011 in favour of the petitioner as the same is technically responsive and financially the lowest and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The facts of the case, as stated in the writ petition, are that the petitioner being incorporated as a company in the year 1982 engaged itself in carrying out engineering, construction and various large scale development programs in Highway, Bridge, and Building including the land mark construction and maintenance of Dhaka-Chittagong Highway, Dhaka-Sylhet Highway, Highways of Dinajpur, Rangpur, Rajshahi and Khulna, 300fts wide Purbachal link road and, eventually, the petitioner diversified its business from infrastructure to Power Generation from 2007 and pursued several powers projects. When respondent No. 1 invited tender on 9-10-2011 for engineering design, manufacturing, inspection, supply, installation, erection, testing & commissioning of Chapai Nawabganj 100 MW ±10% Power Plant (HFO fired Engine Generating Sets.) project on turnkey basis at Amnura, Chapainawabganj, Bangladesh, the petitioner participated in the said tender by submitting the 'Technical Proposal' to which the commitment letter from the financier was appended and the 'Financial Proposal' as per the procedure prescribed in the tender document. On 25-6-2012 the respondents opened the Technical Proposals and found 5 bidders, including the petitioner company, to be technically responsive and, then, respondent No. 2 vide letter dated 14-10-2012 notified the petitioner that their 'Financial Proposal' would be opened on 21-10-2012 at 11 am local time in respondent No. 1's Board room. After opening up the 'Financial Proposal' of the technically responsive 5 bidders, there were communications from Hardy Capital Corporation, which is the financier of the petitioner company. On 3-12-2012 to respondent No. 1 in order to provide a reassurance of funding the project and vide letter dated 17-12-2012 the said financier company provided certain clarifications to respondent No. 1 in relation to the anomalies as to the letterhead and logo of their company. It is stated that though the bidders were notified that the 'Financial Offer' would be opened on 21-10-2012 but nothing was notified to any of the bidders as to their financial offers. It is alleged that the respondents failed to show any transparency in dealing with the said tender and making the bidders financially responsive or non-responsive given that from the date of finding the petitioner to be technically responsive, there was no communication between the petitioner and the respondents. When on 25.02.2013 'The Daily Star', a leading daily newspaper of the land, published news under the title "Harbin Deal Gets Government Nod Again", only then the petitioner had the opportunity to know that the Purchase Committee approved the aforementioned project in favour of the China Company Hubei Electric Power Survey and Design i.e. respondent No. 5 for a price of Taka 948 crores. The petitioner then managed to obtain a copy of the summary of the purchase proposal, which was prepared on the basis of the evaluation report of the Tender Evaluation Committee (hereinafter referred to TEC), wherein the TEC considered the financial proposal of all the 5 technical responsive bidders and found the petitioner's financial proposal to be non-responsive.

3. It is alleged that the petitioner offered Taka 200 crores less than that of respondent No. 5 who was recommended the award but on the ground of lacking some frivolous and petty requirements the petitioner was made financially non-responsive just to favour respondent No. 5 purposefully and the action of respondent Nos. 1 & 2 in offering the tender to respondent No. 5 demonstrates mala fides as the petitioner has been deprived of getting the award for the personal gain of the respondents and against the financial interest of the State at the cost of huge loss of Bangladesh. The petitioner on 27-12-2012 notified respondent Nos. 1&2 about the action of respondent No. 4 when the latter explained its position to the former stating that the petitioner's financial proposal was not found responsive for the reasons stated in the minutes of the meeting of TEC on 8-1-2013. It is stated that since the petitioner was not supplied with any decision, she was

not in a position to prefer an appeal to the appellate authority and under the circumstances the petitioner was compelled to approach this Court for vindication of her legal rights. By filing a supplementary affidavit on 06-10-2013, the petitioner stated that though this Hon'ble Court issued Rule on 10-3-2003 with a verbal direction upon the respondents to maintain statusquo, respondent Nos. 1-3 issued Notice of Award in favour of respondent No. 5 on 14-3-2013 and the same was accepted by the latter on 18-3-2013 and, thereafter, on 31-3-2013 they sealed the agreement. The petitioner terms the aforesaid actions of the respondents to have been taken in sheer disregard of this Court's honour and practice.

4. Bangladesh Power Development Board (BPDB) is respondent No. 1, the Secretary of Bangladesh Power Development Board is respondent No. 2, the Tender Evaluation Committee (TEC) of Bangladesh Power Development Board is respondent No. 3, the Government of the People's Republic of Bangladesh represented by the Ministry of Power, Energy and Mineral Recourses Division is respondent No. 4 and HUBEI Electric Power Survey and Design Institute of China is respondent No. 5 in this writ petition. Respondent Nos. 1-3 have entered their appearances and contested the case by a filing an affidavit-in-opposition followed by supplementary thereto and respondent No. 4, though did not file any separate affidavit-in-opposition, adopted the statements and submissions of respondent Nos. 1-3. Respondent No. 5 contested the Rule by filing a separate set of affidavit-in-opposition with a supplementary thereto.

5. In the affidavit-in-opposition filed by respondent Nos. 1-3, it is stated that BPDB invited Tender under 'Single-Stage Two-envelop Tendering Method' for engineering, design, manufacturing, inspection, supply, installation, erection, testing & commissioning of Chapai Nawabganj 100 MW ±10% Power plant (HFO fired Engine Generating sets project on turnkey basis including 2 years warranty period along with LTSA for next 4 (four) years under the heading of "Construction of Chapai Nawabganj 100 MW. ±10% Power plant (HFO fired Engine Generating sets) project "on 9-10-2011 vide Tender Ref. No. 2781-BPDB (Sect)/Dev-205/2011 dated 9-10-2011. The said Tender Notice was published in several daily newspapers on 10-10-2011, 13-10-2011 and 15-10-2011.

6. As per the Tender Notice and subsequent addenda, the Technical and Financial proposals, separated in two sealed envelopes, were to be submitted to BPDB by 10-00 hrs. BST on 25-6-2012. The Tender opening committee headed by the Secretary of BPDB was to open the Technical proposal at the same date and read out the names of the Tenders. The following 5(five) tenderers namely, 1. M/s. CCC:ETERN-FUJIAN JV (CFFJV), China, 2. Ms. HUBAI Electric Power Survey and Design Institute, China, 3. M/s. Energypac Power Generation Ltd. Bangladesh, 4. M/s. Concord Pragatee Construction Ltd, Bangladesh and 5. M/s. Dong Fang Electric International Corporation, China were received. All the Tenderers' representatives were present. As per clause 25 of the Tender documents, the Technical proposals submitted by the bidders were to be evaluated first and then the "Financial Proposals" of the Tenderers whose "Technical Proposals" found to be responsive would be opened and to be evaluated only. The technical proposals were evaluated by the TEC which was formed by the Power Division, Ministry of Power Energy and Mineral Resources and the said Committee recommended all the said tenderers as technically responsive after receiving requisite clarifications from them and, accordingly, further recommended to open their Financial Proposals which were finally approved by the BPDB and the concerned Ministry (MEMR).

7. Then the Financial Proposals of all the technically responsive tenderers were opened on 21-10-2012 and the evaluation of the financial proposals was done as per the instructions set forth in the tender document and subsequent addenda. As per the assessment of the TEC, only 2 (two) tenderers' financial proposals were found to be responsive namely: (1) M/s. CCC:ETERN-FUJIAN JV(CFFJV), China and (2) M/s. HUBEI Electric Power Survey and Design Institute, China and the following tenderers' Financial proposals were found to be non-responsive- (1) M/s. Energypac Power Generation Ltd. Bangladesh, (2) M/s. Concord Pragatee Construction Ltd, Bangladesh and (3) M/s. Dong Fang Electric International Corporation, China. The Financial proposal of M/s. Concord Pragatee Consortium Ltd. Bangladesh (the petitioner) was found non-responsive since her offer was confusing and conditional which falls under material deviation and the said decision was communicated to the petitioner vide memo No. 27/BPDB(Secy.) /Dev.-205/2011 and dated 3-1-2013. As the financial proposals of the petitioner and two other tenderers were found non-responsive, the same were not considered for further evaluation. The specific reasons for non-considering the writ petitioner's financial offer is given in the minutes of the meeting of TEC held on January 2013 (annexure-I to the writ petition).

8. The financial proposals of 2 responsive tenderers were evaluated by the TEC and after threadbare discussions and considering the facts and factors the said Committee recommended to accept the financial offer (EPC cost) of technically and financially responsive 1st Lowest Bid of M/s. HUBEI Electric Power Survey and Design Institute, China, (respondent No. 5) which was subsequently recommended by BPDB and then was approved by the Purchase Committee and, finally, was received nod from the Hon'ble Prime Minister of the Government of People's Republic of Bangladesh. Thereafter, on 14-3-3013 the Notification of Award was issued in favour of respondent No. 5 who accepted the same on 18-3-2013 and submitted performance Guarantee (PG) on 28-3-2013 and thereafter a contract was signed between the BPDB and respondent No. 5 on 31-3-2013.

9. Out of 3 financially non-responsive tenderers, one M/s. Dong Fang Electric International Corporation went to the Review Panel invoking the provisions under sections 29 and 30 of the Public Procurement Act-2006 (PPA, 2006) and Public Procurement Rules-2008 (PPR, 2008) to seek redress for their grievance and after hearing both the sides the Review Panel rejected the said appeal on 10-2-2013. However, the writ petitioner, without exhausting the said provisions of law for settlement of her grievance, filed the instant writ petition and obtained the present Rule. It is started that as per clause 2 of the Tender Documents, Specimen Form of the Proposal (Form of Tender) 'without price' needed for technical proposal and Specimen Form of Tender 'with price' needed for financial proposal are furnished in Appendix-2 of the Tender Documents. As such, it cannot be said that the financial credit proposal of the writ petitioner has been evaluated with her technical proposal. It is further stated that when the writ petitioner's financial offer was found non-responsive she filed an application to respondent No. 2 on 27-12-2012 and respondent No. 2 after examining the matter rejected the said application of the writ petitioner on 3-1-2013 and, hence, it cannot be said that the writ petitioner was not informed about her financial offer as non-responsive.

10. In the affidavit-in-opposition filed by respondent No. 5, it is contended that the claim of the petitioner as to making the lowest offer by a margin of Taka 200 crores appears to be based on the 'read-out' price as stipulated in the financial proposal of the submitted tender documents. It was mentioned by respondent No. 5 that the read-

out price is not the final price to be accepted for determining the successful bidder. The technical and the financial proposal have to be evaluated and graded/scored in accordance with the provisions of the PPA, 2006 and PPR, 2008 having taken into consideration all the aspects of the technical proposal and the financial proposal. The present tender in question involves such method of procurement where the bidder will arrange finance for the tendered project and, therefore, in addition to read-out price, rate of interest, repayment period, arrangement fees and other bank charges etc should be taken into consideration for final evaluation of the financial proposal. Read-out price is actually the cost of Engineering, Procurement and Construction Cost (EPC) and does not include rate of interest, repayment period, arrangement fees and other charges and expenses as may be incurred. The petitioner, in his financial offer, has claimed 5% as 'Lender Fee" culminating 4.25 million in Euro which is not included in the read-out price. Moreover, the read-out price of the petitioner also does not include USD 1,00,000 as commitment fees as referred to in their financial proposal. It is further stated that the petitioner ranked 4th while respondent No. 5 ranked 2nd among all of the bidders (annexure-I series). All the process of tender was done lawfully, fairly and transparently.

11. Mr. Akhtar Imam, the learned advocate appearing for the petitioner, at the very outset places sections 18 & 60 of the PPA, 2006 and submits that the decision of respondent No.1 in finding the petitioner's bid to be financially non-responsive has been made in sheer violation of the aforesaid provisions of the PPA, 2006 inasmuch as the same has been taken without seeking any clarification of the grounds taken by the TEC for showing the petitioner non-responsive and without communicating the result of the financial evaluation to the petitioner. In a bid to buttress up the above submissions he adds that respondent No. 1 has been provided with ample powers to seek clarifications and negotiate with the tenderers under sections 18 & 60 of the PPA, 2006 and by not seeking the clarifications from the petitioner in relation to the frivolous grounds shown to find the petitioner's offer to be financially non-responsive, the respondents have acted unlawfully in making the impugned decision and, as such, the respondents' decision must be termed as an offspring of their arbitrary and malafide action.

12. Mr. Akhtar refers to Clauses 17 & 25 of the Tender Documents and submits that respondent Nos. 1-4 grossly violated the instructions laid down in the tender documents in addition to the provisions of the PPA, 2006 inasmuch as the Tender Documents do not permit respondent Nos. 1-4 to examine the commitment letter at the financial evaluation stage and, further, the tender documents expressly state the procedure for financial evaluation which does not in any manner include considerations of material deviation, confusion and conditional commitment, rather Clauses 17 & 25 expressly made it clear that material deviation, confusion and conditional commitment are to be considered at the technical evaluation stage and, by referring to annexure-D&E to the writ petition, he submits that the same has already been done at the stage of technical evaluation when the petitioner was asked to clarify some issues raised by respondent Nos. 1-4 and upon receiving satisfactory clarifications the petitioner was declared technically responsive. He submits that commitment letter is part of the technical proposal and, hence, it was examined at the technical evaluation stage and the petitioner was found to be technically responsive. The contents of the letter dated 3-12-2012 is self-explanatory and nothing stated in the said letter can in any way be construed as an intention to influence the respondent Nos. 1-4. Moreover, the petitioner was found to be technically responsive on or before 21-10-2012 (the date of the financial opening) and, as such, the letter dated 3-12-2012 cannot influence a decision taken before 21-10-2012 and was totally redun-

dant and of no legal consequence and should have been ignored. Thus, respondent Nos. 1-4 cannot legally declare the petitioner to be technically non-responsive at the financial evaluation stage after declaring the petitioner to be technically responsive at the technical evaluation stage, otherwise the respondents would be blamed for traveling beyond the powers provided in the Tender Documents.

13. He submits that the impugned decision has been taken having been influenced by the extraneous consideration in collusion with other respondents which is evident from the fact that though the petitioner was the lowest bidder with a margin of Taka 200 (two hundred) crores, respondent No. 5 has been shown as the successful bidder causing a huge financial loss to Bangladesh. He submits that the decision making process of respondent Nos. 1-4 is flawed and reflects complete lack of transparency and, thus, this is a fit and appropriate case for this Court to exercise its judicial power of review in the light of the fact that respondent Nos. 1-4 demonstrated their arbitrariness very nakedly. Mr. Akhtar relies on the following decisions in support of his above submissions: Ramana vs I.A. Authority of *India AIR 1979 (SC) 1628, M/S Kasturi Lal vs State of J&K AIR 1980 (SC) 1992, Ruhul Amin vs Freedom Fighters Welfare Trust 51 DLR 208, Agrogami Engineers Limited vs Bangladesh Bank 45 DLR 134, Hyundai Corporation vs Sumikin Bussan 54 DLR (AD) 88, Tata Cellular vs Union of India AIR 1996 (SC) 11, The Comptroller Auditor General vs KS Gallathan AIR 1987 (SC) 537, Harminder Singh vs Union of India AIR 1986 (SC) 1527, M/S Jyothi Krishna Engineers vs State Bank of Hyderabad AIR 1993 (AP) 327, Chowdhury Mahmud Hassan vs Bangladesh 54 DLR 537.*

14. With regard to the issue of maintainability of this case, Mr. Akhter places Section 29(2)(c)(ii) and sections 18, 52 & 53 of the PPA, 2006 and submits that the petitioner could not exhaust the statutory remedy provided by the PPA, 2006 because the petitioner is required by the PPA, 2006 to file a claim prior to the approval of a bid by the Cabinet Purchase Committee and since the petitioner was not informed at any stage about the tender process and till date has not received a letter rejecting her bid, there was no alternative but to file the instant writ petition. He submits that the tender in the instant case is not an ordinary commercial contract since the terms of the contract must be in compliance with a statute namely PPA 2006 and the Rule framed thereunder namely, PPR 2008 in addition to be in consonance with Clause 33 of Instructions to Tender and must have the approval of the Cabinet Purchase Committee headed by the PM and, as such, the said contract is a statutory contract and, by placing the celebrated case of *Sharping MSS Ltd vs Bangladesh 39 DLR (AD) 85,* he submits that writ is always maintainable with regard to any grievance of a statutory contract. Finally, he submits that even if the contract was an ordinary commercial contract, writ petition is maintainable since the action complained of is blatantly arbitrary, discriminatory, malafide and violative of the fundamental rights of the petitioner guaranteed under Articles 27, 31 & 40 of the Constitution. In support of his submissions he refers to the following case laws: *Abdul Rouf vs Abdul Hamid 17 DLR (SC) (515 para 7), Khondoker Mostaque Ahmed vs Bangladesh 34 DLR (AD) 222 (para 17+23), Khandaker Ehteshamuddin Ahmed vs Bangladesh and others 33 DLR (AD) 154 (para 32), AFM Shah Alam vs Mujibul Haq, 41 DLR (AD) 68 (para 49'3), Asaduzzaman vs Bangladesh, 42 DLR (AD) 153 (para 3'c), Kushtia Sugar Mills Ltd vs Chairman Labour Court, 49 DLR 237 (para 11).* By making the aforesaid submissions the learned Advocate for the petitioner prays for making the Rule absolute.

15. Per contra, Mr Murad Reza, the learned Additional Attorney-General, appearing for the respondent No. 4, at the very outset places Section

2(d) and section 7(1) of the Contract Act, 1872 and submits that an offer must be made by a party in the clearest terms and in an unambiguous manner and, thereafter, the acceptance to an offer must be absolute and unqualified. He refers to the letter dated 5-6-2012 issued by the petitioner's financial company (Hardy Capital Corp.) and submits that the petitioner's said financial by proposing to charge a commitment fees of 1,00,000 (USD) and a lending fee of 5% of the loan amount has, in fact, put a condition on the respondents. He further submits that the technical proposal of a bidder is to be evaluated according to the provisions of Section 59 of the PPA, 2006 and Rules 119-121 of the PPR, 2008. In an endeavour to elaborate his submissions on the provisions of the above Rule, he adds that as per Rules 120 & 121 of the PPR, 2008, the stipulated price/read out price as mentioned in the financial offer is not the only determinant for acceptance of a financial proposal and, thereafter, if the financial proposal of a bidder is the lowest offer, it does not entitle award of contract in view of the provisions of Rule 120 which provides that a financial proposal has to be evaluated in substance. Rules 120, 121(2) and 121(3) lay down formula as to how a financial proposal should be assessed when the evaluation of financial proposal has to be combined with the score obtained in the each respective technical proposal and thereby the most eligible bidder has to be selected. He submits that it is not either the technical proposal or the financial proposal alone that has to be taken into consideration for selecting the most eligible bidder. Therefore, the petitioner's prayer for awarding the tender in her favour is not tenable in law. The above provisions provide that assessment of eligibility on technical proposal is to be expressed in 'scoring'. As regards the technical proposal, the ranking indicates that the petitioner's technical offer was not on a par with that of respondent No. 5.

16. He refers to annexure-B and submits that the writ petitioner was rightly declared non-responsive with regard to her financial proposal as her papers and documents relating to financial proposal were found inconsistent and contrary to the instructions laid down in the Tender Document. By placing Clause 17 of the Tender Documents he submits that in order to substantiate the source of finance of the each tenderer, a firm commitment letter from the financial lender about the tenderer's credit financing covering 100% of the turnkey price is required to be submitted with the technical proposal at the time of bid submission, otherwise the tender shall be considered technically non-responsive and, further, the tenderer shall enclose a complete and firm financing proposal. The Credit proposal shall mainly include (a) offered credit, (b) rate of interest, (c) repayment period, (d) grace period etc and the financial proposal should include 3 (three) amortization schedules considering above mentioned features of credit, 1 (one) for remaining portion of foreign currency, (except CIF value), 01 (one) for local currency and the BPDB will provide corporate guarantees against the credit financing.

17. Then, he places Clause 25 of the Tender Documents and by emphasizing on Sub-Clause 'b' of the part of "Material Deviation", he submits that the tender documents if submitted in deviation of the instructions laid down therein will be declared non-responsive. The financial proposal of the petitioner, he continues to submit, has not been prepared in line with Clause 17 and, therefore, it falls under stipulation regarding material deviation part of Clause 25 and was rightfully declared non-responsive. He submits that since the borrower is BPDB, the conditions stipulated in the petitioners' financial offer, in one hand, would create burden and limit in substantial way BPDB's negotiating capability, on the other hand, are inconsistent with the tender document and, thereby, constitutes material deviations from the stipulations contained in the tender document and, accordingly, was rightly declared non-responsive.

18. Then he places sections 29 and 30 of the PPA, 2006 and Rules 56-60 of the PPR, 2008 and submits that the petitioner has not exhausted efficacious remedy available under law and, as such, the present writ petition is not maintainable. In a bid to elaborate his argument on this point he submits that for the sake of argument if it is conceded that the petitioner did not receive the annexure-7 (communication by the respondents to the petitioner informing her that she was found non-responsive), however, since the petitioner was able to obtain a copy of the summary of the purchase proposal based on the Evaluation Report of the TEC, who considered the financial proposal of the respective parties and found the petitioner's financial proposal to be non-responsive, the petitioner could have easily invoked the statutory provisions as laid down in the PPA, 2006. He submits that it is an admitted fact that the petitioner vide letter dated 27-12-2012 to respondent No. 4 elaborated her grievance in relation to the actions of the respondent Nos. 1 & 2 and thereafter instead of availing the forums available under the PPA, 2006 she opted to file the writ petition on 6-3-2013 having wasted 2 months after lodging the said complaint. He submits under section 59 of the PPA, 2006 Review Panel is an equally efficacious forum as it has the power to pass any ad-interim order upon the respondents and in an endeavour to substantiate his argument he takes the instance of another bidder namely, Dongfang Electric International Corporation who filed complaint with the Procuring Entity on 26-12-2012, thereafter, with the Head of the Procuring Entity on 2-1-2013, thereafter, with the Secretary, Power Division on 10-1-2013 and, finally, the said company preferred the statutory appeal No. 3-162/2013 before the Review Panel when the tender process was temporarily restrained. He submits that the writ petitioner's case does not fall under the exceptions as stipulated in section 29(2) of the PPA, 2006, as the petitioner was informed by respondent No. 2 about the grounds of non-responsiveness and her purported grievance clearly falls under Rule 56 (খ)(৯) of the PPR, 2008 since the tender in question is an open tender but the petitioner without seeking to avail of remedies as mentioned above filed this writ petition. He submits that under the provisions of Rules 59 & 60 of the PPR, 2008, the petitioner till now may avail the efficacious remedy before the Review Panel invoking Rule 56 (খ)(১২) of the PPR, 2008 which provides for grievance procedure to address complaints stemming from inappropriate conclusion of contract.

19. Mr. Murad Reza then refers to the case of *Superintendent Engineer, RHD vs Md. Eunus and Brothers (Pvt.) Ltd* reported in *31 BLD (AD) 1* and submits that the subject matter of the instant writ petition being pure and simple commercial contract, the present writ petition is not maintainable. Then, he refers to the case of *Bangladesh Power Development Board vs Asaduzzaman Sikder, 9 BLC (AD) 1* and submits that the Apex Court in the said case held that writ jurisdiction can only be invoked if the contract is a statutory contract or if the Government enters into a contract in the sovereign capacity. Then, he refers to the case of *Nuruddin vs Manager, Titas Gas Transmission and Distribution Company Ltd 18 BLD (AD) 273= 3 BLC (AD) 231* and *Shamsunnahar Salam vs Mohammad Wahidur Rahman, 51 DLR (AD) 231* and submits that since a question of fact as to receiving the decision from the respondents on the tender application of the petitioner has been disputed, this Court cannot decide the said fact sitting in the capacity of certiorari. By referring to the case of *State of Orissa vs Harinarayan AIR 1972 (SC) 1816, State of UP vs Vijay Bahadur Singh 1982 2 SCC 365, Union of India vs BW Ram AIR 1971 (SC) 2295,* he submits that even if the petitioner's financial offer would have been accepted provisionally by the respondents, the Government has the right to reject the same inasmuch as any bid accepted provisionally can be rejected in the public interest by the government

before issuance of Notification of Award.

20. Mr Razik Al Jalil, the learned advocate appearing for respondent Nos. 1-3, and Dr. Shahdeen Malik, the learned advocate appearing for respondent No.5, both of them opted to adopt the submissions advanced by Mr. Murad Reza. However, Dr. Malik, added a further submission that respondent Nos. 1-4 are government functionaries and in course of carrying out their routine tasks they have made a decision in favour of respondent No. 5 in accordance with law and it is the settled principle of law that presumption on the decision made by a government functionary should be that the same has been taken bonafide unless any aggrieved person makes out a clear case of malafide by categorically stating the motive or dishonesty of the concerned government functionary. He submits that there is no specific allegation against the respondents in leveling blame against them that they have been influenced by extraneous consideration. By referring to the case of *Farzana Haque vs University of Dhaka 42 DLR 262,* he submits that malafide must be pleaded in clearer terms in a writ petition and requires to be proved by material evidence and, thus, malafide must not be readily inferred. By making the aforesaid submissions, the learned advocate for the respondents pray for discharging the Rule.

21. We have heard the learned advocates for both the sides, perused the writ petitions, affidavits-in-opposition together with their annexures, relevant laws and decisions placed before this Court which have been considered by us with great care.

22. The main contentious point in this case is that whether the decision made by the respondents as to finding the petitioner's bid financially non-responsive on the ground of lacking "Material Deviation" was made in compliance with the provisions of PPA, 2006, PPR, 2008 and the instructions stipulated in the Tender Document in the backdrop of declaring the petitioner technically responsive. The further issue falls for consideration by this Court is whether the writ petition is maintainable in view of non-availing of the statutory forum as contended by the respondents.

23. Since the question of maintainability of the instant writ petition has been raised by the respondents' side on the ground of non-exhaustion of the 'equally efficacious forum', this Court is required to deal with the said issue at first.

24. It has been submitted by the learned Advocate for the petitioner that the instant writ petition has been filed under both the sub-Articles 1 & 2 of Article 102 of the Constitution.

25. Let us be acquainted with the provisions of Articles 102(1) & 102(2) of our Constitution which are reproduced herein below:

> Article 102. Powers of High Court Division to issue certain orders and directions, etc. (1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.
>
> (2) the High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-
>
> (a) on the application of any person aggrieved, make an order-
>
> (i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or
>
> (ii) declaring that any act done or pro-

ceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority and is of no legal effect; or

(b) on the application of any person, make an order-

(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring person holding or purporting to hold a public office to show under what authority he claims to hold that office.

26. It appears that the jurisdiction of this Court under Articles 102(1) and Article 102(2) is the 'Special Original Jurisdiction' and both the sub-Articles confer an extraordinary power upon the High Court Division and this power should be exercised on its discretion inasmuch as in both the sub-Articles the word "may" has been employed with the following phraseology "may give such direction or orders ....." in Article 102(1) and "may ....., make an order" in Article 102(2).

27. The fundamental difference between these two sub-Articles is that while Article 102(1) can be invoked directly if an aggrieved person can make out a case of infringement of fundamental rights, however, in order to qualify to be an applicant under Article 102(2), the aggrieved person must satisfy the Court that 'there is no other equally efficacious remedy' to redress his grievance.

28. Now, the pertinent question comes for consideration by this Court as to whether the grievance of the petitioner does fall within the purview of Article 102(1) of the Constitution as has been submitted by the petitioner's side that the impugned decision has been taken in sheer violation of Articles 27, 31 and 40 of the Constitution.

29. However, in our way of scrutiny, we do not find any elements of violation of the above fundamental rights inasmuch as in order to be in a competent position to allege violation of Article 27 the petitioner is required to establish the fact that she was at par with respondent No. 5 but the petitioner's offer being found to be different from that of respondent No. 5, Article 27 of the Constitution has hardly any scope to rescue her. Article 31 also cannot be resorted to by the petitioner inasmuch as there must be a clear case of not treating the petitioner as per law inasmuch as there may be violation of law by the respondents in dealing with the petitioner's matter but it is not capable of attracting Article 31 of the Constitution, for instances, (i) when a worker is not treated by his employer, he is to seek redress in the Labour Court, (ii) when a person's property is refused illegally to be mutated by the Assistant Commissioner of land, he is to appeal before the ADC, (iii) when a government servant is declined to enjoy his service benefits, he is to approach Administrative Tribunal and so on. In all the above instances, there are always allegations of not treating the aggrieved party in accordance with law but it cannot be said that there has been violation of Article 31. Finally, Article 40 being a qualified right its violation can be agitated only when an aggrieved person shall make out a successful case that despite the fact that the law, by which one's profession or business is to be dealt with, has declared a right to enjoy something but due to the authority's particular action, omission, decision or order she has been deprived of the same, which is not the case here. In dealing with the complaints by the litigants as to their violation of 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".

30. The petitioner's grievance, thus, does not come within the periphery of Article 102(1) of our Constitution.

31. The aforesaid conclusion leads us to undertake the examination as to whether the petitioner's grievance is amenable under Article 102(2) of our Constitution.

32. Jurisdiction under Article 102(2), as a whole, is known as an extraordinary jurisdiction and the same is to be availed of only when there is 'no other equally efficacious remedy' available. The framers of the Constitution have intended that the people, at first, must search for and approach an appropriate legal forum other than the Constitutional Court. It is only then the Constitutional Court should be availed of when the citizen will find that the state has not created any legal forum for them for vindication of their right and getting the desired remedy. Thereafter, subject to the 'satisfaction' of this Court, a writ petition may be entertained. Article 102(2) of our Constitution may be quoted in this context. 'The High Court Division may, if satisfied that no other equally efficacious remedy is provided in law.....'. It appears from the words employed in the said Article that 'if satisfied' strongly suggests that this 'Special original jurisdiction' of the High Court Division may be invoked only upon the satisfaction of the High Court Division as to the non-availability of the 'other equally efficacious remedy' *(underlined for emphasize)*. In our opinion, the clear and unambiguous words of our Constitution 'if satisfied' mandates this Court to undertake the scrutiny as to the competency of invoking this 'Special original jurisdiction' before issuance of any Rule given that carrying out of the examination thereto after issuance of a Rule may cause sufferings for the parties of the case in addition to wasting valuable time of this Court in the event of discharging the Rule on this ground.

33. In order to be satisfied as to the availability of the 'equally efficacious remedy' this Court is required to be acquainted with the provisions of the jurisdiction and power of the forum created by the statute namely the PPA, 2006 and the Rules thereunder namely, the PPR, 2008.

34. Here, in the case at hand, respondent Nos. 1-3 invited tender for procurement of some goods for the state and the regulating law for purchasing goods/service for the state is Public Procurement Act, 2006 and the Public Procurement Rules, 2008. Sections 29 and 30 provide the rights and forums for agitating any grievance in connection with any public procurement, which run as follows:

> **২৯। অভিযোগ করিবার অধিকার।**—(১) কোন ব্যক্তি এই আইনের অধীন ক্রয়কারীর উপর অর্পিত দায়িত্ব পালনে ব্যর্থতার জন্য ক্ষতিগ্রস্ত হইলে বা তাহার ক্ষতিগ্রস্ত হইবার সম্ভাবনা থাকিলে তিনি উক্ত ক্রয়কারীর বিরুদ্ধে ধারা ৩০ এ বর্ণিত কর্তৃপক্ষের নিকট অভিযোগ দায়ের করিতে পারিবেন।
>
> **৩০। প্রশাসনিক কর্তৃপক্ষের নিকট অভিযোগ দায়ের, আপীল, ইত্যাদি।**—(১) ধারা ২৯ এর অধীন দায়েরতব্য প্রতিটি অভিযোগ সংশ্লিষ্ট ক্রয়কারীর প্রশাসনিক কর্তৃপক্ষের নিকট দায়ের করিতে হইবে এবং উক্তরূপে কোন অভিযোগ দায়ের হইলে, উক্ত কর্তৃপক্ষ উহা বিবেচনাক্রমে নির্ধারিত সময়সীমার মধ্যে উহা নিষ্পত্তি করিবে।
>
> (২) কোন ব্যক্তি, যদি প্রশাসনিক কর্তৃক প্রদত্ত সন্তুষ্ট না হন বা

উক্ত কর্তৃপক্ষ যথাসময়ে সিদ্ধান্ত প্রদান করিতে ব্যর্থ হয়, তাহা হইলে সংক্ষুব্ধ ব্যক্তি সেই ক্ষেত্রে সরকার বা তৎকর্তৃক নির্ধারিত কোন কর্তৃপক্ষের মাধ্যমে রিভিউ প্যানেলের নিকট আপীল করিতে পারিবেন।

35. From a minute reading of the above provisions of law, it is apparent that any person (কোন ব্যক্তি) may lodge a complaint to the concerned administrative authority (প্রশাসনিক কর্তৃপক্ষ) under section 30(1) in two circumstances namely (1) where he suffers loss due to the failure of the procuring entity in performing its duty or (2) where he (any person) apprehends that there is a likelihood of suffering loss. In the event of dissatisfaction with the decision of the above-mentioned authority, s/he may prefer an appeal to the Review Panel.

