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Editor

Justice Sheikh Hassan Arif

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# Supreme Court of Bangladesh

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# Supreme Court of Bangladesh

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4. Mr. Justice Md. Miftah Uddin Choudhury
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**64.** Mr. Justice Bhishmadev Chakrabortty

**65.** Mr. Justice Md. Iqbal Kabir

**66.** Mr. Justice Md. Salim

**67.** Mr. Justice Md. Shohrowardi

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**69.** Mr. Justice A. S. M. Abdul Mobin

**70.** Mr. Justice Md. Mostafizur Rahman

**71.** Mr. Justice Fatema Najib

**72.** Mr. Justice Md. Kamrul Hossain Mollah

**73.** Mr. Justice S M Kuddus Zaman

**74.** Mr. Justice Md. Atoar Rahman

**75.** Mr. Justice Khizir Hayat

**76.** Mr. Justice Sashanka Shekhar Sarkar

**77.** Mr. Justice Mohammad Ali

**78.** Mr. Justice Mohi Uddin Shamim

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**80.** Mr. Justice Md. Khairul Alam

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**91.** Mr. Justice Kazi Ebadoth Hossain

**92.** Mr. Justice K.M. Zahid Sarwar

**93.** Mr. Justice A.K.M. Zahirul Huq

**94.** Mr. Justice Kazi Zinat Hoque

*Justice Syed Mahmud Hossain*
*Chief Justice of Bangladesh*

**Supreme Court of Bangladesh**
**Dhaka-1000**

## *Message*

*An independent, capable and proactive judiciary is indispensable for protection and advancement of democracy and rule of law. In Bangladesh, the Judiciary also plays very significant role in securing rule of law and democracy.*

*The Judiciary, which is the last hope of the citizen, contributes vitally to the preservation of the social peace and order to settling legal disputes and thus promotes a harmonious and integrated society. The quantum of its contribution, however, largely depends upon the willingness of the people to present their problems before it and to submit to its judgments. What matters most, therefore, is the extent to which people have confidence in judicial impartiality. According to Justice Frankfurter "the confidence of the people is the ultimate reliance of the Court as an institution."*

*Article 111 of the Constitution of the People's Republic of Bangladesh envisages that the law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division shall be binding on all subordinate courts. By its different judgments, the Supreme Court, from time to time, enunciates some principles in order to keep the law predictable. The ratio and obiter of those judgments help the subordinate courts, government and other authorities in taking appropriate decision and thereby they may render even-handed justice to the people. The editors of the Supreme Court Online Bulletin (SCOB) took infinite pains in selecting some landmark judgments of the Supreme Court. Thereby, the judges, lawyers, law-makers, government executives, law-students, academics etc. will immensely be benefited.*

*I conclude by expressing my deepest appreciation to the editors, Mr. Justice Moyeenul Islam Chowdhury and Mr. Justice Sheikh Hassan Arif, and the research team who are rendering tremendous service in publishing SCOB.*

*In fine, I wish continuous and unremitting success as well as wider readership of this on line bulletin.*

***Justice Syed Mahmud Hossain***
*Chief Justice of Bangladesh*

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# Editorial

*Justice Sheikh Hassan Arif* •

After a few days of preparation, we are now proud of presenting an online law bulletin – Supreme Court Online Bulletin, in short **SCOB**, in order to provide for ready case references to the Hon'ble Judges, learned Advocates, other members of the legal community, media and the people at large. A surfeit of case laws are generated every year by both the Divisions of the Supreme Court of Bangladesh having far-reaching effect and impact on the functioning of the Judiciary as well as other vital organs and pillars of a democratic State, e.g., the Executive, Legislature and the Media. However, even the Judges of the Supreme Court find it difficult to cope with such quick legal developments due to the lack of proper communication apparatus which may, sometimes, be the cause of inconsistent and/or contradictory decisions by different Benches of the High Court Division on a particular legal issue. These inconsistencies, though rare, draw criticisms and harsh strictures from the Appellate Division, particularly when some Benches of the High Court Division issue Rules and/or pass orders which evidently transgress the legal parameters as set by the Appellate Division from time to time. In such cases, litigant people also get confused as to the real position of law regarding a particular issue. Considering these aspects, amongst others, the Supreme Court has taken the initiative to launch this online bulletin under the direct patronization of the Hon'ble Chief Justice of the Bangladesh and guidance from the Judicial Reform Committee of the Supreme Court. This purpose of dissemination is the **raison d'etre** of this Supreme Court Online Bulletin (SCOB).

In the struggle to establish the rule of law, the Supreme Court of Bangladesh, through its numerous judicial pronouncements on various issues of law and constitutional importance, has already made its presence heavily felt by the concerned stakeholders in this country. Having successfully grappled with different important constitutional issues such as the separation of the Judiciary from the Executive, restrictions on the amending power of the Parliament in respect of certain Articles of the Constitution touching the basic structures of the same, issuance of *Suo Motu* Rules by the High Court Division, power of the Appellate Division to review the judgments passed by it on the appeals preferred by the war-crime convicts, are some examples by which the Supreme Court has endeavoured to act in true sense and spirit as the guardian of the Constitution and principal protector of the rule of law. Nevertheless, the aforesaid huge accomplishments of the Supreme Court are not effectively known to the concerned players of the society because of a long-standing vacuum in the dissemination process. This law bulletin will, no doubt, try to bridge that vacuum to a great extent, knowing very well that it would be a daunting task altogether.

Though, initially, the plan was to publish one bulletin in each month, yet, considering the generation of voluminous case laws in future, we are keeping it open for the editors of tomorrow to publish, if necessary, more than one bulletin in a month. Accordingly, the word "Monthly", before the word "Bulletin" has been taken off and as such the name of this bulletin has been chosen as "Supreme Court Online Bulletin", in short – **"SCOB"**.

At the end, while we express our gratitude to the Hon'ble Chief Justice of Bangladesh, Judicial Reform Committee of the Supreme Court, our research associates, IT personnel and all others who have extended co-operation in preparing and publishing the SCOB, we welcome comments, constructive criticisms and suggestions in order to improve the quality of the SCOB from the legal fraternity and the media through our contact e-mail (scob@supremecourtcourt.gov.bd).

Thank you all.

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• At present, Presiding Judge of a Division Bench of the High Court Division of the Supreme Court of Bangladesh.

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## Appellate Division



## High Court Division

# Cases of the Appellate Division

| Sl. No. | Name of the Parties and Citation | Key Word | Short Ratio |
|---|---|---|---|
| **1.** | A.T.M. Azharul Islam. Vs. The Chief Prosecutor, International Crimes Tribunal, Dhaka, Bangladesh.<br><br>14 SCOB [2020] AD<br><br>(*SYED MAHMUD HOSSAIN, C. J*) | Crimes against Humanity; Genocide and War Crimes; Law of evidence; Hearsay evidence; Abetment; Form of charge in case of mass victims; Probative value of an uncrossed deposition; | The cardinal principle of assessment of evidence is that the entire evidence is to be considered as a whole and then a decision is to be arrived. There is no scope to consider one statement made in cross-examination in isolation.<br><br>It is the cardinal principle of law of evidence that hearsay evidence is to be considered together with circumstances and the material facts depicted. If hearsay evidence has probative value then it is admissible in evidence.<br><br>In order to incur criminal liability in a case of crime against humanity, the accused himself need not participate in all aspects of the criminal conduct.<br><br>It is of the essence of the crime of abetment that abettor should assist the principal culprits towards the commission of the offence. Participation *de facto* may sometimes be obscure in detail, it is established by the presumption *Juris et de jure* that actual presence plus prior abetment can mean nothing else but participation.<br><br>When a charge involves hundred of victims, it is not at all necessary for the prosecution to narrate the names of all the victims.<br><br>In a criminal case the prosecution must prove the charge brought against an accused beyond any shadow of reasonable doubt. Criminal cases are not like civil cases. In criminal case the accused may only take the plea of not guilty and the burden is entirely upon the prosecution to prove its case. Cross-examination is not also necessary on the entire deposition of a witness as it may damage the defence case. Non-cross-examination on a certain fact would not make the deposition of a witness on that point admitted facts**.** . |

# Cases of the Appellate Division

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| 2. | Palash Chandra Saha<br>Vs.<br>Shimul Rani Saha and others.<br><br>(*MUHAMMAD IMMAN ALI, J*)<br><br>14 SCOB [2020] AD | Suit for declaration, Adoption; | The adoptive father of the child to be adopted must belong to the same caste and that adoption would be valid if they belong to different sub-division of the same caste.<br><br>According to Hindu Law any act done in contravention of the Hindu texts which are in their nature mandatory cannot be said to be lawful by applying the principle of *factum valet.* Hence, the principle of *factum valet* is ineffectual in the case of adoption in contravention of the provision of legal texts.<br><br>Even if he was accepted as a family member, the legality of the adoption must be considered. The provision of Hindu Law is clear that there cannot be adoption across castes. In other words, a child from one caste cannot be legally adopted by a member of another caste. |
| 3. | Md. Abul Kaher Shahin Vs. Emran Rashid and another<br><br>(*Hasan Foez Siddique, J*)<br><br>14 SCOB [2020] AD | Dishonour of cheque, Section 118,138 of The Negotiable Instruments Act, 1881 ; | Once there is admission of the execution of the cheque or the same is proved to have been executed, the presumption under section 118(a) of the Act is raised that it is supported by consideration. The category of "stop payment cheque" would be subject to rebuttal and hence it would be an offence only if the drawer of the cheque fails to discharge the burden of rebuttal. The accused person can prove the non-existence of a consideration by raising a probable defence. If the accused discharges the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the complainant. He will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to grant of relief on the basis of negotiable instrument .<br><br>Where the amount promised shall depend on some other complementary facts or fulfillment of another promise and if any cheque is issued on that basis, but that promise is not fulfilled it will not create any obligation on the part of the drawer of the cheque or any right which can be claimed by the holder of the cheque. |