36. The petitioner's grievance is that she has suffered loss for the failure of the respondents in performing their duties inasmuch as when the petitioner being a technically responsive bidder was expecting to have the award of the tender as the lowest bidder, she was declared financially non-responsive and, in the said premises, though she is required to approach the forums under section 30 of the PPA, 2006, however, the apparent reasons, as contended by the petitioner, for non-availing the forum under the said section 30 of the PPA, 2006 are that her position falls within the ambit of section ২৯(২)(গ)(আ) of the PPA, 2006 and, as such, she is debarred from invoking the provisions of Section ২৯(১)of the PPA, 2006. Let us look at the said provisions of the PPA, 2006, which are as under:

> ২৯(২) নিম্নবর্ণিত ক্ষেত্রে উপ-ধারা (১) এর অধীন কোন অভিযোগ দায়ের করা যাইবে না যথাঃ—
>
> (ক) পণ্য, কার্য বা সেবা ক্রয় পদ্ধতি নির্বাচন;
>
> (খ) কোন আবেদনকারীর সংক্ষিপ্ত তালিকাভুক্তির আবেদন প্রত্যাখ্যান;
>
> (গ) যে সকল ক্ষেত্রে নিম্নবর্ণিত সিদ্ধান্ত হইয়াছে–
>
> (অ) প্রাক্-যোগ্যতার আবেদন, দরপত্র, কোটেশন বা প্রস্তাব বাতিল করিবার সিদ্ধান্ত; বা
>
> (আ) সরকারী ক্রয় সংক্রান্ত মন্ত্রিসভা কমিটি কর্তৃক অনুমোদনের পরিপ্রেক্ষিতে চুক্তি সম্পাদনের সিদ্ধান্ত।

37. From a close reading of the above provisions of section ২৯(২) it appears that there are exceptional circumstances where the right to agitate grievance in a public procurement matter under section ২৯(১) of the PPA has been made inapplicable. It is the petitioner's plea that since the Cabinet Committee on Public Procurement headed by the Hon'ble Prime Minister has already given approval to the decision of the TEC, the forum for agitating her grievance as to declaring her financially a non-responsive bidder is not available to her.

38. Now let us examine the petitioner's plea in the laboratory of law. We find from the reading of section ২৯(১) of the PPA, 2006 that forum under section 30 of the PPA, 2006 becomes available not only when a person suffers loss by the decision of the purchasing entity, but also when a person foresees the probability of suffering loss by the action/omission or decision of the purchasing entity. From the letter dated 27-12-2012 (annexure-i) it appears that the petitioner had approached the administrative authority (প্রশাসনিক কর্তৃপক্ষ) of the purchasing entity well before the matter got approval of the Cabinet Committee on Public Procurement as she somehow had come to know that she was likely to be prejudiced by the decision of the purchasing entity when the latter replied to the former on 3-1-2013 informing that she had been found financially non-responsive. Thus, we find that after receiving the decision from the administrative authority under Rule 57(7) of the PPR, 2008, the petitioner had the opportunity to approach the Review Panel under section 30(2) of the PPA, 2006 but she opted not to exhaust the aforesaid forum of Review Panel.

39. The other reason, as stated by the peti-

tioner, for not approaching the forums under section 30 of the PPA, 2006 is that since the petitioner at no point in time had received a decision on her tender application, she was not in a position to invoke the said forums under section 30 of the PPA, 2006. However, as it has already been found from the petitioner's aforesaid letter dated 27-12-2012 (annexure i) that she has, in fact, invoked Section 30(1) of the PPA, 2006 by approaching the administrative authority (প্রশাসনিক কর্তৃপক্ষ) of the purchasing entity, the fact does not require detailed examination.

40. However, having skimmed through the petitioner's letter dated 27-12-2012 submitted to the Secretary, Ministry of Power & Electricity any one with ordinary prudence is led to take a view that since the tender in question is an open tender, apparently the contentions of the said letter come under the provisions of Rule 56(b)(9) & (11) of the PPR, 2008, which run as follows:

৫৬। **অভিযোগ করার অধিকার।** নিম্নবর্ণিত ক্ষেত্রে বা পরিস্থিতিতে কোন ক্রয়কারীর বিরুদ্ধে আনুষ্ঠানিক অভিযোগ দায়ের করা যাইবে, যথাঃ—

(ক) প্রাক-যোগ্যতা নির্ধারণের ক্ষেত্রে

(১).....

(২).....

(৩).....

(৪).....

(৫).....

(খ) উন্মুক্ত, সীমিত, সরাসরি, দুই-পর্যায় ও কোটেশন পদ্ধতির ক্ষেত্রে–

(১).....

(২).....

(৩).....

(৪).....

(৫).....

(৬).....

(৭).....

(৮).....

(৯) মূল্যায়ন কমিটি দরপত্র দলিলে উল্লিখিত নির্ণায়ককের আলোকে দরপত্র মূল্যায়ন করিতে ব্যর্থ হইলে; বা

41. Thereafter, vide annexure 7 dated 3-1-2013 the administrative authority (প্রশাসনিক কর্তৃপক্ষ) communicated its decision to the petitioner informing that she is found financially non-responsive. It has been alleged by the petitioner that she has never received the said decision dated 3-1-2013. The resolution of this issue of receiving or non-receiving the said communication dated 3-1-2013 being a disputed question of fact, this Court requires the examination of witnesses as to who dispatched the letter and who received the same, exercise of which is normally declined by this Court except in a rare of the rarest cases. On this count as well, the present writ petition may be declared to be not maintainable. However, if the contention of the petitioner as to non-receiving of the respondents' decision is accepted, even then she could have availed the forum under section 30 of the PPA, 2006 in view of the provisions laid down in Rule 57(9) of the PPR, 2008 with the following wordings

৫৭। (৯) কোন ব্যক্তি প্রত্যেকটি স্তরের জন্য নির্ধারিত সময়সীমার মধ্যে লিখিত সিদ্ধান্ত প্রাপ্ত না হইলে, উক্ত ব্যক্তি তফসিল-২ এ বর্ণিত সময়সীমার মধ্যে সরাসরি উক্ত কর্তৃপক্ষের পরবর্তী উর্ধ্বতন কর্তৃপক্ষের নিকট আপীল করিতে পারিবে।

42. On the other hand, from the legal point of view, the petitioner's above plea of non-receiving a decision on her tender application does not appear as a barrier in seeking redress from the authority under section 30 of the PPA, 2006 in view of the provisions of section 29(1) in the following words "ক্ষতিগ্রস্থ হইবার সম্ভাবনা থাকিলে"। Thus, it appears that even if the contentions of the petitioner are accepted that she was not given any decision by the purchasing entity, it does not refrain the petitioner from lodging a complaint to the administrative authority (প্রশাসনিক কর্তৃপক্ষ) at first if she feels that she is likely to suffer loss by the action or decision of the purchasing entity and, then, in the event of her non-satisfaction with the

decision of the administrative authority she may prefer an appeal to the Review Panel.

43. urthermore, in an open tender under Rule 56(11) of the PPR, 2008 ("দূর্নীতি বা চক্রান্তমুলক কার্যকলাপ সম্পর্কে সন্দেহ হইলে") if there is any suspicion of any malafide activities in the process of any public procurement and under Rule 56(12) of the PPR, 2008 ("ত্রুটিপূর্ণ বা অন্যায়ভাবে চুক্তি সম্পাদন করা হইয়াছে বলিয়া ধারনা করিবার সঙ্গত কারন থাকিলে") if there is reason to believe that the contract has been sealed unfairly, anyone can take recourse to section 29 and 30 of the PPA, 2006.

44. From a plain reading of sections 29 & 30 in tandem with Rule 56(b)(9) and 57(9) of the PPR, 2008, it is our considered view that in an open tender if the Tender Evaluation Committee fails to perform its duty in accordance with the provisions of the PPA, 2006, PPR, 2008 and instruction stipulated in the Tender Document, then, anyone who suffers loss or is likely to suffer loss can lodge a complaint against the purchaser to the administrative authority at first and, then, to Review panel if aggrieved by the administrative authority's decision.

45. In the backdrop of the above findings by this Court that there is a specific forum in a special law, now we may proceed to see the powers of the said forum as enumerated in Rule 59 and 60 of the PPR, 2008, which are as under:

৫৯। আপীলের নিষ্পত্তি না হওয়া পর্যন্ত চুক্তি সম্পাদনের নোটিশ জারী করা হইতে বিরত থাকার জন্য নির্দেশ প্রদানের ক্ষমতা।—(১) সিপিটিইউ, তফসিল-২ এ উল্লিখিত নির্ধারিত নিবন্ধন ফী এবং নিরাপত্তা জামানতসহ কোন আপীল আবেদন প্রাপ্তির পর, তফসিল -২ এ বর্ণিত সময়সীমার মধ্যে, পালাক্রমে একটি রিভিউ প্যানেল নির্বাচন করিয়া উহার নিকট উক্ত আপীল আবেদন নিষ্পত্তির জন্য প্রেরণ করিবে এবং উক্ত বিষয়ে রিভিউ প্যানেলের সিদ্ধান্ত না পাওয়া পর্যন্ত রিভিউ প্যানেল এর বিবেচনাধীন কোন ক্রয়কার্য বিষয়ে চুক্তি সম্পাদন করা হইতে বিরত থাকার জন্য ক্রয়কারীকে নির্দেশ প্রদান করিয়া সংশ্লিষ্ট মন্ত্রণালয় বা বিভাগের সচিব ও আবেদনকারীকে গৃহীত ব্যবস্থা সম্পর্কে পত্র মারফত অবহিত করিবে।

(২) ক্রয়কারী বা রিভিউ প্যানেলের নিকট কোন অভিযোগ বা আপীল বিবেচনাধীন থাকিলে উক্ত অভিযোগ বা আপীলের উপর চূড়ান্ত সিদ্ধান্ত না হওয়া পর্যন্ত চুক্তি সম্পাদনের নোটিশ জারী করা যাইবে না, তবে অভিযোগ বিবেচনাধীন থাকাকালীন দরপত্র মূল্যায়ন ও উহার অনুমোদন প্রক্রিয়া অব্যাহত রাখা যাইবে।

৬০। রিভিউ প্যানেল কর্তৃক আপীল নিষ্পত্তি।—(১) কোন আপীল আবেদন রিভিউ প্যানেলের সিদ্ধান্তের জন্য প্রেরণ করা হইলে এবং উক্ত আপীল যথাযথ নিরাপত্তা জামানত ও নিবন্ধন ফিসসহ দায়েরকৃত হইলে রিভিউ প্যানেল, উহার সিদ্ধান্ত প্রদানের সময় পর্যন্ত, চুক্তি সম্পাদনের নোটিশ জারী সংক্রান্ত স্থগিতাদেশ অব্যাহত রাখিতে ক্রয়কারীকে পরামর্শ দিবে।

(২) রিভিউ প্যানেল, তফসিল-২ এ বর্ণিত সময়সীমার মধ্যে উহার লিখিত সিদ্ধান্ত প্রদান করিবে এবং উক্ত সিদ্ধান্তের কপি সংশ্লিষ্ট ব্যক্তি, সংশ্লিষ্ট মন্ত্রণালয় বা বিভাগের সচিব, সিপিটিইউ এবং ক্রয়কারীকে প্রদান করিবে।

46. From a plain reading of the Rules 59 & 60, it appears that the forum created by the statute namely PPA, 2006 under section 30 of the same is amply empowered to adjudicate upon any sort of complaint or grievance related to arising out of procurement by a public body with the public money inasmuch as there are abundant provisions for passing interim order restraining the purchasing entity from entering into the contract until disposal of the complaint or appeal.

47. In order to know as to what types of power the Review Panel possesses or what kind of order it can pass and whether the decision of the Review Panel has the binding effect on the public authorities, let us look at Rules 60(3) & 60(5) of the PPR, 2008, which run as follows:

৬০(৩) তুচ্ছ (frivolous) কারণে অভিযোগ দায়েরের কারণে উহা খারিজ এবং ক্ষেত্রমত, নিরাপত্তা জামানত বাজেয়াপ্ত করার ক্ষেত্রে ব্যতীত, আপীল নিষ্পত্তির ক্ষেত্রে, রিভিউ প্যানেল নিম্নবর্ণিত যে কোন সিদ্ধান্ত স্বতন্ত্রভাবে বা সন্মিলিতভাবে প্রদান করিতে পারিবে, যথাঃ

(ক) কারণ উল্লেখপূর্বক আপীল আবেদন খারিজ করিয়া ক্রয়কারীকে ক্রয় কার্যক্রম পরিচালনা অব্যাহত রাখার পরামর্শ প্রদান;

(খ) আপীল আবেদনে উত্থাপিত অভিযোগের বিষয়বস্তু নিষ্পত্তির ক্ষেত্রে প্রযোজ্য বিধি-বিধান ও নীতি উল্লেখপূর্বক উহার আওতায় অভিযোগকৃত বিষয় নিষ্পত্তির জন্য যথাযথ ব্যবস্থা গ্রহণের জন্য পক্ষবৃন্দকে পরামর্শদান;

(গ) ক্রয়কারী কর্তৃক গৃহীত পদক্ষেপ এই বিধিমালার পরিপন্থি হইলে উহার প্রতিকারমূলক ব্যবস্থা গ্রহণের জন্য সুপারিশ প্রদান;

(ঘ) ক্রয় সংক্রান্ত চুক্তি কার্যকরণে গৃহীত ব্যবস্থা বা সিদ্ধান্ত ব্যতীত, ক্রয়কারী কর্তৃক বিধি-বিধানের সহিত সামঞ্জস্যপূর্ণ নহে এইরূপ কোন কার্য বা সিদ্ধান্ত, সম্পূর্ণ বা আংশিক, বাতিলের সুপারিশ প্রদান;

(ঙ) ক্রয়কারী, এই বিধিমালার অধীন উহার বাধ্যবাধকতা প্রতিপালনে ব্যর্থ হইয়ে থাকিলে, রিভিউ প্যানেল আপীল আবেদন দাখিলকারী ব্যক্তিকে দরপত্র দলিল প্রস্তুত ও আইন সংক্রান্ত ব্যয় এবং অভিযোগ দাখিল সংক্রান্ত অন্যান্য ব্যয় বাবদ ক্ষতিপূরণসহ বিধি ৫৭(১২) (গ) এর অধীন প্রদত্ত নিরাপত্তা জামানত ফেরত প্রদানের সুপারিশ প্রদান; এবং

(চ) ক্রয় কার্যক্রম সমাপ্তির জন্য সুপারিশ প্রদান।

(৪) .....

(৫) রিভিউ প্যানেলের সিদ্ধান্ত চূড়ান্ত হইবে এবং সংশ্লিষ্ট সকল পক্ষ উক্ত সিদ্ধান্ত মোতাবেক ব্যবস্থা গ্রহণ করিবে।

48. Under the provisions of Rule 60 (3) of the PPR, 2008 the Review Panel is empowered to pass any kind of order as it deems appropriate including payment of costs and compensation and Rule 60 (5) of the PPR, 2008 makes the decision of the Review Panel to be the final verdict and the same is binding upon the purchasing entity. In the case of *BTCL vs CPTU, 18 BLC 98* it was held that "the decision of the Review Panel, be that advice, recommendation or direction, will be binding upon all the parties (Para-17)". Moreover, section 4 of the PPA, 2006 heralds that it is a special law having overriding effect on other laws and the Review Panel being constituted with 3 (three) highly knowledgeable adjudicators, one having experience from the field of administration, one from judiciary and the third one from technical field of relevant procuring staff, the forum appears to be one of the most competent and best forum any statute has ever created in our country for speedy and complete disposal of this kind of complicated grievances. The above discussions on the power and jurisdiction of the Review Panel leads us to conclude that the forum under section 30 of the PPA, 2006 is a 'better forum' than an "equally efficacious" forum for adjudication of the petitioner's grievance as it has the power to stay the further proceedings of the procurement process and, then, to dispose of the complaint and, thereafter, to finally adjudicate upon the appeal within the stipulated time as fixed in the 'schedule 2' of the Rule with or without costs and, if appropriate, to compensate the aggrieved party. Accordingly, on the basis of the above discussions, we hold that the instant writ petition does not come within the ambit of Article 102 (2) of the Constitution.

49. We should now deal with the submissions of the learned Advocate for the petitioner that even if there is an alternative remedy the instant writ petition is maintainable as the impugned decision is taken without jurisdiction and, also, the same is tainted with malafide action. We, in dealing with the above submissions, are required to succinctly delve into the case laws referred to by the petitioner.

50. Let us, first, briefly examine the facts as well as law under which the cited case laws were adjudicated upon in order to see as to whether their ratio decidendi are applicable in the present case.

51. The case of *Abdur Rouf and vs Abdul Hamid Khan* reported in *17 DLR (SC) 515* was regarding a dispute over land properties, which was sent to the Deputy Commissioner as a refer-

ence under a Regulation (Frontier Criminal Regulation) for adjudicating of the matter and, as per sections 10 and 60 of the said Regulation, the order of the Deputy Commissioner was final. Then, question arose as to whether the dispute was at all referable to the Deputy Commissioner and it was found by the Supreme Court that the matter was sent as a reference to the DC under misconception of law and, therefore, the order passed by the DC was without jurisdiction. The facts of the above-cited case and the law points involved therein being different from that of the instant case, its dictum is not applicable here.

52. In the case of *Begum Lutfunnessa vs Bangladesh 42 DLR (AD) 86* the writ petitioner's grievance was that her property was included in the list of abandoned property though she was in physical possession of the same and when the High Court Division rejected the writ petition on the ground that there was an alternative remedy under section 7 of the Abandoned Building Ordinance, 1985, the Apex Court held that the writ petition is maintainable given that when the writ petitioner filed the writ petition on 19-8-1986 challenging the publication of the impugned list under notice dated 28-4-1986, there was no Settlement Court in operation under section 7 and, further, the Apex Court found that since the fact of possessing the property by the writ petitioner was not denied by the respondents, inclusion of the writ petitioner's property in the list of abandoned property was exfacie without jurisdiction. Thus, it appears that the facts and legal issues of the cited case is completely different from the fact of the case at hand and, this, the ratio decidendi of the said case law is not applicable in this case.

53. In the case of *Nesar Ahmed vs Bangladesh 49 DLR (AD) 111* the writ petitioner challenged the judgment and order passed by the Special Tribunal convicting him for 10 years in prison when the High Court Division rejected the writ petition in limine on the ground that there is an alternative remedy of appeal under section 30 of the Special Powers Act, 1974. However, the Appellate Division held that as the appellant had no reasonable opportunity to face the trial and, thereafter, to avail of the alternative remedy his writ petition was maintainable and, in addition thereto, it was also found that the recovered torch light and rope being not arms within the provisions of the Arms Act, the trial and conviction was without jurisdiction. But in the case at hand, the petitioner had the opportunity to avail the alternative forum and the decision of the respondents having attracted the mischief of some provisions of the PPA, 2006 and PPR, 2008 cannot be said to have been made without jurisdiction.

54. The case of Government of *Bangladesh vs Sayeda Chand Sultana 51 DLR (AD) 24* was with regard to challenging the inclusion of the petitioner's property in the list of abandoned property though he was in possession thereof during and after the liberation war and the aforesaid fact was not rebutted by the government and, in that premise, the High Court Division as well as the Appellate Division held that the impugned decision was without jurisdiction.

55. The above four case laws were referred to by the petitioner in a bid to show that the impugned decision was taken by the respondents without jurisdiction and, hence, the instant writ petition is maintainable without availing the forum under section 30 of the PPA, 2006. However, since the discussions made hereinbefore suggest that the facts of the afore-cited cases being different from that of the present case and the principles laid down in the above cases are not relevant at all to this case and, as such, it cannot be applied here inasmuch as our jurisprudence on the word "without jurisdiction" has subsequently developed in clear terms making the word applicable in specific situation/case.

56. The fact of the cases of *(i) Hyundai Corporation vs Sumikin Bussan Corporation 54*

DLR (AD) 88 and (ii) Ekushey Television vs Chowdhury Mahmud Hassan 54 DLR (AD) 130 (Popularly Known as ETV case) appear to be almost similar to the present case. In both of the cases the actions of the government authorities were found to have been taken aiming at favouring their chosen persons and in entertaining the writ petitions, which was affirmed by the Appellate Division, our Courts heavily relied upon the dictum propounded in the case of *Tata Cellular vs Union of India AIR 1996 (SC) 11.* However, at that point in time the PPA, 2006 was not in place and, therefore, there was no equally efficacious forum functioning under section 30 of the PPA, 2006 to take recourse to redress any grievance related to public procurement. Thus, the ratio decidendi of these two cases have lost their force so far as it relates to the issue of maintainability of a writ petition on the grievance of public procurement after the enactment of the PPA, 2006 and, as such, the same is not applicable in the case at hand.

57. Much reliance was placed by both the parties on the issue as to whether the contract is a statutory contract upon referring to the celebrated case of *Sharping MSS 39 DLR (AD) 85 and Superintendent Engineer, RHD vs Md Eunus and Brothers (Pvt) Ltd 31 BLD (AD) 1.* However, the dictum of these two cases or such like others cases are not applicable in the grievance related to the purchasing of public services/goods with the public money given that appropriate provisions have now been incorporated in the PPA, 2006 for dealing with statutory contracts.

58. To substantiate his argument that the impugned decision is an offspring of malafide, the case, of *(i) Khandaker Mostaque Ahmed vs Bangladesh* reported in *34 DLR (AD) 223, (ii) Jamil Huq vs Bangladesh* reported in *34 DLR (AD) 125 and (iii) Kh. Ehteshamuddin Ahmed vs Bangladesh* reported in *33 DLR (AD) 154* were cited before this Court. In all these three cases writ petitions were filed challenging the convictions passed by the Tribunal set up under the Martial Law Ordinance (MLO). Schedule of the said MLO incorporated provision for this Court to review actions and proceedings of the Tribunals and, therefore, there was scope in the said MLO itself to review the actions of the Martial Law Tribunals. When the issue of maintainability of these writ petitions were raised on the ground of operation of the ouster provisions under Article 102(5) of our Constitution, it was observed by our Apex Court that the High Court's jurisdiction under Article 102 may be exercised if the authority of a disciplined force or Courts/Tribunal under the Army Act or other law relating to disciplined forces acts malafide or without jurisdiction or is not properly constituted. It is to be noted here that though all the aforesaid three cases laid down the above principle of invoking writ jurisdiction overriding the exception of Article 102(5) of the Constitution, but, interestingly enough, in all of the cases, writ petitions were rejected summarily, which were upheld by the Appellate Division. The ratio decidendi of the above cases are not applicable in the instant case inasmuch as the petitioners of the afore-cited cases did not jump directly to the High Court Division when they were accused of committing the offence under Army Act bypassing the Tribunal. Here in this case, the petitioner approached the High Court Division straightaway without submitting herself to the Review Panel. Also, from the facts of the above cases and the conclusion arrived at by the Apex Court therein, it is our view that the aforesaid principle seems to be applicable only to the criminal cases.

59. Mala fide connotes malice in fact; meaning that when a public authority acts maliciously affecting adversely the right of a citizen, the said authority is blamed to have acted malafide. In order to successfully make out a case on the basis of malafide, the petitioner is required to categorically state the grudge against her, if any, or to pro-

duce the proof/evidence of naked favour by the respondents to another party. Allegations of malafide on vague or general terms is beyond the scope of consideration by this Court. Here in this case the decision of the respondents in declaring the petitioner financially non-responsive has been branded to be malafide on the ground that the respondents have purposefully excluded the name of the petitioner from the list of the financially responsive bidders because they had an ulterior motive to favour respondent No. 5 in awarding the contract and, in a bid to substantiate this allegation, the petitioner has relied upon mainly on the following facts (i) she is the lowest bidder with a margin of 200 crores Taka, (ii) the grounds taken for rejection of her bid are not related with financial part, rather technical part and (iii) she has not been provided with a copy of the decision as to finding her non-responsive. However, out of the above facts while last two have been denied completely by the respondents, the first one has been disputed in other way round stating that until a bidder is found to be responsive there is no scope to compare the rate of any bidder. Thus, the allegations raised by the petitioner appear to be disputed questions of fact and the same are beyond the adjudication of this Court.

60. In our assessment, the foregoing assertion that until the petitioner is found to be responsive both technically and financially there is hardly any scope to consider the rate apparently may sound to be acceptable but its adjudication being interrelated with the allegation No. 2, both the allegation Nos. 1 & 2 should be dealt with analogously. With regard to the third allegation that annexure-I and annexure-7 were never communicated to the petitioner and he was not informed about the decision of the TEC, the concerned person of the respondents is required to corroborate the same by adducing his/her evidence for which the petitioner may approach the Review Panel.

61. Our above view should not be misunderstood to be a conservative stand as we are not curtailing the power of the High Court Division nor this judgment is aimed at reduction of the number of briefs of the members of this Bar. This Court in past has never hesitated or shall not be shaky in future to entertain writ petitions in fit and proper cases, for example, where an action taken or order passed by a Government or any statutory body or even any Constitutional body is ex facie illegal, malafide, or the same suffers from malice-in-law or quorum non-judice in carrying out its functions within administrative capacity, inspite of the existence of other alternative forums.

62. Before we part with the judgment, this Court feels it pertinent to overview on the tasks of the Review Panel. The Review Panel, being constituted with three persons of vast experience having sound knowledge on the technical, administrative and judicial works, is the most competent body to examine the veracity of allegation of the petitioner as to whether grounds taken for rejection of the petitioner's bid, such as charging a commitment fees of USD 1,00,000 and a lending fee of 5% do form the part of technical bid or financial bid and, that is how, the fact shall be revealed. In order to carry out a scrutiny on the allegation as to whether the grounds of rejection of the petitioner's bid are the components of the technical stage or financial stage, the Review Panel must look at the provisions of section 59 of the PPA, 2006 which are as under:

৫৯। প্রস্তাব মূল্যায়ন।—(১):.....

(২) উপ-ধারা (১) এর অধীন কারিগরি মূল্যায়ন অনুমোদিত হইবার পর প্রস্তাব মূল্যায়ন কমিটি, কারিগরি প্রস্তাব পরীক্ষা ও মূল্যায়নে কারিগরি যোগ্যতা অর্জনকারী ব্যক্তিগণকে, অতঃপর এই অধ্যায় পরামর্শক বলিয়া উল্লিখিত তাহাদের দাখিলকৃত আর্থিক প্রস্তাবসমূহ প্রকাশ্যে উন্মুক্তকরণের সময়, তৎকর্তৃক নির্ধারিত স্থানে, উপস্থিত থাকিবার জন্য আহ্বান জানাইবে।

(৩) প্রস্তাব মূল্যায়নের ক্ষেত্রে প্রস্তাব মূল্যায়ন কমিটি–

(ক) গুণগতমান ও ব্যয়ভিত্তিক নির্বাচন পদ্ধতির ক্ষেত্রে,

প্রত্যেক আর্থিক প্রস্তাব বিস্তারিতভাবে পর্যালোচনা করিয়া কারিগরি ও আর্থিক নির্ণায়কসমূহের সম্মিলিত বিবেচনায় সর্বোচ্চ পয়েন্ট অর্জনকারী পরামর্শককে নিগোসিয়েশনের জন্য আমন্ত্রণ জানাইবে;

63. The petitioner is a technically responsive bidder which has been admitted by the respondents in their affidavits and the same is also evident in the minutes of the TEC's meeting held on 8-1-2013 and, accordingly, as per the provisions of section 59(2) of the PPA, 2006 and Rule 120(1) of the PPR, 2008, the TEC is under a legal obligation to invite all the technical responsive bidders to be present on the occasion of opening their financial offers. Here in this case it is alleged by the petitioner that though she was asked to be present at the occasion of opening up the financial offer, nothing was disclosed or told by the TEC on the merit or position of any bidder leaving her in an obscure situation and this allegation having not been rebutted by the respondents either by making any statement in the writ petition or by annexing any paper thereto appears to be true.

64. The Review Panel must also look at the provisions of Rule 119-121 of the PPR, 2008 in tandem with the aforementioned statutory provisions while it will examine the aforesaid allegations. The said Rules are reproduced below:

১১৯। কারিগরি প্রস্তাব মূল্যায়ন।—(১) আইন, এই বিধিমালা এবং প্রস্তাব দাখিলের অনুরোধ সম্বলিত দলিল অনুসারে প্রস্তাব মূল্যায়ন কমিটি সকল কারিগরি প্রস্তাব মূল্যায়ন করিবে।

(২).....

(৩) গুণগতমান ও ব্যয়ভিত্তিক নির্বাচন, নির্দিষ্ট বাজেটের অধীন নির্বাচন, সর্বনিম্ন ব্যয়ভিত্তিক নির্বাচন পদ্ধতির আওতায় মূল্যায়নের প্রথম পর্যায়ে কেবলমাত্র কারিগরি প্রস্তাবসমূহের পরীক্ষণ এবং মূল্যায়ন সম্পন্ন করা হইবে এবং প্রস্তাব দাখিলের অনুরোধ সম্বলিত দলিলের সুনির্দিষ্ট নির্দেশনা মোতাবেক প্রস্তাব মূল্যায়ন কমিটি কর্তৃক উক্ত মূল্যায়ন সম্পন্ন করিতে হইবে।

(৪) প্রস্তাব মূল্যায়ন কমিটি প্রতিটি প্রস্তাব কর্মপরিধির প্রতি রেসপনসিভ কিনা উহার আলোকে মূল্যায়ন করিবে এবং কোন প্রস্তাব কর্মপরিধির গুরুত্বপূর্ণ বিষয় সমূহ প্রতিপালন না করিলে বা প্রস্তাব দাখিলের অনুরোধ সম্বলিত দলিলে বর্ণিত ন্যূনতম কারিগরি স্কোর অর্জনে ব্যর্থ হইলে, উক্ত প্রস্তাব বিবেচনার অযোগ্য বা নন-রেসপনসিভ বলিয়া বিবেচিত হইবে এবং উহা বাতিল করা হইবে।

(৫) কারিগরী প্রস্তাবসমূহ গৃহীত এবং উন্মুক্তকরণের পরে, পরামর্শকদেরকে তাহাদের প্রস্তাবসমূহের সারবস্তু, উহাতে উল্লিখিত প্রদান কর্মীবৃন্দ এবং অন্য কোনরূপ পরিবর্তন সাধন করিবার জন্য নির্দেশ দেওয়া যাইবে না বা পরিবর্তনের অনুমতি প্রদান করা যাইবে না।

(৬).....

(৭).....

(৮).....

(৯).....

(১০) সম্মিলিত কারিগরি ও আর্থিক মূল্যায়নে বিবেচিত হইবার জন্য প্রয়োজনীয় ন্যূনতম কারিগরি নম্বর অর্জনকারী আবেদনকারীদের চিহ্নিতকরণের উদ্দেশ্যে প্রত্যেক প্রস্তাবে প্রদত্ত কারিগরি নম্বর প্রদর্শনপূর্বক একটি প্রস্তাব মূল্যায়ন প্রতিবেদন প্রণয়ন করিতে হইবে।

১২০। আর্থিক প্রস্তাব মূল্যায়ন।—(১) ক্রয়কারী কার্যালয় প্রধান বা তাহার নিকট হইতে ক্ষমতাপ্রাপ্ত কর্মকর্তা অথবা অনুমোদনকারী কর্তৃপক্ষ (যদি অনুমোদনকারী কর্তৃপক্ষ ক্রয়কারী কার্যালয় প্রধানের নীচের ধাপের কর্মকর্তা হন) কর্তৃক কারিগরি মূল্যায়ন প্রতিবেদন অনুমোদনের পর যে সকল আবেদনকারী প্রস্তাব দাখিলের অনুরোধ সম্বলিত দলিলের বর্ণনামতে ন্যূনতমকারিগরি স্কোর অর্জন করিয়াছে, তাহাদিগকে অর্থিক প্রস্তাবের প্রকাশ্য উন্মুক্তকরণ সভায় উপস্থিত থাকিবার জন্য আহ্বান জানানো হইবে।

(২) প্রকাশ্য প্রস্তাব উন্মুক্তকরণ সভায় প্রস্তাব মূল্যায়ন কমিটি ন্যূনতম কারিগরি স্কোর অর্জনকারী প্রত্যেক প্রস্তাবের ব্যয় সহকারে প্রাপ্ত কারিগরি স্কোর ঘোষণা করিবে।

১২১। গুণগত ও ব্যয়ভিত্তিক নির্বাচন পদ্ধতিতে সম্মিলিত বিবেচনায় কারিগরি ও আর্থিক মূল্যায়ন।—নিম্নবর্ণিত উদাহরণ অনুসারে সম্মিলিত কারিগরি ও আর্থিক মূল্যায়নে কারিগরি স্কোর নির্ধারণ করিতে হইবেঃ

উদাহরণ।—যদি কোন কারিগরি প্রস্তাব ৯০ নম্বর প্রাপ্ত হয়, এবং তুলনামূলক গুরুত্ব শতকরা ৮০ হইয়া থাকে, সেইক্ষেত্রে উক্ত তুলনামূলক গুরুত্ব প্রয়োগকারতঃ এই প্রস্তাবের কারিগরি নম্বর হইবে ৯০x৮০%=৭২

(২) প্রত্যেক প্রস্তাবের আর্থিক স্কোর এইরূপ নির্ধারিত হইবে যে সর্বনিম্ন মূল্যায়িত আর্থিক প্রস্তাবকে ১০০ নম্বর দেওয়া হইবে এবং অন্যান্য প্রস্তাবের ক্ষেত্রে আনুপাতিক ক্রমহ্রাসমান হারে নম্বর দেওয়া হইবে; সর্বনিম্ন আর্থিক প্রস্তাবের তুলনায় যে হারে অন্যান্যদের আর্থিক প্রস্তাব অধিক হইবে, সেই হারে প্রদেয় নম্বর হ্রাস পাইতে থাকিবে।

উদাহরণ।—যদি সর্বনিম্ন আর্থিক প্রস্তাবের দর ১ মিলিয়ন টাকা হয়, তাহা হইলে উহাতে প্রদত্ত আর্থিক নম্বর হইবে ১০০(সর্বোচ্চ) এবং অতঃপর নির্ণেয় আর্থিক স্কোর হইবে নিম্নরূপঃ

প্রস্তাব	দর	নম্বর	গুরুত	স্কোর
সর্বনিম্ন আর্থিক প্রস্তাব	টাকা ১.০ মিলিয়ন	১০০	২০%	২০
পরবর্তী উচ্চতর আর্থিক প্রস্তাব	টাকা ১.২ মিলিয়ন	৮৩.৩	২০%	১৬.৬
পরবর্তী উচ্চতর আর্থিক প্রস্তাব	টাকা ১.৫ মিলিয়ন	৬৬.৬	২০%	১৩.৩২

(৩) কারিগরি স্কোরের সহিত আর্থিক স্কোর যোগ করিয়া সম্মিলিত স্কোর পাওয়া যাইবে, এবং সর্বোচ্চ সম্মিলিত স্কোর অর্জনকারী পরামর্শককে চুক্তি নিগোসিয়েশনের জন্য আমন্ত্রণ জানাইতে হইবে।

65. From a concurrent reading of Rules 119-121 of the PPR, it is our understanding that the TEC is required to prepare a score sheet containing the scores of each of the bidders which they were awarded on their technical proposals. The minimum score set for passing through the technical stage is to be obtained by a bidder in order to qualify for its financial offer to be opened up and, thereafter, the TEC shall show the bidders the cumulative score they have obtained but nothing was produced before this Court by the respondents to corroborate their claim that respondent No. 5 got the highest score in the technical offer as well as in the financial offer and it was awarded contract as the highest scorer in the combined score sheet.