# Cases of the Appellate Division

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|---|---|---|---|
| **4.** | Abul Kasem Md. Kaiser<br>Vs.<br>Md. Ramjan Ali and others.<br><br>(*MIRZA HUSSAIN HAIDER, J*)<br><br>14 SCOB [2020] AD | Pre-emption, Extinguishment of Co-sharership; | The 62 DLR case has not overruled the contention that 'only by a partition suit or partition deed the co-sharership is extinguished'. So in this case by separating the Jama the pre-emptor and/or his predecessor having already lost her/his character of co-sharership in the case jote so the pre-emptor is no more a co-sharer and as such his right to pre-empt as a co-sharer does not exist anymore<br><br>Not only separation of Jama/Khatian by a party will cause him to cease to be a co-sharer in the jama but co-sharership will also be ceased by a final decree in a partition suit or by a registered deed of partition. That means either of the two will cause a person to cease his co-sharership in the case jote.<br><br>The appellant cannot take the plea of non-service of notice upon the other party once he has taken benefit of such mutation or separation of "Jama". Such plea,if any, can be taken only by the party affected by it or to whose disadvantage the same has been obtained and upon whom the notice was required to be served. But not the person at whose prayer separation has been made and who takes the benefit of such separation. |
| **5.** | Firoza Noor Khan and others<br>Vs.<br>Raisa Aziz Begum and others.<br><br>(Zinat Ara, J)<br><br>14 SCOB [2020] AD | Khas Mohal property of the Government; Article 104 of the Constitution; Complete Justice; | Any property owned by the Government is the property of the People's of the Republic of Bangladesh and the citizens of this country are the actual owners of such property. Therefore, no one can dispose of valuable Government properties at his/their sweet will to anyone else unlawfully.<br><br>The power of this Court under article 104 of the Constitution is an extensive one though it is not used often or randomly. It is generally used for doing complete justice in any cause or matter pending before it in rare occasions in exceptional or extra-Ordinary cases for avoiding miscarriage of justice.. Article 104 widens our hands so that this Division is not powerless in exceptional matters. The matters (appeals/CPLA) in our hands are matters requiring exercise of this power, to save a valuable property of the Government from the clutches of greedy land/property grabbers, that too with the active collaboration and help from the Government Officials. |

# Cases of the High Court Division

| Sl. No. | Name of the Parties and Citation | Key Word | Short Ratio |
|---|---|---|---|
| **1.** | Grameenphone Limited, represented the Chief Executive Officer, GP House, Bashundhara, Baridhara, Dhaka- 1229.<br>Vs.<br>Bangladesh Telecommunication Regulatory Commission (BTRC), represented by the Chairman, IEB Bhaban, Ramna, Dhaka-1000 and others<br><br>(*SYED REFAAT AHMED, J*)<br><br>14 SCOB [2020] HCD | The Bangladesh Telecommunication Regulation Act Section 63 and 65; | It is our finding further that section 65 in its entirety is the corridor within the statutory scheme through which the sanctity of the section 63 penal sanction must be gauged. Consequentially, any failure to trigger section 65 or any of its components necessarily leads to a statutory infraction resulting in a more fundamental constitutional infraction.<br><br>If the section 65 provisions are to be obliterated or to be considered a dead letter of the law one is necessarily at a loss to find other statutory mechanisms that may be called upon for due implementation of section 63. Furthermore, it is our unqualified view that the power to charge an administrative fine to a maximum of Tk. 300 Crore must always have an in-built mechanism of fair play. Otherwise one is visited with a scenario of administrative anarchy resulting from an exercise of unfettered discretion. |
| **2.** | Abdur Rahman and others<br>Vs.<br>Judge (District Judge) Arpita Shampparrti Prattarpan Appellate Tribunal, Brahmanbaria and others<br><br>*(Md. Ashfaqul Islam, J)*<br><br>14 SCOB [2020] HCD | Writ of Certionary: Maintainability | It is well settled that in writ certiorari this Division would be loath to interfere with a decision of a Tribunal in specific, if the same is not a perverse one or a gross miscarriage of justice has been done.<br><br>A writ of certiorari is maintainable only in a case where erroneous decision within it jurisdiction. Even if there is mere error of law that will not confer any power on the High Court Division to issue a writ of certiorari except where there is an error apparent on the face of the record, that means, the error must be something more than a mere error. The High Court Division can issue writ of certiorari only if it can be shown that the judgment has been obtained by fraud, collusion or corruption or where the tribunal has acted contrary to the principles of natural justice or where there is an error apparent on the face of the record or where the tribunal's conclusion is based on no evidence whatsoever or where the decision is vitiated by malafide. |
| **3.** | Dr. Nafia Farzana Chowdhury<br>Vs.<br>Bangabandhu Sheikh Mujib Medical | Equal protection of law in appointment; | If any particular case the selection committee abuse its power in violation of Article 31 of the Constitution, that may be a case for setting aside the result of a particular interview. |

# Cases of the High Court Division

| Sl. No. | Name of the Parties and Citation | Key Word | Short Ratio |
|---|---|---|---|
| | University (BSMMU), represented by its Vice Chancellor and others.<br>*(Zubayer Rahman Chowdhury, J)*<br>14 SCOB [2020] HCD | Unlawful Appointments not validated by rendering service; | If any appointment is given by the Authority in gross violation of the Rules, lapse of any period of time and rendering of service in the said post by the incumbent cannot clothe the said appointment with any legal validity. |
| **4.** | Feroza Begum and others<br>Vs.<br>Md. Nannu Mollah and others<br>(*A.K.M. Abdul Hakim: J.*)<br>14 SCOB [2020] HCD | Doctrine of past and closed transaction read with Sections 95 & 95A of the State Acquisition & Tenancy Act, 1950. | In the present case the Plaintiffs grandfather sold the suit property by registered saf-kabala deed dated 11.10.1963 and executed a deed of re-conveyance on that date with a condition of repurchase of the same within eight years period that is till 10.10.1971.The President's Order No.88 of 1972 came into effect on 03.08.1972 and following certain amendments therein by P.O No. 136 of 1972 and the condition giving right of repurchase having expired. The sale/transaction became past and closed transaction and the plaintiff was not entitled to get relief on the ground that the property was a mortgaged property. |
| **5.** | Md. Akram Ali and others<br>Vs.<br>Khasru Miah and others<br>(*Muhammad Khurshid Alam Sarkar, J*)<br>14 SCOB[2020] HCD | Partition Suit or Title Suit,<br>Ubi Jus ibi remedium,<br>Section 54, Order 20, Rule 18 and Order 26, Rule 13;<br>Joint tenants, | Simply remanding back the suit for proper evaluation of the much-discussed documentary evidences, there shall not be an effective adjudication of the suit.<br><br>Since in a partition suit, a person approaches the Civil Court with a grievance of not being able to enjoy his/her property absolutely or independently or peacefully and, in responding to the plaintiff's case, if the defendant questions the very title of the plaintiff, in that scenario, it is incumbent upon the Court to assess and determine the plaintiff's title, right and interest in the suit land.<br><br>If the plaintiff does not make proper prayer in the plaint, the suit must not be dismissed on the said ground; rather it would be the duty of the Court to frame appropriate issue/s on the basis of the pleadings and submissions put forwarded by all the parties to the suit and proceed with the suits towards its effective disposal. |
| **6.** | Md. Anwar Hossain, Proprietor of M/s. Pride Knit Wear Ltd. | An appeal under section 100(2) of the Trade | Prior use of trade mark and prior application for registration in case of identical marks will go in favour of the prior user. |

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| Sl. No. | Name of the Parties and Citation | Key Word | Short Ratio |
|---|---|---|---|
| | Vs.<br>Registrar, Patents, Designs and Trade Mark, Dhaka and another.<br><br>(*S.M. Maniruzzaman, J*)<br><br>14 SCOB [2019] HCD | Marks Act, 2009; | |
| **7.** | Md. Badaruddin being dead his heirs Most. Arjuda Khatun and others<br>Vs.<br>Md. Shahidullah Miah<br><br>(*Zafar Ahmed, J*)<br><br>14 SCOB [2020] HCD | Sale deeds, Article 113 of the Limitation Act, 1908, Baina dated, Time from which the period of limitation begins, Novation of contract, Performance of a contract, | Time consumed in the so called arbitration proceedings or waiting for subsequent refusal are of no assistance to the plaintiff.<br><br>Specific performance is a relief which the Court will not grant, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will admit. The rights of equity are rights which are given to litigants who are vigilant and not to those who sleep. |
| **8.** | Md. Giasuddin<br>Vs.<br>Govt. of Bangladesh, represented by the Secretary, Ministry of Primary and Mass Education, Bangladesh Secretariat, Ramna, Dhaka and others.<br><br>(*Naima Haider, J*)<br><br>14 SCOB [2020] HCD | Rules 2(Ga) & 9(1) of the অধিগ্রহণকৃত বেসরকারি প্রাথমিক বিদ্যালয়ের শিক্ষক (চাকুরী শর্তাবলী নির্ধারণ) বিধিমালা, ২০১৩ | The issue before the Honorable HCD is whether Rule 2(Ga) and Rule 9(1) of the 2013 Rules should be struck down.<br><br>Rule 2(Ga) define "কার্যকর চাকুরীকাল" which means that if a teacher renders, say 10 years of service prior to nationalization, his effective service period under the 2013 Rules shall be 50% thereof, i.e. 5 years. However, if the particular teacher's term of service is less than 4 years, then his previous service years shall not be counted after the nationalization. The provision is strange but not unreasonable. The nationalized teachers shall be entitled to different Government facilities including pension benefits. If Rule 2(Ga) was drafted differently to take account of the entire period of service prior to nationalization, then it would have had severe financial implications on the Government. Therefore, Rule 2(Ga) of the 2013 Rules is the mechanism used to reduce the financial exposure and at the same time, provide benefits to the teachers. It can be |