66. In addition to the violation of the provisions of the PPA, 2006 and PPR, 2008 heavy emphasis were given by the petitioner on the non-compliance of the Clauses 17 & 25 of the Instructions of Tender Document in making the petitioner financially non-responsive.

67. Let us look at the aforesaid Clauses.

Clause No. 17: Source of finance will be from Tenderer's Financing. For Tenderer's financing, firm commitment letter from the financial unit/lender about Tenderer's credit financing shall be submitted with 'Technical proposal' at the time of bid submission, otherwise the Tender shall be considered technically non-responsive. The credit amount shall cover 100% of the turnkey price (both foreign and local currency portion of the offered price). The Tenderer shall enclose a complete and firm financing proposal. The Credit Proposal shall mainly include the followings:

a) Offered credit

b) Rate of interest

c) Repayment period

d) Grace period etc.

The Financial proposal should also include 3 (three) amortization schedules considering above mentioned features of credit, 1(one) for CIF value of Schedule-1 in foreign currency, 01 (one) for remaining portion of foreign currency (except DIF value, 1 (one) for local currency. BPDB will provide Corporate Guarantees against the credit financing.

Claus No. 25: The Technical proposals submitted by the bidders shall be opened first in presence of the Bidders. At the same time the envelope marked "Financial Proposal" submitted by the respective Bidders will be noted for record and kept unopened in proper custody of the Secretary, BPDB until the Technical Proposals are completely evaluated. Considering all the aspects (in connection with specified work) offered by each Bidder as well as the date and information submitted and on proper judgment of the capability of individual Bidders, technically qualified pro-

posals shall be selected amongst them and listed. The technical qualifications and overall capability of the Bidder for carrying out the work as specified as well as the specifications of the equipment/materials offered and fulfillment of the key dates shall be the essence for selection of technically qualified Bidders.

The technical qualifications and overall capability of the Tenderer for carrying out the Words as specified as well as the Specifications of the equipment/materials offered and fulfillment of key dates shall be the essence for selection of qualified tenderers.

In the process of evaluation, tender may be considered as responsive only if it is submitted in compliance with the mandatory requirement set out in the tender document, without material deviation or reservation.

A material deviation or reservation is one:

a) Which affects in any substantial way the scope, quality or performance of the works,

b) Which limits in any substantial way, inconsistent with the tender document, the procuring entity's rights or the tenderer's obligations under the contract

c) Whose rectification would affect unfairly the competitive position of other tenderers presenting responsive tenders.

68. From a bare reading of Clause 17 it appears that 'Firm Commitment letter" is a component or part of the 'Technical Proposal' which the petitioner had submitted with 'Technical Proposal' vide annexure-C dated 5-6-2012 which assures that credit amount shall cover 100% of the price which is completely ready for immediate use. The respondents having been satisfied with the same declared the petitioner to be a technically responsive bidder. However, since the respondents are empowered under Rules 120 & 121 to take into consideration the combined score, the Review Panel is to consider as to whether the petitioner's offer with 5% lending fees or commitment fees of $ 1,00,000 cumulatively stand as a poor offer (albeit with a margin of 200 crores Taka) than that of respondent No. 5.

69. And from the perusal of Clause 25 it appears that a tenderer shall be qualified for being responsive only when her proposals will be found in compliance with the 'mandatory requirement' set out in the Tender Document without being in 'material deviation'. The Review Panel is to assess as to whether the grounds taken by the TEC in rejecting the petitioner's financial proposal comes within the mischief of (a), (b) or (c) of the definition of 'material deviation' under Clause 25 of the instructions of 'Tender Document'

70. If the petitioner approaches the Review Panel following the disposal of this case, the Review Penal may take the anomalies indicated hereinbefore into its consideration upon condoning the delay in preferring an appeal before it under section 30(2) of the PPA, 2006 as an exceptional case in view of the statements made by the petitioner in this Court that she had never received the annexure-7 (decision of the respondents on the petitioner's representation). The Review Panel may also ask the respondents to produce the score sheets of all the bidders who were declared technically responsive and the combined score sheets of the financially responsive bidders to examine the allegations of the petitioner in details and, thereby, make its observation as to whether the provisions of Section 59 of the PPA, 2006, Rules 199-121 and the instructions contained in the Tender Documents, particularly the instructions laid down in Clause Nos. 17 and 25 thereof, have been followed. In the event that the Review Panel finds the decision of the TEC to have been taken

in violation of any provisions of the PPA, 2006 and PPR, 2008, it shall pronounce its decision under the provisions of Rule 60 of the PPR, 2008 with necessary ancillary relief/s to the parties of this case whatever may deem fit and appropriate to the adjudicators. The fact that the respondents have already awarded contract in favour of respondent No. 5 and, now, the works for construction and installation of the project is going on in full speed, which ought not to have been done by the respondents during pendency of the Rule, may be mitigated by compensating either respondent No. 5 for the works already she has carried out if the Review Panel decides for cancellation of the contract executed between respondent No. 5 and the respondents. Or, in the alternative, allowing respondent No. 5 to continue with the construction and installation of the project works at the rate quoted by the petitioner to protect the financial interest of the state and, in that event, the petitioner should be entitled to be compensated sufficiently by the government authorities and respondent No. 5. Here it is pertinent to refer to the facts and dictum of the case of *RAJUK vs Abdur Rouf Chowdhury 61 DLR (AD) 28* where the writ petitioner Mr. Abdur Rouf Chowdhury constructed a 22 storied building near the Tejgaon Airport and RAJUK alleged that the same has been done without obtaining any planning permission from them and, eventually, it threatened to dismantle the building when the High Court Division though made the Rule absolute but on an appeal the Apex Court ordered for demolishing the building. The purpose of referring this case here is that the Court can pass an order to demolish a project if it is required for protection of the national interest. However, in this case there should not be any order to demolish the project for the protection of financial interest of the state. In the cited case, the order of demolition was passed in order to protect the interest of the state i.e. to protect the Tejgaon Airport and, here the national interest is installation of the project with the minimum cost and maxim quality. Thus, if it is required in this case any appropriate order may be passed by the Review Panel without hampering the ongoing construction and installation work of the project upon unhesitatingly detecting the illegality and lack of transparency, if there is any, towards adjudication of this sensitive public procurement related complaint.

71. Though this Court declined to exercise its power of judicial review for now, however, this judgment shall not operate as a bar (res judicata) to seek the 'certification' (certiorari) from this Court on the Review Panel's decision, if the petitioner wishes to revert back to this Court following the Review Panel's verdict in favour of the respondent and the petitioner finds herself dissatisfied and aggrieved with the same. In that event this Division shall be fully competent and will be in a better and convenient position to exercise its power of judicial review on the said decision of the Review Panel.

72. In our jurisdiction the power of judicial review of this Court flows from the mandate of Article 102 of our Constitution unlike the UK where inspite of not having any written legal mandate, their judiciary exercises this power. However, the British judiciary since long has formulated some rules, principles/guidelines as to where the judicial power should be exercised. Among them, one rule is constantly being followed by them that if there is any forum created by any law, the UK judiciary does not entertain the judicial review application.

73. In our jurisdiction as well, our Apex Court has repeatedly reminded the High Court Division to be skeptical in entertaining writ petition where there is an alternative forum. In a series of decisions our Apex Court disapproved invocation of writ jurisdiction by circumventing the alternative forum. In a recent case, *ACC vs Enayetur Rahman, 64 DLR (AD) 14,* when the ACC filed charge-sheet against the petitioner he invoked the writ jurisdiction for quashing the

criminal proceedings and the High Court Division quashed the proceeding but the Appellate Division set-aside the verdict on the ground that the High Court Division should not have entertained the writ petition when there is an alternative forum.

74. In another recent case, *Government of Bangladesh vs M Anwar Hossain 32 BLD (AD) 36 =16 BLC (AD) 155,* when High Court Division entertained the writ petition on the grievance of the petitioner that his mutation case is being kept pending without disposing of the same for malafide purpose, it was held that-

> What's more, the writ petitioners have also alternative remedy against the inaction of the Assistant Commissioner (Land), if there be any, for mutating their names. Where an alternative remedy is available, the remedy under Article 102(2) being discretionary High Court Division should refuse to grant relief to the aggrieved person. Where the alternative remedy could not be equally efficacious the exercise of discretionary power by the High Court Division is called for. The writ petitioners failed to make out any case that the alternative remedy available to them is not efficacious.

75. Since, this Court has held that the Review Panel is equally efficacious forum for adjudication of the grievance of the petitioner, the present Rule is liable to be discharged only on the ground of maintainability without embarking upon other issues under the law of contract for examination as has been advanced by the learned Additional Attorney-General.

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

Ed.

HIGH COURT DIVISION
(Criminal Appellate Jurisdiction)

Syed Md Ziaul Karim J
ANM Bashir Ullah J

Judgment
October 4th, 2012.

State.....Appellant

vs

Bidhan Chandra Roy and another.....
....Condemned-Prisoners*

Code of Criminal Procedure (V of 1898)
Section 374

Penal Code (XLV of 1860)
Section 302

In sentencing process, two important factors come out which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that justice has been done and court responded to the society's cry for Justice. ...(83)

Penal Code (XLV of 1860)
Section 302

Under section 302 of the Code, though discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal justice. .....(83)

Penal Code (XLV of 1860)
Section 300

Nari-o-Shishu Nirjatan Daman Ain (VIII of 2000)
Section 9(3)

Since offence of murder punishable under section 302 of the Code was carried to the door

*Death Reference No. 76 of 2008 with

Criminal Appeal No. 5256 of 2008 with Jail Appeal Nos. 841-843 of 2008.

of convict-appellants they can be very much convicted for offence of section 302 of the Code and, as such, we convert the offence of section 9(3) of the Ain to offence of section 302 of Code.

.....(82)

State vs Md Abdur Rashid alias Abdur Rashid, 7 BLD (AD) 73; Shaharul Islam alias Green vs State, 1 BLC 524; State vs Raja Abdul Majid, 1 BLC 144; Bilkis Ara Begum vs State 4 BLC 387; Mizazul Islam alias Dablu vs State 41 DLR (AD) 157; Islam Uddin vs State, 13 BLC (AD) 81; Abdur Rashid vs State 3 BLD 206, Amir Hossain vs State 4 BLD (AD) 193 = 37 DLR (AD) 139, Gouranga Chandra Paul vs State 59 DLR 17, 29 DLR (SC) 27, Shajahan Ali alias Md Shahjahan vs State 59 DLR 396, Hazrat Ali vs State 44 DLR (AD) 51, State vs Abul Kalam Azad 8 BLC 464; Asiman Begum vs State, 51 DLR (AD) 18; State vs Abul Kalam, 5 BLC 230; Shibu Pada Acharjee vs State, 56 DLR 285 and State vs Mahbur Sheikh alias Mahabur 1 LNJ 139 ref.

MA Mannan Mohan, DAG with Md Osman Goni Khan, AAG and Md Ensan Uddin Sheikh, AAG—For the State.

AKM Shafi Uddin, Advocate—For the convict- appellant Nos. 1 and 3 [In Criminal Appeal No. 5256 of 2008]

SM Shahjahan, Advocate, with Mohiuddin MA Kader, Advocate—For the convict-appellant No. 2 [In Criminal Appeal No. 5256 of 2008].

Md Aminur Rashid Razu, Advocate— For the convict-appellant [In Jail Appeal No. 841 of 2008]

Md Khabir Uddin Bhuiyan, Advocate—For the convict-appellant [In Jail Appeal No. 842 of 2008].

Md Baharuddin-al-Razi, Advocate—For the convict-appellant [In Jail Appeal No. 843 of 2008]

Judgment

Syed Md Ziaul Karim, J : This reference under section 374 of the Code of Criminal Procedure (briefly as the Code) has been made by learned Judge of Nari-o-Shishu Nirjatan Daman Tribunal, Dinajpur (briefly as Tribunal), for confirmation of death sentences of condemned-prisoners.

2. By the above appeals the appellants have challenged the legality and propriety of the judgment and order of conviction and sentence dated 28-7-2008 passed by learned Judge of Tribunal, in Nari-o-Shishu Case No. 311 of 2007 convicting the appellants under section 9(3) of the Nari-o-Shishu Nirjatan Daman Ain 2000 (briefly as Ain) and sentencing each of them to death by hanging and also to pay a fine of Taka 1,00,000 each.

3. This death reference and all these appeals having arisen out of a common judgment, these have been heard together and are being disposed of by this judgment.

4. The prosecution case as projected in the first information report (briefly as FIR) and unfurled at trial are that victim Mahzabin Chowdhury alias Giti aged about 38 years (since deceased), after the death of her husband used to reside with her mother Mrs Razia Chowdhury (PW 1) of south Munshipara, PS Kotwali, Dinajpur. She was issueless and contributor to 'Daily Ittefaq'. On 7-9-2007 at 7-30 PM she returned from Dhaka and approached for supper to her mother. After taking meal she made herself busy with papers. At 10-30 PM she talked with three persons aged about 25-30 years in front of her gate. On 8-9-2007 at 4-00 AM she was found strangulated to death at her bed room. The reason behind such murder might be the sequel to the conflict between the victim and locals namely Artist and his cousin Helal. With these allegations the prosecution was launched by lodging a FIR by her mother Mrs Razia Chowdhury (PW 1) as informant which was recorded as Kotwali PS case No. 9 dated 8-9-2007 corresponding to GR No. 417 of 2007.

6. During investigation the Police arrested the accused Bidhan Chandra Roy alias Bidhan Kabiraj, Md Tushar Babu alias Babu and Moniram Chandra Roy alias Babu by checking mobile call lists of victim and those accused. They subsequently made confessions recorded under section 164 of the Code disclosing the facts of committing sexual intercourse with victim.

7. The Police after investigation submitted charge-sheet under section 9(3) of the Ain accusing those accused.

8. Eventually the case was taken up for trial by the Tribunal wherein the accused were called upon to answer the charge under section 9(3) of the Ain and accused on dock pleaded not guilty and claimed to be tried.

9. In course of trial the prosecution in all examined twelve witnesses out of sixteen charge sheeted witnesses and the defence examined none.

10. After closure of prosecution case, the accused on dock were examined under section 342 of the Code, again they repeated their innocence and furnished some explanations in support of their innocence, but led no evidence in defence.

11. The defence case as it appears from the trend of cross-examinations of the prosecution witnesses are that of innocence and false implication. It was divulged in defence that due to internal feud they were falsely implicated out of vengeance by their local rivals

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

(a) The prosecution successfully proved the charge under section 9(3) of the Ain against convicts;

(b) The confessions made by the accused were true and voluntary and the same were consistent with the prosecution case;

(c) There are substantive corroborative evidence against the appellants;

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

13. The learned Deputy Attorney-General appearing for the State supports the reference and submits that those accused were arrested by checking their mobile call lists. He adds that soon-after arrest they made confessions which were true and voluntary and the same were made in terms of the allegations of the prosecution. He adds that date, time and procedure of recording of confessions are consistent and uniform and the learned Magistrate recorded the same after complying all legal formalities laid down in sections 164 and 364 of the Code. Even the Police diary also indicates the correct date of arrest of the accused. In support of his contentions he refers the case of *State vs Md Abdur Rashid alias Abdur Rashid 7 BLD (AD) 73* held:

> "Police Diary—Whether it is evidence—Use of the police diary—The court may use the police diary not as evidence of any date, fact or statement referred to it, but as containing indication of sources and lines of enquiring- It is intended to be used only for the purpose of assisting the court in the appreciation of the evidence and to clear up any doubtful point."

14. The learned Counsel lastly submits that the Tribunal after considering the evidence on record rightly convicted and sentenced the accused which calls for no interference by this Court.

15. The learned Counsels appearing for the condemned-prisoners by their common contentions seek to impeach the impugned judgment

and order of conviction and sentence on five fold arguments.

Firstly—It is a case of no evidence inasmuch as there is no eye-witness to the occurrence and the prosecution measurably failed to prove the motive of the case;

Secondly—The conviction and sentence based on confessions of the accused but the same were not voluntary and true; the accused were in unauthorised Police custody for four days and the confessions were extracted by torture and coercion, which can never be treated as true and voluntary. So conviction and sentence of those accused relying on such confessions cannot be sustained.

16. In respect of their contentions they refer the case of *Shaharul Islam alias Green vs The State 1 BLC 524* held:

"Section 164

Custody before recording confessional statement—The confessing accused was arrested on 4-3-90 at 4-00 AM and produced before the Magistrate on 6-3-90 at 10-00 AM for recording confessional statement which shows that the accused was kept in custody for $54^{1}/_{2}$ hours after arrest without remand by a Magistrate and no explanation was given for such custody and, as such, the prolonged police custody immediately preceding the making of the confession is sufficient to treat it as involuntary."

17. In the case of *State vs Raja Abdul Majid and others 1 BLC 144* held:

"Section 164(3)

Recording of confessional statement—Reasonable time for reflection was not given and caution should be given to the accused persons at least twice before recording the confessional statement by the Magistrate who has not fully complied with the mandatory provisions of section 164(3),CrPC, the confessional statement cannot be deemed to be either voluntary or true. "

18. In the case of *Bilkis Ara Begum vs State 4 BLC 387* held:

"As there are grave discrepancy and inconsistency between the confessional statement and the evidence of PWs 4 and 5 resulting thereby the statement recorded under section 164, CrPC that does not contain correct statement and such confessional statement cannot be said to be true. "

19. In the case of *Mizazul Islam alias Dablu vs State 41 DLR (AD) 157* wherein at paragraph-16 it was observed:

"Next Dablu made a confessional statement on 26-22-80. He was arrested at about noon on the following day and produced before a Magistrate. The significant aspect of the confessional statement is that about the manner of occurrence. Dablu stated in his confession that he along with Fiktu and Sukkur went to Nurul Islam's house at about 1-00 AM and removed the bulb whereupon Nurul Islam and his wife woke up. As to why light went off "বাতি ফিউজ হয়ে গেছে কিনা দেখার জন্য চাচা দরজা খুলে ফেলে ও আমি ও ফিকটু চাচাকে বুকে কোপ মারি। তখন চাচী আমাকে বলে ডাবলু তুই এই কাজ করলি।"

20. The confessional statement runs counter to the prosecution case because PW 4 saw two persons when he opened the door and he was under the impression that they were the persons of the neighbour-hood and asked them "কিরে বাপু তোরা এখানে কি করছিস।" then and there one of the persons dealt a dagger blow on his chest and when he retraced his steps his assailant pushed him down on the floor. He stated that there was a light in the room and he tussled with the assailant shouted that he was being killed. At this time, when his wife coming to his rescue, the other men dealt her a chora blow "তখন আমরা ২ জন ঐ লোক দুই জনের সাথে ধস্তাধস্তি করিতে থাকি।"

Thirdly—The wearing apparels of the victim described in the FIR and in inquest are inconsistent. Therefore, the manner of occurrence is doubtful.

Fourthly—The case will not come within the purview of section 9(3) of the Ain, so the conviction and sentence under the said provision is not maintainable.

Fifthly—The judgment and order of conviction and sentence based on misreading and non-consideration of the evidence on record which cannot be sustained in the eye of law.

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

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

23. PW I Razia Chowdhury, mother of the deceased. She deposed that her first daughter victim Mahzabin Chowdhury alis Giti used to reside with her. After the death of her husband (victim) her daughter was employed in 'Daily Ittefaq', a Bengali News-paper. On 7-9-2007 her daughter came from Dhaka at 7-30 PM then she approached for supper. After taking meal she was busy herself with the papers and she (PW I) went for sleep at 10-30 PM. After sometime she found that three persons were talking with her daughter. Of whom, one man was tall. At night 12'0 Clock she went in toilet and found a smell of biri. She came out and went for sleep. At 4-00 AM she went to the room of her daughter wherein she found her daughter was strangulated by two napkins and found marks of blood at her mouth and nose. She tried to communicate the incident with the Police Station but her telephone line was cut-off. She suspected one local namely Artist for commission of murder. She informed the incident to her another daughter Naznin. Later, Police came and sent the dead-body to the morgue for autopsy. She proved FIR as (Exhibit 1) and her signature on it (Exhibit l/1) She also signed in the inquest report (Exhibit 2) and her signature on it (Exhibit 2/1).

24. In cross-examination she stated that she was alone in the house and found her daughter was taking with three persons; she could not recognise those persons. She also filed a Naraji petition against the Police report for implicating accused Artist and Helal. She denied the suggestion that she was deposing falsely.

25. PW 2 Naznin Chowdhury, sister of victim Mahzabin. She deposed that on 7-9-2007 her sister Mahzabin was strangulated to death by wrapping napkins; on the following morning she was informed by her mother. Then she communicated the incident to her father and other sister by telephone. Then she and her husband came to the PO and found the dead-body of her sister lying on a cot. The body bore marks of blood at nose. Later, the Police came and held inquest upon the cadaver. She also signed in the inquest report (Exhibit 2/2). She also signed in the seizure list (Exhibit 3) and her signature on it (Exhibit 3/1). She heard from her mother that the victim Mahzabin talked with three persons in the previous night.

26. In cross-examination she stated that at the time of occurrence she was in her conjugal home. After the death of her sister she came to the PO.

27. PW 3 Ziaur Rahman, was a local Commissioner of Ward No. 3 at the relevant time. He deposed that he could not remember the date of occurrence, however in the following morning at 7-30 AM the Police informed him that one lady died. He rushed to the PO and found the dead-body of Mahzabin. Then he returned from there.

28. PW 4 Meherullah Badal is uncle of victim Mahzabin. He deposed that after receiving information of death of Mahzabin he rushed to the PO and found the dead-body, sustaining marks of blood at mouth and neck. He was informed by the

informant that in the previous night three persons entered into the room of Mahzabin. He also signed in the inquest report (Exhibit 2/3) and seizure list (Exhibit 3/2). She also proved two napkins (Material Exhibit ক series), nine condoms (Material Exhibit খ series) and nine packets of condom (Material Exhibit গ series), two packets unused condom (Exhibit ঘ series). One hand-carchip (Exhibit ঙ) and one bed sheet (Exhibit চ).

29. In cross-examination he stated that the informant disclosed about the three persons without address. He had no definite knowledge about the occurrence.

30. PW 5 Shafiqul Islam. He deposed that he was night-guard in the locality. He had no knowledge about the incident. The defence declined to cross-examine him.

31. PW 6 Nazma Begum. She was the tenant under the informant at the relevant time. She deposed that on the day of occurrence the victim Mahzabin came from Dhaka and took meal; at night 10'00 Clock, she went for sleep on the following morning at 5-00 AM the informant informed her about the death of victim Giti. She also find the dead-body of the victim on a cot and heard that three persons entered into the room of victim Mahzabin and committed murder.

32. In cross-examination she stated that she heard from the Police that three persons murdered the victim inside her room.

33. PW 7 Yeasmin Chowdhury, sister of victim Mahzabin. She deposed that on the day of occurrence i.e. on 7-9-2007 she was in Dhaka. On receiving information from her sister about the death of victim Mahzabin, she rushed to the PO and found the dead-body of victim and found black mark at her neck. Her mother informed that on 7-9-2007 victim Mahzabin came from Dhaka and after taking meal she went in her room. At 10-30 PM her mother found three persons at the gate and victim Mahzabin talked with them. On the following morning her mother found that victim Mahzabin strangulated to death. She heard the occurrence from her mother.

34. In cross- examination she stated that her father was a Police officer and retired before 8/9 years. She had no knowledge about the savings and properties of victim Mahzabin. Her sister had a land dispute with one Matiar and Artist. She denied the suggestion that she did not see the dead-body of her sister.

35. PW 8 Wadud a local witness of Doania. He deposed that Bidhan Kobiraj was arrested from their home at the last Friday of the month of Holy Ramzan. He also signed in the seizure list (Exhibit 4) and his signature on it (Exhibit 4/ 1).

36. In cross-examination he stated that accused Bidhan was a Kobiraj by profession.

37. PW 9 Masiur Rahman, a local witness of Doania. He deposed that accused Bidhan Kobiraj came to their village on the last Friday of the month of Holy-Ramzan wherein he was arrested by the Police. The Police seized his bag and kept bicycle in their home. He also signed in the seizure list (Exhibit 4/2).

38. In cross- examination he stated that after one month Police again came to their home who did not see the mobile phone before taking signature in the seizure list.

39. PW 10 Dr Mir Hamdey, Assistant Professor, Department of Forensic Medicine, Dinajpur Medical College. He deposed that on 8-9-2007 he held autopsy upon the cadaver of victim Mahzabin identified by Sepoy Rubel and found the following injuries:

(1) One faint broad ligature mark 2" in breath is present at front and mid point of the neck.

(2) One oval shaped ($^1/_2$" in diameter) abrasion and burse is present at the lateral aspect of

the Rt side of the chaiw.

(3) .04 (four) oval shaped ($^1/_4$" to $^1/_3$") abrasion with bruises are present one upon another at the Lt side of the neck up to below the Lt ear darlaball,

(4) Abrasion with bruise (0" x 013") is present at the upper part of the upper lip."

40. He opined that the death was due to shock and asphyxia as a result of strangulation which was anti mortem and homicidal in nature and she was raped.

41. He proved the post mortem report as (Exhibit 5) and his signature on it (Exhibit 5/1).

42. In cross-examination he stated that he did not find any mark of injury on the breast, chin, etc. injury Nos. 1-3 shows that the assailants pressed the neck of the victim and it was wrapped by a soft wearing. He denied the suggestion that the report was not prepared properly.

43. PW 11 SM Abu Horaira, Magistrate first Class. He recorded the confessions of accused. He deposed that on 16-10-2007 at 11-30 AM accused Bidhan Chandra alias Bidhan Kobiraj was brought to his chamber. He recorded his confession, after complying all legal formalities; he proved his confession (Exhibit 6) and his signature on it (Exhibit 6/ 1).

44. On 17-10-2007 at 11-30 he recorded the confession of accused Tushar Babu after complying all legal formalities. He proved the same (Exhibit 7) and his signature on it (Exhibit 7/1) and on the same day he also recorded the confession of Moniram Babu (Exhibit 8) and his signature on it (Exhibit 8/1).

45. In cross-examination he stated that SI Sares Chandra produced the accused Tushar, Maniram and Bidhan before him. He denied the suggestion that proper time was not given to them for refreshment of their mind and the accused did not confess voluntarily and deposing falsely.

46. PW 12 SI Saresh Chandra was the investigating Officer (IO) of the case. On 8-9-2007 the case was entrusted to him for investigation. He visited the PO and held inquest upon the cadaver of Mahzabin and sent the same to the morgue for autopsy. He prepared sketch map and index, recorded the statements of the witnesses. He checked the call-list of mobile No. 017-1208-5620 belonged to victim Mahzabin. Then, after investigation he nabbed accused. The accused confessed before the Magistrate to the effect that after committing rape they murdered the victim Mahzabin. He proved the sketch map (Exhibit 9) and his signature on it (Exhibit 9/1)

47. In cross-examination he stated that in inquest report it was shown that the victim weared Kamij and Paijama. On 10-9-2007 he received the post mortem report. He seized used and unused condoms. The seized condom was not chemically examined. He seized bed sheet and seized blood stained napkins. Rajesh was arrested in this case on 11-10-2007. The victim had fixed deposit for Taka10,00,000 and 27,00,000 with the Bank wherein Rajesh was made nominee. She had an illicit relationship with Rajesh; on the night of occurrence the victim had talked with Rajesh. He also arrested Artist. There was a land dispute between victim and Matiar. At the relevant time Matiar was in custody. On 15-10-2007 accused Bidhan was arrested from village Dokania. On the following day other co-accused were arrested. He denied the suggestion that on 12-10-2007 accused Bidhan was arrested and on 13-10-2007 other two were arrested and he tortured them keeping in custody for 4/5 days, and accused confessed according to his advise. Witness Yeasmin did not state to him that her sister Naznin informed the incident by mobile phone. Police Super made press-conference for nabbing the accused. He denied the suggestion that he submitted charge-sheet after perfunctory investigation and deposing falsely.

48. These are all of the evidence on record

adduced by the prosecution.

49. On going to the materials on record it transpires that twelve witnesses were examined by the prosecution out of sixteen charge-sheeted witnesses to prove the charge. Of them PW 1 is the mother of the victim and not eye witness to the occurrence. PWs 2 and 7 are the sisters of the victim, they heard the occurrence from their mother. PWs 3, 5 and 6 are the local witnesses and heard the occurrence. PW 4, uncle of victim and witness of inquest and the seizure list. PWs 8 and 9 hailed from village Doania from-where accused Bidhan Chandra was nabbed by the Police. PWs 10, 11 and 12 are the official witnesses. Of them PW 10 held autopsy upon the cadaver, PW 11, Magistrate first Class recorded the confessions of the accused and PW 12 is the investigating officer of this case who submitted charge-sheet accusing the condemned prisoners as accused.

50. It is indisputable that victim Mahzabin alias Giti was strangulated to death.

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

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

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

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

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

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

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

53. It is true that there is no eye-witness to the occurrence but the case is absolutely rests upon the confessions of accused Bidhan Chandra Roy alias Bidhan Kobiraj (Exhibit 6), Md Tushar Babu alias Babu (Exhibit 7) and Moniram Chandra Roy and Babu (Exhibit 8).