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| | | | argued that the effect of Rule 2(Ga) is that the petitioners expectation to service benefits is affected; however, expectation is not synonymous to "rights and entitlements". Loss of expectation of the petitioners cannot be a ground to strike down Rule 2(Ga) of the 2013 Rules.<br><br>Rules 9(1) অধিগ্রহণকৃত বেসরকারি প্রাথমিক বিদ্যালয়ের শিক্ষক (চাকুরী শর্তাবলী নির্ধারণ) বিধিমালা, ২০১৩ provides that the seniority shall be counted by reference to কার্যকর চাকুরীকালের ভিত্তিতে. This provision also states that the direct appointee shall be senior to the teacher who has been nationalized under the 2013 Rules despite the fact that his tenure of service is less than the tenure of service of the nationalized teacher. This is manifestly absurd, particularly when the teacher directly recruited and nationalized teachers are treated at par. The previous tenure of service in the private schools is recognized by the 2013 Rules. On the date when a nationalized teacher is appointed, he carries forward a deemed tenure of service. The deemed tenure of service recognized by first part of Rule 9(1) would cease to be recognized by second part of Rule 9(1). The second part of Rule 9(1) of the 2013 Rules renders the first part of the Rules 9(1) being "শিক্ষকের নিয়োগ প্রদানের তারিখ হইতে কার্যকর চাকুরীকালের ভিত্তিতে শিক্ষক পদে তাহার জ্যেষ্ঠতা গণনা করা হইবে" redundant.<br><br>It appears that the teachers who are nationalized are affected because their seniority would not be properly recognized. This would affect their পদোন্নতি, সিলেকশন গ্রেড এবং প্রযোজ্য টাইম স্কেল because under Rule 9(3) of the 2013 Rules নিয়োগ বিধির শর্ত পূরণ সাপেক্ষে, উপ-বিধি (১) ও (২) এর অধীন জ্যেষ্ঠতার ভিত্তিতে শিক্ষকগণ পদোন্নতি, সিলেকশন গ্রেড এবং প্রযোজ্য টাইম স্কেল প্রাপ্য হবেন। The Court has concluded that Rule 9(1) of the 2013 Rules is manifestly |

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| Sl. No. | Name of the Parties and Citation | Key Word | Short Ratio |
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| | | | unreasonable and self contradictory and therefore, is liable to be struck down. |
| **9.** | Md. Golam Morshed<br>Vs.<br>Court of the Executive Magistrate and General Certificate Officer, Dhaka, Deputy Commissioner's Office Building, Dhaka and another<br><br>(*MOYEENUL ISLAM CHOWDHURY, J*)<br><br>14 SCOB [2020] HCD | Sentence of Fine: whether it is a Public Demand; | Unquestionably the sentence of fine passed by any Criminal Court is not a "public demand" within the meaning of the Public Demands Recovery Act, 1913. As it is not a "public demand" within the meaning of the Public Demands Recovery Act, the question of realization of the fine amounts through initiation of the Certificate Case is out of the question. Such Certificate cases are an abuse of the process of law.<br><br>The realization of any fine amount under any sentence of fine of any Criminal Court cannot be effected by resorting to the provisions of the Public Demands Recovery Act, 1913. |
| **10.** | Md. Ibrahim<br>Vs.<br>The State<br><br>(*Md. Badruzzaman, J*)<br><br>14 SCOB [2020] HCD | Under section 9(4)(Kha) of Nari-O-Shishu Nirjatan Daman Ain 2000 (as amended in 2003);<br>FIR, Misuse of the privilege of bail, Ad-interim bail, Non-extension of bail, Section 498 of the Cr. P.C. | It is settled principle that bail is a very valuable right granted to an accused by the Court and once it is granted, it should not and ought not to be interfered with lightly except upon valid grounds and cogent reasons.<br><br>When an accused is enjoying the privilege of bail granted by the High Court Division for a limited period in a pending *rule* under section 498 of the Cr.P.C or in an appeal under special law, as the case may be, and he is regularly appearing before the Court below his bail cannot be cancelled and he cannot be taken into jail custody by the Court below only on the ground of non-extension of the period of bail by the High Court Division. If such situation arises, the Court below must wait for the result of the *rule* or the appeal, as the case may be, in which the accused was granted ad-interim bail. |
| **11.** | মোঃ নাজমুল হুদা ওরফে নাজমুর হুদা<br><br>বনাম<br><br>রাষ্ট্র এবং অন্য<br><br>(*বিচারপতি এম. ইনায়েতুর রহিম*)<br><br>14 SCOB [2020] HCD | দ্য কোড অব ক্রিমিনাল প্রসিডিউর, ১৮৯৮ এর ধারা ২৬৫সি। | আদালত দ্য কোড অব ক্রিমিনাল প্রসিডিউর, ১৮৯৮ এর ধারা ২৬৫সি এর বিধান অনুযায়ী তখনই একজন আসামীকে মামলা হতে অব্যাহতি দিতে পারবেন যদি নথি (রেকর্ড) এবং তৎসঙ্গে দাখিলকৃত কাগজাদি (documents submitted therewith) হতে প্রাথমিক দৃষ্টিতেই যদি দেখা যায় যে, ঐ আসামীর বিরুদ্ধে মামলার কার্যক্রম পরিচালনা করার জন্য পর্যাপ্ত কোন উপাদান (Sufficient ground for proceeding) নেই। আসামী পক্ষ শুধুমাত্র মামলার নথি এবং তৎসঙ্গে দাখিলকৃত কাগজাদির উপর তাঁর বক্তব্য উপস্থাপনের অধিকারী। এ পর্যায়ে আসামীর |

# Cases of the High Court Division

| Sl. No. | Name of the Parties and Citation | Key Word | Short Ratio |
|---|---|---|---|
| | | | দাখিলকৃত আত্মপক্ষ সমর্থনে কৈফিয়তের কাগজাদি বা বক্তব্য কিংবা আসামীর পেশা, পদবি বা অবস্থা (status) বিবেচনা করার সুযোগ নেই।<br><br>কোন আসামীর বিরুদ্ধে অভিযোগের প্রাথমিক/আপাত যথার্থতা থাকলে ( prima facie case) অভিযোগ গঠন পর্যায়ে তাঁকে অব্যাহতি দেয়ার কোন সুযোগ নেই। অভিযোগ গঠন পর্যায়ে আসামীর বিরুদ্ধে আনীত আপাতদৃষ্ট অভিযোগটি সত্য কিংবা মিথ্যা তা নির্ধারণ করার সুযোগ নেই; সেটি নির্ধারণ হবে বিচার প্রক্রিয়ার শেষে উপস্থাপিত সাক্ষ্য প্রমাণের ভিত্তিতে। |
| **12.** | National Warehouse . Vs. Anti-Corruption Commission and others<br><br>(*Md. Ruhul Quddus, J*)<br><br>14 SCOB [2020] HCD | Section 14 of the Money Laundering Protirodh Ain 2012 and Principles of Natural Justice in Criminal Justice System: | The principle of natural justice by way of service of prior show cause notice are to be complied with, where any legal or vested rights of a citizen or entity are going to be taken away by an administrative order. Non service of prior show cause notice can be a very strong ground against such administrative/quasi judicial order that generates different type of writ petitions amongst others. However, natural justice in the sense of prior show cause notice is not available in criminal justice system. The criminal law, however, provides procedural fairness in enquiry/investigation, ensures the right to defence of an accused and fair trial.<br><br>For the purpose of freezing/attachment of property under section 14 of the Act V of 2012, no prior show cause notice is necessary. It may alert the offender, prompt him to transfer or take the property beyond his possession immediately after receipt of the notice thus defeat the purpose of law.<br><br>The ACC can proceed with an application for freezing even before completion of the investigation, if there are any credible documents/probative materials or information, which are gathered during investigation, subject to fulfillment of the conditions as provided in section 14 (2) of the Act V of 2012. It will depend on the facts and circumstances of a particular case. Even in rare cases, an order of freezing/attachment of one's property can be passed when such documents/materials or information are available to the prosecuting/enquiring agency at the time of receiving the initial complaint or at the initial stage of pre-FIR enquiry, but this must not be a general practice. |

# Cases of the High Court Division

| Sl. No. | Name of the Parties and Citation | Key Word | Short Ratio |
|---|---|---|---|
| | | Section 16 of the Money Laundering Protirodh Ain 2012 : | Where despite a prolonged inquiry, no FIR is lodged and the ACC fails to produce any primary evidence regarding one's involvement in any offence of money laundering or any predicate offence, his right to maintain and operate bank account cannot be infringed at the whim of Anti-Corruption Commission.<br><br>A person aggrieved by an order passed under section 14 of the Money laundering Protirodh Ain (Act V of 2012), can prefer an appeal directly to the High Court Division under section 16 without approaching the Court below under section 15 of the Act. |
| **13.** | Pankaj Roy<br>Vs.<br>Alliance Securities & Management Limited and others.<br><br>(*Md. Mozibur Rahman Miah, J)*<br><br>14 SCOB [2020] HCD | Company matter, Article 45 of the Articles of association; Interim order, Board of directors, Modify the judgement, Administration of Justice; | Invariably, under no circumstances, this court can interfere with its own judgment which was even affirmed by the Honb'le Appellate Division. |
| **14.** | Pruesiau Aug Marma and another<br>Vs.<br>Aungmra Shang Marma and another<br><br>(*Kashefa Hussain, J*)<br><br>14 SCOB [2020] HCD | Temporary injunction, Mutation Case, Special statutory rules and regulations, Cittagong Hill Tracts Refgulation 1900, Customary laws of the Chittagong Hill Tracts, Article 152 of the Constitution of Bangladesh, Existing laws; Private parties regarding declaration of a deed, Registration of | Mandatory issuance of notice upon the statutory authorities before filing of any suit in accordance with the relevant laws and also taking into consideration the existing customary laws of the Chittagong Hill Tracts which contemplate mandatory service of notice to the concerned authorities prior to filing any suit.<br><br>Customary laws and usages of the Chittagong Hill Tracts are all within the ambits of law and as such they can not be violated. |

# Cases of the High Court Division

| Sl. No. | Name of the Parties and Citation | Key Word | Short Ratio |
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| | | the deed, Competence any of party. | |
| **15.** | The State<br>Vs.<br>Advocate Noor-E-Alam Uzzal and others<br><br>*(Md. Nazrul Islam Talukder, J)*<br><br>14 SCOB [2020] HCD | Contempt of Court; | Whether the conduct, behavior and activities like shouting, assaulting the Bench Officer and ransacking the case records, fall within the purview of contempt of court. Contempt may be constituted by any conduct that brings authority of the court into disrespect, disregard and/or disrepute or undermines the dignity and prestige of the court. By the aforesaid act of the Advocates, the administration of the justice and the court proceedings had been seriously interfered with and the course of justice had also been obstructed. The behavior and the conduct of the Advocates by beating and assaulting the Bench Officer is insulting, disrespectful and threatening to the administration of justice. |
| **16.** | আব্দুল্লা আল মামুন<br><br>-বনাম-<br><br>বাংলাদেশ সরকার ও অন্যান্য<br><br>*(বিচারপতি মোঃ আশরাফুল কামাল)*<br><br>14 SCOB [2020] HCD | Bangladesh Civil Service Recruitment Rules 1981 এর ৪(৩) (এ) (বি) উপবিধি: | দুরভিক্রম্য চারটি ধাপ তথা প্রয়োজনীয় শিক্ষাগত যোগ্যতা, এমসিকিউ, লিখিত ও মৌখিক পরীক্ষা অতিক্রম করে আসা একজন প্রার্থীকে বাংলাদেশের সর্বজন গ্রহণযোগ্য সাংবিধানিক প্রতিষ্ঠান তথা বাংলাদেশ সরকারী কর্ম কমিশন কর্তৃক নিয়োগের সুপারিশ করা সত্ত্বেও যথাযথ সংস্থা (appropriate agency) কর্তৃক কোনরূপ উপযুক্ত কারণ প্রদর্শন না করে নিয়োগের অনুপযুক্ত মর্মে মতামত প্রদান বেআইনী, সংবিধান বিরোধী |

**14 SCOB [2020] AD**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Syed Mahmud Hossain**
**-Chief Justice**
**Mr. Justice Hasan Foez Siddique**
**Ms. Justice Zinat Ara**
**Mr. Justice Md. Nuruzzaman**

**CRIMINAL APPEAL NO.12 of 2015**
(From the judgment and order dated 30.12.2014 passed by the International Crimes Tribunal-1 in ICT-BD Case **No.05 of 2013**.

A.T.M. Azharul Islam. : .....**Appellant.**

***-Versus-***

The Chief Prosecutor, International Crimes Tribunal, Dhaka, Bangladesh. : **.....Respondent.**

| | | |
|---|---|---|
| **For the Appellant**. | : | Mr. Khandaker Mahbub Hossain, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record. |
| **For the Respondent.** | : | Mr. Mahbubey Alam, Attorney General, Mr. Murad Reza, Additional Attormey General, Mr. Momtaz Uddin Fakir, Additional Attorney General and Mr. Biswajit Devnath, Deputy Attorney General, instructed by Mrs. Mahmuda Begum, Advocate-on-Record. |
| **Dates of Hearing** | : | **18. 06. 2019, 19. 06. 2019, 24. 06. 2019, 25. 06. 2019, 26. 06. 2019, 01. 07. 2019, 02. 07. 2019, 03. 07. 2019, 08. 07. 2019, 09. 07. 2019 and 10. 07. 2019.** |
| **Date of Judgment** | : | **The 31st October, 2019.** |

**Crimes against Humanity, Genocide and War Crimes; Law of evidence; Hearsay evidence; Abetment; Form of charge in case of mass victims; Probative value of an uncrossed depostion.**

**Editor's Note:**

This criminal appeal has been preferred by the convict appellant A.T.M. Azharul Islam against the judgment and order dated 30.12.2014 passed by the International Crimes Tribunal No. 1 convicting the appellant on charge nos. 2, 3, 4, 5, 6. The Tribunal acquitted him on charge no.1 and Government did not prefer any appeal against the same.

Charge No. 2: The Appellant was charged for abetting and facilitating the commission of offence of looting, arson and murder of 14 named and other unnamed civilians on 16th April 1971 at Moksedpur village in Dhap Para area in Rangpur as crimes against humanity as specified in sections 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973.

The Tribunal convicted the appellant and sentenced him with death.

The Appellate Division, by majority decision (Syed Mahmud Hossain, C.J., Hasan Foez Siddique, J., Md. Nuruzzaman, J.) affirmed the conviction and maintained the death sentence. Zinat Ara, J. (Minority View) dissented on the conviction and accordingly ordered acquittal.

Charge No. 3: The Appellant was charged for abetting and facilitating the commission of offences of looting, arson and murder of about 1200 unarmed people on 17th April 1971 at Jharuarbeel area in Rangpur as crimes against humanity and also genocide as specified in sections 3(2)(a)(g)(h) and 3(2)(c)(g)(h) respectively and for commission of above offences under sections 4(1) and 4(2) of the International Crimes (Tribunals) Act, 1973.

The Tribunal convicted the Appellant and sentenced him with death.

The Appellate Division, by majority decision (Syed Mahmud Hossain, C.J., Hasan Foez Siddique, J., Md. Nuruzzaman, J.) affirmed the conviction and maintained the death sentence. Zinat Ara, J. (Minority View) dissented on the conviction and accordingly ordered acquittal.

Charge No. 4: The Appellant was charged for abetting or conspiracy, persecuting, complicity in or failure to prevent commission of such crimes and the offences of killing of 4 Professors and a wife of one Professor of Rangpur Carmichael College and other inhuman acts on 30th April 1971 at the campus of Carmichael College under Kotwali Police Station of Rangpur as crimes against humanity and genocide as specified under sections 3(2)(a), 3(2)(c), 3(2)(g) and 3(2)(h) and commission of above offences under sections 4(1) and 4(2) of the International Crimes Tribunal Act 1973.

The Tribunal convicted the appellant and sentenced him with death.

The Appellate Division, by majority decision (Syed Mahmud Hossain, C.J., Hasan Foez Siddique, J., Md. Nuruzzaman, J.) affirmed the conviction and maintained the death sentence and Zinat Ara, J. (Minority View) agreed on the conviction but dissented on the sentence and accordingly sentenced him with life imprisonment with a fine of taka 10,000, in default, to suffer rigorous imprisonment for a further period of 2 years more.

Charge No. 5: The Appellant was charged for abetting, facilitating commission of offences of abduction, confinement, torture and rape of many women on between 25th March to 16th December, 1971 at Rangpur Town Hall as crimes against humanity as specified in sections 3(2)(a), 3(2)(g) and 3(2)(h) of the International Crimes (Tribunals) Act, 1973.

The Tribunal convicted the appellant and sentenced him with rigorous imprisonment for 25 years.

The Appellate Division allowed the appeal unanimously and acquitted the appellant.

Charge No. 6: The Appellant was charged for abetting, facilitating commission of offences of abduction, confinement and torture at Al-Badr Camp, Rangpur as crimes against humanity as specified in sections 3(2)(a), 3(2)(g) and 3(2)(h) of the International Crimes (Tribunals) Act, 1973 and for the commission of above offences under sections 4(1) and 4(2) of the Act. A civilian Rafiqul Hasan @ Nannu, a first year student of Rangpur Carmichael College was the victim of this offence.

The Tribunal convicted the appellant and sentenced him with rigorous imprisonment for 5 (five) years.

The Appellate Division affirmed the conviction and sentence unanimously.