54. For the convenience of understanding the material excerpts of those confessions read as hereunder:

বিধান চন্দ্র রায় ওরফে বিধান কবিরাজঃ

"গত ৬-৯-২০০৭ তারিখ রাত্রি অনুমান ৮-০০ টার দিকে কুতুবডাঙ্গা বাজারে তুষার বাবুর সাথে আমার (বিধান) কথা হয়। কথা হয় পরদিন দিনাজপুর যেয়ে উক্ত মেয়ের সাথে খারাপ কাজ করিবে। ঐ দিন রাত্রে তুষার বাবু জানায় তার বন্ধু মনিরাম বাবু ও তার সঙ্গে। কথা হয়। দিনাজপুর হাসপাতালের সামনে দেখা হবে। পর দিন ৭-৯-২০০৭ বেলা ১০-০০ টার দিকে চিরির বন্দর যেয়ে মার্শাল ফার্মেসী থেকে তিনটা কনডম কিনি, ভ্যানে করে সুরুরতলি যাই ১১-০০ টায়। সেখান থেকে বাসে করে ১২-০০ টায় বটতলী মোড়ে নামি বাস থেকে দিনাজপুরে, রিক্সা নিয়ে মালদহ পট্রিতে উৎপল বাবুর ঔষধের দোকানে যাই এবং ঔষধ কিনি অন্যান্য দোকানে যাই সময় কাটাই। সন্ধ্যা ৭টার দিকে তুষার বাবু ও মনিরাম বাবু সদর হাসপাতালে আসে, আমরা তিনজন পায়ে হেঁটে এক সংগে ওরিয়েন্টাল ফার্মেসীতে গিয়ে ঔষধ কিনি, রাত্র অনুমান ৯/৯-৩০ টার দিকে গুলশান মার্কেটের কাছে থেকে মেয়েটাকে ফোন করি, তিন জন আছি কত লাগবে জানতে চাই। ৬০০ বললে ৫০০ দিতে চাই, রাজী হয় যেতে বলে। তার বাড়ীর নীচে গিয়ে আবার মোবাইল করি ৯-৪৫ এর দিকে বলি তার বাসার দরজার কাছে মেয়েটা বাড়ীর দক্ষিন পাশের দরজা খুলে দেয়। ভিতরে যাই, কথামত ৫০০ টাকা দিই। তুষার বাবু প্রথমে গেলে মেয়েটা তোষকের নীচ থেকে একটা কনডম দেয়। আমরা ঐ সময় একই ঘরে ছিলাম। পরে মনিরাম বাবুর কথা বললে মেয়েটা রাজী না হওয়ায় তুষার বাবু ২য় বার করে। আমি করি। পরে মনিরাম বাবু করি। তুষার বাবু ৩য় বার করে, আমি ৩য় বার করি। মনিরাম বাবু ২য় বার করে, তুষার বাবু ৪র্থ বার খারাপ কাজ করার কালে মেয়েটা রাজী হয় না বলে শরীর খারপ লাগছে, ঢাকা থেকে এসেছে। তুষার বাবুর সাথে তর্কাতর্কি হয় এক সময় মেয়েটা তুষার বাবুকে একটা থাপ্পর মারে, তখন তুষার বাবু

মেয়েটাকে মাথার চুল ধরে খাটের উপর ফেলে দেয় ও চেপে ধরে, আমি ঘরেই ছিলাম, তখন তুষার বাবু একটা গামছা দিয়ে মেয়েটার গলায় ফাঁস দিয়ে আমাকে ধরতে বলে, আমি ধরি। মনিরাম বাবু মেয়েটার ২ পা চেফে ধরে। এর পর শ্বাস নিঃশ্বাস বন্ধ হয়েছে বুঝতে পারলে বাড়ী থেকে বের হয়ে গলির মধ্যে দিয়ে পূর্ব দিকে পায়ে হেটে ফুলবাড়ী বাসস্ট্যান্ডে যাই। তখন রাত অনুমান ১২/১টা বাজে। মাইক্রো করে উচিতপুরে যাই ৭৫ টাকা ভাড়া দেওয়া হয়। উচিতপুর থেকে তিনজন ৩০ টাকা ভাড়া দিয়ে ভ্যান করে কুতুবডাঙ্গা বাজারে যাই, ওখানে গিয়ে একে অপরকে এই ঘটনা কাউকে না বলার জন্য বলে নিজ নিজ গন্তব্যে চলে যাই। ভ্যান ওয়ালা ভ্যানের উপর শুয়ে ছিলো উচিতপুরে। ২/৩ বার পাহাড়াদার জিজ্ঞেস করে বলি সিনেমা দেখতে গেছিলাম। ঐ মেয়েটার সাথে আগে ও খারাপ কাজ করেছি।

স্বা/-বিধান চন্দ্র রায় স্বা/-অসম্পষ্ট
১৬-১০-২০০৭ইং ১৬-১০-২০০৭ইং

এস,এম, আবু হোরায়রা
১ম শ্রেণীর ম্যাজিষ্ট্রেট আদালত
দিনাজপুর

মোঃ তুষার বাবুঃ

আমি বিদেশ যাবার জন্য দিনাজপুর ড্রাইভিং শিখতাম। সে সময় চাউলিয়া পট্টিতে খালুর বাসায় থাকতাম, এক মোবাইলের দোকানে পার্শ্বের মেয়ের এক ছেলের সাথে পরিচয়ের মাধ্যমে ঐ মহিলার বাসায় যাতায়াত করতাম। খারাপ কাজ করেছি আগেও। ঘটনার আগের দিন বিধান কবিরাজের সাথে আমার বাড়ীর কাছে কুতুবডাঙ্গা বাজারে কথা হয়। পর দিন দিনাজপুর আসার এবং কোথায় দেখা হবে ঠিক হয়। কথামত ৭-৯-২০০৭ দিনাজপুর সদর হাসপাতালের সামনে ৭/৭-৩০ টার দিকে বিধান বাবুর সাথে দেখা হয়। আমার সাথে মনিরাম বাবু (লুঙ্গি পরে) ও ছিলো। বিধান বাবু অনেক ক্ষন হেঁটে বিভিন্ন দোকানে যায় ঔষধ কেনে, প্যান্ট দেখে গুলশান মার্কেটে, পছন্দ হয়নি। রাত অনুমান ৯.২০/২.৩০ টার দিকে বিধান বাবু ঐ মহিলার সাথে কথা বলে এবং চুক্তির টাকা ৫০০ ঠিক হয়। আমরা ওখান থেকে পায়ে হেঁটে মেয়েটার বাড়ীর দরজায় যাই। বিধান, মোবাইল করলে দরজা খুলে, কথামত আমি খারাপ কাজ আগে করতে চাইলে মেয়েটা কনডম দেয় বের করে। আমি ১৫-২০ মিঃ খারাপ কাজ করি। বিধান করে, মনিরাম করতে চাইলে প্রথমে রাজী হয় না পরে আমি, বিধান ও মনিরাম করি। আবার আমি, বিধান করি। মোট ৩ জনে ৮ বার করি। এক পর্যায়ে মেয়েটা আর করতে দিতে না চাইলে কথা কাঁটা কাঁটি হয় এক পর্যায়ে মেয়েটা বলে বাড়ীতে দিয়ে তোদের মা বোনের সাথে খারাপ কাজ করগে। আমাদের রাগ হয়। মেয়েটা এক পর্যায়ে আমাকে থাপ্পর মারে। রাগ হয় বলে চুল ধরে খাটে ধাক্কা দিই। তোয়ালে টাইপের গামছা দিয়ে গলায় চেপে ধরি বিধান ও ধরে। মনিরাম পাশে ছিলো। তাকে বললে সে ও ধরে পা দুটি। হঠাৎ নিঃশ্বাস বন্ধ হলে মৃত্যু হয়েছে বুঝতে পেরে তাড়াতাড়ি চলে যাই। গলি দিয়ে ফুলবাড়ী বাসস্ট্যান্ড যাই। পরে মাইক্রো, ভ্যান ইত্যাদি করে বাড়ী যাই।

তিনজন মিলে কথা হয় যেন কাউকে না বলি। পাহাড়াদার জিজ্ঞেস করলে বলি সিনেমা দেখতে গেছিলাম।

স্বা/-মোঃ তুষার বাবু স্বা/-অসম্পষ্ট
১৭-১০-২০০৭ ইং। ১৭-১০-২০০৭ইং

এস,এম, আবু হোরায়রা
১ম শ্রেণীর ম্যাজিষ্ট্রেট আদালত
দিনাজপুর

মনিরাম বাবুঃ

দিন তারিখ মনে নাই। তবে ঘটনার আগের দিন রাত্রে কুতুবডাঙ্গা বাজারে তুষার বাবু আমাকে বলে পর দিন দিনাজপুর যাবে খালুর বাসায়। আমাকে টাকা দিতে বলে, আমি বলি টাকা নাই। সে বলে আচ্ছা ঠিক আছে সমস্যা নাই। ঘটনার দিন তুষার বাবুর সাথে ভ্যান করে, বাসে করে দিনাজপুর আসি। সদর হাসপাতালের সামনে বিধান চন্দ্র (বিধান কবিরাজ) এর সাথে দেখা হয়। তারা আমাকে সাথে নিয়ে অনেক হাঁটায়, রাস্তা ঘাট চিনি না। আমি দিনাজপুর এর গ্রামের লোক। রাত ৯/১০ টার দিকে এক বাড়ীতে নিয়ে যায়। বিধান বাবু ফোন করে কয়েকবার। ঐ বাড়ীতে ঢুকি, আমি মনে করি যে ওটা তুষার বাবুর বাসা। বারান্দায় দাঁড়িয়ে থাকি। দরজা খোলা ছিল, হঠাৎ দেখি তুষার বাবু একটা মেয়ের সাথে খারাপ কাজ করছে। পরে দেখি বিধান বাবু করছে ঐ মেয়েটার সাথে। আমাকে বললে মায়ের কসমের কথা বলি, তারা আবার খারাপ কাজ করে ঐ মেয়েটার সাথে, পরে আবার আমাকে বললে আমি ঐ মেয়েটার কাছে গেলে আমাকে মেয়েটা কনডম দেয়। খারাপ কাজ আগে না করার জন্য অসুবিধা হলে মেয়েটা আমাকে খারাপ কথা বলে। আমি ২/৩ মিনিট খারাপ কাজ করি। আমি পরে আরো একবার খারাপ কাজ করি। ওরা তিনবার করে খারাপ কাজ করে। পরে আমি আবার ঘরের পাশে গেলে কিছুক্ষন পর তুষার বাবু আমাকে ডাক দেয় আমি যাই, ধাক্কা ধাক্কি করতে দেখি মেয়েটার সাথে। তুষার বাবু মেয়েটার গলা টিপে ধরে খাটের উপর। আমাকে ২পা ধরতে বললে ধরি। তুষার ও বিধান তোয়ালে দিয়ে মেয়েটার গলায় ফাঁস দিয়ে ২ দিক থেকে টানে, আমি বারান্দায়যাই। ওরা ঘর থেকে বের হয়ে ফুলবাড়ী বাস স্ট্যান্ডে যাই, মাইক্রো করে উচিৎপুর যাই। সেখান থেকে ভ্যানে কুতুবডাঙ্গা,

ওখানে আমি প্রস্রাব করতে বসি। উরা বলে এই ঘটনা কাউকে বলা যাবে না। পরে বাড়ী যাই।

স্বা/-টিপ সহি্ স্বা/-অসম্পষ্ট
(ডান হাতের বৃদ্ধাংগুলির ১৭-১০-২০০৭ইং
টিপসহি্ মনিরাম বাবুর)
১৭-১০-২০০৭ ইং।

এস,এম, আবু হোরায়রা
১ম শ্রেণীর ম্যাজিষ্ট্রেট আদালত
দিনাজপুর

55. On careful scrutiny of the above confessions we find that the same were made in terms of the prosecution case. It were the admission in terms or at rate substantially all facts which constituted the offence. Moreso PW 11 recorded the confessions by observing all legal formalities laid in section 364 of the Code. PW 11 was extensively cross-examined by the defence but nothing could be elicited to shake its credibility in any manner whatsoever.

56. It is pertinent to point out that at the time of recording confession by PW 11 the confessing accused did not raise any objection regarding its truth and voluntaries but later on, at the time of examination under section 342 of the Code, they offered explanations of identical nature to the effect that the confessions were extracted under coercion and torture.

57. We have carefully examined their allegations and gone through its contents. It appears to us that they made out a new story of torture, which are inconsistent with that of the evidence on record and attention to those facts were not drawn to the investigation officer (PW 12) at the time of cross-examining him who earlier arrested them and produced before the Magistrate for recording confessions. So the same should be left out of consideration. Therefore, we hold that the confessions were true and voluntary.

58. It further appears to us that above confessing accused implicated themselves in commission of murder. The materials on record shows that their confessions were shown as voluntary and inculpatory in nature. It is well established that confessional statement if found inculpatory in nature and also true and voluntary it can be used against its maker and conviction can solely be based on it without any further corroborative evidence.

59. In the instant case the confessions made by the accused (Exhibits 6, 7 and 8) were not only inculpatory in nature, but also true and voluntary and, as such, the Tribunal very rightly based solely on the confessions and correctly convicted and sentenced the above accused by the impugned judgment and order.

60. In the case of *Islam Uddin (Md) alias Din Islam vs State, 13 BLC (AD) 81* held:

> "It is now settle principle of law that Judicial confession if it is found to be true and voluntary can form the sole basis of conviction as against the maker of the same. The High Court Division has rightly found the judicial confession of the condemned-prisoner true and voluntary and considering the same, the extra judicial confession and, circumstances of the case, found the condemned-prisoner guilty and accordingly imposed the sentence of death upon him."

61. Similar views were taken in the cases of *Abdur Rashid vs State 3 BLD 206, Amir Hossain vs State 4 BLD (AD) 193 = 37 DLR (AD) 139, Gouranga Chandra Paul vs State 59 DLR 17, 29 DLR (SC) 27, Shajahan Ali alias Md. Shahjahan vs State 59 DLR 396, Hazrat Ali vs State 44 DLR (AD) 51, State vs Abul Kalam Azad 8 BLC 464.* Therefore, we hold that the Court below rightly convicted the above confessing accused after considering the evidence on record.

62. On appraisal of the confessions along with other evidence particularly Dr PW 10, who held autopsy upon the cadaver of victim

Mehzabin we find that their evidences regarding death of the victim are consistent, uniform and corroborative with each other with all material particulars. There is absolutely no reason to disbelieve those competent witnesses having no reason whatsoever to depose falsely against the appellants. The defence extensively cross-examined them but nothing could be elicited to shake their credibility in any manner whatsoever. So, the same are invulnerable to the credibility.

63. The condemned-prisoners stood charge and convicted for the offence prescribed in section 9(3) of the Ain.

64. For the convenience of understanding section 9(3) of the Ain reads as hereunder:

৯। ধর্ষণ, ধর্ষণজনিত কারণে মৃত্যু, ইত্যাদি শাস্তি।

(১).....

(২).....

(৩) যদি একাধিক ব্যক্তি দলবদ্ধভাবে কোন নারী বা শিশুকে ধর্ষণ করেন এবং ধর্ষণের ফলে উক্ত নারী বা শিশুর মৃত্যু ঘটে বা তিনি আহত হন, তাহা হইলে ঐ দলের প্রত্যেক ব্যক্তি মৃত্যু দন্ডে বা যাবজ্জীবন সশ্রম কারাদন্ডে দন্ডনীয় হইবেন এবং ইহার অতিরিক্ত অন্যূন এক লক্ষ টাকা অর্থ দন্ডেও দন্ডনীয় হইবেন।

(৪).....

(৫).....

65. In the aforesaid Provision the word "ধর্ষণ" has been defined in section 2(ঙ) which reads as hereunder:

"ধর্ষণ" অর্থ ধারা ৯ এর বিধান সাপেক্ষে, Penal Code, 1860 (Act XLV of 1860) এর section 375 সংজ্ঞায়িত "rape".

66. Section 375 of the Penal Code reads as follows:

"375. Rape—A man is said to commit 'rape' who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions—

Firstly—Against her will.

Secondly—Without her consent.

Thirdly—With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly—With or without her consent, when she is under fourteen years age.

Explanation—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception—Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape."

67. We have meticulously examined the aforesaid Provisions of Rape along with other evidence on record, but we failed to discover any ingredient of Rape committed by the accused upon the victim. Therefore, we hold that the victim was strangulated to death by the accused, without committing rape upon her.

68. In order to attract section 9(3) of the Ain, it is to be proved that the death was caused by committing rape by one or more persons.

69. From the materials on record and all other circumstantial evidence it has come to light that condemned-prisoners had caused the death of victim by strangulation and it is a clear case of murder had been brought home to the door of appellants.

This takes us to a legal debate of fundamental character, which is,

i. Whether the convict-appellants can be

graced with a verdict of acquittal when charge of section 9(3) of the Ain could not be pressed against them;

ii. When a clear case of murder has been established by circumstantial and medical evidence against them whether the convicts can be convicted for the offence of murder punishable under section 302 of the Penal Code.

iii. Whether the case is required to be sent back to Tribunal or Court of sessions for fresh-trial.

70. Section 25 of the Ain postulates that Tribunal defined in section 2 (Gha) shall be treated as Court of Sessions and Tribunal shall be able to exercise all powers of Sessions Court in holding trial of an offence.

71. Section 26 of the Ain enshrines that Tribunal so constituted shall be regarded as Nari-o-Shishu Nirjatan Daman Tribunal and shall be constituted with one Judge and Judge of Tribunal shall be appointed from amongst District and Sessions Judge by the Government, if necessary, shall appoint any District and Sessions Judge as Tribunal Judge in addition to his charge. Section 26(4) of the Ain further enjoins that under the section Additional District and Sessions Judge shall, also, stand included as District and Sessions Judge.

72. From the above, it becomes manifestly clear that a Tribunal trying a case under the Ain is, also, a Court of District and Sessions Judge. When a Judge sits in a Tribunal holding trial of an offence in Special Tribunal case under a Statute or Special Statute is a Tribunal or Special Tribunal and a Judge when sits in Sessions Case trying an offence punishable under Penal sections of Penal Code sits as Sessions Judge.

73. The case in our hand although, tried by a Tribunal constituted under the Ain that Tribunal was, also, the court of Sessions. In the judgment, learned Judge was described as District and Sessions Judge, Dinajpur as well as Nari-o-Shishu Nirjatan Daman Tribunal, Dinajpur. Judgment demonstrates that learned District and Sessions Judge has been, also, exercising the power and Jurisdiction of the Nari-o-Shishu Nirjatan Daman Tribunal. Fate of the convict-appellants and result of the case would have been the same whether it would have been tried either as a Nari-o-Shishu case by the Tribunal or as a sessions case by learned Sessions Judge and if section 9(3) of the Ain be not attracted in respect of convict-appellants the offence of section 302 the Penal Code could be very much pressed into service against the convict-appellants, and they could be conveniently tried and convicted for offence of section 302 of the Penal Code.

74. In the case of *Asiman Begum vs. The State 51 DLR (AD) 18* held:

> "When it is found after a full trial that there was a mis-trial or trial without jurisdiction, the Court of appeal before directing a fresh trial by an appropriate Court should also see whether such direction should at all be given in the facts and circumstances of a particular case.
>
> It is found that there was no legal evidence to support the conviction then in that case it would be wholly wrong to direct a retrial because it would then be a useless exercise. Further, the prosecution should not be given a chance to fill up its lacuna by bringing new evidence which it did not or could not produce in the first trial."

75. As regards remand of the case, we may profitably refer the above decision in the case of *Asiman Begum vs. State* reported in *51 DLR (AD) 18* wherein it has been decided that the remand order for trial of the case as a Sessions case in the particular circumstances of the case will be a mere formality because Nari-o-Shishu Case No.311 of

2007, although tried under the Ain by Tribunal, the presiding officer was no other than the Sessions Judge himself and, as such, it was unlikely that the result would be anything different if the case was tried by him as a Sessions case. Appellate Division thus sent the appeal to High Court Division to consider the case on merit and to pass whatever order or orders it might think appropriate in the interest of justice.

76. In *State vs Abul Kalam, 5 BLC 230* one Abul Kalam stood convicted for offence of section 10(1) of the Ain of 1995 for murder of his wife for dowry by learned Sessions Judge and Special Tribunal No.l, Noakhali. Consequential sentence was death. Condemned-prisoner preferred Jail appeal and, also, regular Criminal appeal before High Court Division. There had been, also, Death Reference. A Division Bench of High Court Division heard Death Reference, Jail appeal and Criminal appeal together and disposed of those by a common Judgment. High Court Division found that there had not been cogent evidence as to committing murder for dowry and no evidence had been led as to the real cause of killing of wife by husband and held that the case did not come under section l0(l) of the Ain of 1995 and the case comes under section 302 of the Penal Code. The High Court Division further held that Sessions Judge, in fact, was the Special Tribunal No. I who tired the case and for no fault of the accused the case had been tried as Special Tribunal case. High Court Division instead of sending the case back for fresh trial under section 302 of the Penal Code by learned Sessions Judge disposed of the appeal. High Court Division altered conviction from section 10(1) of the Ain, 1995 to one under section 302 of the Penal Code. Sentence of death was altered to one of imprisonment for life. The High Court Division in rendering decision took into account the case of *Asiman Begum vs State* (Supra).

77. In the case of *Shibu Pada Acharjee vs. State* reported in *56 DLR 285*, accused-appellant was convicted for offence of section 4(c) of The Ordinance 1983 for commission of rape upon victim Ratna Rani but ingredients of section 4(c) of the Ordinance, 1983 could not be brought home to accused-appellant. In the case it had been laid down:

> "To take the prosecution out of Court on a question of technicality, will be a travesty of Justice and technicality must bend to cause of Justice inasmuch as ends of law is Justice."

78. Accused-appellant can be fastened for offence of section 376 of the Penal Code and conviction under section 4(c) of the Ordinance of 1983 can be altered to one of section 376 of The Penal Code.

79. In the said case conviction under section 4(c) of The Ordinance 1983 was altered to one of section 376 of the Penal Code.

80. In the case of *State vs Mahbur Sheikh alias Mahabur 1LNJ 139 i.e. 1 the Lawyers & Jurist 139* held:

> "Since offence of murder punishable under section 302 of Penal Code was carried to the door of convict-appellants they can be very much convicted for offence of section 302 of the Penal Code and, as such, we convert the offence of section 9(3) of the Ain to offence of section 302 of the Penal Code. Convict-appellant, thus stands convicted for offence of section 302 of the Code.

81. In the event of sending the case either to Tribunal or Court of Sessions for fresh trial proceeding would be protracted which cannot be allowed in the interest of true dispensation of criminal Justice.

82. Since offence of murder punishable under section 302 of the Penal Code was carried to the door of convict-appellants they can be very much convicted for offence of section 302 of the

Penal Code and, as such, we convert the offence of section 9(3) of the Ain to offence of section 302 of Penal Code. Convict-appellants, thus stands convicted for offence of sections 302, 34 of the Code.

Legal debate stands solved in the following terms and language:

i. Convict-appellants cannot be graced with a verdict of acquittal;

ii. Convict-appellants can be convicted for the offence punishable under sections 302, 34 of the Penal Code.

iii. Case is not required to be sent either to Tribunal or Court of Sessions for fresh-trial.

83. With regard to the sentence imposed upon convict-appellants we are of the view that sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come out- which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice. Under section 302 of the Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice.

84. Therefore, we find that there are cogent convincing and unimpeachable evidence on record regarding the complicity of the accused 1. Bidhan Chandra Roy alias Bidhan Kabiraj, 2. Md. Tushar Babu alias Babu, 3. Moniram Chandra Roy alias Babu, with the crime of murder punishable under sections 302, 34 of the Penal Code but the prosecution utterly failed to bring home charge under section 9(3) of the Ain against them beyond all reasonable doubt.

85. In the light of discussions made above and the preponderant judicial views emerging out of the authorities referred to above, we are of the view that the appellants should be convicted for the offence punishable under sections 302, 34 of the Penal Code. In respect of sentence of condemned prisoners we hold that they are young men aged between 22-35 years. Record indicates that the condemned prisoners are not the hard criminals and have been languishing in the condemned-Cell for about five years with suffering of mental agony with death within the death-cell. Taking an account of aggravating and mitigating circumstances ends of justice will be met if death sentences are altered to one of imprisonment for life. Condemned-prisoners 1. Bidhan Chandra Roy alias Bidhan Kobiraj, 2. Md Tushar Babu alias Babu, 3. Moniram Chandra Roy alias Babu, thus stand sentenced to imprisonment for life. In the result:—

(a) Death reference No. 76 of 2008 is rejected.

(b) The impugned Judgment and order of conviction and sentence dated 28-7-2008 passed by learned Judge of Nari-o-Shishu Nirjatan Daman Tribunal, Dinajpur, in Nari-o-Shishu Case No. 311 of 2007 are confirmed with the modification of sentence to the effect that the above condemned-prisoners are convicted under sections 302, 34 of the Penal Code and sentenced to suffer imprisonment for life and also to pay a fine of Taka5,000 each in default to suffer rigorous imprisonment for six months more.

87. In view of the provisions laid in section

35A(1) of the Code of Criminal Procedure the total period the condemned-prisoners have been in custody before conviction in connection with this offence shall be deducted from the period of imprisonment for life awarded to them.

(c) Accordingly, Criminal appeal No. 5256 of 2008, Jail appeal Nos. 841 of 2008, 842 of 2008 and 843 of 2008 are allowed in part in the above terms.

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

Ed.

HIGH COURT DIVISION
(Special Original Jurisdiction)

AFM Abdur Rahman J
Kashefa Hussain J

Judgment
September 29th & 30th, 2014

Nurun Nabi.....
.....Petitioner

vs

National Board of Revenue and others.....
.....Respondent*

Income Tax Ordinance (XXXVI of 1984)
Sections 93(2), (3)(a)(b) and 94(2)

It appears from section 94(2) of the Ordinance 1984 that the limitation of two years have been provided in the said section meaning thereby that the provision of section 93(3)(a) and (b) of the Ordinance is applicable both for ordinary and the Self Assessment Scheme and in case of Self Assessment Scheme the same became barred after the elapse of two years and the provision of section 93(3)(a) and (b) cannot be invoked after the assessment barred by limitation under the provision of section 94(2) of the Ordinance. Because, the Self Assessment Scheme is a privilege and from the issuance of the receipt by the DCT concern as to receiving of a compliant return the same became finalized which become absolute after the elapse of two years, as provided in section 94(2) of the Income Tax Ordinance 1984. The provision of section 93(2) being applicable for ordinary assessment will remain applicable as against five years of any assessment made in ordinary manner. .....(51)

Spectra SN Tex Limited vs Commissioner of Taxes, reported in Income Tax Reference No. 39 of 2012 ref.

Mosharaf Hossain, Advocate—For the Assessee-Applicant.

S. Rashed Jahangir, DAG with Nurun Nahar, AAG with Saikat Basu, AAG—For IT Department.

Judgment

AFM Abdur Rahman J: These two Writ Petitions filed by the same writ petitioner have been taken together for hearing as the similar and identical questions of law are involved in the rules and now disposed off by this single judgment.

Facts of the Case.

2. In Writ Petition No. 4761 of 2009 the Rule Nisi was issued on 23-7-2009 by this court to the following extent;

Let a rule Nisi be issued calling upon the respondents to show cause as to why the impugned assessment order dated 18-1-2009 under section 83A(1)/83A (2)/83(2)/156 section 20(2) of the Ombudsman Act, 2005 by the DCT companies Circle, Taxes Zone-O1, Chittagong (against the income of the petitioner) for the assessment year 2006-2007 (Annexure-F) should not be declared to have been passed without lawful authority and is of no legal effect and/or such other or further order or orders as to this court may seem fit and proper.

*Writ Petition No. 5539 & 4761 of 2009.

3. In Writ Petition No. 5539 of 2009 the rule Nisi was issued on 9-8-2009 by this court to the following effect;

> Let a rule Nisi be issued calling upon the respondents to show cause as to why the impugned notice dated 30-3-2008 and 4-5-2008 under section 93 of the Income Tax Ordinance 1984 issued by the Deputy Commissioner of Taxes, Companies Circle 2, Taxes Zone-1, Chittagong so far as it relates to assessment of income of the petitioner for the assessment year 2003-2004, 2004-2005 and 2005-2006 (Annexures-F and F(l) and Notice dated 24-5-2009 asking the petitioner to produce books of accounts and other documents for the assessment of income of the petitioner for the assessment year 2003-2004, 2004-2005 and 2005-2006 issued by the Deputy Commissioner of Taxes, Companies Circle 2, Taxes Zone 1, Chittagong (Annexure-H) should not be declared to have been made without any lawful authority and is of no legal effect and/or such other or further order or orders as to this court may seem fit and proper.

4. Almost the similar factual circumstances have been stated in both the Writ Petitions which states that the writ-petitioner Nurun Nabi is an assessee of income tax as well as regular tax payee holding TIN. 349-106-1003/Coy-2. The writ-petitioner is the Director of income tax payee six private limited companies, namely (1) Balaka Hatchery Limited, having TIN. 306-200-4430/Coys-2, (2) Balaka Sweater Industries Limited, having TIN. 306-200-4326/Coys-2, (3) Balaka Composite Textile & Sweater Mills Limited, having TIN. 306-200- 4262/Coys-2, (4) Balaka Re-rolling Mills Limited, having TIN. 306-200-4414/Coys-2, (5) Balaka Royal Textile Mills Limited having TIN. 306-200-4414/Coys-2 and (6) Balaka Royal & and Printing Limited and also shareholder of South Point Hospital Limited.

5. It has been stated in the writ petitions that the four Textile Mills under the Bangladesh Textile Mills Corporation; namely (1) Amin Textile Limited, (2) RR. Textile Mills Limited, (3) Dost Textile Mills Limited and (4) Valuka Wollen Mills Limited, situated at Foujderhat Industrial Area in Chittagong, manufacturing low cost fabrics, were all loosing concern under the government management and the government was facing severe consecutive loss in those four textile mills for long. In order to save the loss and to pay the dues to the workers, the government decided to run the mills by private entrepreneur and accordingly the writ-petitioner was selected, being a textile expert, for managing the said four textile mills. Thereafter, the writ-petitioner entered into a contract with the Bangladesh Textile Mills Corporation (BTMC) as to the management procedure and financial affairs and accordingly obtained loan from 6(six) private Banks namely the (1) Premier Bank Limited, (2) Social Investment Bank Limited, (3) South East Bank Limited, (4) Mutual Trust Bank Limited, (5) Bangladesh Commerce Bank Limited and (6) Jamuna Bank Limited to invest in the said four textile mills for the purpose of importing raw materials from abroad and to maintain the expenses of the said mills including payment of back salaries to the workers. The writ-petitioner, having immense experience in the field, successfully started maintaining the said four textile mills and still doing the same job with success. The writ-petitioner obtained loan of Taka 395,83,19,572 from aforesaid Banks and regularly transacted the said amount in the bank by way of paying back the loan dues and to withdraw the fresh amount from the bank account and, in such, course of transaction the writ-petitioner had a liability in the bank loan up to the date of filing his income tax return for the assessment year 2006-2007 at an amount of Taka 18,75,83,796 to the said Banks.

6. Despite the fact of such loan liability on the shoulder and the payment of income tax regularly, the writ-petitioner had some undisclosed money in his hand and taking the privilege of the SRO No. 200/Ain-2005, dated 6th July, 2005, the writ-petitioner declared his previously undisclosed amount and paid income tax on the said undisclosed amount at an amount of Taka 33,75,000 through Pay Order No. 0177135 of the Bank Asia Limited, MCB, Sk. Mujib Road Branch, Chittagong, dated 17-10-2006.

7. It has been further stated that the writ-petitioner filed its income tax return for the assessment year 2006-2007 on 18-10-2006 under the Self Assessment Scheme, provided under section 83A(1) of the Income Tax Ordinance 1984 and the Deputy Commissioner of Taxes, Companies Circlc-11, Taxes Zone-2, Chittagong, issued the receipt of the return, which deemed to be the finalization of the assessment for the assessment year 2006-2007. Thereafter, the writ-petitioner by availing the privilege of the SRO being No. 98-Ain/2007 dated 4th June 2007 paid a penalty @, 5% to the tune of Taka 28,245 on his rest undisclosed income for the assessment year 2006-2007 through the Pay Order No. 6591446 of Sonali Bank Ltd Agrabad Corporate Branch, Chittagong, on 27-9-2007 and accordingly the writ-petitioner submitted a revised return for the assessment year 2006-2007 to the concerned Deputy Commissioner of Taxes which was duly received.

8. It has been stated that thereafter the writ-petitioner received a notice from the Deputy Commissioner of Taxes, Companies Circle-2, Taxes Zone-1, Chittagong, issued on 31-5-2005 under the provision of section 83(1) and 79 of the Income Tax Ordinance 1984 directing him to be present in a hearing on 12-6-2007 in respect of its income tax return for the assessment year 2006-2007.

9. The writ-petitioner complied with the said notice and the authorised representative of the writ petitioner Mr. Omar Bhattacharjee, ITP submitted all the papers and documents in support of the income from (1) Amin Textile Limited, (2) RR. Textile Mills Limited, (3) Dost Textile Mills Limited and (4) Valuka Wollen Mills Limited, before the concerned DCT.

10. The DCT concern in the meantime made a secret investigation in respect of the writ-petitioners income tax return for the assessment year 2006-2007 through the Tax Inspector of Companies Circle-2, Chittagong, on 8-10-2007 upon which the DCT concern made an assessment on 31-12-2007 for the assessment year 2006-2007 under the provision of section 83A(1), 83A(2)/83(2) of the Income Tax Ordinance 1984. Such a proceeding for the assessment being illegal the writ-petitioner preferred a writ petition on 8-5-2008, before the High Court Division and later obtained a rejection of the writ petition as not pressed and thereafter the writ-petitioner filed a complaint petition, being No. 143 dated 19-8-2008, before, the Tax Ombudsmen, under the provision of section 13 of the Tax Ombudsmen Act 2005 against the taxes department. The Tax Ombudsmen upon hearing both the parties delivered his recommendation on 24th November, 2008 upon which the DCT concern made further assessment on 18-1-2009 relating to the assessment year 2006-2007.

11. Being aggrieved with and highly dissatisfied by the said assessment order dated 31-12-2007 made by the DCT concern, the writ-petitioner preferred the instant writ petition and obtained the rule as aforementioned.