## Majority view

**The cardinal principle of assessment of evidence is that the entire evidence is to be considered as a whole and then a decision is to be arrived. There is no scope to consider one statement made in cross-examination in isolation. ... (Para 111)**

**It is the cardinal principle of law of evidence that hearsay evidence is to be considered together with circumstances and the material facts depicted. If hearsay evidence has probative value then it is admissible in evidence. ... (Para 129)**

**In order to incur criminal liability in a case of crime against humanity, the accused himself need not participate in all aspects of the criminal conduct. ... (Para 134)**

**(Per Mr. Justice Syed Mahmud Hossain, CJ)**

**It is of the essence of the crime of abetment that abettor should assist the principal culprits towards the commission of the offence. Participation *de facto* may sometimes be obscure in detail, it is established by the presumption *Juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. ... (Para 243)**

**When a charge involves hundred of victims, it is not at all necessary for the prosecution to narrate the names of all the victims. ... (Para 233)**

**(Per Mr. Justice Hasan Foez Siddique)**

**Minority View**

**In a criminal case the prosecution must prove the charge brought against an accused beyond any shadow of reasonable doubt. Criminal cases are not like civil cases. In criminal case the accused may only take the plea of not guilty and the burden is entirely upon the prosecution to prove its case. Cross-examination is not also necessary on the entire deposition of a witness as it may damage the defence case. Non-cross-examination on a certain fact would not make the deposition of a witness on that point admitted facts. ... (Para 295)**

**(Per Madam Justice Zinnat Ara)**

## J U D G M E N T

**SYED MAHMUD HOSSAIN,C. J**. (**Majority View):**

1. Partition of Indiaand birth of two nations: Bangladesh had endured a long colonial rule administered by the British from 1757 to 1947. The partition gave birth to two countries—India and Pakistan. In undivided India, the Muslims and the Hindus were two major religious groups. During their regime the British applied the policy "divide and rule" based on religious division. As a result, many riots broke out at that time in which the Hindus and the Muslims killed one another on a large scale. It is in this context that Muhammad Ali Jinnah, the leader of the Muslim League in India, put forward his "Two Nations theory." This theory was based on the idea that Islam and Hinduism are two different streams which cannot go hand-in-hand. In 1947 India was divided on the basis of the "Two Nations" theory. Pakistan came into existence in two different portions of land comprising East and West Pakistan. In the East Pakistan, East Bengal, a portion of Assam and tribal areas of Chittagong Hill Tracts were included. On the other hand, West Pakistan comprised of four provinces-Punjab, Baluchistan, Sind and the North-West Frontier. After the partition of India, a large number of Hindus of East Bengal migrated to West Bengal and a large number of Bengali

Muslims and non-Bengali Muslims known as Biharis, migrated to East Pakistan. Culturally the Biharis were more akin to the West Pakistanis. They were Urdu speaking people. Muslims left India for Pakistan and Hindus left Pakistan for India. Massive communal violence took place during the process. Millions of lives were lost. Many became homeless, abandoning everything they had behind. In the whole process religious affinity was prioritized over geographical distance and cultural and linguistic differences.

2. Social Exploitation and Language Movement:

Since the very formation of Pakistan, the Western part branded the Eastern part as inferior, because it considered the Muslims in the Eastern Wing subordinate due to their social and cultural affiliation with the Hindu population. Historically, people from various religions had always co-existed peacefully in the East Wing, as they were naturally adopting practices and customs from one another, while tolerating everyone's traditions and beliefs. The West-Pakistani government was critical about the intimacy between the Muslim and the Hindu population. Even though the Muslims of the East Wing supported the partition, they were not willing to give up their own culture or language for the sake of becoming a Pakistani as envisioned by the elite of West-Pakistan.

3. The West-Pakistani government remained insensitive to the cultural sentiments of the East-Pakistani people. The selection of a national Pakistani language became a contentious issue since the onset of its genesis. The West-Pakistan government did not pay any heed to the language that predominated in East-Pakistan, namely Bengali. The number of Bengali speakers were higher in comparison with the number of Urdu speakers. Urdu was the language of the elite, used only by 7% of Pakistanis. In contrast, Bengali was spoken by 56% of Pakistanis. In 1948, the Government of the Dominion of Pakistan ordained Urdu as the sole national language, sparking extensive protests among the Bengali-speaking majority people of East Bengal. Despite constituting a majority of the Pakistani population, Bengalis constituted a small part of Pakistan's military, police and civil services. Ethnic and socio-economic discrimination against Bengali people aggravated and agitations arose in East Pakistan over sectional bias, neglect and insufficient allocation of resources and national wealth.

4. Dhirendranath Dutta, a member of the Pakistan Constituent Assembly, first raised the demand for making Bengali an official language of Pakistan along with Urdu. It was as early as February 25, 1948, that Dutta had raised the question during a session of the Pakistan Constituent Assembly drafting a constitution for newly created Pakistan.

The language movement was one of the first movements against the discrimination against Bengali people.

5. However, Muhammad Ali Jinnah, the First Governor-General of Pakistan, in a meeting in Dhaka, on 21st March, 1948, declared that Urdu and only Urdu shall be the official State Language of Pakistan. Bengali people strongly resisted this declaration. Students and intellectuals of East Pakistan protested and demanded that not Urdu alone but Bangla also should be one of the state languages. That is how the Language Movement began in 1948 in the province known as East Pakistan.

6. The West-Pakistani leaders did not consider this factor while choosing an official language. Mohammed Ali Jinnah the first Governor General, declared on the 24th of March 1948 during a conference in Dhaka University that Urdu will become the State language.

This declaration triggered a great outrage among the people of the Eastern Wing that became to be known as the Bengali Language Movement.

7. Students formed the 'State Language Action Committee' and worked tirelessly to make Bangla one of the state languages of Pakistan. The immediate starting point of the tragedy of 21stFebruary was that on 27thJanuary, 1952, the then Prime Minister of Pakistan Khwaja Nazimuddin announced at a public meeting that Urdu alone should be the state language of Pakistan. The students were infuriated at the announcement because Nazimuddin as chief minister of East Bengal in 1948 signed an agreement with the leaders of State Language Action Committee with a commitment to adopt a resolution of having Bangla as the other state language of Pakistan by the provincial Assembly.

8. Subsequently students of the Dhaka University and Dhaka Medical College took a robust role in the cause of the Language Movement and took a crucial decision and defied the wishes of politicians to violate Section 144 on 21st February, 1952. On their way at the site of the Medical College students' hostel number 12, at 3-30 PM, the police opened fire on the peaceful procession of students by an order of a Magistrate (a West Pakistani). Barkat, Rafiq, Jabbar, Shafiur and Salam, among others, sacrificed their precious young lives for honour and preservation of their mother language, Bangla.

9. This movement ultimately ended in the adoption of Bangla as one of the state languages of Pakistan in 1956. However, the movement was not isolated to this as it sowed the seeds for the independence movement of the Bangladesh which resulted in the liberation of Bangladesh as an independent state in 1971. The great Language Movement had been a historic and significant event in our national history.

10. Economic exploitation by the Pakistanis and Six point demand by the Father of the Nation:

The economic disparity created by the West Pakistanis was very severe. Although most of the foreign currrency of Pakistan was earned by exporting jute, which was only cultivated in East Pakistan, the per capita income of East Pakistan was far lower than that of West Pakistan and the difference grew higher as time passed. There was also a huge transfer of capital with negligible transfer of labor from East Pakistan to West Pakistan. Disparity regarding industrial development was also acute. The misery of East-Pakistan was due to the political hegemony of the Western Wing. East-Pakistan faced severe economic exploitation and the relation between the two wings was analogous to the ruthless economic abuse of the British colonial power over the subcontinent. Alike the British, the West-Pakistani government profited from the Eastern Wing but did not invest adequately in its development. The number of East-Pakistanis employed in the Western Wing, particularly in higher respectable positions was insignificant compared to that of West-Pakistanis. Even though the population size of West-Pakistan was smaller compared to that of East-Pakistan after the partition, a major share of national budget (75%) was spent on West-Pakistan, leaving a negligible portion for East-Pakistan. The latter was financially deprived although it was responsible for the generation of 62% of the revenue income. Gross negligence towards the region was evident in the distribution of other resources as well. The Western Wing had 25 times higher military personnel compared to that of the Eastern Wing. The indifference of the West-Pakistan government towards the development of East-Pakistan was visible through the per capita income of that period, which was 32% higher for West-Pakistan during the period of 1959-60 and 61% during 1969-1970. In 1947 there were only nine textile mills in West Pakistan, whereas there were 11 in East Pakistan. In 1971, West Pakistan had as many as 150 mills, but

there were only 26 in East Pakistan. The West Pakistanis actually made East Pakistan a protected market to sell their high priced products that could not compete in the world market.

11. During the war of 1965 between Pakistan and India, East-Pakistan was left with meagre military defense.

In this context, in 1966, Father of the Nation Bangabandhu Sheikh Mujibur Rahman drew up the Six Point Demand (known as the Six Point Movement or Charter of Freedom) to express the demands for economic development for the East Wing. The main features of the six point demand were:

(1) The character of the government shall be federal and parliamentary.

(2) The federal government shall be responsible only for defense and foreign affairs.

(3) There shall be two separate currencies mutually or freely convertible in each wing for each region, or in the alternative, a single currency subject to the establishment of a Federal Reserve System in which there will be regional federal reserve banks.

(4) Fiscal policy shall be the responsibility of the federating units. The federal government shall be provided with requisite revenue resources for meeting the requirements of defense and foreign affairs.

(5) Constitutional provisions shall be made to enable separate accounts to be maintained of the foreign exchange earnings of each of the federating units, under the control of the respective governments of the federating units.

(6) The government of the federating units shall be empowered to maintain a militia or paramilitary force in order to contribute effectively towards national security.

12. The focus of the Six Point Demand was on establishing Pakistan as a Federal State in order to consolidate the autonomy of the East Wing and its control over resources. Other aims of the demand were the creation of two separate currencies for the two wings; independent foreign reserves; East Wing's self-governance over its foreign exchange earnings and taxes from trade. Additionally, to raise and maintain a self-contained armed force in the Eastern Wing as they further demanded access to economic and military resources. The Six Point Demand gathered widespread support from the Eastern Wing but were rejected by the political power of the Western Wing. The Six Point Movement is a significant turnover in the history of Bangladesh. The six-point demand became a core component of the election campaign of Bangabandhu Sheikh Mujibur Rahman during the election of 1970. It embraced his campaign on yielding equal access to economic opportunities for everyone.