12. In Writ Petition No. 5539 of 2009 similar facts have been stated as to the tax return for the assessment year 2006-2007 with an addition that the writ-petitioner submitted its income tax return for the assessment year 2003-2004, 2004-2005, 2005-2006 and 2006-2007 to the Deputy Commissioner of Taxes, Companies Circle-11,

Taxes Zone-2, Chittagong, under the Self Assessment Scheme as provided under section 83 A of the Income Tax Ordinance 1984. But the DCT concern after the proceeding taken in respect of the assessment year 2006-2007 further initiated proceeding under section 93 of the Income Tax Ordinance 1984 in respect of the assessment year 2003-2004, 2004-2005, 2005-2006 and 2006-2007 and issued show cause notice on 12-3-2008 calling upon the writ-petitioner to explain as to the source of investment and income which have been shown under the provision of SRO. 200/Ain/2005, dated 6th July, 2005 earlier upon which the writ-petitioner deposited huge amount of taxes. The said notice was received by the writ-petitioner on 30-7-2009 against which the writ-petitioner by a letter seriously objected the said proceeding under section 93 of the Income Tax Ordinance 1984. That being not stopped by the DCT concern, the writ-petitioner preferred the instant writ petition No. 5535 of 2009 and obtained the rule as aforementioned.

Respondent's Contentions.

13. Pursuant to the service of notice of the rule, the learned Deputy Attorney-General Mr S. Rashed Jahangir along with the learned Assistant Attorney-General Ms Nurun Nahar and Mr Saikat Basu, appeared on behalf of the Taxes Department and filed affidavit-in-opposition in the respective writ petition.

14. In Writ Petition No. 4761 of 2009 the taxes department stated that the writ-petitioner was asked to explain the source from where the money was deposited to the bank. But the writ petitioner failed to mention/explain the source of fund and as the writ petitioner did not mention the assessment year in respect of deposit of tax at an amount of Taka 33,75,000 as per SRO 200/Ain/2005, dated 6th July, 2005, the said declared undisclosed income was remained uninterfered, unchanged by the Tax Ombudsmen as well as the DCT concern. The issuance of receipt under section 83A(1) of the Income Tax Ordinance 1984 is not the final assessment rather the return may be selected for further proceeding as per the section 83A(2) of the Income Tax Ordinance 1984 and on the basis of definite information regarding concealment of income as per the provision of section 83A(5) of the Income Tax Ordinance 1984, the said declared undisclosed income was incredible, absurd, irrelevant, inconsistent against the deposited money of Taka 395,83,19,572 found in several Bank accounts. The National Board of Revenue (NBR) selected the writ petitioners income tax return, filed under Self Assessment Scheme for the purpose of audit and the DCT concern for the purpose of auditing got local investigation report by the Inspector of taxes, issued letter to the writ petitioner informing his intention of audit and issued the notices under section 83A(1) and 79 of the Income Tax Ordinance 1984 directing the writ petitioner for production of books of account, asking for documentary evidence in favour of the shown income, expenditure and other requirement. But the writ petitioner filed a complain before the Honorable Tax Ombudsmen. The writ petitioner failed to produce documents before the Tax Ombudsmen to improve his case and accordingly the Tax Ombudsmen did not interfere the order of the assessment of the DCT concern who put his observation and recommendation regarding the complaint through his recommendation dated 28-11-2008. No injustice was committed to the writ petitioner to enabling him to invoke the writ jurisdiction of the High Court Division. The writ petitioner failed to produce any documents for his source of fund deposited in the bank accounts and accordingly the DCT concern was justified in making assessment of the selected file in accordance with the prior approval of the National Board of Revenue as per the section 83A(2) of the Income Tax Ordinance 1984. The DCT concern complied the recommendation of the Tax Ombudsmen and made the assessment on 18-1-

2009 under section 83A(1), 83A(2), 83(2); 156 and section 20(2) of the Tax Ombudsmen Act 2005, without waiting for written order from the National Board of Revenue due to the time constraint of sixty days to implement the order of the Tax Ombudsmen. The instant writ petition is not maintainable under the provision of section 33 of the Tax Ombudsmen Act 2005 and accordingly the respondents have prayed for discharge of the rule.

15. By a supplementary affidavit-in-opposition a photocopy of notice dated 22-2-2007, issued under নথি নং-৩৪৯-১০৬-১০০৩-সা-১১/৯১৯, has been filed before this court, stating that the supplementary affidavit is very much necessary for proper disposal of the rule. But without any statement as to the said notice in the supplementary affidavit excepting that an audit was held within the meaning of section 83A(2) of the Income Tax Ordinance 1984 and for the purpose of holding audit a notice dated 22-2-2007 was served upon the assessee-writ petitioner.

16. In writ petition No. 5539 of 2009 the Taxes Department stated in the affidavit-in-opposition that the concerned DCT came to notice from different sources that the writ petitioner had been maintaining a number of accounts in different banks. Thereafter, the DCT concern collected the bank statement from the said banks, taken prior approval of the Commissioner of Taxes as per the provision of section 113(f) of the Income Tax Ordinance 1984 and huge amount of money was found deposited in the writ petitioners bank accounts. Accordingly, the DCT concern proceeded to re-open the cases from the assessment year 2003-2004 to 2006-2007, under section 93 of the Income Tax Ordinance 1984 for concealment of income. Thereafter, issuing the notice, under section 93, 83(1) and 79 and being empowered under the provision of section 93(3)(b) of the Income Tax Ordinance 1984, the DCT concern reassessed the income tax cases as he has reason to believe that the writ petitioner has for any assessment year concealed the particulars of his income or furnish inaccurate return thereof or omitted or failed to disclose materials fact for the assessment for such year within five years from the end of assessment year for which the assessment is to be made.

Appraisal of the Facts.

17. These two writ petitions relates to the assessment year 2003-2004, 2004-2005, 2005-2006, 2006-2007 and 2007-2008 of the assessee-writ petitioner Nurun Nabi, who having obtained the management of the denationalized Textile Mills namely (1) Amin Textile Limited, (2) RR. Textile Mills Limited, (3) Dost Textile Mills Limited and (4) Valuka Wollen Mills Limited, previously under the Bangladesh Textile Mills Corporation (BTMC), and upon obtaining loan from four private Banks to the tune of Taka 395,83,19,572, started to manage and administer those denationalized textile mills under the agreement with the government of Bangladesh. Admittedly the writ petitioner is a regular income tax payer and submitted all his income tax returns as aforesaid, under the provision of Self Assessment Scheme prevailing at the relevant period under the provision of section 83A of the Income Tax Ordinance 1984. The said provision of Self Assessment Scheme indicates that upon submission of the return the DCT concern shall issue a receipt of receiving the return under the Self Assessment Scheme and the said receipt shall be treated as a deemed finalization of the assessment for the relevant assessment year. Accordingly, the writ petitioner upon obtaining the receipt from the DCT concern was satisfied as to his finalization of the assessment for those assessment years from 2003-2004 up to 2007-2008.

18. It appears that the National Board of Revenue under the provision of section 83A(2) of the Income Tax Ordinance 1984 selected the

return of the writ petitioner for the assessment year 2006-2007 for audit and it appears from the subsequent assessment order that the DCT concern upon serving notice under section 83(1) and 79 of the Income Tax Ordinance 1984 called upon the writ petitioner to submit certain evidence and to attend the hearing of the re-opening of assessment case for the assessment year 2006-2007. Wherefrom, the dispute arose and ultimately the writ petitioner preferred the instant writ petition challenging the reopening of the assessment case for the assessment year 2006-2007, before this court.

Arguments of the Parties.

19. The learned Advocate Mr Mosharaf Hossain, appearing on behalf of the assessee-writ-petitioner, while taken this court through the provision of section 83A(2) of the Income Tax Ordinance 1984, prevailing during the assessment year 2006-2007, strenuously argued that the National Board of Revenue is empowered under the provision of section 83A(2) of the Income Tax Ordinance 1984 to select for an audit of any return, submitted under the Self Assessment Scheme as provided in the said section 83A of the Income Tax Ordinance 1984 and it is incumbent upon the DCT concern to hold an audit, exparte, to make him satisfied as to any prospect of further proceeding with an end to re-open the said assessment and thereafter to serve notice under section 83(1) and 79 of the Income Tax Ordinance 1984, calling upon the concerned assessee to submit documents supporting the return and to remain present at the hearing of the case. But the DCT concern did not comply the mandatory provision of section 83A(2) of the Income Tax Ordinance 1984 in respect of holding an audit, rather directly serve the notice under section 83(1) and 79 of the Income Tax Ordinance 1984, calling upon the assessee-writ-petitioner to attend the hearing of the re-opened case for the assessment year 2006-2007. That being a palpable illegality the same cannot be sustained under the provision of law and, as such, the rules are required to be made absolute.

20. On the other hand, the learned Deputy Attorney-General Mr S. Rashed Jahangir, appearing on behalf of the Taxes Department refuted the argument of the assessee-writ-petitioner and submitted that the DCT concern hold an audit after the return, for the assessment year 2006-2007 was selected for audit by the National Board of Revenue under the provision of section 83A(2) of the Income Tax Ordinance 1984 by way of serving a notice dated 22-2-2007, a copy of which has been annexed with the supplementary-affidavit-in-opposition, filed by the Taxes Department. Thereafter, the DCT concern appraising the same direction for his further proceeding to re-open the case, admittedly served notice under section 83(1) and 79 of the Income Tax Ordinance 1984, calling upon the writ petitioner to attend the hearing and to submit the evidence in support of the return. But that not being complied with, the DCT concern had no other alternative but to proceed in making the assessment order, which being lawful under the provision of law, the same cannot be declared to have been passed without lawful authority.

21. The learned Deputy Attorney-General Mr S. Rashed Jahangir next argued that the writ petitioner availed the provision of Tax Ombudsman Act 2005 and having failed to prove that no audit was held and that any legality committed by the DCT concern, failed to attend the further hearing held by the DCT concern upon getting the recommendation from the Tax Ombudsmen, whereupon the DCT concern further, complied the observation as made by the Tax ombudsman and re-assessed the tax liability of the writ petitioner, which being lawful has been erroneously challenged in the instant writ petitions and therefore the rules are required to be discharged by this court.

22. Further from the Writ Petition No. 5539 of 2009 it appears that the DCT concern upon delivering the re-assessment order in respect of the assessment year 2006-2007, further found that huge amount of transaction has been made by the assessee-writ-petitioner in different banks which was not disclosed earlier in the returns filed under Self Assessment Scheme for the assessment year 2003-2004, 2004-2005, 2005-2006, 2006-2007 and 2007-2008 and thereafter the DCT concern upon serving a notice under section 93 of the Income Tax Ordinance 1984 reopened those assessment years and upon obtaining a report from the Tax Inspector served a different notice upon the writ petitioner lastly on 4-5-2008, but as the writ petitioner preferred the instant writ petition, the same was stopped at that stage.

23. The learned Advocate Mr Mosharaf Hossain vigorously argued that the DCT concern committed palpable illegality in reopening the deemed finalized assessment for the assessment year 2003-2004, 2004-2005, 2005-2006 and 2007-2008 since the assessee-writ-petitioner did not conceal any of the bank transaction as made in respect of the accounts maintained with different banks relating to the denationalized enterprises, as the assessee-writ-petitioner upon disclosing his earlier undisclosed income availed the privilege of SRO. No. 200/Ain-2005 dated 6-7-2005 and SRO being No. 98-Ain/2007, dated 4th June, 2007 and paid a huge amount income tax. Moreover, the Tax Inspector in his report categorically stated about the liability of the assessee-writ-petitioner amounting to Taka 22,00,00,000 which indicates that there is no concealment as to any income of the writ-petitioner for those assessment years.

24. The learned Advocate Mr Mosharaf Hossain next argued that by inserting the provision of section 83A(5) of the Income Tax Ordinance 1984 through the Finance Act 2003, the legislature has empowered the DCT concerned to re-open a Self Assessment return deemed to be finalized by issuance of the receipt, if definite information came to the possession of the DCT concern. This empowerment made available to the DCT concern to the provision of section 93 of the Income Tax Ordinance 1984 and any Self Assessment return may be re-opened under such provision subject to the provision of section 94 of the Income Tax Ordinance 1984, which prescribed the time limit for such reopening. The learned Advocate Mr Mosharaf" Hossain, contends that the DCT concern in the instant case failed to understand the implication of section 94 of the Income fax Ordinance 1984 and without obtaining the prior approval of the Inspecting Joint Commissioner proceeded to reopen the assessment as aforesaid and therefore the instant rule challenging the illegal step taken by the DCT concern is required to be made absolute as have been taken without lawful authority.

25. The learned Deputy Attorney-General Mr S. Rashed Jahangir in this respect meticulously argued that the provision of section 83A(5) is an independent provision as it contains a non-obstantive clause indicating that irrespective of the provision of reopening of a deemed assessment under the provision of section 83A(2) of the Income Tax Ordinance 1984, the DCT concern may proceed to reopen any of the Self Assessment Scheme deemed finalized assessment, if definite knowledge of concealment reached to the hands of the DCT concern and in the instant case the DCT concerned upon obtaining definite knowledge of bank transaction of a huge amount served the notice under section 93 of the Income Tax Ordinance 1984, being empowered under the provision of section 83A(5) read with section 93 of the Income Tax Ordinance 1984 and all those assessment years having been within five years, the DCT concerned lawfully served the notice.

26. The learned Deputy Attorney-General Mr S Rashed Jahangir further argued that the DCT concern lawfully proceeded to reopen the deemed finalization of the tax liability for the assessment year 2003-2004, 2004-2005, 2005-2006, 2006-

আইন) এর ধারা ৩ এর অধীন প্রতিষ্ঠিত বাংলাদেশ সিকিউরিটিজ অ্যান্ড এক্সচেঞ্জ কমিশন;

(৬) "কোম্পানী" অর্থ কোম্পানী আইন, ১৯৯৪(১৯৯৪ সনের ১৮ নং আইন) এর অধীনে গঠিত এবং নিবন্ধিকৃত কোন কোম্পানী বা কোন বিদ্যমান কোম্পানী;

(৭) "কৌশলগত বিনিয়োগকারী" অর্থ কমিশন কর্তৃক অনুমোদিত দেশী বা বিদেশী কোন প্রতিষ্ঠান;

(৮) "ট্রেডিং রাইট এনটাইটেলমেন্ট সার্টিফিকেট (ট্রেক)" অর্থ এই আইন কার্যকর হইবার পর কোন এক্সচেঞ্জে তালিকাভুক্ত সিকিউরিটিজ অনুমোদিত স্কীম অনুযায়ী ব্রোকার বা ডিলার হিসাবে লেনদেন করিবার যোগ্যতা অর্জন সাপেক্ষে উক্ত এক্সচেঞ্জ কর্তৃক ইস্যুকৃত সিকিউরিটিজ লেনদেনের অধিকার সম্বলিত সনদ;

(৯) "ডিপজিটরি" অর্থ ডিপজিটরি আইন, ১৯৯৯ (১৯৯৯ সনের ৬ নং আইন) এর অধীনে প্রতিষ্ঠিত কোন ডিপজিটরি;

(১০) "ডিমিউচ্যুয়ালাইজেশন" অর্থ অনুমোদিত স্কীম অনুযায়ী যে কোন এক্সচেঞ্জ এর সিকিউরিটিজ লেনদেনের অধিকার (Trading Right) হইতে উহার মালিকানা ও ব্যবস্থাপনা পৃথকীকরণ;

(১১) "নির্ধারিত" অর্থ বিধি বা প্রবিধান দ্বারা নির্ধারিত;

(১২) "পরিচালনা পরিষদ" অর্থ কোন এক্সচেঞ্জ এর পরিচালনা পরিষদ;

(১৩) "প্রাথমিক শেয়ারহোল্ডার" অর্থ ডিমিউচ্যুয়ালাইজেশন এর তারিখে কোন এক্সচেঞ্জ এর শেয়ারের আইনগত মালিক;

(১৪) "বিদ্যমান এক্সচেঞ্জ" অর্থ কোন স্টক এক্সচেঞ্জ যাহা Securities and Exchange Ordinance, 1969 (Ordinance No. XVII of 1969) এর অধীনে নিবন্ধিত অথবা নিবন্ধিত বলিয়া গণ্য এবং এই আইন কার্যকর হওয়ার তারিখে বাংলাদেশে কার্যরত;

(১৫) "ব্যক্তি" অর্থ স্বাভাবিক ব্যক্তিসহ (natural person) যে কোন কোম্পানী, অংশীদারী কারবার বা ফার্ম বা একাধিক ব্যক্তির সমিতি বা সংঘ তাহা নিবন্ধিত হউক বা না হউক;

(১৬) "ব্লকড হিসাব (blocked account)" অর্থ ধারা ৮ এর দফা (গ) অনুযায়ী কোন এক্সচেঞ্জ কর্তৃক ডিপোজিটরিতে খোলা হিসাব;

(১৭) "রেজিস্ট্রার" অর্থ কোম্পানী আইন, ১৯৯৪(১৯৯৪ সনের ১৮ নং আইন) এর অধীনে কোম্পানীসমূহ নিবন্ধনের দায়িত্ব পালনকারী রেজিস্ট্রার বা অন্য যে কোন কর্মকর্তা, তিনি যে নামেই অভিহিত হউন না কেন;

(১৮) "সদস্য" অর্থ বিদ্যমান এক্সচেঞ্জ এর কোন সদস্য;

(১৯) "সম্পর্কিত ব্যক্তি" অর্থ প্রাকৃতিক ব্যক্তিসত্ত্বার (Natural Person) ক্ষেত্রে তাহার স্বামী বা স্ত্রী, অথবা তাহার উপর নির্ভরশীল কোন ব্যক্তি, অথবা তাহার কোন অংশীদারী প্রতিষ্ঠানের অংশীদার, অথবা তাহার উল্লেখযোগ্য সংখ্যক শেয়ার রহিয়াছে বা তিনি উহার একজন পরিচালক এমন কোন কোম্পানী বা নিগমিত সংস্থা, এবং আইনানুগ ব্যক্তিসত্ত্বার ক্ষেত্রে উহার সহিত সম্পর্কিত কোন আন্ডারটেকিং, কোম্পানী বা নিগমিত সংস্থা যাহা উক্ত আইনানুগ ব্যক্তিসত্ত্বার একটি নিয়ন্ত্রণকারী (holding), অধীনস্থ (subsidiary) বা সহযোগী (associate) কোম্পানী;

(২০) "সিকিউরিটিজ" অর্থ Securities and Exchange Ordinance, 1969 (Ordinance No.XVII of 1969) এর section 2 এর clause(1) এ সংজ্ঞায়িত "securities";

(২১) "স্বতন্ত্র পরিচালক" অর্থ এক্সচেঞ্জ এর কোন পরিচালক, যিনি উহার ব্যবস্থাপনা, ব্যবসা, সেবা, লেনদেন এবং উহার উল্লেখযোগ্য সংখ্যক শেয়ার ধারকের সহিত সম্পর্কিত নহে।

(২) প্রসংগের প্রয়োজনে ভিন্নরূপ না হইলে, এই আইনে ব্যবহৃত যে সকল শব্দ বা অভিব্যক্তির সংজ্ঞা দেওয়া হয় নাই, সেই সকল শব্দ বা অভিব্যক্তি Securities and Exchange Ordinance, 1969 (Ordinance No. XVII of 1969) ব্যাংক কোম্পানী আইন, ১৯৯১ (১৯৯১ সনের ১৪ নং আইন), বাংলাদেশ সিকিউরিটিজ অ্যান্ড এক্সচেঞ্জ কমিশন আইন, ১৯৯৩ (১৯৯৩ সনের ১৫ নং আইন), আর্থিক প্রতিষ্ঠান আইন, ১৯৯৩ (১৯৯৩ সনের ২৭ নং আইন), কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন), ডিপজিটরি আইন, ১৯৯৯(১৯৯৯ সনের ৬ নং আইন), বীমা আইন, ২০১০ (২০১০ সনের ১৩ নং আইন) এ যে অর্থে ব্যবহৃত হইয়াছে উক্ত শব্দ বা অভিব্যক্তি সেই অর্থ বহন করিবে।

৩। **আইনের প্রাধান্য**।—আপাততঃ বলবৎ অন্য কোন আইন, চুক্তি বা আইনগত দলিলে যাহা কিছুই থাকুক না কেন, এই আইনের বিধানাবলী প্রাধান্য পাইবে।

দ্বিতীয় অধ্যায়

ডিমিউচ্যুয়ালাইজেশন

৪। **এক্সচেঞ্জ এর ডিমিউচ্যুয়ালাইজেশন**।—(১) এই আইন কার্যকর হইবার পর ধারা ৫ অনুযায়ী স্কীম দাখিল এবং এই আইনের অন্যান্য বিধানাবলী অনুসরণ ও কমিশন কর্তৃক নির্ধারিত কার্যক্রম সম্পন্ন করিয়া বিদ্যমান এক্সচেঞ্জ এর সিকিউরিটিজ লেনদেনের অধিকার (Trading Right) উহার মালিকানা ও ব্যবস্থাপনা হইতে পৃথকীকরণের মাধ্যমে ডিমিউচ্যুয়ালাইজ করিতে হইবে।

(২) এই আইন কার্যকর হইবার পর নিম্নলিখিত শর্তাবলী পরিপালন না করিয়া কোন এক্সচেঞ্জ অথবা কোন ব্যক্তি সিকিউরিটিজ লেনদেনের উদ্দেশ্যে এক্সচেঞ্জ কর্তৃক পরিচালিত কোন কার্যক্রম পরিচালনা বা সেবা প্রদান করিতে পারিবে না, যদি না,—

(ক) উক্ত এক্সচেঞ্জ কমিশন কর্তৃক নিবন্ধিত হয়;

(খ) উহা শেয়ার দ্বারা সীমাবদ্ধ একটি পাবলিক কোম্পানী হিসাবে নিবন্ধিত হয়;

(গ) উহা ডিমিউচ্যুয়ালাইজড হয়।

৫। **ডিমিউচ্যুয়ালাইজেশন এর জন্য স্কীম দাখিল**।—এই আইন কার্যকর হইবার তারিখ হইতে ৯০ (নব্বই) দিনের মধ্যে বিদ্যমান এক্সচেঞ্জ ডিমিউচ্যুয়ালাইজেশন স্কীমসহ নিম্নলিখিত তথ্যাদি কমিশন এর নিকট দাখিল করিবে, যথা:

(ক) উহার সংঘস্মারক ও সংঘবিধি পরিবর্তন সংক্রান্ত প্রস্তাব যাহাতে অন্যান্য বিষয়ের মধ্যে পরিচালনা পরিষদের সদস্য হইবার জন্য প্রয়োজনীয় যোগ্যতা ও অভিজ্ঞতার বিস্তারিত বিবরণ থাকিতে হইবে;

(খ) উহার প্রাথমিক শেয়ারহোল্ডারদের নামের তালিকা এবং তাহাদের প্রত্যেকের নামে নগদ অর্থের বিনিময় ব্যতিরেকে (For consideration other than cash) বরাদ্দতব্য শেয়ারের পরিমাণ;

(গ) ডিমিউচ্যুয়ালাইজেশন এর জন্য প্রাতিষ্ঠানিক পরিচালনা কাঠামো (Governance Structure) সংক্রান্ত Board and Administration Regulations, অথবা অনুরূপ বিধানাবলীর খসড়া;

(ঘ) প্রস্তাবিত প্রথম পরিচালনা পরিষদের পরিচালকদের তালিকা;

(ঙ) কমিটিসমূহের কাঠামো এবং উক্ত কমিটিসমূহে স্বতন্ত্র পরিচালকদের ভূমিকার বিস্তারিত বিবরণ;

(চ) কমিশন কর্তৃক নির্ধারিত যে কোন তারিখে এক্সচেঞ্জ এর আর্থিক মূল্যায়ন প্রতিবেদন যাহা ডিসকাউন্টেড ক্যাশ ফ্লো, ডিভিডেন্ড ডিসকাউন্ট, এন্টারপ্রাইজ ভ্যালু, সদস্যদের সম্মিলিত মূলধনের নীট সম্পদ মূল্য এবং ভবিষ্যৎ আয়ের বর্তমান মূল্য এর সংমিশ্রনে, অথবা কমিশনের নিকট গ্রহণযোগ্য যে কোন আন্তর্জাতিকভাবে স্বীকৃত পদ্ধতি অনুসরণে, কমিশন কর্তৃক নিবন্ধিত কোন মার্চেন্ট ব্যাংকার অথবা বিদেশী ইনভেস্টমেন্ট ব্যাংক কর্তৃক প্রস্তুত করিতে হইবে;

(ছ) কমিশন কর্তৃক নির্ধারিত যে কোন তারিখে তৎকর্তৃক অনুমোদিত কোন নিরীক্ষক কর্তৃক প্রস্তুতকৃত এক্সচেঞ্জ এর দায় ও সম্পদের পুনঃমূল্যনির্ধারণ (Re-valuation) এবং উহার ভিত্তিতে ১০ (দশ) টাকা অভিহিত মূল্যে (Face Value) শেয়ারের সংখ্যা নির্ধারণ;

(জ) উহার ইস্যুতব্য শেয়ারসংখ্যাসহ অনুমোদিত এবং পরিশোধিত মূলধন সংক্রান্ত প্রস্তাব;

(ঝ) সংশ্লিষ্ট যে সকল বিধানাবলীর পরিবর্তন করিতে হইবে সেইগুলির খসড়া সংশোধনী প্রস্তাব;

(ঞ) স্বার্থ-সংঘাত নিয়ন্ত্রণ এবং বিনিয়োগকারীর স্বার্থ সংরক্ষণ পদ্ধতি;

(ট) স্ব-নিয়ন্ত্রক এর দায়িত্ব হইতে ব্যবসা কার্যক্রম পৃথকীকরণের পদ্ধতি;

(ঠ) শেয়ার মালিকানা বিস্তৃতকরণ পদ্ধতি এবং উহা অর্জনের জন্য সময়সীমা;

(ড) নতুন ট্রেক-হোল্ডারদের অন্তর্ভুক্তির ক্ষেত্রে এক্সচেঞ্জ কর্তৃক যোগ্যতা, ফি নির্ধারণ, এবং অন্যান্য আনুষ্ঠানিকতা প্রতিপালনের জন্য সময়সীমা নির্দিষ্টকরণ;

(ঢ) অন্যূন ৩ (তিন) বৎসরের ব্যবসায় পরিকল্পনাসহ উহার লভ্যাংশ সংক্রান্ত নীতিমালা, (policy on dividend) সম্ভাব্য মূলধনী ব্যয় (Capital expenditure) এবং অর্থায়নের উৎস সংক্রান্ত বিবরণী;

(ণ) ডিমিচ্যুয়ালাইজেশন এর জন্য প্রয়োজনীয় অথবা উহার সহিত সম্পর্কিত অন্য যে কোন বিষয়।

৬। **স্কীম অনুমোদন**।—(১) ধারা ৫ অনুযায়ী দাখিলকৃত স্কীম প্রাপ্তির পর অনধিক ৬০ (ষাট) দিনের মধ্যে কমিশন তৎকর্তৃক প্রয়োজনীয় বলিয়া বিবেচিত সংশোধনসহ বা সংশোধন ব্যতিরেকেই উক্ত স্কীম অনুমোদন করিবে।

(২) উপ-ধারা (১) এর অনুযায়ী কোন সংশোধন বা পরিবর্তন করিবার ক্ষেত্রে বিদ্যমান এক্সচেঞ্জকে শুনানীর সুযোগ প্রদান করিতে হইবে।

(৩) দাখিলকৃত স্কীম ও তথ্যাদির মধ্যে অসম্পূর্ণতা থাকিলে উহা দূরীকরণের জন্য কমিশন সময় নির্দিষ্ট করিয়া বিদ্যমান এক্সচেঞ্জকে

নির্দেশনা প্রদান করিতে পারিবে।

(৪) বিদ্যমান এক্সচেঞ্জ কর্তৃক নির্দিষ্ট সময়ের মধ্যে প্রয়োজনীয় কার্যক্রম গ্রহণে ব্যর্থতার ক্ষেত্রে, কমিশন, সংশ্লিষ্ট দলিলাদি প্রস্তুত করিয়া উহার সিদ্ধান্ত বিদ্যমান এক্সচেঞ্জকে প্রতিপালনের জন্য জানাইয়া দিতে পারিবে এবং উক্ত দলিলাদি প্রস্তুতের জন্য কোন মার্চেন্ট ব্যাংকার বা কোন নিরীক্ষক নিয়োগের প্রয়োজন হইলে, উহার যাবতীয় ব্যয় সংশ্লিষ্ট বিদ্যমান এক্সচেঞ্জ বহন করিবে।

(৫) উপ-ধারা (৪) এর অধীন কমিশন কর্তৃক প্রস্তুতকৃত দলিলাদি বা গৃহীত কোন সিদ্ধান্ত চূড়ান্ত বলিয়া গণ্য হইবে এবং উহা সংশ্লিষ্ট এক্সচেঞ্জ এবং উহার সদস্যবৃন্দের জন্য বাধ্যকর হইবে।

৭। **অনুমোদিত স্কীম প্রকাশনা।**—বিদ্যমান এক্সচেঞ্জ স্কীম অনুমোদন প্রাপ্তির ৭ (সাত) দিনের মধ্যে অনুমোদিত স্কীম—

(ক) সকল সদস্যের নিকট বন্টন করিবে;

(খ) সংশ্লিষ্ট এক্সচেঞ্জের ওয়েব সাইটে প্রকাশ করিবে;

(গ) দুইটি বাংলা এবং দুইটি ইংরেজিতে প্রকাশিত বহুল প্রচারিত জাতীয় দৈনিক পত্রিকায় প্রকাশ করিবে; এবং

(ঘ) সরকারি গেজেটে প্রকাশের ব্যবস্থা গ্রহণ করিবে।

৮। **সংঘস্মারক ও সংঘবিধি পরিবর্তন, শেয়ার বরাদ্দ, ইত্যাদি।**—স্কীম অনুমোদন প্রাপ্তির ৩০ (ত্রিশ) দিনের মধ্যে বিদ্যমান এক্সচেঞ্জ—

(ক) উহার শেয়ারহোল্ডারদের সাধারণ সভায় অনুমোদিত স্কীম, সংঘস্মারক ও সংঘবিধি পরিবর্তন এবং ডিমিউচ্যুয়ালাইজেড এক্সচেঞ্জ এর প্রথম পরিচালনা পরিষদ এর পরিচালকগণের তালিকা বিশেষ সিদ্ধান্ত হিসাবে গ্রহণ (adopt) করিবে;

(খ) প্রাথমিক শেয়ারহোল্ডারগণের অনুকূলে অজড় (Dematerialized) অবস্থায় শেয়ার বরাদ্দ করিবে, যাহা কোন সময় বা কোন কারণেই জড় (Rematerialized) অবস্থায় রূপান্তর করা যাইবে না;

(গ) প্রাথমিক শেয়ারহোল্ডারগণের অনুকূলে বরাদ্দকৃত শেয়ারের অন্যূন ৬০ (ষাট) শতাংশ শেয়ার একটি ব্লকড হিসাবে ধারা ১৪ অনুযায়ী হস্তান্তরের সময় পর্যন্ত জমা রাখিবে;

(ঘ) প্রাথমিক শেয়ারহোল্ডারকে ব্লকড হিসাবে জমাকৃত উহার শেয়ারের সংখ্যা উল্লেখপূর্বক একটি করিয়া সনদ প্রদান করিবে; এবং

(ঙ) প্রাথমিক শেয়ারহোল্ডারকে একটি করিয়া ট্রেডিং রাইট এনটাইটেলমেন্ট সার্টিফিকেট(ট্রেক) প্রদান করিবে।

৯। **সংঘস্মারক ও সংঘবিধি দাখিল, ইত্যাদি।**—(১) বিদ্যমান এক্সচেঞ্জ ধারা ৮ এর দফা (ক) অনুযায়ী সংঘস্মারক ও সংঘবিধি পরিবর্তনের বিশেষ সিদ্ধান্ত গ্রহণের ৭ (সাত) দিনের মধ্যে উহা কমিশন এবং রেজিস্ট্রারের নিকট নিম্নলিখিত কাগজাদি দাখিল করিবে, যথা:—

(ক) গৃহীত সংঘস্মারক ও সংঘবিধি একটি অনুলিপি;

(খ) সংঘস্মারক ও সংঘবিধি পরিবর্তন সংক্রান্ত বিশেষ সিদ্ধান্তের অনুলিপি;

(গ) উহার প্রথম পরিচালনা পরিষদ এর পরিচালকদের বিবরণ (Particulars of Directors);

(ঘ) উহার শেয়ার বরাদ্দ সংক্রান্ত প্রতিবেদনের (Return of allotment of shares) অনুলিপি;

(ঙ) প্রাথমিক শেয়ারহোল্ডারের অনুকূলে অজড় অবস্থায় শেয়ার বরাদ্দ করা হইয়াছে মর্মে উহার নিরীক্ষক কর্তৃক ইস্যুকৃত প্রত্যয়নপত্র; এবং

(চ) প্রাথমিক শেয়ারহোল্ডারের অনুকূলে বরাদ্দকৃত শেয়ারের অন্যূন ৬০(ষাট) শতাংশ ব্লকড হিসাবে জমা করা হইয়াছে মর্মে ডিপজিটরির প্রত্যয়নপত্র।

(২) উপ-ধারা (১) এর উল্লিখিত কাগজাদি দাখিল হওয়ার পর কাগজাদি সম্পর্কে সংশ্লিষ্ট বিধি-বিধান অনুসরণের বিষয়ে সন্তুষ্ট হইলে, রেজিস্ট্রার, দাখিল হওয়ার অনধিক ১৪ (চৌদ্দ) দিনের মধ্যে—

(ক) গৃহীত সংঘস্মারক ও সংঘবিধি নিবন্ধিকৃত করিয়া নিবন্ধন প্রত্যয়নপত্র প্রদান করিবেন; এবং

(খ) গ্যারান্টি দ্বারা সীমাবদ্ধ পাবলিক কোম্পানী হইতে শেয়ার দ্বারা সীমাবদ্ধ পাবলিক কোম্পানীতে রূপান্তরের প্রমাণস্বরূপ সংশ্লিষ্ট এক্সচেঞ্জ এর অনুকূলে একটি পুনঃনিবন্ধন সনদ প্রদান করিবেন।

(৩) এই আইন দ্বারা নির্ধারিত দায়িত্ব হস্তান্তরের সময় পর্যন্ত এক্সচেঞ্জের প্রথম পরিচালনা পরিষদ উহার উপর অর্পিত দায়িত্ব পালন করিবে।

১০। **ডিমিউচ্যুয়ালাইজেশনের তারিখ।**—ধারা ৮ এর দফা (ক)-তে বর্ণিত সভা অনুষ্ঠানের তারিখ অথবা প্রযোজ্য ক্ষেত্রে, ধারা ৯ এর উপ-ধারা (২) এ বর্ণিত নিবন্ধন প্রত্যয়নপত্র প্রদানের তারিখ, এই দুইয়ের মধ্যে যেই তারিখ পরে হয়, ক্ষেত্র বিশেষে সেই তারিখ হইতে সংশ্লিষ্ট বিদ্যমান এক্সচেঞ্জ ডিমিউচ্যুয়ালাইজড বলিয়া গণ্য হইবে।

১১। **ডিমিউচ্যুয়ালাইজেশন পরবর্তী পালনীয় শর্তাদি।**—(১) বিদ্যমান অন্য কোন আইনে যাহা কিছুই থাকুক না কেন, ডিমিউচ্যুয়ালাইজড এক্সচেঞ্জ, নিম্নলিখিত শর্তাদি আবশ্যিকভাবে পালন

করিবে, যথাঃ—

(ক) ডিমিউচ্যুয়ালাইজেশন এর তারিখ হইতে ৯০ (নব্বই) দিনের মধ্যে সংঘবিধি অনুযায়ী নির্বাচন সম্পন্ন করিয়া পরিচালনা পরিষদের প্রথম সভা অনুষ্ঠান করিবে;

(খ) লেনদেনের অধিকার হইতে উহার মালিকানা ও ব্যবস্থাপনা পৃথক করিবে;

(গ) অনুমোদিত স্কীম-এ বর্ণিত যোগ্যতা ও শর্তাদি অনুযায়ী ট্রেডিং রাইট এন্টাইটেলমেন্ট সার্টিফিকেট প্রদান করিবে;

(ঘ) কমিশনের লিখিত পূর্বানুমোদন সাপেক্ষে, বিশেষ সিদ্ধান্তবলে, নতুন শেয়ার ইস্যু করিবে।

(২) ডিমিউচ্যুয়ালাইজড এক্সচেঞ্জ এর পরিচালনা পরিষদের চেয়ারম্যানসহ সংখ্যাগরিষ্ঠ সদস্য স্বতন্ত্র পরিচালক হইবেন।

(৩) ডিমিউচ্যুয়ালাইজড এক্সচেঞ্জ এর পরিচালনা পরিষদ স্বতন্ত্র পরিচালকদের মধ্য হইতে চেয়ারম্যান নির্বাচন করিবে।

তৃতীয় অধ্যায়

শেয়ার হোল্ডিং এর সীমা, ব্লকড (blocked) শেয়ার, ট্রেক লেনদেন, ইত্যাদি

১২। শেয়ার হোল্ডিং এর সীমা, ইত্যাদি।—(১) ডিমিউচ্যুয়ালাইজড এক্সচেঞ্জ এর ক্ষেত্রে—

(ক) ব্লকড হিসাবে প্রাথমিক শেয়ারহোল্ডারগণ কর্তৃক সাময়িকভাবে ধারণকৃত শেয়ার ব্যতীত, ট্রেক হোল্ডারগণ এবং তাহাদের সহিত সম্পর্কিত ব্যক্তি কর্তৃক সামষ্টিকভাবে ধারণকৃত শেয়ার উহার মোট ইস্যুকৃত শেয়ারের শতকরা ৪০(চল্লিশ) ভাগের অধিক হইবে না;

(খ) কোন কৌশলগত বিনিয়োগকারী, কমিশনের অনুমোদন সাপেক্ষে, উহার মোট ইস্যুকৃত শেয়ারের শতকরা ২৫ (পচিঁশ) ভাগ পর্যন্ত ধারণ করিতে পারিবে ঃ

তবে শর্ত থাকে যে, কমিশন, জনস্বার্থে, এই সীমার অধিক শেয়ার ধারণ করিবার জন্য কোন কৌশলগত বিনিয়োগকারীকে অনুমোদন প্রদান করিতে পারিবে ঃ

(গ) কোন ব্যক্তি, কৌশলগত বিনিয়োগকারী ব্যতীত, এককভাবে এবং তাহার সহিত সম্পর্কিত ব্যক্তির সহিত যৌথভাবে উহার মোট ইস্যুকৃত শেয়ারের শতকরা ৫ (পাঁচ) ভাগের অধিক শেয়ার ধারণ করিতে পারিবে না।

(২) যদি কোন এক্সচেঞ্জ এর এমন ধারণা পোষণ করিবার কারণ ঘটে যে, কোন ব্যক্তি উপ-ধারা (১) এর দফা(ক) বা (খ) বা (গ) লংঘন করিয়াছে,তাহা হইলে উক্ত এক্সচেঞ্জ সংশ্লিষ্ট ব্যক্তিকে শেয়ারের প্রকৃত মালিকের পরিচয় প্রকাশের জন্য নির্দেশ প্রদান করিতে পারিবে এবং এইরূপ নির্দেশ অমান্য করিলে, এক্সচেঞ্জ উক্ত নির্দেশ অমান্যকারী শেয়ারহোল্ডার কর্তৃক ধারণকৃত শেয়ার জব্দ করিতে পারিবে এবং বিষয়টি ৭ (সাত) দিনের মধ্যে কমিশনকে অবহিত করিবে।

(৩) কোন ব্যক্তি উপ-ধারা (১) এর দফা (ক) বা (খ) বা (গ) এ বর্ণিত শেয়ার হোল্ডিং সীমা লংঘন করিলে, কমিশন উক্ত ব্যক্তিকে তাহার ধারণ সীমার অতিরিক্ত শেয়ারসমূহ তদকর্তৃক নির্ধারিত পদ্ধতিতে এবং সময়ে হস্তান্তর করিবার নির্দেশনা প্রদান করিতে পারিবে।

১৩। ব্লকড হিসাবে ধারণকৃদ শেয়ারের প্রাপ্যতা ও রক্ষণাবেক্ষণ।—(১) ব্লকড হিসাবে সংরক্ষিত শেয়ারের প্রাপ্যতা হইবে নিম্নরূপ, যথাঃ—

(ক) উহাদের বিপরীতে অর্জিত লভ্যাংশ, বোনাস শেয়ার, রাইটস শেয়ার এবং বিক্রয়ের ফলে অর্জিত বিনিময়মূল্য প্রাথমিক শেয়ারহোল্ডারগণ প্রাপ্য হইবেন;

(খ) উহাদের বিপরীতে অর্জিত বোনাস শেয়ার বা রাইটস শেয়ার ব্লকড হিসাবে ধারণকৃত শেয়ারের সহিত যোগ হইবে এবং ধারা ১৪ এ উল্লিখিত উপায়ে ব্লকড হিসাবে সংরক্ষিত শেয়ারের সহিত হস্তান্তরিত হইবে।

(২) ব্লকড হিসাবে সংরক্ষিত শেয়ার রক্ষণাবেক্ষণ এবং হস্তান্তরের অধিকার পরিচালনা পরিষদের উপর বর্তাইবে।

১৪। ব্লকড হিসাবে (blocked account) সংরক্ষিত শেয়ার হস্তান্তর।—(১) ডিমিউচ্যুয়ালাইজেশন পরবর্তী অনধিক ৩ (তিন) বৎসরের মধ্যে যে কোন সময়, কমিশন, কোন এক্সচেঞ্জকে নিম্নলিখিত কার্যাদি নির্দেশনা প্রদানের ১ (এক) বৎসরের মধ্যে সম্পাদনের জন্য নির্দেশনা প্রদান করিতে পারিবে, যথাঃ—

(ক) ব্লকড হিসাবে সংরক্ষিত শেয়ার হইতে মোট ইস্যুকৃত শেয়ারের অনধিক শতকরা ২৫ (পঁচিশ) ভাগ শেয়ার বিক্রয়ের জন্য কোন কৌশলগত বিনিয়োগকারীর সহিত ১ (এক) বৎসর মেয়াদি বা কমিশন কর্তৃক নির্ধারিত সময়ের জন্য চুক্তি সম্পাদন;

(খ) কৌশলগত বিনিয়োগকারীদের অনুকূলে বরাদ্দকৃত শেয়ার ব্যতিরেকে ব্লকড হিসাবে সংরক্ষিত অবশিষ্ট শেয়ার জনগণ বা প্রাতিষ্ঠানিক বিনিয়োগকারীদের নিকট বিক্রয়ের প্রস্তাব প্রদান করা যাইবে ঃ

তবে শর্ত থাকে যে, সংশ্লিষ্ট এক্সচেঞ্জ উল্লিখিত সময়ের মধ্যে উক্ত নির্দেশনা প্রতিপালন করিতে না পারিবার যুক্তিসংগত কারণ উল্লেখ করিয়া আবেদন করিলে, কমিশন, উক্তরূপ প্রতিপালনের সময়সীমা বর্ধিত করিতে পারিবে।

(২) উপ-ধারা (১) এ উল্লিখিত ১ (এক) বৎসর অথবা কমিশন কর্তৃক নির্ধারিত সময়সীমার মধ্যে কোন এক্সচেঞ্জ যদি বর্ণিত শেয়ার বিক্রয়ের উদ্দেশ্যে কোন কৌশলগত বিনিয়োগকারীর সহিত চুক্তি সম্পাদনে ব্যর্থ হয়, সেক্ষেত্রে উক্ত এক্সচেঞ্জ, কমিশনের অনুমোদনক্রমে, কৌশলগত বিনিয়োগকারী ব্যতীত অন্য কাহারও নিকট উহার পরিচালনা পরিষদ কর্তৃক নির্ধারিত পদ্ধতিতে উক্ত শেয়ারসমূহ হস্তান্তর করিতে পারিবে।

(৩) ব্লকড হিসাবে সংরক্ষিত শেয়ারের হস্তান্তর সম্পন্ন না হওয়া পর্যন্ত উহার বিপরীতে ভোটদানের ক্ষমতা রহিত থাকিবে।

১৫। কৌশলগত বিনিয়োগকারী কর্তৃক শেয়ার ক্রয়-বিক্রয়।—(১) ধারা ১৪ অনুসারে কোন কৌশলগত বিনিয়োগকারী শেয়ার অর্জন করিলে, কমিশনের অনুমোদন সাপেক্ষে, উহা কেবলমাত্র অন্য কোন কৌশলগত বিনিয়োগকারীর নিকট বিক্রয় করিতে পারিবে।

(২) কমিশন, লিখিত আদেশ দ্বারা, কৌশলগত বিনিয়োগকারীর শেয়ার ক্রয়, বিক্রয়, অর্জন, অধিগ্রহণ বা কর্তৃত্ব গ্রহণের ক্ষেত্রে এতদ্‌সংক্রান্ত বিদ্যমান বিধানাবলীর প্রযোজ্যতা হইতে অব্যাহতি প্রদান করিতে পারিবে।

১৬। ট্রেডিং রাইট এন্টাইটেলমেন্ট সার্টিফিকেট বা ট্রেক গ্রহণ, হস্তান্তর, ইত্যাদি।—(১) অনিবন্ধিত কোন প্রাথমিক শেয়ারহোল্ডার, যাহার অনুকূলে ট্রেক ইস্যু করা হইয়াছে, তিনি বাংলাদেশ সিকিউরিটিজ অ্যান্ড এক্সচেঞ্জ কমিশন আইন, ১৯৯৩ (১৯৯৩ সনের ১৫ নং আইন) বা তদধীন প্রণীত কোন বিধিমালার বিধান অনুসারে নিবন্ধিত না হইয়া থাকিলে, তাহাকে ডিমিউচ্যুয়ালাইজেশনের তারিখ হইতে ৩ (তিন) বৎসরের মধ্যে উক্ত আইন বা বিধিমালার বিধান অনুসারে নিবন্ধন সনদ গ্রহণ করিতে হইবে এবং উক্ত সনদ প্রাপ্তির ৬(ছয়), মাসের মধ্যে ব্যবসা শুরু করিতে হইবে।

(২) ডিমিউচ্যুয়ালাইজেশনের তারিখ হইতে ৫ (পাঁচ) বৎসরের মধ্যে ইস্যুকৃত ট্রেক একবার হস্তান্তর করা যাইবে।

(৩) উপ-ধারা (২) এর অধীন কোন কোম্পানী হস্তান্তরিত ট্রেক গ্রহণ করিলে, উক্তরূপ গ্রহণের ১২ (বার) মাসের মধ্যে উহাতে বাংলাদেশ সিকিউরিটিজ অ্যান্ড এক্সচেঞ্জ কমিশন আইন, ১৯৯৩ (১৯৯৩ সনের ১৫ নং আইন) বা তদ্‌ধীন প্রণীত কোন বিধিমালার বিধান অনুসারে নিবন্ধন সনদ গ্রহণ করিতে হইবে এবং উক্ত সনদ গ্রহণের ৬ (ছয়) মাসের মধ্যে ব্যবসা পরিচালনা শুরু করিতে হইবে।

(৪) ডিমিউচ্যুয়ালাইজেশনের ৫ (পাঁচ) বৎসরের মধ্যে, কোন এক্সচেঞ্জ শেয়ারহোল্ডারদের সভায় বিশেষ সিদ্ধান্ত গ্রহণ পূর্বক ট্রেকের সংখ্যা বৃদ্ধি করিতে পারিবে।

(৫) ডিমিউচ্যুয়ালাইজেশনের তারিখ ৫ (পাঁচ) বৎসর অতিক্রান্ত হইবার পর কোন এক্সচেঞ্জ কর্তৃক, ধারা ১১ এর দফা (গ) পরিপালন সাপেক্ষে, নির্ধারিত পদ্ধতিতে কোন আবেদনকারীর অনুকূলে ট্রেক ইস্যু করা যাইবে।

(৬) ধারা ১১ এর দফা(গ) এর অধীনে কোন কোম্পানী ট্রেক গ্রহণ করিলে, উহার ১২ (বার) মাসের মধ্যে বাংলাদেশ সিকিউরিটিজ অ্যান্ড এক্সচেঞ্জ কমিশন আইন, ১৯৯৩ (১৯৯৩ সনের ১৫ নং আইন) বা তদধীন প্রণীত কোন বিধিমালার বিধান অনুসারে নিবন্ধন সনদ গ্রহণ করিতে হইবে এবং নিবন্ধন সনদ গ্রহণের ৬ (ছয়) মাসের মধ্যে ব্যবসা শুরু করিতে হইবে।

(৭) ডিমিউচ্যুয়ালাইজেশনের তারিখ হইতে ৫ (পাঁচ) বৎসর অতিক্রান্ত হইলে সকল ট্রেক অ-হস্তান্তরযোগ্য হইবে।

(৮) কোন কোম্পানী বা প্রাথমিক শেয়ারহোল্ডার উপ-ধারা (১) ও (৩) এর বিধান অনুযায়ী নিবন্ধন সনদ গ্রহণ এবং নির্দিষ্ট সময়ের মধ্যে ব্যবসা শুরু করিতে ব্যর্থ হইলে সংশ্লিষ্ট ট্রেক বাতিল হইয়া যাইবে।

(৯) ট্রেডিং রাইট এন্টাইটেলমেন্ট সার্টিফিকেট ধারকগণের জন্য উহার শেয়ার ধারক হইবার বাধ্যবাধকতা থাকিবে না।

(১০) ডিমিউচ্যুয়ালাইজড এক্সচেঞ্জ, বিধি দ্বারা নির্ধারিত পদ্ধতিতে, ট্রেক ইস্যু, স্থগিত ও বাতিল করিতে পারিবে।

১৭। তালিকাভুক্তি।—কোন এক্সচেঞ্জের শেয়ার উহার সিদ্ধান্ত ও সময় অনুযায়ী প্রবিধান দ্বারা নির্ধারিত পদ্ধতিতে যে কোন এক্সচেঞ্জে তালিকাভুক্ত হইতে পারিবে।

চতুর্থ অধ্যায়

ডিমিউচ্যুয়ালাইজেশন এর ফলাফল

১৮। চলমান কার্যধারা, ইত্যাদি।—ডিমিউচ্যুয়ালাইজেশন এর ফলে বিদ্যমান এক্সচেঞ্জ এর—

(ক) সকল সিকিউরিটিজ ডিমিউচ্যুয়ালাউজড এক্সচেঞ্জ এ তালিকাভুক্ত সিকিউরিটিজ হিসাবে গণ্য হইবে;

(খ) প্রবিধান বা বিধি-বিধান অনুসারে প্রদত্ত কোন আদেশ বা নির্দেশ, অনুমোদিত স্কীম এর সহিত সাংঘর্ষিক না হওয়া সাপেক্ষে, ডিমিউচ্যুয়ালাইজড এক্সচেঞ্জ এর ক্ষেত্রে প্রযোজ্য হইবে;

(গ) অর্জিত অধিকার, সুবিধা, দায়-দায়িত্ব, সম্পাদিত কোন চুক্তি বা দেনা-পাওনার কোন পরিবর্তন হইবে না, বা উহার বিরুদ্ধে সূচিত কোন আইনানুগ কার্যধারা ত্রুটিপূর্ণ বলিয়া গণ্য হইবে না, এবং উহার বিরুদ্ধে কোন আইনানুগ কার্যধারা অব্যাহত থাকিলে বা উহা দ্বারা সূচিত হইয়া থাকিলে উহা চলমান ও অব্যাহত থাকিবেঃ

(ঘ) কোন বিধি-বিধান লংঘনের কারণে কাহারও বিরুদ্ধে

সূচিত হইতে পারে, এমন কোন আইনানুগ কার্যধারা গ্রহণে বাধা হইবে না;

(ঙ) নতুন কোন আইনগত সত্ত্বা প্রতিষ্ঠিত হইবে না বা উহার পরিচিত বা ধারাবাহিকতায় কোন প্রকার বাধা সৃষ্টি হইবে না;

(চ) সকল সম্পদ সংশ্লিষ্ট ডিমিউচ্যুয়ালাইজড এক্সচেঞ্জ এর সম্পদ হিসাবে গণ্য হইবে;

(ছ) সকল কর্মকর্তা-কর্মচারী ডিমিউচ্যুয়ালাইজড এক্সচেঞ্জ এর কর্মকর্তা-কর্মচারী হিসাবে গণ্য হইবেন এবং তাহাদের বেতন-ভাতা, প্রভিডেন্ট ফান্ড, ছুটি, অবসর ও চাকুরীর অন্যান্য শর্তাদি একইরূপে বহাল থাকিবে;

(জ) কোন অনুমোদন, দায়িত্ব ঘোষণা, দায়মুক্তি ঘোষণা, প্রদত্ত ছাড়পত্র, অব্যাহতি, গৃহীত সিদ্ধান্ত, ব্যবস্থা, প্রদত্ত ফিস, কৃত বন্ধক, হস্তান্তর, বহি বা অন্যধিক দলিল বা কৃত কার্যাদি বা উহাদের অনুবলে সম্পাদিত কার্যাদি পূর্বের ন্যায় বহাল ও কার্যকর থাকিবে।

১৯। এক্সচেঞ্জ এর কার্যক্রম পরিচালনায় বাধ্যবাধকতা।—এক্সচেঞ্জ সকল সময়,—

(ক) জনস্বার্থ তথা বিনিয়োগকারীদের স্বার্থ সংরক্ষণের জন্য কাজ করিবে; এবং

(খ) উহার স্বার্থের সহিত সাংঘর্ষিক হইলে জনস্বার্থ তথা বিনিয়োগকারীদের স্বার্থকে প্রাধান্য প্রদান করিবে।

পঞ্চম অধ্যায়

অপরাধ ও দণ্ড

২০। অপরাধ ও দণ্ড।—(১) কমিশনের নিকট প্রাথমিকভাবে (prima facie) যদি প্রতীয়মান হয় যে, কোন এক্সচেঞ্জ বা বিদ্যমান এক্সচেঞ্জ বা উহার কোন পরিচালক, সদস্য, প্রধান নির্বাহী কর্মকর্তা, কর্মকর্তা-কর্মচারী, কমিটির কোন সদস্য, শেয়ারহোল্ডার বা কোন ব্যক্তি ইচ্ছাকৃতভাবে ও জ্ঞাতসারে এই আইনের কোন বিধান পালনে ব্যর্থ হইয়াছে বা লংঘন করিয়াছে, তাহা হইলে কারণ প্রদর্শনের যুক্তিসংগত সুযোগ প্রদান করিয়া উক্তরূপ ব্যর্থতা বা লংঘনের জন্য কমিশন—

(ক) সংশ্লিষ্ট এক্সচেঞ্জকে অন্যূন ১০ (দশ) লক্ষ টাকা অর্থদণ্ডে দণ্ডিত করিতে পারিবে, অথবা উক্ত এক্সচেঞ্জের নিবন্ধন সনদ স্থগিত করিতে পারিবে;

(খ) উহার কোন পরিচালক, সদস্য, প্রধান নির্বাহী কর্মকর্তা, কর্মকর্তা-কর্মচারী, কমিটির কোন সদস্য, শেয়ারহোল্ডার বা ব্যক্তিকে অন্যূন ১ (এক) লক্ষ টাকা পর্যন্ত অর্থদণ্ডে দণ্ডিত করিতে পারিবে, যাহা তাহার ব্যক্তিগত তহবিল হইতে পরিশোধ করিতে হইবে।

(২) এই আইনের অধীন কমিশন কর্তৃক আরোপিত অর্থদণ্ড অনাদায়ী হইলে উহা বকেয়া ভূমি রাজস্ব হিসাবে আদায়যোগ্য হইবে।

(৩) উপ-ধারা (১) এর বিধানের সামগ্রিকতাকে ক্ষুণ্ন না করিয়া, কমিশন—

(ক) এক্সচেঞ্জ বা বিদ্যমান এক্সচেঞ্জ এর পরিচালনা পরিষদ অথবা কোন পরিচালক বা কর্মকর্তা-কর্মচারী ইচ্ছাকৃতভাবে ও জ্ঞাতসারে এই আইনের বিধান পালনে ব্যর্থ হইলে বা লংঘন করিলে, উক্ত পরিচালনা পরিষদ বাতিল অথবা পরিচালনা পরিষদের সংশ্লিষ্ট সিদ্ধান্ত পরিবর্তন করিতে পারিবে, অথবা সংশ্লিষ্ট পরিচালককে পরিচালনা পরিষদ হইতে অপসারণ বা তাহার সদস্য-পদ সাময়িকভাবে স্থগিত, অথবা সংশ্লিষ্ট কর্মকর্তা-কর্মচারীকে সাময়িকভাবে বরখাস্ত বা অপসারণ করিতে পারিবে;

(খ) এক্সচেঞ্জ বা বিদ্যমান এক্সচেঞ্জ এর বিধান নির্বাহী কর্মকর্তা ইচ্ছাকৃতভাবে ও জ্ঞাতসারে এই আইনের বিধান পালনে ব্যর্থ হইলে বা লংঘন করিলে, কমিশন তাহাকে সাময়িকভাবে বরখাস্ত বা অপসারণ করিতে পারিবে;

(গ) কোন কমিটি বা কোন কমিটির সদস্য ইচ্ছাকৃতভাবে ও জ্ঞাতসারে এই আইনের বিধান পালনে ব্যর্থ হইলে বা লংঘন করিলে, কমিশন উক্ত কমিটির সদস্যকে সাময়িকভাবে বরখাস্ত বা অপসারণ, বা উক্ত কমিটি বাতিল করিতে পারিবে;

(ঘ) কোন সদস্য, শেয়ারহোল্ডার হউক বা না হউক, ইচ্ছাকৃতভাবে ও জ্ঞাতসারে এই আইনের বিধান পালনে ব্যর্থ হইলে বা লংঘন করিলে, কমিশন উক্ত সদস্যের নিবন্ধন সনদ সাময়িকভাবে স্থগিত বা বাতিল করিতে পারিবে;

(ঙ) কোন এক্সচেঞ্জ বা বিদ্যমান এক্সচেঞ্জ এর পরিচালনা পরিষদ অথবা উহার কোন পরিচালক বা কমিটির সদস্য বা কর্মকর্তা-কর্মচারীকে অপসারণ করিলে, লিখিত আদেশ দ্বারা অন্য কোন ব্যক্তি অথবা কর্তৃপক্ষকে, প্রযোজ্য ক্ষেত্রে, তাহাদের স্থলাভিষিক্ত করিতে পারিবে।

২১। কোম্পানী কর্তৃক অপরাধ সংঘটন।—এই আইনের কোন বিধান লংঘনকারী ব্যক্তি যদি কোম্পানী হয়, তাহা হইলে উক্ত কোম্পানীর ব্যবস্থাপনা পরিচালক, পরিচালক, ম্যানেজার, সচিব বা অন্য কোন কর্মকর্তা বা এজেন্ট বিধানটি লংঘন করিয়াছেন বলিয়া গণ্য হইবেন যদি না তিনি প্রমাণ করিতে পারেন যে, উক্ত লংঘন তাহার অজ্ঞাতসারে

হইয়াছে বা উক্ত লংঘন রোধ করিবার জন্য তিনি যথাসাধ্য চেষ্টা করিয়াছেন।

ষষ্ঠ অধ্যায়

বিবিধ

২২। বিধি প্রণয়নের ক্ষমতা ।—(১) এই আইনের উদ্দেশ্য পূরণকল্পে, কমিশন, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, উপ-ধারা (৪) এর বিধান সাপেক্ষে, বিধি প্রণয়ন করিতে পারিবে।

(২) উপ-ধারা (১) অনুযায়ী বিধি প্রণয়নের ক্ষেত্রে সংশ্লিষ্ট বিধি-বিধান অনুসরণ এবং প্রাক- প্রকাশনা করিতে হইবে।

(৩) প্রাক-প্রকাশনার ক্ষেত্রে প্রস্তাবিত বিধি, বা সংশোধনের নিমিত্ত উহার খসড়া অন্যূন ৩ (তিন) সপ্তাহের সময় প্রদানপূর্বক জনমত আহবান করিয়া সরকারি গেজেটের পাশাপাশি কমিশনের ওয়েবসাইটে প্রকাশ করিতে হইবে এবং কমপক্ষে ৩ (তিন) টি দৈনিক পত্রিকাতে উল্লিখিত ওয়েবসাইটের ঠিকানাসহ ওয়েবসাইটে প্রকাশিত বিধির প্রাক-প্রকাশনা সংক্রান্ত নোটিশ প্রকাশ করিতে হইবে।

(৪) উপ-ধারা ৩ (তিন) অনুযায়ী প্রাক-প্রকাশনার পর নির্ধারিত সময়ের মধ্যে কোন মতামত, পরামর্শ বা আপত্তি, যদি কোন,পাওয়া গেলে উহা বিবেচনা করিয়া, কমিশন,খসড়া বিধি সংশোধনপূর্বক উপ-ধারা (১) এর বিধান অনুসারে চূড়ান্তভাবে সরকারি গেজেটে প্রকাশের ব্যবস্থা করিবে।

২৩। প্রবিধান প্রণয়নের ক্ষমতা ।—(১) এই আইনের উদ্দেশ্য পূরণকল্পে, এক্সচেঞ্জ, কমিশনের পূর্বানুমতিক্রমে, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, এই আইন বা উহার অধীন প্রণীত বিধির সহিত সংগতিপূর্ণ হওয়া সাপেক্ষে প্রবিধান প্রণয়ন করিতে পারিবে।

(২) যদি কমিশনের নিকট এই মর্মে প্রতীয়মান হয় যে কোন এক্সচেঞ্জ সংক্রান্ত কোন প্রবিধান প্রণয়ন অথবা বিদ্যমান কোন প্রবিধানের সংশোধন বা বাতিল করা প্রয়োজন তাহা হইলে কমিশন উক্ত কার্য সম্পাদনের জন্য এক্সচেঞ্জকে সুনির্দিষ্ট সময় উল্লেখপূর্বক লিখিত আদেশ প্রদান করিতে পারিবে।

(৩) যদি কোন এক্সচেঞ্জ উপ-ধারা (২) এ প্রদত্ত আদেশ নির্দিষ্ট সময়ের মধ্যে পালনে ব্যর্থ হয় তাহা হইলে কমিশন উক্ত প্রবিধান প্রণয়ন, সংশোধন বা বাতিল করিতে পারিবে এবং উক্তরূপে প্রণীত, সংশোধিত বা বাতিলকৃত প্রবিধান এই ধারার অধীন এক্সচেঞ্জ কর্তৃক প্রণীত, সংশোধিত বা বাতিল হইয়াছে বলিয়া গণ্য হইবে।

২৪। আদেশ বা নির্দেশে প্রদানে কমিশনের ক্ষমতা ।—এই আইনের উদ্দেশ্য পূরণকল্পে কোন আদেশ বা নির্দেশ প্রদান করিবার প্রয়োজন হইলে, কমিশন, কোন এক্সচেঞ্জ অথবা এক্সচেঞ্জের শেয়ারহোল্ডার অথবা ট্রেকহোল্ডার অথবা কোন কমিটি বা কমিটির সদস্যকে যথোপযুক্ত আদেশ বা নির্দেশ প্রদান করিতে পারিবে।

২৫। গোপনীয়তা সংরক্ষণ ।—এক্সচেঞ্জ বা বিদ্যমান এক্সচেঞ্জ এর কোন পরিচালক, সদস্য, প্রধান নির্বাহী কর্মকর্তা, কর্মকর্তা-কর্মচারী, কমিটির কোন সদস্য, শেয়ারহোল্ডার বা কোন ব্যক্তি এই আইনের বিধান অনুযায়ী কোন দায়িত্ব পালনকালে অথবা অন্য কোন ভাবে কোন মূল্যে সংবেদনশীল তথ্য, তদন্তাধীন কোন বিষয়ের তথ্য বা বাজার নজরদারি (Market Surveiliance) হইতে প্রাপ্ত কোন তথ্য অবগত হইলে উহা কমিশনের সম্মতি ব্যতীত অন্য কাহারও নিকট প্রকাশ করিতে পারিবেন না।

২৬। জটিলতা নিরসন ।—এই আইনের বিধানাবলী কার্যকর করিবার ক্ষেত্রে এই আইনের কোন বিধানের অস্পষ্টতার কারণে কোন জটিলতা বা অসুবিধা দেখা দিলে সরকার, বিদ্যমান আইন ও বিধি-বিধানের সহিত সামঞ্জস্য রাখিয়া, স্পষ্টীকরণ বা ব্যাখ্যা প্রদানপূর্বক উক্ত বিষয়ে করণীয় সম্পর্কে সংশ্লিষ্টদের দিক-নির্দেশনা প্রদান করিতে পারিবে।

২৭। ইংরেজিতে অনূদিত পাঠ প্রকাশ ।—এই আইনর প্রবর্তনের পর সরকার, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, এই আইনের ইংরেজিতে অনূদিত একটি নির্ভরযোগ্য পাঠ (Authentic English Text) প্রকাশ করিবে;

তবে শর্ত থাকে যে, এই আইন ও ইংরেজি পাঠের মধ্যে বিরোধের ক্ষেত্রে এই আইন প্রাধান্য পাইবে।

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বাংলাদেশ জাতীয় সংসদ

ঢাকা, ০২ মে, ২০১৩/১৯ বৈশাখ, ১৪২০

সংসদ কর্তৃক গৃহীত নিম্নলিখিত আইনটি ০২ মে, ২০১৩(১৯ বৈশাখ, ১৪২০) তারিখে রাষ্ট্রপতির সম্মতি লাভ করিয়াছে এবং এতদ্বারা এই আইনটি সর্বসাধারণের অবগতির জন্য প্রকাশ করা যাইতেছেঃ—