13. Agartala Conspiracy Case and 1969 Mass Movement:

The popularity of the Six-Point Demand of Bangabandhu Sheikh Mujibur Rahman instilled fear into the West-Pakistani government during the reign of General Ayub Khan. On the 19th of June 1968, the Ayub Khan government arrested Bangabandhu Sheikh Mujibur Rahman along with 34 other Bengali civil and military officers, charging them with conspiracy against Pakistan. The case is known as the Agartala conspiracy case because General Ayub Khan claimed that Bangabandhu Sheikh Mujib and his political associates were conspiring with the Indian Government in the city of Agartala (Tripura, India) to create an Independent Bangladesh. This case is also known as "State versus Sheikh Mujibur Rahman and others". Ayub Khan's intention to malign Bangabandhu Sheikh Mujibur Rahman while underestimating his popularity, failed. People of East-Pakistan were convinced

that the affair itself was a conspiracy against Bangabandhu Sheikh Mujibur Rahman and against East-Pakistan, and started a movement demanding the unconditional release of Bangabandhu. The revolt of the people of East-Pakistan became more fierce with the passage of time.

14. Different political parties and student organizations started movement throughout the country for autonomy of the East Bengal. People started chanting slogans for self governance. The movement for autonomy paved the way for movement for independence. Agitations by the people started gaining momentum. The six-point demand presented by the Bangabandhu Sheikh Mujibur Rahman became the demand of the people. When movement flared up across East Pakistan, President General Ayub Khan imposed martial law and handed over power to Army Chief General Yahya Khan. During the ongoing movement on 20 January,1969 one student named Asaduzzaman and on 24 January,1969 another student Motiur Rahman, were killed by the police. This atrocious act of police infuriated the people more and resulted in renaming "Ayub Gate" at Mohammadpur to "Asad Gate" and naming the garden in front of Bangabhaban as "Motiur Rahman Child Garden". On 15.02.1969 one of the accused persons of Agartala Conspiracy Case, Sergeant Zahurul Haque died after sustaining bullet injury in his prison cell. On 18$^{th}$February,1969, Proctor of the Rajshashi University Dr. Shamsuzzoha died when he was hit by bullet fired by the police. The news of the death of Dr. Samsuzzoha added fuel to the ongoing movement. A huge commotion followed and the Pakistan Government was compelled to withdraw the Agartala Conspiracy case on 22$^{nd}$February of 1969. The next day Bangabandhu Sheikh Mujibur Rahman and all other accused were freed from Dhaka Cantonment. This event heralded the most crucial victory of the people of the East-Pakistan against the Government of West-Pakistan.

15. Through this movement Bangabandhu Sheikh Mujibur Rahman became the unanimous leader of the Bengali nation. On 23$^{rd}$ February 1969 in a felicitation program organized in the Race Course grounds he was conferred the title "Bangabandhu" by the all party student movement parishad.

16. General Election of 1970:After assuming power General Yahya Khan announced the first general election in Pakistan's history, which was scheduled to take place on the 7th of December, 1970. On the 12$^{th}$of November a devastating cyclone hit the coast of East Pakistan - almost a million people died in one of the world's worst natural disasters. The Pakistani government did nothing for the distressed people. Those who had survived the cyclone fell sick and could not recover due to lack of medicine and started to die from lack of food and water. The Bengalis were enraged at the government's neglect. At this backdrop on the 7th of December, 1970, Pakistan's first General Election was held in a free and fair manner. The Generals of the Pakistan army assumed that a single political party would not obtain a majority, so they would all just fight amongst themselves. The army could use this as an excuse to remain in power and plunder the country. So General Yahya Khan was shocked to see the results of the election which were unbelievable. Out of 162 seats in East Pakistan, Bangabandhu's Awami League got 160 in the National Assembly. Along with the selected female candidates out of 313 seats of Pakistan National Assembly, East Pakistan's Awami League got 167, West Pakistan's Zulfikar Ali Bhutto got 88, and other parties together got the remaining 58. Bangabandhu clearly stated that as people cast their votes in favor of his six points, he would formulate the constitution based on these six points, and the country would be ruled by these six points. The Pakistan army then decided that no matter what, the Bengalis would not be allowed to rule Pakistan.

17. Non-cooperation Movement of 1971:

Following the victory of Bangabandhu Sheikh Mujibur Rahman, leader of Awami League, and his demands for East-Pakistan's development, General Yahya Khan summoned the Sessions of the National Assembly on 03.03.1971. Although Bangabandhu Sheikh Mujibur Rahman repeatedly announced that no harm to sovereignty or the Islamic character of Pakistan would be made, the West Pakistan leadership spread the word that the unity of the country was in danger. Therefore, instead of handing over power to the Awami League, the then President Yahia Khan "postponed the convening of the National Assembly, sine die".

18. When the postponement of the Assembly was announced on the radio, instantaneously the people erupted in protest. Educational institutions, offices, stores-everything were shut down immediately. Thousands of people took to the streets; Dhaka became a city of processions. The people began chanting slogans for independence: "Joy Bangla," "Bir Bangali Ostro Dhoro, Bangladesh Swadhin Koro" (Brave Bengalis, take up arms to liberate Bangladesh). Bangabandhu called a five-day hartal and an indefinite non-cooperation movement in Dhaka and the whole country. Through this no-nviolent movement, Bangabandhu said that the Pakistani administration was not to be cooperated in any way, and his words brought all of East Pakistan to a standstill. To control the situation, curfew was imposed-the students and the public broke the curfew and took to the streets. There were processions, slogans, rage everywhere, people dying under the army's gunfire-but nobody stopped. On the 2nd of March at the Dhaka University's historical banyan tree, the flag with Bangladesh's map was hoisted. On the 3rd of March at the Paltan Maidan, the Students' League meeting decided that Rabindranath Tagore's "Amar Sonar Bangla" would be Bangladesh's national anthem. After the five-day hartal on the 7th of March, Bangabandhu went to today's Suhrawardy Uddayan to deliver a speech. By then all of East Pakistan was following his rule. Tens of thousands of people came to listen to his speech; Suhrawardy Uddayan was literally turned into a sea of people. Bangabandhu announced in this famous speech, "The struggle, this time, is a struggle for our emancipation. The struggle, this time, is a struggle for our independence." There have been few speeches of this type in the history of the world. The speech brought together all the people and gave them the courage they needed to sacrifice their lives for the independence of their motherland. The people put up barricades to stop the Pakistani military. All over the country, along with black flags, the flags of an independent Bangladesh were flying. Right around this time General Yahya Khan was preparing to start the genocide. General Tikka Khan, known as the Butcher of Baluchistan, was sent to East Pakistan as governor, but none of the Justices in East Pakistan agreed to swear him in. Yahya Khan went to Dhaka on the 15th of March and pretended to have discussions with Bangabandhu while troops were secretly being brought in. War-ships with arms and ammunition tried to dock at the Chittagong port, but the people wouldn't let them. Bhutto joined the conspiracy on the 21st of March and came to Dhaka to pretend to have discussions.

19. The 23rd of March was Pakistan Day, but besides the army cantonment and the Government House, a single Pakistani flag could not be seen anywhere in Bangladesh. At Bangabandhu's house in Dhanmondi that day, the free Bangladesh flag was hoisted while 'Amar Sonar Bangla · was played. The next day was the 24th of March. There was an ominous feel in the country-it was as if the whole country's earth, sky, and air knew what was about to happen and was holding its breath wait.

20. Operation Searchlight:

Operation Searchlight is the planned genocide that took place on the 25th of March 1971 and was undertaken by the West-Pakistani government against its own citizens of the Eastern Wing.

General Yahya Khan conceived a genocide course of action of Bengali nationalists in order to punish the people of East-Pakistan for their denial to follow the orders of the West-Pakistani Government. He arranged a military crackdown to be executed during the night of the 25th of March 1971, which aimed at eliminating the force of Bengali Nationalism from Pakistan. The objective of Operation Searchlight was to eradicate all Bengali Nationalists including political and military oppositions within a month. The intention was to take absolute control over all major cities dominated by the Nationalist rebels. Consequently, the people of East-Pakistan witnessed one of the most cruel genocides in history. Troops from West-Pakistan marched secretly towards East-Pakistan and on the night of the 25th of March 1971, the Pakistani military started their operation in Dhaka, the present capital city of Bangladesh. The same night, Bangabandhu was arrested and taken to West-Pakistan. Before his arrest, Bangabandhu declared the independence of Bangladesh-an Independent sovereign country. The declaration of independence was transmitted throughout East-Pakistan via an E.P.R. transmitter. Although the declaration was made on the 25th of March, its transmission took place after midnight. Since then, the 26th of March is celebrated as the Independence Day of Bangladesh.