২০১৩ সনের ১৬ নং আইন

ধূমপান ও তামাকজাত দ্রব্য ব্যবহার(নিয়ন্ত্রণ) আইন, ২০০৫ এর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে, ধূমপান ও তামাকজাত দ্রব্য ব্যবহার (নিয়ন্ত্রণ) আইন, ২০০৫(২০০৫ সনের ১১ নং আইন) এর

সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্‌দ্বারা নিম্নরূপ আইন করা হইলঃ—

১। সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।—(১) এই আইন ধূমপান ও তামাকজাত দ্রব্য ব্যবহার (নিয়ন্ত্রণ)(সংশোধন) আইন, ২০১৩ নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। ২০০৫ সনের ১১ নং আইন এর ধারা ২ এর সংশোধন।— ধূমপান ও তামাকজাত দ্রব্য ব্যবহার (নিয়ন্ত্রণ) আইন, ২০০৫ (২০০৫ সনের ১১ নং আইন), অতঃপর উক্ত আইন বলিয়া উল্লিখিত, এর ধারা ২ এর—

(ক) দফা (ক),(খ) ও (গ) এর পরবর্তী নিম্নরূপ দফা(ক), (খ) ও (গ) প্রতিস্থাপিত হইবে, যথাঃ—

"(ক) "কর্তৃত্বপ্রাপ্ত" কর্মকর্তা অর্থ উপজেলা নির্বাহী কর্মকর্তা বা উপজেলা স্বাস্থ্য ও পরিবার পরিকল্পনা কর্মকর্তা বা তাঁহার সমমানের বা তদূর্ধ্ব পদমর্যাদার স্বাস্থ্য অধিদপ্তরের কোন কর্মকর্তা এবং এতদ্‌সংশ্লিষ্ট দায়িত্বপালনের জন্য কোন আইনের অধীন, বা সরকার কর্তৃক সরকারি গেজেট প্রজ্ঞাপন দ্বারা, ক্ষমতাপ্রাপ্ত যে কোন বা সকল কর্মকর্তাও ইহার অন্তর্ভুক্ত হইবে;

(খ) "তামাক" অর্থ কোন নিকোটিনা টাবাকাম বা নিকোটিনা রাসটিকার শ্রেণিভুক্ত উদ্ভিদ বা এতদ্‌সম্পর্কিত অন্য কোন উদ্ভিদ বা উহাদের কোন পাতা বা ফসল, শিকড়, ডাল বা উহার কোন অংশ বা অংশ বিশেষ;

(গ) "তামাকজাত দ্রব্য" অর্থ তামাক, তামাক পাতা বা উহার নির্যাস হইতে প্রস্তুত যে কোন দ্রব্য, যাহা চোষণ বা চিবানোর মাধ্যমে গ্রহণ করা যায় বা ধূমপানের মাধ্যমে শ্বাসের সহিত টানিয়া লওয়া যায় এবং বিড়ি, সিগারেট, চুরুট, গুল, জর্দা, খৈনী, সাদাপাতা, সিগার এবং হুক্কা বা পাইপের ব্যবহার্য মিশ্রণও (**mixture**) ইহার অন্তর্ভুক্ত হইবে;"

(খ) দফা (চ) এর পরিবর্তে নিম্নরূপ দফা (চ) প্রতিস্থাপিত হইবে, যথাঃ—

"(চ) "পাবলিক প্রেস" অর্থ শিক্ষা প্রতিস্থান, সরকারি অফিস, আধা-সরকারি অফিস, স্বায়ত্তশাসিত অফিস ও বেসরকারি অফিস, গ্রন্থাগার, লিফট, আচ্ছাদিত কর্মক্ষেত্র (indoor work place), হাসপাতাল ও ক্লিনিক ভবন, আদালত ভবন, বিমানবন্দর ভবন, সমুদ্রবন্দর ভবন, নৌ-বন্দর ভবন, রেলওয়ে স্টেশন ভবন, বাস টার্মিনাল ভবন, প্রেক্ষাগৃহ, প্রদর্শনী কেন্দ্র, থিয়েটার হল, বিপণী ভবন, চতুর্দিকে দেয়াল দ্বারা আবদ্ধ রেস্টুরেন্ট, পাবলিক টয়লেট, শিশুপার্ক, মেলা বা পাবলিক পরিবহনে আরোহণের জন্য যাত্রীদের অপেক্ষার জন্য নির্দিষ্ট সারি, জনসাধারণ কর্তৃক সম্মিলিতভাবে ব্যবহার্য অন্য কোন স্থান অথবা সরকার বা স্থানীয় সরকার প্রতিষ্ঠান কর্তৃক, সাধারণ বা বিশেষ আদেশ দ্বারা, সময় সময় ঘোষিত অন্য যে কোন বা সকল স্থান;"

(গ) দফা (ঝ) এর পরিবর্তে নিম্নরূপ দফা(ঝ) প্রতিস্থাপিত হইবে, যথাঃ—

"(ঝ) "ব্যক্তি" অর্থে কোম্পানী, সমিতি, সংস্থা বা ব্যক্তি সমষ্টি, সংবিধিবদ্ধ হউক বা না হউক, তামাকজাত দ্রব্য উৎপাদনকারী বা পরিবেশনকারীও অন্তর্ভুক্ত হইবে।

৩। ২০০৫ সনের ১১ নং আইন এর ধারা ৩ এর সংশোধন।— উক্ত আইনের ধারা ৩ এ উল্লিখিত "the Juvenile Smoking Act, 1919 (Ben. Act II of 1919)" শব্দগুলি, কমা, সংখ্যাগুলি ও বন্ধনীগুলি বিলুপ্ত হইবে এবং "রাজশাহী মহানগরী পুলিশ আইন,(১৯৯২ সনের ২৩ নং আইন)" শব্দগুলি, কমা, সংখ্যাগুলি ও বন্ধনীগুলির পর,"সিলেট মহানগরী পুলিশ আইন, ২০০৯ (২০০৯ সনের ২৩ নং আইন), বরিশাল মহানগরী পুলিশ আইন, ২০০৯ (২০০৯ সনের ২৪ নং আইন)" কমাগুলি, শব্দগুলি, সংখ্যাগুলি এবং বন্ধনীগুলি সন্নিবেশিত হইবে।

৪। ২০০৫ সনের ১১ নং আইন এর ধারা ৪ এর সংশোধন।— উক্ত আইনের ধারা ৪ এর উপ-ধারা (২) এর পরিবর্তে নিম্নরূপ উপ-ধারা (২) প্রতিস্থাপিত হইবে, যথাঃ—

"(২) কোন ব্যক্তি উপ-ধারা (১) এর বিধান লঙ্ঘন করিলে তিনি অনধিক তিনশত টাকা অর্থদণ্ডে দণ্ডনীয় হইবেন এবং উক্ত ব্যক্তি দ্বিতীয়বার বা পুনঃ পুনঃ একই ধরনের অপরাধ সংঘটন করিলে তিনি পর্যায়ক্রমিকভাবে উক্ত দণ্ডের দ্বিগুণ হারে দণ্ডনীয় হইবেন।"

৫। ২০০৫ সনের ১১ নং আইন এর ধারা ৫ এর প্রতিস্থাপন।— উক্ত আইনের ধারা ৫ এর পরিবর্তে নিম্নরূপ ধারা ৫ প্রতিস্থাপিত হইবে, যথাঃ—

"৫। তামাকজাত দ্রব্যের বিজ্ঞাপন ও প্রচারণা নিষিদ্ধ এবং পৃষ্ঠপোষকতা নিয়ন্ত্রণ সম্পর্কিত বিধান।—(১) কোনো ব্যক্তি—

(ক) প্রিন্ট বা ইলেক্ট্রনিক মিডিয়ায়, বাংলাদেশে প্রকাশিত কোন বই, লিফলেট, হ্যান্ডবিল, পোস্টার, ছাপানো কাগজ, বিলবোর্ড বা সাইনবোর্ডে বা অন্য কোন ভাবে

তামাকজাত দ্রব্যের বিজ্ঞাপন প্রচার করিবেন না বা করাইবেন না;

(খ) তামাকজাত দ্রব্য ক্রয়ে প্রলুব্ধকরণের উদ্দেশ্যে,উহার কোন নমুনা, বিনামূল্যে বা স্বল্পমূল্যে, জনসাধারণকে প্রদান বা প্রদানের প্রস্তাব করিবেন না বা করাইবেন না;

(গ) তামাকজাত দ্রব্যের বিজ্ঞাপন প্রচার বা উহার ব্যবহার উৎসাহিত করিবার উদ্দেশ্যে, কোন দান, পুরস্কার, বৃত্তি প্রদান, বা কোন অনুষ্ঠানের ব্যয়ভার (sponsor) বহন করিবেন না বা করাইবেন না;

(ঘ) কোন প্রেক্ষাগৃহে, প্রিন্ট ও ইলেক্ট্রনিক মিডিয়ায় বা ওয়েব পেজে তামাক বা তামাকজাত দ্রব্য সম্পর্কিত কোনো বিজ্ঞাপন প্রচার করিবেন না বা করাইবেন না;

(ঙ) বাংলাদেশে প্রস্তুতকৃত বা লভ্য ও প্রচারিত, বিদেশে প্রস্তুতকৃত কোন সিনেমা, নাটক বা প্রামাণ্য চিত্রে তামাকজাত দ্রব্য ব্যবহারের দৃশ্য টেলিভিশন, রেডিও, ইন্টারনেট, মঞ্চ অনুষ্ঠান বা অন্য কোন গণমাধ্যমে প্রচার, প্রদর্শন বা বর্ণনা করিবেন না বা করাইবেন নাঃ

তবে শর্ত থাকে যে, কোন সিনেমার কাহিনীর প্রয়োজনে অত্যাবশ্যক হইলে তামাকজাত দ্রব্য ব্যবহার দৃশ্য রহিয়াছে এইরূপ কোন সিনেমা প্রদর্শনকালে তামাকজাত দ্রব্য ব্যবহারের ক্ষতিকর প্রভাব সম্পর্কে লিখিত সতর্কবাণী, বিধি দ্বারা নির্ধারিত পদ্ধতিতে, পর্দায় প্রদর্শনপূর্বক উহা প্রদর্শন করা যাইবে;

(চ) তামাকজাত দ্রব্যের মোড়ক, প্যাকেট বা কৌটার অনুরূপ বা সাদৃশ্য অন্য কোন দ্রব্য বা পণ্যের মোড়ক, প্যাকেট বা কৌটার উৎপাদন, বিক্রয় বা বিতরণ করিবেন না বা করাইবেন না;

(ছ) তামাকজাত দ্রব্যের বিক্রয়স্থলে (point of sales) যে কোন উপায়ে তামাকজাত দ্রব্যের বিজ্ঞাপন প্রচার করিবেন না বা করাইবেন না।

ব্যাখ্যাঃ—উপ-ধারা (১) এর উদ্দেশ্য পূরণকল্পে, "তামাকজাত দ্রব্যের বিজ্ঞাপন প্রচার" অর্থ প্রত্যক্ষ বা পরোক্ষভাবে কোন তামাকজাত দ্রব্য বা তামাকের ব্যবহার প্রবর্ধনের উদ্দেশ্যে যে কোনো ধরনের বাণিজ্যিক কার্যক্রম পরিচালনা করা।

(২) উপ-ধারা(১) এর দফা (ঙ) এর কোন কিছুই তামাক বিরোধী স্বাস্থ্য শিক্ষা বিষয়ক প্রচারণার ক্ষেত্রে প্রযোজ্য হইবে না।

(৩) কোন ব্যক্তি সামাজিক দায়বদ্ধতা কর্মসূচীর (Corporate Social Responsibility) অংশ হিসেবে সামাজিক কর্মকাণ্ডে অংশগ্রহণ করিলে বা উক্ত কর্মকাণ্ড বাবদ ব্যয়িত অর্থ প্রদানের ক্ষেত্রে কোন তামাক বা তামাকজাত দ্রব্যের উৎপাদনকারী প্রতিষ্ঠানের নাম, সাইন, ট্রেডমার্ক, প্রতীক ব্যবহার করিবে না বা করাইবে না অথবা উহা ব্যবহারে অন্য কোন ব্যক্তিকে উৎসাহ প্রদান করিবেন না।

(৪) কোন ব্যক্তি এই ধারার বিধান লঙ্ঘন করিলে তিনি অনূর্ধ্ব তিন মাস বিনাশ্রম কারাদণ্ড বা অনধিক এক লক্ষ টাকা অর্থদণ্ড বা উভয় দণ্ডে দণ্ডনীয় হইবে এবং উক্ত ব্যক্তি দ্বিতীয়বার বা পুনঃ পুনঃ একই ধরনের অপরাধ সংঘটন করিলে তিনি পর্যায়ক্রমিকভাবে উক্ত দণ্ডের দ্বিগুণ হারে দণ্ডনীয় হইবেন।"

৬। ২০০৫ সনের ১১ নং আইন এর ধারা ৬ এর সংশোধন।—উক্ত আইনের ধারা ৬ এর পরিবর্তে নিম্নরূপ ধারা ৬ প্রতিস্থাপিত হইবে, যথাঃ—

"৬। অটোমেটিক ভেন্ডিং মেশিন স্থাপন নিষিদ্ধ।—(১) কোন ব্যক্তি কোন স্থানে তামাকজাত দ্রব্য বিক্রয়ের জন্য অটোমেটিক ভেন্ডিং মেশিন স্থাপন করিতে পারিবেন না।

(২) কোন ব্যক্তি এই ধারার বিধান লঙ্ঘন করিয়া কোন স্থানে তামাকজাত দ্রব্য বিক্রয়ের জন্য অটোমেটিক ভেন্ডিং মেশিন স্থাপন করিলে তিনি অনূর্ধ্ব তিন মাস বিনাশ্রম কারাদণ্ড বা অনধিক এক লক্ষ টাকা অর্থদণ্ড বা উভয় দণ্ডে দণ্ডনীয় হইবেন এবং উক্ত ব্যক্তি দ্বিতীয়বার বা পুনঃ পুনঃ একই ধরনের অপরাধ সংঘটন করিলে তিনি পর্যায়ক্রমিকভাবে উক্ত দণ্ডের দ্বিগুণ হারে দণ্ডনীয় হইবেন।"

৭। ২০০৫ সনের ১১ নং আইন এ নূতন ধারা ৬ক এর সন্নিবেশ।—উক্ত আইনের ধারা ৬ এর পর নিম্নরূপ নূতন ধারা ৬ক সন্নিবেশিত হইবে, যথাঃ—

"৬ক। অপ্রাপ্ত বয়স্ক ব্যক্তির নিকট তামাক বা তামাকজাত দ্রব্য বিক্রয় নিষিদ্ধ, ইত্যাদি।—(১) কোন ব্যক্তি অনধিক আঠারো বৎসর বয়সের কোন ব্যক্তির নিকট তামাক বা তামাকজাত দ্রব্য বিক্রয় করিবেন না, অথবা উক্ত ব্যক্তিকে তামাক বা তামাকজাত দ্রব্য বিপণন বা বিতরণ কাজে নিয়োজিত করিবেন না বা করাইবেন না।

(২) কোন ব্যক্তি উপ-ধারা (১) এর বিধান লঙ্ঘন করিলে তিনি অনধিক পাঁচ হাজার টাকা অর্থদণ্ডে দণ্ডনীয় হইবেন এবং উক্ত ব্যক্তি দ্বিতীয়বার বা পুনঃ পুনঃ একই ধরনের অপরাধ সংঘটন করিলে তিনি পর্যায়ক্রমিকভাবে উক্ত দণ্ডের দ্বিগুণ হারে দণ্ডনীয় হইবেন।"

৮। ২০০৫ সনের ১১ নং আইন এ নূতন ধারা ৭ক এর সন্নিবেশ।—উক্ত আইনের ধারা ৭ এর পর নিম্নরূপ নূতন ধারা ৭ক সন্নিবেশিত হইবে, যথাঃ—

"৭ক। পাবলিক প্লেস বা পাবলিক পরিবহনের মালিক,

ইত্যাদির দায়িত্ব।—(১) এই আইনের উদ্দেশ্য পূরণকল্পে, প্রত্যেক পাবলিক প্লেস বা পাবলিক পরিবহনের মালিক, তত্ত্বাবধায়ক, নিয়ন্ত্রণকারী ব্যক্তি বা ব্যবস্থাপক বিধি দ্বারা নির্ধারিত দায়িত্ব পালন করিবেন।

(২) উপ-ধারা (১) এর অধীন প্রণীত বিধির বিধান লঙ্ঘন করিলে তিনি অনধিক পাঁচশত টাকা অর্থদণ্ডে দণ্ডনীয় হইবেন।"

৯। ২০০৫ সনের ১১ নং আইন এর ধারা ৮ এর সংশোধন।—উক্ত আইনের ধারা ৮ এর বিদ্যমান বিধান উপ-ধারা(১) রূপে সংখ্যায়িত হইবে এবং অতঃপর উক্তরূপ সংখ্যায়িত উপ-ধারা(১) এর পর নিম্নরূপ উপ-ধারা(২) সংযোজিত হইবে, যথাঃ—

"(২) কোন পাবলিক প্লেস বা পাবলিক পরিবহনের মালিক, তত্ত্বাবধায়ক বা নিয়ন্ত্রণকারী ব্যক্তি বা ব্যবস্থাপক উপ-ধারা (১) এর বিধান লঙ্ঘন করিলে তিনি অনধিক এক হাজার টাকা অর্থদণ্ডে দণ্ডনীয় হইবেন এবং উক্ত ব্যক্তি দ্বিতীয়বার বা পুনঃ পুনঃ একই ধরনের অপরাধ সংঘটন করিলে তিনি পর্যায়ক্রমিকভাবে উক্ত দণ্ডের দ্বিগুণ হারে দণ্ডনীয় হইবেন।"

১০। ২০০৫ সনের ১১ নং আইন এ ধারা ১০ এর প্রতিস্থাপন।—উক্ত আইনের ধারা ১০ এর পরিবর্তে নিম্নরূপ ধারা ১০ প্রতিস্থাপিত হইবে, যথাঃ—

"**১০। তামাকজাত দ্রব্যের প্যাকেটে স্বাস্থ্য ও অন্যান্য ক্ষতি সম্পর্কিত সচিত্র সতর্কবাণী মুদ্রণ, ইত্যাদি।**—(১) তামাকজাত দ্রব্যের প্যাকেট, মোড়ক, কার্টন বা কৌটার উভয় পার্শ্বে মূল প্রদর্শনী তল বা যে সকল প্যাকেট দুইটি প্রধান পার্শ্বদেশ নাই সেই সকল প্যাকেটের মূল প্রদর্শনী তলের উপরিভাগ অন্যূন শতকরা পঞ্চাশ ভাগ পরিমাণ স্থান জুড়িয়া তামাকজাত দ্রব্যের ব্যবহারের কারণে সৃষ্ট ক্ষতি সম্পর্কে, রঙ্গিন ছবি ও লেখা সম্বলিত, স্বাস্থ্য সম্পর্কিত সতর্কবাণী, বিধি দ্বারা নির্ধারিত পদ্ধতিতে, বাংলায় মুদ্রণ করিতে হইবে।

(২) তামাকজাত দ্রব্যের প্যাকেট, মোড়ক, কার্টন বা কৌটায় নিম্নবর্ণিত সচিত্র সতর্কবাণী মুদ্রণ করিতে হইবে, যথাঃ—

(ক) ধূমপানে ব্যবহৃত তামাকজাত দ্রব্যের ক্ষেত্রেঃ—

(অ) ধূমপানের কারণে গলায় ও ফুসফুসে ক্যান্সার হয়;

(আ) ধূমপানের কারণে শ্বাস-প্রশ্বাসের সমস্যা হয়

(ই) ধূমপানের কারণে স্ট্রোক হয়;

(ঈ) ধূমপানের কারণে হৃদরোগ হয়;

(উ) পরোক্ষ ধূমপানের কারণে গর্ভের সন্তানের ক্ষতি হয়;

ঊ) ধূমপানের কারণে গর্ভের সন্তানের ক্ষতি হয়;

(খ) ধোঁয়াবিহীন তামাকজাত দ্রব্যের ক্ষেত্রেঃ—

(অ) তামাকজাত দ্রব্য সেবনে মুখে ও গলায় ক্যান্সার হয়;

(আ) তামাকজাত দ্রব্য সেবনে গর্ভের সন্তানের ক্ষতি হয়;

(গ) বিধি দ্বারা নির্ধারিত অন্য কোন সতর্কবাণী।

(৩) বাংলাদেশে বিক্রিত তামাকজাত দ্রব্যের সকল প্যাকেট, মোড়ক, কার্টন ও কৌটায় "শুধুমাত্র বাংলাদেশে বিক্রয়ের জন্য অনুমোদিত" মর্মে একটি বিবৃতি মুদ্রিত না থাকিলে বাংলাদেশে কোনো তামাকজাত দ্রব্য বিক্রয় করা যাইবে না।

(৪) জনস্বাস্থ্যের উপর প্রভাব ও ঝুঁকি সম্পর্কে একটি ভ্রান্ত ধারণা তৈরির উদ্দেশ্যে, তামাকজাত দ্রব্যের প্যাকেট, কার্টন, কৌটা বা মোড়কে ব্র্যান্ড এলিমেন্ট (যেমন— লাইট, মাইল্ড, লো-টার, এক্সট্রা, আল্ট্রা শব্দ) ব্যবহার করা যাইবে না।

(৫) উপ-ধারা(২) এ উল্লিখিত সচিত্র সতর্কবাণী এবং উপ-ধারা(৩) এ উল্লিখিত বিবৃতি তামাকজাত দ্রব্যের প্যাকেট, মোড়ক, কার্টন ও কৌটায় মুদ্রণ পদ্ধতি বিধি দ্বারা নির্ধারিত হইবে।

(৬) কোন ব্যক্তি এই ধারার বিধান লঙ্ঘন করিলে তিনি অনূর্ধ্ব ছয় মাস বিনাশ্রম কারাদণ্ড বা অনধিক দুই লক্ষ টাকা অর্থদণ্ড বা উভয় দণ্ডে দণ্ডনীয় হইবেন এবং উক্ত ব্যক্তি দ্বিতীয়বার বা পুনঃ পুনঃ একই ধরনের অপরাধ সংঘটন করিলে তিনি পর্যায়ক্রমিকভাবে উক্ত দণ্ডের দ্বিগুণ হারে দণ্ডণীয় হইবেন।

১১। ২০০৫ সনের ১১ নং আইন এ ধারা ১২ এর প্রতিস্থাপন।—উক্ত আইনের ধারা ১২ এর পরিবর্তে নিম্নরূপ ধারা ১২ প্রতিস্থাপিত হইবে, যথাঃ—

"**১২। তামাক ও তামাক জাতীয় ফসল উৎপাদন ও ব্যবহার নিরুৎসাহিতকরণ।**—তামাকজাত দ্রব্য উৎপাদন ও উহার ব্যবহার ক্রমাগত নিরুৎসাহিত করিবার জন্য উদ্বুদ্ধ, এবং তামাকজাত সামগ্রীর শিল্প স্থাপন, তামাক জাতীয় ফসল উৎপাদন ও চাষ নিরুৎসাহিত, করিবার লক্ষ্যে সরকার প্রয়োজনীয় নীতিমালা প্রণয়ন করিতে পারিবে।"

১২। ২০০৫ সনের ১১ নং আইন এ ধারা ১৫ এর সংশোধন।—উক্ত আইনের ধারা ১৫ এর বিদ্যমান বিধান উপ-ধারা (১) রূপে সংখ্যায়িত হইবে এবং অতঃপর উক্তরূপ সংখ্যায়িত উপ-ধারা (১) এরপর নিম্নরূপ উপ-ধারা(২) সংযোজিত হইবে, যথাঃ—

"(২) উপ-ধারা(১) এ উল্লিখিত কোম্পানী কোন আইনগত ব্যক্তিসত্ত্বা বিশিষ্ট সংস্থা (Body Corporate) হইলে, উক্ত উপ-ধারায় উল্লিখিত ব্যক্তিকে অভিযুক্ত ও দোষী করা ছাড়াও উক্ত কোম্পানীকে আলাদাভাবে একই কার্যধারায় অভিযুক্ত ও দোষী

সাব্যস্ত করা যাইবে, তবে ফৌজদারী মামলায় উহার উপর সংশ্লিষ্ট বিধান অনুসারে শুধু অর্থদণ্ড আরোপ করা যাইবে।"

১৩। ২০০৫ সনের ১১ নং আইন এ নূতন ধারা ১৫ক এর সংযোজন।—উক্ত আইনের ধারা ১৫ এর পর নিম্নরূপ নূতন ধারা ১৫ক সন্নিবেশিত হইবে, যথাঃ—

"১৫ক। জাতীয় তামাক নিয়ন্ত্রণ সেল গঠন, ইত্যাদি।—(১) এই আইনের সুষ্ঠু বাস্তবায়ন, তামাক নিয়ন্ত্রণ কার্যক্রম পরিবীক্ষণ, গবেষণা এবং এ সংক্রান্ত অন্যান্য কার্যক্রম সম্পাদনের উদ্দেশ্যে স্বাস্থ্য ও পরিবার কল্যাণ মন্ত্রণালয় এর অধীন "জাতীয় তামাক নিয়ন্ত্রণ সেল" নামে একটি সেল থাকিবে।

(২) উক্ত সেলের গঠন, ক্ষমতা ও কার্যাবলী বিধি দ্বারা নির্ধারিত হইবে।"।

১৪। ২০০৫ সনের ১১ নং আইন এ ধারা ১৮ এর সংশোধন।—উক্ত আইনের ধারা ১৮ এর বিদ্যমান দফা(ক) দফা(কক) রূপে পুনঃসংখ্যায়িত হইবে এবং অতঃপর উক্তরূপ পুনঃসংখ্যায়িত দফা(কক) এর পূর্বে নিম্নরূপ দফা (ক) সন্নিবেশিত হইবে, যথাঃ—

"(ক) The Juvenile Smoking Act, 1919 (Ben. Act, II of 1919);"।

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২০১৩ সনের ১৭ নং আইন

ভোটার তালিকা আইন, ২০০৯ এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে ভোটার তালিকা আইন, ২০০৯ (২০০৯ সনের ৬ নং আইন) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজন;

সেহেতু এতদ্দ্বারা নিম্নরূপ আইন প্রণয়ন করা হইলঃ—

১। সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।—(১) এই আইন ভোটার তালিকা (সংশোধন) আইন, ২০১৩ নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। ২০০৯ সনের ৬ নং আইনের ধারা ৩ এর সংশোধন।—ভোটার তালিকা আইন, ২০০৯ (২০০৯ সনের ৬ নং আইন) এর ধারা ৩ এর দফা (ক) এর পর নিম্নরূপ নূতন দফা(কক) সন্নিবেশিত হইবে, যথাঃ—

"(কক) "নাম" অর্থ জন্ম ও মৃত্যু নিবন্ধন আইন, ২০০৪ (২০০৪ সনের ২৯ নং আইন) এর অধীন নিবন্ধিত বা প্রদত্ত সনদে উল্লিখিত নাম অথবা প্রাথমিক শিক্ষা সমাপনী বা জুনিয়র স্কুল সার্টিফিকেট বা মাধ্যমিক স্কুল সার্টিফিকেট বা উহার সমমানের কোন পরীক্ষায় প্রদত্ত সনদে উল্লিখিত নামঃ

তবে শর্ত থাকে যে, এই আইনে নামের সংজ্ঞা সংযোজনের পূর্বে প্রণীত ভোটার তালিকায় উল্লিখিত নামের ক্ষেত্রে এই সংজ্ঞা প্রযোজ্য হইবে না;"।

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২০১৩ সনের ১৮ নং আইন

Waqfs Ordinance, 1962 (Ordinance No. 1 of 1962), এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্ণিত উদ্দেশ্যসমূহ পূরণকল্পে Waqfs Ordinance, 1962(Ordinance No. 1 of 1962), এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্দ্বারা নিম্নরূপ আইন করা হইলঃ—

১। সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।—(১) এই আইন Waqfs(Amendment) Act, 2013 নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। Ordinance No. I of 1962এর section 2 এর সংশোধন।—Waqfs Ordinance, 1962 (Ordinance No. 1 of 1962), অতঃপর উক্ত Ordinance বলিয়া উল্লিখিত, এর section 2 এর clause(11) এর পর নিম্নরূপ নতুন clause(11a) সন্নিবেশিত হইবে, যথাঃ—

"(11a) "Waqf estate" means the totality of immovable properties, as well as movable properties, in respect of which the waqf is made by a deed; and no waqf property shall be designated as waqf estate if it consists of only movable properties;"।

৩। Ordinance No.I of 1962 এ নূতন section 6A এর সন্নিবেশ।—উক্ত Ordinance এর section 6 এর পর নিম্নরূপ নতুন section 6A সন্নিবেশিত হইবে, যথাঃ—

"6A. Record-of-Rights, separate Khatian, etc.—(1) any immovable property belonging to any waqf estate shall be recorded in the record-of-rights in the name the waqf, and shall be represented by the designation of mutawalli, Receiver or Administrator, as the

case may be.

(2) The personal name of the mutawalli, Receiver or Administrator shall not be stated in the record-of-rights.

(3) Notwithstanding anything contained in any other law for the time being in force, the Revenue Officer shall record the waqf estate in a separate khatian.

Explanation—Revenue-officer as referred to in this sub-section means the Revenue-officer as defined in section 2(24) of the State Acquisition and Tenency, Act 1950 (Act, No. XXVIII of 1951.

(4) If any immovable property belonging to any waqf estate is not recorded in accordance with the provisions of the section, the Administrator shall take immediate steps for correction of the record-of-rights."।

৪। **Ordinance No.I of 1962 এ section 31A এর সন্নিবেশ**।—উক্ত Ordinance এর section 31 এর পর নিম্নরূপ নূতন section 31A সন্নিবেশিত হইবে, যথাঃ—

"31A. Magistarial powers of Administrator and others.—(1) The Administrator shall have such powers of an Executive Magistrate as may be necessary for due administration, management, maintenance and protection of properties of a waqf estate.

(2) The Administrator may, with prior approval of the government, by notification in the official Gazette, delegate to any Deputy Administrator and Assistant Administrator such of his powers of an Executive Magistrate as he may deem necessary for due administrator, management, maintenance and protection of properties of waqf estate.

(3) The magistarial powers of the Administrator, Deputy Administrator and Assistant Administrator may extend all over the country, and while exercising the powers of an Executive Magistrate under this section within the territorial Jurisdiction of a particular district, the Administrator shall be deemed to be a District Magistrate of that District and a Deputy Administrator or Assistant Administrator shall be deemed to be an Executive Magistrate of that District.

(4) While exercising the powers of Executive Magistrate under this section within the territorial jurisdiction of a particular district or metropolition area the Administrator, Deputy Administrator and Assistant Administrator, may, if necessary, ask for assistance of police and district administration of that district or metropolition area, as the case may be, and, if so asked for, such assistance shall be provided,"।

৫। **Ordinance No.I of 1962, এর section 32 এর সংশোধন**।—উক্ত Ordinance এর section 32 এর sub-section (1) এর "person" শব্দটির পরিবর্তে "beneficiary" শব্দ প্রতিস্থাপিত হইবে।

৬। **Ordinance No.I of 1962 এ নূতন section 57A এর সন্নিবেশ**।—উক্ত Ordinance এর section 57 এর পর নিম্নরূপ নূতন section 57A সন্নিবেশিত হইবে, যথাঃ—

"57A. Sub-registrar not to register deeds.—(1) Notwithstanding anything contained to the Contrary in the Registration Act, 1908 (Act No. XVI of 1908), no Sub-registrar shall register any deeds of transfer of any immovable property belonging to a waqf, without the previous sanction of the Administrator or the Government, as the case may be.

(2) If a sub-registrar, knowingly and intentionally, registers a deed in violation of the prohibition under sub-section (1), he shall be liable for commission of the offence of abetment of criminal breach of trust."।

৭। **Ordinance No. I of 1962 এর section 61এর সংশোধন**।—উক্ত Ordinance এর section 61 এর—

(ক) sub-section (1) এর clause (n) এ, শর্তাংশসহ, দুইবার উল্লিখিত, "two thousand" শব্দগুলির পরিবর্তে উভয়স্থানে "twenty thousand" শব্দগুলি প্রতিস্থাপিত হইবে;

(খ) sub-section (2) এ উল্লিখিত "two thousand" শব্দগুলির পরিবর্তে "twenty thousand" শব্দগুলি প্রতিস্থাপিত হইবে।

৮। **Ordinance No. I of 1962 এর section 63 এর সংশোধন।**—উক্ত Ordinance এর section 63 এ উল্লিখিত "two thousand" শব্দগুলির পরিবর্তে "twenty thousand" শব্দগুলি প্রতিস্থাপিত হইবে।

৯। **Ordinance No. I of 1962 এ নূতন section 69A এর সন্নিবেশ।**—উক্ত Ordinance এর section 69 এর পর নিম্নরূপ নূতন section 69A সন্নিবেশিত হইবে, যথাঃ—

"69A. Redetermination of monetary amounts.—(1) If the wakif in his waqf deed directs for payment, out of income of the waqf estate or waqf property, of any amount of money on monthly or yearly basis, the mutawalli or beneficiary of any waqf estate or waqf property may every after ten years, apply to the Administrator for re-determination of the amount mentioned in the waqf deed.