21. The victims of this operation originated from all layers of the Bengali social strata. However, certain groups were primarily targeted, such as the students of Dhaka University. Two student dormitories of the Dhaka University were attacked and the Pakistani military killed around 7000 students in cold blood during one night. The military officers forced the students to dig up their own mass graves before murdering them. Teachers and employees of Dhaka University also lost their lives at the hands of the Pakistani military. The Pakistani military did not spare civilians even though the main targets were politicians (especially supporters of Awami League), activists and people demanding independence of the Eastern Wing. Another target was the inhabitants of Hindu majority areas. The Pakistani military killed innocent people, burnt houses and destroyed places of worship of Hindus. Operation Searchlight led to the massacre of 30,000 Bengalis in a week. Almost half of the population of Dhaka fled the city in search for safe shelters elsewhere. Contrary to its objectives, the military operation, in essence designed to exterminate nationalist tendencies, gave rise to the birth of the new nation of Bangladesh. Operation Searchlight created terror but at the same time encouraged the determination of the people of East-Pakistan to secede from the oppressive Central Government. Operation Searchlight implemented its schemes in avoiding international attention as all foreign journalists were deported and radio operations were shut down to prevent any sort of communication. A journalist named Simon John Dring stayed secretly and disseminated information to the world about the genocide and the Liberation War that lasted 9 months in which 3 million Bengali people died. In return for his bravery, Simon Dring won several awards for his contribution and was later solemnly recognized as a citizen of Bangladesh.

22. The Liberation War (March to December 1971):

Following the massacre of the 25th of March 1971, Bengalis started fighting against the Pakistani military with every resource they had. Ordinary Bengalis, especially young people, who had no knowledge or training to fight in a war, risked their lives and the lives of their family members for the sake of making Bangladesh an independent country. Following the "Black Night" of 25th of March, the atrocities of the Pakistani military aggravated. The operation was extended to the entire region of East-Pakistan.

23. The Bengali Nationalists assembled an armed force called "Mukti Bahini" (The Force of Independence). The Bengali military officers of East-Pakistan took charge over the military operations of the Bengali nationalists. They divided East-Pakistan in 11 sectors in order to conduct their guerrilla operations against the West-Pakistani military. In the meantime, the Provisional Government of the People's Republic of Bangladesh was installed in Mujibnagar. Father of the Nation Bangabandhu Sheikh Mujibur Rahman who was a prisoner of the West-Pakistan government during that time was made the President and Tajuddin Ahmed was made the Prime Minister of Bangladesh. This event led to the official declaration of Bangladesh as an independent state.

24. Refugee Crisis:

While a lot of Bengalis joined the guerrilla force favouring independence, many others, particularly women and children, fled the country and took refuge in the closest neighbouring country-India. According to an estimate, the number of refugees taking shelter in India during the liberation war was about 10 million. The Indian government came under huge pressure to provide resources and space for the refugees. The Prime Minister of India during that period, Indira Gandhi, expressed concern over this issue but continued supporting the people of Bangladesh in their struggle for independence. Refugee camps were built in areas nearby Bangladesh such as West Bengal, Bihar, Assam, Meghalaya and Tripura.

25. The Rajakars:

Political groups based on religious values such as the Jamaat-E-Islami swore allegiance to the West-Pakistani government when the liberation war of Bangladesh began. Despite being Bengalis, the political leaders and supporters of Jamaat-E-Islami collaborated with the Pakistani army in their atrocities against Bengalis. It created branches in both West-andEast-Pakistan with the new objective of creating an Islamic state. When Bengali nationalists demanded separation from West-Pakistan, the Jamaat-E-Islami leaders of East-Pakistan provided full support to the West-Pakistani government. In the name of religion, they betrayed the people of their own land. Their loyalty and support towards the West-Pakistani military was to the extent that they managed to create armed forces of their own that assisted the military operations of West-Pakistan. The latter government established the "East-Pakistan Central Peace Committee" (Shanti Bahini) and made Ghulam Azam, the leader of Jamaat-E-Islami in East-Pakistan, the Chief of Shanti Committee. The Shanti Committee or Bahini was responsible for committing horrendous war crimes, such as killings of civilians and non-combatants and raping Bengali women. One of the main tasks of the Rajakar groupsthe Al-Badar and Al-Shamswas to generate lists of the details of freedom fighters, which were consequently entrusted to the West-Pakistani military. The latter identified the families of the aforementioned freedin fighters, tortured them in return for information and eventually killed them. The most horrific transgression committed by the Rajakar groups was the abduction of Bengali women, which were transported to West-Pakistani military camps for the entertainment of Pakistani soldiers. During the liberation war, around 200,000 to 400,000 women became victims of rape and sexual slavery. Al-Badar, which was mainly created by the Islami Chatra Sangha, the student wing of the Jamaat-E-Islami in East-Pakistan, was specifically involved in killing "the intellectual people" (known as Budhijibi in Bengali) such as teachers, scholars and social activists.

26. Atrocities Committed by the Pakistani Army:The West-Pakistani army showed no compassion for Bengalis.The rules of engagement were at no time adhered to. The convoys of the West-Pakistani army would kill civilians without any mercy. They would bring

Bengalis as prisoners and kill them remorselessly in batches. According to witnesses, the West-Pakistani army were having the capacity to torch and murder anyone that was obstructing their way. Their preferred targets were religious minorities such as Hindus. They would kill large number of Hindu men at once and would abduct women and girls.

27. International Support:

Bangladesh received continuous moral support from India since the beginning of the Liberation War. Indira Gandhi, the Prime Minister of India during that time, was able to secure support from the Soviet Union, The United Kingdom and France to ensure that there would be no directives in favour of Pakistan in the United Nations Security Council. In contrast, Pakistan received support from the United States and China. The United States provided ammunition while China provided moral advocacy. In spite of the protection and encouragement from the United States, Pakistan did not have high chances of winning the war because of the Soviet Union which played against the efforts of the United States during the war.

28. The Surrender of Pakistani Army and Victory of Bangladesh:

When West-Pakistan launched attacks against India on the 3rd of December 1971, the Indian military forces joined Bangladeshi guerrilla forces to fight against the West-Pakistani military. The latter did not receive any support during this crucial period of the war although they were expecting military aid from the United States and China. West-Pakistani military camps were attacked and they lost control over their previously captured territories. Consequently, they had to accept defeat and capitulate to the joint forces. Finally, in the afternoon of the 16th of December 1971, General Niazi of West-Pakistan signed the agreement of surrender. After a bloodbath of 9 months, Bangladesh was finally an Independent State. Today Bangladesh, celebrates 16th December as Victory Day.

[Edited and extracted from *Muhammad Zafar Iqbal, History of the Liberation War (Proteeti, Dhaka 2008); Wardatul Akmam*, Atrocities against humanity during the liberation war in Bangladesh: a case of genocide (Journal of Genocide Research (2002); 1971 Liberation War, birth of Bangladesh and comparison with present day Pakistan (European Foundation for South Asian Studies, Amsterdam 2017].

29. Liberation War in the Eyes of Foreign Writers:

*(The Duel: Pakistan on the flight path of American power*
*by Tariq Ali, Material Exhibit-II)*

Jinnah's Pakistan died on March 26, 1971, with East Bengal drowned in blood. Two Senior West Pakistanis had, to their credit, resigned in protest against what was about to happen. Admiral Ahsan and General Yaqub left the province after their appeals to Islamabad had been rejected. Both men had strongly opposed a military solution. Bhutto, on the other hand, backed the invasion. "Thank God, Pakistan has been saved," he declared, aligning himself with the disaster that lay ahead. Rahman (Bangabandhu) was arrested and several hundred nationalist and left-wing intellectuals, activists, and students were killed in a carefully organized massacre. The lists of victims had been prepared with the help of local Islamist vigilantes, whose party, the Jamaat-e-Islami, had lost badly in the elections. Soldiers were told that Bengalis were relatively recent converts to Islam and hence not "proper Muslims"-their genes needed improving. This was the justification for the campaign of mass rape.

30. The military shelled Dhaka University. Artillery units flattened working-class districts; trade-union and newspaper offices were burned to the ground. Soldiers invaded the women's hostel on the university campus, raping and killing many residents. With the help of the intelligence agencies and local collaborators, mainly Islamist activists, lists of nationalist and Communist intellectuals had been prepared (as in Indonesia in 1965), and they were now picked up and killed. Some had been close friends of mine. I was both sad and angry. I had predicted this tragedy, while hoping it might be avoided.

31. Operation Searchlight was brutal, but ineffective. Killing students and intellectuals did not lead to the quick and clear victory sought by the Pakistani Generals. Once the initial attack had failed, the military with the help of local Islamist volunteers (members of the Jamaat-e-Islami) began to kill. Tens of thousands were exterminated. These were crimes according to any international law.

32. Bangladesh: The unfinished Revolution:
*(By Lawrence Lifschultz, Material Exhibit-III)*

But the national question was not destined to be so easily resolved. The 1970 elections brought a sweeping victory for Sheikh Mujibur Rahman's Awami League in East Pakistan. In the provinces of the Frontier and Baluchistan the National Awami Party (N.A.P.), led by Wali Khan, won control of the Provincial governments. Responsible for the political triumph of the Awami League and the N.A.P. was the fact that both reflected the national aspirations of Bengal, Baluchistan, and the Frontier. Each had laid down as the leading principle of its programme the establishment of broad autonomous rights for the provinces within a democratic republic.

The Awami League won 167 out of the 169 seats from East Bengal in the National Assembly of the unified Pakistan. This constituted an absolute majority in the assembly and meant that Mujibur Rahman should have become the Prime Minister of Pakistan. But, as a Bengali scholar pointed out:

"At that point it was clear that if the elected National Assembly was called into being, the Awami League would easily be able to enact a constitution based on its autonomy programmes, and this would in turn convert Pakistan into nothing more than a loose confederation. As an elite group with high salaries and entrenched privileges, spending more than half the country's yearly budget, the armed forces had a material stake in keeping East Bengal as an integral part of Pakistan."