(2) The Administrator shall, upon application made under sub-section (1), if he considers the application reasonable and appropriate, re-determine the amount so as to make that consistent with prevalent market price."।

১০। **Ordinance No. I of 1962 এর section 71 এর সংশোধন।**—উক্ত Ordinance এর section 71 এর sub-section (7) এ উল্লিখিত "300" সংখ্যার পরিবর্তে "10,000" সংখ্যা ও কমা প্রতিস্থাপিত হইবে।

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২০১৩ সনের ১৯ নং আইন

রাবার চাষ ও রাবার শিল্পের সার্বিক বিকাশ ও উন্নয়নের লক্ষ্যে রাবার বোর্ড প্রতিষ্ঠা এবং এতদ্‌সংক্রান্ত বিধান করার উদ্দেশ্যে প্রণীত আইন

যেহেতু রাবার চাষ ও রাবার শিল্পের সার্বিক বিকাশ ও উন্নয়নের লক্ষ্যে একটি বোর্ড প্রতিষ্ঠা এবং এতদ্‌সংক্রান্ত বিধান করা সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্‌দ্বারা নিম্নরূপ আইন করা হইলঃ—

১। **সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।**—(১) এই আইন বাংলাদেশ রাবার বোর্ড আইন, ২০১৩ নামে অভিহিত হইবে।

(২) সরকার, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, যে তারিখ নির্ধারণ করিবে সেই তারিখে ইহা কার্যকর হইবে।

২। **সংজ্ঞা।**—বিষয় বা প্রসঙ্গের পরিপন্থী কোন কিছু না থাকিলে, এই আইনে—

(১) "পরিষদ" অর্থ ধারা ৬ এর অধীন গঠিত বোর্ডের পরিচালনা পরিষদ;

(২) "বোড" অর্থ ধারা ৩ এর অধীন প্রতিষ্ঠিত বাংলাদেশ রাবার বোর্ড;

(৩) "রাবার" অর্থ রাবার গাছ হইতে প্রাপ্ত কষ বা ল্যাটেক্স এবং উহার উপজাত কোন পদার্থ;

(৪) "সচিব" অর্থ বোর্ডের সচিব; এবং

(৫) "সদস্য" অর্থ পরিষদের কোন সদস্য।

৩। **বোর্ড প্রতিষ্ঠা।**—(১) এই আইন কার্যকর হইবার সঙ্গে সঙ্গে এই আইনের উদ্দেশ্য পূরণকল্পে বাংলাদেশ রাবার বোর্ড নামে একটি বোর্ড প্রতিষ্ঠিত হইবে।

(২) বোর্ড একটি সংবিধিবদ্ধ সংস্থা হইবে এবং ইহার স্থায়ী ধারাবাহিকতা ও একটি সাধারণ সীলমোহর থাকিবে।

(৩) এই আইনের বিধানাবলী সাপেক্ষে, বোর্ডের স্থাবর ও অস্থাবর উভয় প্রকার সম্পত্তি অর্জন করিবার, অধিকারে রাখিবার ও হস্তান্তর করিবার ক্ষমতা থাকিবে।

(৪) 'বাংলাদেশ রাবার বোর্ড' এই নামে ইহার পক্ষে বা ইহার বিরুদ্ধে মামলা দায়ের করা যাইবে।

৪। **বোর্ডের কার্যালয়।**—(১) বোর্ডের প্রধান কার্যালয় সরকার কর্তৃক নির্ধারিত স্থানে অবস্থিত হইবে।

(২) বোর্ড, প্রয়োজনে, সরকারের পূর্বানুমোদনক্রমে, বাংলাদেশের যে কোন স্থানে উহার শাখা কার্যালয় স্থাপন করিতে পারিবে।

৫। **বোর্ডের পরিচালনা ও প্রশাসন।**—(১) বোর্ডের একটি পরিচালনা পরিষদ থাকিবে এবং উপ-ধারা (২) এর বিধান সাপেক্ষে, বোর্ডের পরিচালনা ও প্রশাসন উক্ত পরিষদের উপর ন্যস্ত থাকিবে, এবং বোর্ড যে সকল ক্ষমতা প্রয়োগ ও কার্য সম্পাদন করিতে পারিবে পরিষদও সেই সকল ক্ষমতা প্রয়োগ ও কার্য সম্পাদন করিতে পারিবে।

(২) পরিষদ উহার ক্ষমতা প্রয়োগ ও কার্যাবলি সম্পাদনের ক্ষেত্রে, সরকার কর্তৃক, সময় সময়, প্রদত্ত নির্দেশনা, আদেশ ও নির্দেশ অনুসরণ করিবে।

৬। **পরিচালনা পরিষদের গঠন**।—পরিচালনা পরিষদ নিম্নবর্ণিত সদস্য সমন্বয়ে গঠিত হইবে, যথাঃ—

(ক) সরকার কর্তৃক, নির্ধারিত শর্তাবলি সাপেক্ষে, নিয়োজিত অন্যূন অতিরিক্ত সচিব পদমর্যাদার একজন কর্মকর্তা অথবা রাবার বিষয়ে অভিজ্ঞ সরকার কর্তৃক মনোনীত একজন ব্যক্তি, যিনি উহার চেয়ারম্যানও হইবেন;

(খ) সকল বিভাগের অতিরিক্ত বিভাগীয় কমিশনার (রাজস্ব), পদাধিকারবলে;

(গ) পরিবেশ ও বন মন্ত্রণালয় কর্তৃক মনোনীত উক্ত মন্ত্রণালয়ের উপ-সচিব পদমর্যাদার একজন কর্মকর্তা;

(ঘ) ভূমি মন্ত্রণালয় কর্তৃক মনোনীত উক্ত মন্ত্রণালয়ের উপ-সচিব পদমর্যাদার একজন কর্মকর্তা;

(ঙ) অর্থ বিভাগ অর্থ মন্ত্রণালয় কর্তৃক মনোনীত উক্ত বিভাগের উপ-সচিব পদমর্যাদার একজন কর্মকর্তা;

(চ) সরকার কর্তৃক মনোনীত বন অধিদপ্তরের বন সংরক্ষক পদমর্যাদার একজন কর্মকর্তা;

(ছ) সরকার কর্তৃক মনোনীত বাংলাদেশ বনশিল্প উন্নয়ন কর্পোরেশনের পরিচালক পদমর্যাদার একজন কর্মকর্তা;

(জ) সরকার কর্তৃক মনোনীত বাংলাদেশ বন গবিষণা ইনস্টিটিউটের পরিচালক পদমর্যাদার একজন কর্মকর্তা;

(ঝ) পার্বত্য চট্টগ্রাম বিষয়ক মন্ত্রণালয় কর্তৃক মনোনীত পার্বত্য চট্টগ্রাম উন্নয়ন বোর্ডের একজন প্রতিনিধি;

(ঞ) পার্বত্য চট্টগ্রাম বিষয়ক মন্ত্রণালয় কর্তৃক মনোনীত পার্বত্য চট্টগ্রাম আঞ্চলিক পরিষদ/ জেলা পরিষদ বা অন্যান্য পরিষদের একজন প্রতিনিধি;

(ট) বাংলাদেশ রাবার বাগান মালিক সমিতির সভাপতি/প্রতিনিধি;

(ঠ) বাংলাদেশ রাবার শিল্প সমিতির সভাপতি/প্রতিনিধি;

(ড) সরকার কর্তৃক মনোনীত রাবার উৎপাদনকারী চা বাগানের একজন মালিক প্রতিনিধি;

(ঢ) সরকার কর্তৃক মনোনীত একজন রাবার বিশেষজ্ঞ; এবং

(ণ) বোর্ডের সচিব, যিনি উহার সদস্য সচিবও হইবেন।

৭। **সদস্য পদের মেয়াদ**।—(১) ধারা ৬ এর দফা (ড) ও (ঢ) এর অধীন মনোনীত কোন সদস্য, উপ-ধারা (২) এর বিধান সাপেক্ষে, তাহার মনোনয়নের তারিখ হইতে ৩ (তিন) বৎসরের জন্য সদস্য পদে বহাল থাকিবেন।

(২) উপ-ধারা (১) এর বিধান সত্ত্বেও মনোনয়ন প্রদানকারী কর্তৃপক্ষ যে কোন সময় উহার প্রদত্ত কোন মনোনয়ন বাতিল করিয়া উপযুক্ত নূতন কোন ব্যক্তিকে মনোনয়ন প্রদান করিতে পারিবে।

(৩) উপ-ধারা (২) এ যাহা কিছুই থাকুক না কেন, মেয়াদ শেষ হইবার পূর্বে যে কোন সময়, উক্ত সদস্য সরকারের উদ্দেশ্যে স্বাক্ষরযুক্ত পত্রযোগে স্বীয় পদ ত্যাগ করিতে পারিবেন এবং সরকার কর্তৃক পদত্যাগপত্র গৃহীত হইবার তারিখ হইতে সংশ্লিষ্ট পদটি শূন্য হইয়াছে বলিয়া গণ্য হইবে।

৮। **বোর্ডের কার্যাবলি**।—বোর্ডের কার্যাবলি হইবে নিম্নরূপ; যথাঃ—

(ক) রাবার চাষ ও রাবার শিল্প সংক্রান্ত নীতিমালা ও পরিকল্পনা প্রণয়ন এবং উহা বাস্তবায়নে সরকারকে সুপারিশ, পরামর্শ ও সহায়তা প্রদান;

(খ) সংশ্লিষ্ট সকল মন্ত্রণালয় বা বিভাগের সহযোগিতায় রাবার চাষ উপযোগী জমি চিহ্নিতকরণ;

(গ) রাবার চাষে আগ্রহী উপযুক্ত ব্যক্তি বা প্রতিষ্ঠান বাছাই এবং তাহাদের অনুকূলে জমি ইজারা বা বরাদ্দ প্রদানের নিমিত্ত সরকারের নিকট সুপারিশ পেশ;

(ঘ) ইজারা বা বরাদ্দ চুক্তির শর্ত ভঙ্গকারীর বিরুদ্ধে প্রয়োজনীয় আইনানুগ ব্যবস্থা গ্রহণে সরকারকে প্রয়োজনীয় সুপারিশ প্রদান;

(ঙ) রাবার বাগান সৃজনে উহার মালিক বা, ক্ষেত্রমত, বরাদ্দ গ্রহীতাগণকে উদ্বুদ্ধকরণ;

(চ) রাবার বাগান সৃজন এবং রাবার শিল্প স্থাপন ও বিকাশে মালিক বা, ক্ষেত্রমত, বরাদ্দ গ্রহীতাগণকে ঋণ ও বীমা সুবিধা প্রাপ্তিতে প্রয়োজনীয় সহায়তা প্রদান;

(ছ) রাবার বাগানের মালিক বা, ক্ষেত্রমত, বরাদ্দ গ্রহীতাগণকে বৈজ্ঞানিক, কারিগরি ও অর্থনৈতিক সহায়তা প্রদান;

(জ) রাবার বাগানের মালিক, শ্রমিক ও কর্মচারীদের প্রশিক্ষণের ব্যবস্থা গ্রহণ;

(ঝ) ক্ষতিকারক কৃত্রিম রাবার সামগ্রীর উৎপাদন, আমদানী, বিপণন ও ব্যবহার নিরুৎসাহিত করিবার জন্য সরকারকে পরামর্শ প্রদান;

(ঞ) রাবার বাগানের জমির অনুপযুক্ত অংশে (৩৫ ডিগ্রি ঢালের উপরে অথবা জলাবদ্ধ অংশে) ফলজ, বনজ বা ঔষধি বৃক্ষসহ অন্যান্য সহায়ক অর্থকরী ফসল উৎপাদনে প্রযুক্তিগত ও অর্থনৈতিক সহায়তা প্রদান;

(ট) উৎপাদিত রাবার বিপণন বা, ক্ষেত্রমত, রপ্তানীর জন্য প্রয়োজনীয় সহায়তা প্রদান;

(ঠ) রাবার চাষ ও রাবার শিল্প সংক্রান্ত যে কোন বিষয়ে

ডাটাবেজ তৈরী ও নিয়মিত হালনাগাদকরণ;

(ড) রাবার চাষ ও রাবার শিল্পের সার্বিক অগ্রগতি পর্যবেক্ষণ ও পরিবীক্ষণ;

(ঢ) রাবার বাগান ও রাবার শিল্পের সহিত সংশ্লিষ্ট শ্রমিক ও কর্মচারীদের জন্য প্রয়োজনীয় কল্যাণমূলক ব্যবস্থা গ্রহণ;

(ণ) রাবার চাষ ও রাবার শিল্প বিষয়ে গবেষণার নিমিত্ত রাবার গবেষণা ইনস্টিটিউট প্রতিষ্ঠার জন্য সরকারকে সুপারিশ প্রদান; এবং

(ত) জীবনচক্র হারানো রাবার কাঠ আহরণ, প্রক্রিয়াজাতকরণ ও বিপণনে সহায়তা প্রদান;

(থ) রাবার চাষ ও পুনর্বাসন কার্যক্রমে প্রয়োজনীয় সহায়তা প্রদান;

(দ) সরকার কর্তৃক, সময়ে সময়ে, অর্পিত অন্য কোন দায়িত্ব পালন করা।

৯। **পরিচালনা পরিষদের সভা**।—(১) এই ধারার বিধানাবলি সাপেক্ষে, পরিষদ উহার সভার কার্যপদ্ধতি নির্ধারণ করিতে পারিবে।

(২) পরিষদের সভা চেয়ারম্যান কর্তৃক নির্ধারিত স্থান ও সময়ে অনুষ্ঠিত হইবে;

তবে শর্ত থাকে যে, প্রতি বৎসর পরিষদের ন্যূনতম ৩ (তিন) টি সভা অনুষ্ঠিত হইবে।

(৩) পরিষদের সকল সভায় চেয়ারম্যান সভাপতিত্ব করিবেন এবং তাহার অনুপস্থিতিতে সভায় উপস্থিত সদস্যগণ কর্তৃক মনোনীত অন্য কোন সদস্য সভায় সভাপতিত্ব করিবেন।

(৪) অন্যূন এক তৃতীয়াংশ সদস্যের উপস্থিতিতে সভার কোরাম গঠিত হইবে।

(৫) উপস্থিত সদস্যগণের সংখ্যাগরিষ্ঠ ভোটে পরিষদের সভায় সিদ্ধান্ত গৃহীত হইবে এবং ভোটের সমতার ক্ষেত্রে সভাপতিত্বকারী ব্যক্তির একটি নির্ণায়ক ভোট প্রদানের ক্ষমতা থাকিবে।

(৬) শুধুমাত্র কোন সদস্যপদে শূন্যতা বা পরিষদ গঠনে ত্রুটি থাকিবার কারণে পরিষদের কোন কার্য বা কার্যধারা অবৈধ হইবে না বা তৎসম্পর্কে কোন প্রশ্ন উত্থাপন করা যাইবে না।

১০। **কমিটি গঠন ও উহার কার্যপরিধি**।—(১) বোর্ডের কার্যাবলি সুষ্ঠুভাবে সম্পাদনের লক্ষ্যে বা কোন বিশেষ কার্য সম্পাদন বা সুপারিশ প্রণয়নের উদ্দেশ্যে পরিষদ উহার সদস্য এবং, উহার বিবেচনায়, সংশ্লিষ্ট বিষয়ে অভিজ্ঞ অন্য কোন ব্যক্তি বা ব্যক্তিবর্গের সমন্বয়ে এক বা একাধিক কমিটি গঠন করিতে পারিবে।

(২) কমিটির কার্যপরিধি বোর্ড কর্তৃক নির্ধারিত হইবে।

১১। **বোর্ডের তহবিল**।—(১) এই আইনের উদ্দেশ্য পূরণকল্পে, বোর্ডের একটি তহবিল থাকিবে এবং উহাতে নিম্নবর্ণিত অর্থ জমা হইবে, যথাঃ—

(ক) সরকার কর্তৃক প্রদত্ত অনুদান;

(খ) সরকারের পূর্বানুমোদনক্রমে বোর্ডের নিজস্ব বিনিয়োগ হইতে প্রাপ্ত আয়;

(গ) সরকারের পূর্বানুমোদনক্রমে অন্য কোন উৎস হইতে প্রাপ্ত অনুদান; এবং

(ঘ) বোর্ড কর্তৃক গৃহীত ঋণ।

(২) তহবিল বোর্ডের নামে যে কোন তফসিলি ব্যাংকে জমা রাখিতে হইবে এবং পরিষদ কর্তৃক নির্ধারিত পদ্ধতিতে তহবিল হইতে অর্থ উত্তোলন ও ব্যয় করা যাইবে।

ব্যাখ্যা।—এই ধারায় "তফসিলি ব্যাংক" বলিতে Bangladesh Bank Order, 1972 (P.O. 127 of 1972) এর article 2(j) তে সংজ্ঞায়িত Scheduled Bank কে বুঝাইবে।

(৩) তহবিল হইতে বোর্ডের প্রয়োজনীয় ব্যয় নির্বাহ করা যাইবে।

১২। **বাজেট**।—বোর্ড, প্রত্যেক বৎসর সরকার কর্তৃক নির্দিষ্ট সময়ের মধ্যে, পরবর্তী অর্থ-বৎসরের বার্ষিক বাজেট বিবরণী সরকার কর্তৃক এতদুদ্দেশ্যে নির্দিষ্ট ফরমে অনুমোদনের জন্য সরকারের নিকট পেশ করিবে এবং উহাতে উক্ত অর্থ-বৎসরে সরকারের নিকট হইতে বোর্ডের কি পরিমাণ অর্থের প্রয়োজন হইবে উহার উল্লেখ থাকিবে।

১৩। **হিসাবরক্ষক ও নিরীক্ষা**।—(১) পরিষদ, সরকার কর্তৃক নির্দেশিত পদ্ধতিতে, বোর্ডের হিসাব রক্ষণ করিবে এবং হিসাবের বার্ষিক বিবরণী প্রস্তুত করিবে।

(২) প্রতি বৎসর বোর্ড কর্তৃক নিয়োজিত চার্টার্ড একাউন্টেন্ট ফার্ম বোর্ডের তহবিলের হিসাব নিরীক্ষার কাজ সম্পাদন করিবে।

(৩) বাংলাদেশের মহা-হিসাব নিরীক্ষক ও নিয়ন্ত্রক বা তৎকর্তৃক এতদুদ্দেশ্যে ক্ষমতাপ্রাপ্ত কোন ব্যক্তি নির্দিষ্ট সময় অন্তর বোর্ডের তহবিলের হিসাব নিরীক্ষা করিবেন এবং নিরীক্ষা প্রতিবেদনের একটি করিয়া অনুলিপি সরকার এবং, ক্ষেত্রমত, বোর্ডের নিকট পেশ করিবেন।

(৪) উপ-ধারা (৩) এর অধীন হিসাব নিরীক্ষার উদ্দেশ্যে বাংলাদেশের মহা-হিসাব নিরীক্ষক ও নিয়ন্ত্রক কিংবা তাঁহার নিকট হইতে এতদুদ্দেশ্যে ক্ষমতাপ্রাপ্ত কোন ব্যক্তি বোর্ডের সকল রেকর্ড, দলিল-দস্তাবেজ, নগদ বা ব্যাংকে গচ্ছিত অর্থ, জামানত, ভান্ডার এবং অন্যবিধ সম্পত্তি পরীক্ষা করিয়া দেখিতে পারিবেন এবং সচিব বা বোর্ডের যে কোন

কর্মকর্তা বা কর্মচারীকে জিজ্ঞাসাবাদ করিতে পারিবেন।

১৪। **ঋণ গ্রহণের ক্ষমতা**।—বোর্ড এই আইনের অধীন ইহার কার্যাবলি সম্পাদনের নিমিত্ত সরকারের পূর্বানুমোদনক্রমে, প্রয়োজনীয় ঋণ গ্রহণ করিতে পারিবে এবং প্রযোজ্য শর্তাবলির অধীন উক্ত ঋণ পরিশোধের জন্য বোর্ড দায়ী থাকিবে।

১৫। **বোর্ডের সচিব এবং তাহার দায়িত্ব ও কর্তব্য**।—(১) বোর্ডের একজন সচিব থাকিলে যিনি সরকার কর্তৃক নিযুক্ত হইবেন এবং তাহার চাকুরীর শর্তাবলি সরকার কর্তৃক স্থিরীকৃত হইবে।

(২) সচিব বোর্ডের সার্বক্ষণিক মুখ্য নির্বাহী কর্মকর্তা হইবেন এবং তিনি—

(ক) পরিষদের সিদ্ধান্ত বাস্তবায়নের জন্য দায়ী থাকিবেন;

(খ) পরিষদের নিকট কর্মকাণ্ডের জবাবদিহিতা নিশ্চিত করিবেন; এবং

(গ) পরিষদের নির্দেশনা অনুযায়ী বোর্ডের কার্যাবলি সম্পাদন করিবেন।

(৩) সচিবের দায়িত্ব ও কর্তব্য হইবে নিম্নরূপ, যথাঃ—

(ক) পরিষদের সিদ্ধান্ত ও নির্দেশনা বাস্তবায়ন;

(খ) বোর্ডের কর্মসূচি এবং বাৎসরিক কর্মসূচির বাজেটসহ রাজস্ব বাজেট প্রণয়ন;

(গ) পরিষদ কর্তৃক অনুমোদিত পরিকল্পনা এবং কর্মসূচি বাস্তবায়ন;

(ঘ) বোর্ডের কর্মকর্তা ও কর্মচারীদের শৃংখলা ও নিয়ন্ত্রণ; এবং

(ঙ) পরিষদ কর্তৃক অর্পিত অন্য কোন দায়িত্ব পালন।

১৬। **বোর্ডের কর্মকর্তা ও কর্মচারী**।—বোর্ড উহার কার্যাবলি সুষ্ঠুভাবে সম্পাদনের জন্য প্রয়োজনীয় সংখ্যক কর্মকর্তা ও কর্মচারী নিয়োগ করিতে পারিবে এবং তাহাদের চাকুরীর শর্তাবলি প্রবিধান দ্বারা নির্ধারিত হইবে।

১৭। **বার্ষিক প্রতিবেদন**।—(১) বোর্ড প্রত্যেক বৎসরের ৩০ শে সেপ্টেম্বরের মধ্যে অব্যবহিত পূর্বের অর্থবৎসরের একটি বার্ষিক প্রতিবেদন সরকারের নিকট পেশ করিবে যাহাতে, অন্যান্য বিষয়ের মধ্যে, সংশ্লিষ্ট অর্থ বৎসরে গৃহীত উন্নয়ন কৌশল, পরিকল্পিত ও বাস্তবায়িত কর্মসূচি, প্রাক্কলিত ও প্রকৃত আয় ও ব্যয়, সাফল্য নিরূপণের জন্য নির্ধারিত প্রধান নির্ণায়কসমূহের আলোকে অর্জন এবং সাংগঠনিক দক্ষতা সম্পর্কে বিস্তারিত বিবরণ এবং সংশ্লিষ্ট অর্থ বৎসরের লক্ষ্যমাত্রা অর্জন, বাস্তবায়নাধীন প্রকল্পসমূহের হালনাগাদ অবস্থা এবং সমাপ্ত প্রকল্পসমূহের পরিচালনা ব্যবস্থার বিশ্লেষণ থাকিবে।

(২) উপ-ধারা (১) এ যাহা কিছুই থাকুক না কেন, সরকার প্রয়োজনে, বোর্ডের নিকট হইতে যে কোন সময় বোর্ডের যে কোন বিষয়ের উপর প্রতিবেদন, বিবরণী, নথিপত্র, রেকর্ড, কাগজ বা দলিল-দস্তাবেজ তলব করিতে পারিবে এবং সরকার কর্তৃক ক্ষমতাপ্রাপ্ত যে কোন কর্মকর্তা বোর্ডের যে কোন নথিপত্র, রেকর্ড, কাগজ বা দলিল-দস্তাবেজ পরিদর্শন করিতে পারিবে।

১৮। **তথ্য সংগ্রহ, প্রবেশ, ইত্যাদির ক্ষমতা**।—(১) বোর্ড, এই আইনের উদ্দেশ্য পূরণকল্পে, আদেশ দ্বারা যে কোন ব্যক্তিকে রাবার চাষ, রাবার উৎপাদন এবং রাবার শিল্প সংক্রান্ত যে কোন তথ্য বা বিবরণী সরবরাহ করিবার জন্য নির্দেশ প্রদান করিতে পারিবে এবং উক্ত ব্যক্তি উক্ত তথ্য বা বিবরণী সরবরাহ করিতে বাধ্য থাকিবে।

(২) সচিব বা বোর্ড কর্তৃক ক্ষমতাপ্রাপ্ত যে কোন কর্মকর্তা বা ব্যক্তি এই আইন বা তদ্‌ধীন প্রণীত কোন বিধির অধীন তাহার উপর অর্পিত দায়িত্ব সম্পাদন করিবার উদ্দেশ্যে কোন রেকর্ড, রেজিস্টার, দলিল বা এতদ্‌সংশ্লিষ্ট কোন গুরুত্বপূর্ণ তথ্য পরীক্ষা, যাচাই-বাছাই বা সংগ্রহ করিবার জন্য কোন রাবার বাগান বা স্থানে প্রবেশ করিবার অধিকারী হইবেন এবং সংশ্লিষ্ট রাবার বাগান ও রাবার শিল্পের মালিক, শ্রমিক ও কর্মচারী প্রয়োজনীয় সহযোগিতা প্রদান করিতে বাধ্য থাকিবেন।

১৯। **ক্ষমতা অর্পণ**।—পরিষদ এই আইন বা তদ্‌ধীন প্রণীত বিধি বা প্রবিধানের অধীন উহার কোন ক্ষমতা, লিখিত আদেশ দ্বারা সচিব বা বোর্ডের কোন কর্মকর্তাকে অর্পণ করিতে পারিবে।

২০। **বিধি প্রণয়নের ক্ষমতা**।—এই আইনের উদ্দেশ্য পূরণকল্পে সরকার, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, বিধি প্রণয়ন করিতে পারিবে।

২১। **প্রবিধান প্রণয়নের ক্ষমতা**।—ধারা ১৬ এর উদ্দেশ্য পূরণকল্পে বোর্ড, সরকারের অনুমোদনক্রমে এবং সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, প্রবিধান প্রণয়ন করিতে পারিবে।

২২। **ইংরেজীতে অনূদিত পাঠ প্রকাশ**।—(১) এই আইন কার্যকর হইবার পর সরকার, প্রয়োজনে, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, এই আইনের ইংরেজীতে অনূদিত একটি নির্ভরযোগ্য পাঠ—(Authentic English Text) প্রকাশ করিতে পারিবে।

(২) বাংলা পাঠ ও ইংরেজী পাঠের মধ্যে বিরোধের ক্ষেত্রে বাংলা পাঠ প্রাধান্য পাইবে।

২৩। **রহিতকরণ ও হেফাজত**।—(১) এই আইন কার্যকর হইবার সঙ্গে সঙ্গে নিম্নবর্ণিত প্রজ্ঞাপনসমূহ রহিত হইবে, যথাঃ—

(ক) কৃষি মন্ত্রণালয়ের বন, মৎস্য ও পশুসম্পদ বিভাগের Notification No. 1/For-109/75/1109, তারিখ 1st October 1977 ও Notification

Sections 241 and 245—A case of total dead lock in running and managing the affairs of the company as a commercial concern has been made out, on facts and from the circumstances revealed from the averments made by the parties as well as from the materials on record, and no device has been kept in these articles to over come such dead lock either by forming quorum or by using casting vote, while the intention for separation in both groups is obvious from the fact of filing this petition. *Sayem Sobhan vs Registrar of Joint Stock Companies & Firms (Statutory Original) 461*

Sections 241 and 245—Because of supervening impossibility resulted from and due to the total dead lock in managing the affairs of the company and owing to mis-management and withdrawal of money from the accounts of the company the allottees are not bound to further perform their obligations, with reference to the terms and conditions of the allotment letters issued in their favour and they are entitle to receive their entire money back. *Sayem Sobhan vs Registrar of Joint Stock Companies & Firms (Statutory Original) 461*

Constitution of Bangladesh, 1972

Article 40—Article 40 being a qualified right its violation can be agitated only when an aggrieved person shall make out a successful case that despite the fact that the law, by which one's profession or business is to be dealt with, has declared a right to enjoy something but due to the authority's particular action, omission, decision or order she has been deprived of the same. *Concord Pragatee Consortium Ltd vs BPDB (Spl. Original) 475*

Article 102(1)(2)—The fundamental difference between two sub-Articles of Article 102 of the Constitution is that while Article 102(1) can be invoked directly if an aggrieved person can make out a case of infringement of fundamental rights, however, in order to qualify to be an applicant under Article 102(2), the aggrieved person must satisfy the Court that 'there is no other equally efficacious remedy' to redress his grievance. *Concord Pragatee Consortium Ltd vs BPDB (Spl. Original) 475*

Article 102(1)(2)—Review Panel is equally efficacious forum for adjudication of the grievance of the petitioner, the Rule is liable to be discharged only on the ground of maintainability without embarking upon other issues under the law of contract for examination. *Concord Pragatee Consortium Ltd vs BPDB (Spl. Original) ... 475*

Income Tax Ordinance (XXXVI of 1984)

Sections 93(2), (3)(a)(b) and 94(2)—It appears from section 94(2) of the Ordinance that the limitation of two years have been provided in the section meaning thereby that the provision of section 93(3)(a) and (b) of the Ordinance is applicable both for ordinary and the self assessment scheme and in case of self assessment scheme the same became barred after the elapse of two years and the provision of section 93(3)(a) and (b) cannot be invoked after the assessment barred by limitation under the provision of section 94(2) of the Ordinance. Because, the self Assessment Scheme is a privilege and from the issuance of the receipt by the DCT concern as to receiving of a compliant return the same became finalized which become absolute after the elapse of two years, as provided in section 94(2) of the Ordinance. The provision of section 93(2) being applicable for ordinary assessment will remain applicable as against five years of any assessment made in ordinary manner. *Nurun Nabi vs National Board of Revenue (Spl. Original) ... 514*

Penal Code (XLV of 1860)

Section 302—Under section 302 of the Code, though discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal justice. *State vs Bidhan Chandra Roy (Criminal) 500*

Penal Code (XLV of 1860)

Section 300

Nari-o-Shishu Nirjatan Daman Ain (VIII of 2000)

Section 9(3)—Since offence of murder punishable under section 302 of the Code was carried to the door of convict-

appellants they can be very much convicted for offence of section 302 of the Code and, as such, we convert the offence of section 9(3) of the Ain to offence of section 302 of Code. *State vs Bidhan Chandra Roy (Criminal)* ... 500

Public Procurement Act (XXIV of 2006)

Section 4—Section 4 of the PPA, 2006 heralds that it is a special law having overriding effect on other laws and the Review Panel being constituted with 3 (three) highly knowledgeable adjudicators, one having experience from the field of administration, one from judiciary and the third one from technical field of relevant procuring staff, the forum appears to be one of the most competent and best forum any statute has ever created in our country for speedy and complete disposal of complicated grievances. *Concord Pragatee Consortium Ltd vs BPDB (Spl. Original)* ... 475

Public Procurement Act (XXIV of 2006)

Sections 29 and 30

Public Procurement Rules, 2008

Rule 56(11)—In an open tender under Rule 56(11) of the PPR, 2008 ("দূর্নীতি বা চক্রান্তমুলক কার্যকলাপ সম্পর্কে সন্দেহ হইলে") if there is any suspicion of any malafide activities in the process of any public procurement and under Rule 56(12) of the PPR, 2008 ("ত্রুটিপূর্ণ বা অন্যায়ভাবে চুক্তি সম্পাদন করা হইয়াছে বলিয়া ধারনা করিবার সঙ্গত কারণ থাকিলে") if there is reason to believe that the contract has been sealed unfairly, anyone can take recourse to sections 29 and 30 of the PPA, 2006. *Concord Pragatee Consortium Ltd vs BPDB (Spl. Original)* 475

Public Procurement Act (XXIV of 2006)

Section 30

Public Procurement Rules, 2008

Rules 56 and 60—From a plain reading of the Rules 59 and 60, it appears that the forum created by the statute namely PPA, 2006 under section 30 of the same is amply empowered to adjudicate upon any sort of complaint or grievance related to arising out of procurement by a public body with the public money inasmuch as there are abundant provisions for passing interim order restraining the purchasing entity from entering into the contract until disposal of the complaint or appeal. *Concord Pragatee Consortium Ltd vs BPDB (Spl. Original)* 475

Trade Mark Act (XIX of 2009)

Section 42—Provisions did not mention about the user of registered trade mark within the territory of Bangladesh yet the scheme and object of Act indicates that unless the registered trade mark is used within the territory of Bangladesh for the purpose of business by affixing the mark on the body of the product and marketing the same within the territory of Bangladesh, then the registered trade mark cannot be treated to have been in use within the meaning of section 71 of the Act. *MD, Vegetable Oil Industries Ltd vs Van Den Heghs (Statutory Original)*... 450

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