33. Pakistan's military leadership chose not to transfer power to the elected Awami League administration. Zulfikar Ali Bhutto, leader of Pakistan's People's Party, which had won majorities in the provinces of Sindh and the Punjab with 81 seats in the National Assembly, was instrumental in the military authorities' refusal to convene the National Assembly. In demagogic style Bhutto declared that the Punjab and the Sindh were the 'bastions of power' in Pakistan and that, since his party now dominated those provinces, he would not accept any constitution determined by the 'brute majority' of the Awami League. Bhutto threatened to boycott the assembly if Mujib became Prime Minister on a platform of transforming Pakistan into a loose confederation of provinces.

On March 1st 1971 the martial law authorities announced an indefinite postponement of the date for convening the National Assembly originally scheduled for March 3rd. The reaction in East Pakistan was immediate and violent. Demands for complete independence were issued by the powerful and militant student federation, the Chattra League. The Military Junta of Pakistan entered into new negotiations with the Awami League leadership while a

mass movement based on non-cooperation and strikes crippled East Bengal. The negotiations, however, were merely a ruse for a massive military build-up. On the night of March 25th 1971 the most violent and brutal act of political repression in South Asian history took place. Tanks and armoured personnel carriers of the Pakistan Army rumbled through Dacca. It was remembered as *'Kala Ratri'* or 'The Black Night', and on the first evening alone thousands were killed in the indiscriminate firing and shelling. Details of these events have been extensively published elsewhere.

34.WITNESS TO SURRENDER
*(SIDDIQ SALIK, Material Exhibit-IV)*

These elements were organized into two groups. The elderly and prominent among them formed Peace Committees, while the young and able-bodied were recruited as Razakars(volunteers). The Committees were formed in Dacca as well as in the rural areas and they served as a useful link between the Army and the local people. At the same time, they earned the wrath of the rebels and 250 of them were killed, wounded or kidnapped.

35. Razakars were raised to augment the strength of the West Pakistani troops and to give a sense of participation to the local population. Their manpower rose to nearly 50,000 as against a target of 100,000. In September, a political delegation from West Pakistan complained to General Niazi that he had raised an army of Jamaat-e-Islami nominees. The general called me to his office and said, 'From now on, you will call the Razakars, *Al-Badr* and *Ash-Shams* to give the impression that they do not belong to one single party'. I complied.

(The above book was referred to show that Jamaat-e-Islami and its student front collaborated with the Pakistani Army from the very beginging of the Liberation War of Bangladesh).

36. This criminal appeal under section 21(1) of the International Crimes (Tribunal) Act,1973 has been preferred by the convict-appellant A.T.M. Azharul Islam against the judgment and order dated 30.12.2014 passed by the International Crimes Tribunal No.1 in ICT-BD Case No.05 of 2013 convicting the appellant on Charge Nos.2, 3, 4, 5 and 6 for the offences of Crimes against Humanity under section 3(2)(a)(g)(h)(c) read with section 4(1) and 4(2) of the International Crimes (Tribunals)Act,1973 and sentencing him to death in respect of Charge Nos.2, 3 and 4, to 25 yearsimprisonment in respect of Charge No.5 and to 5 years imprisonment in respect of Charge No.6 under section 20(2) of the said Act of 1973.

37.Appellant A.T.M. Azharul Islam was arrested and produced before the Tribunal on 23.08.2012 in pursuance of warrant of arrest issued against him by the Tribunal.

38. On 18.07.2013, the Chief Prosecutor submitted formal charges under section 9(1) of the Act on the basis of investigation report of the Investigation Agency. In the formal charges, it has been alleged that during War of Liberation in 1971, the appellant as president of Islami Chhatra Sangha, Rangpur Unit had committed crimes against Humanity and Genocide including abetting, aiding, participating, and providing moral support to commit such types of crimes in different parts of Rangpur. On perusal of formal charges, statements of witnesses and documents submitted by the Prosecution, the Tribunal took cognizance of offences as mentioned in section 3(2) of the Act on 25.07.2013 against the accused. The International Crimes Tribunal No.1 directed the prosecution to supply copies of formal

charges, statements of the witnesses and list of witnesses to the appellant for preparation of defence.

39.A.T.M. Azharul Islam denied the charges brought against him. His case was that he was not the Commander of Al-Badr Bahini of Rangpur District during the Liberation War in 1971. It is further contended that he never aided, abetted, facilitated or participated in any offence of crime against Humanity and Genocide as mentioned in the charges. The appellant has been implicated in this case by the present Government for political victimization because the appellant had taken the charge of Secretary General of Jamat-E-Islam after arrest of its Secretary General Ali Ahsan Mohammad Mojahid.

40. *The International Crimes (Tribunals) Act,1973 (ICTA):*

The perpetrators of crimes of a universally abhorrent nature are *hostis humani generis*-enemies of all people. These crimes include war crimes, genocide, crimes against humanity, aggression, *etc.* Irrefutably, the war crimes and crimes against humanity committed during the Liberation war of Bangladesh in 1971 exceeded the brutalities and dreadfulness of war crimes committed in contemporary times. With the aim of establishing durable peace and justice, and bringing the perpetrators of atrocities committed during the Liberation war in 1971 to justice, a legislation known as the International Crimes (Tribunals) Act,1973('ICTA') was enacted by our Parliament.

41. The ICT-BD (International Crimes Tribunals-Bangladesh) is a purely domestic tribunal. In other words, it is a national judicial mechanism that has been established to try crimes to an international nature which have been criminalised pursuant to domestic legislation of Bangladesh. Therefore, while the Tribunal's name includes the word "international" and it possesses jurisdiction over crimes, such as crimes against humanity, crimes against peace, genocide and war crimes, it would be wrong to assume that the Tribunal must be treated as an 'international tribunal' as per the International criminal Tribunal for Rwanda ('ICTR'), International Criminal Tribunal for former Yugoslavia('ICTY'), Special Court for Sierra Leone ('SCSL'), Extraordinary Chambers in the Courts of Cambodia ('ECCC'), International Criminal Court ('ICC') and others.

42. The legitimacy of the ICTA stems from its adoption by an overwhelming decision of the Bangladesh Parliament, which is a democratically elected body of representatives and constitutionally mandated to enact legislation. As such, the ICT-BD can only be interpreted in light of the framework set out by ICTA, and not any other legal instruments of international nature. It should, however, be noted that ICTA refers to, and expressly adopts, a variety of international legal standards. Nevertheless, respect for a country's domestic sovereignty and its people's democratic will require ICTA to be considered as the first and predominant point of reference.

43. The proceedings before the Tribunal shall commence upon submissions of the "formal charge" by the prosecution prepared on the basis of Investigation Report submitted by Investigation Agency, established under ICTA. The challenge of collecting and organizing evidence is not insurmountable, even after, passage of 40 years. The ICT-BD will consider all probative evidence regardless of its format, unless the rights of the accused are deemed to be prejudiced by the admission of said evidence. Section 19(1) of the ICTA noted that the Tribunal "shall not be bound by technical rules of evidence." Section 19 provides for the possibility of admitting reports, photographs, films and other materials carrying by Rule 44 of

the Rules of Procedure, which notes the Tribunal's discretion to "exclude any evidence which does not inspire any confidence in it."

44. No one can be convicted unless the charge brought against him is proved "beyond reasonable doubt". This is the normal and universally settled criminal jurisprudence that all the courts constituted under valid legislation will follow. This norm, due to its settled nature, does not need to be embodied in ICTA for the Tribunal to remain bound to respect it.

45. The Tribunal's legal framework reflects this commitment to proof beyond reasonable doubt. Rule 50 requires the burden of proving the charge to lie upon the prosecution. More recently, the Tribunal adopted Rule 43(2) which states that a person charged with crimes as described under section 3(2) of the Act shall be presumed innocent until found guilty.

46. Before considering the charges seriatim, it would be proper to have a brief account of the appellant A.T.M. Azharul Islam.

On 28.02.1952, A.T.M. Azharul Islam was born in Rangpur. He took his early education in 1968 from Rangpur Zilla School.

During General Election of 1970 convict-appellant was a leader of ICS (Islami Chhatra Sangha) and in this respect there are oral and documentary evidence.

47. P.W.3, Moklesur Rahman Sarker is from Police Station Badargonj.He stated in his examination-in-Chief that he knew A.T.M. Azharul Islam because in 1971 he came to their locality to campaign in favour of the candidate of Jamat-E-Islami. He denied the suggestion that the statement that this witness knew Jamat leader because he came to this witness's locality to campaign in favour of the candidate of Jamat-E-Islami is false, concocted, imaginary and not true.

48. P.W.4, Meseruddin was the Principal of Badargonj Degree College in 1970. He was the student of Carmicheal College. He stated regarding existence of Islami Chhatra Sangha in that College saying that at that time there were student wings of Ayub Khan's NSF and Islami Chhatra Sangha of Jamat-E-Islami. Referring to the General Election of 1970, P.W.4 stated that during that election A.T.M. Azharul Islam came to campaign in favour of the candidate of Jamet-E-Islami as a student leader of Jamat-E-Islami and as a resident of that locality.

49. The convict appellant is from Badargonj and in the election of 1970, the jamat candidate was also from Badargonj and regarding the same, he stated that during that election Mir Afzal Hossain, the candidate of Jamat-E-Islami hailed from Badargonj. Suggestion was given to P.W.4 from defence to the effect that convict appellant did not participate in election campaign, but P.W.4 denied the suggestion and stated that it is not a fact that A.T.M. Azharul Islam did not participate in the election campaign as a student leader of Jamat-E-Islami in 1970. In cross-examination, P.W.4 asserted that convict-appellant was a student leader of Carmicheal College, Rangpur. He further stated that he saw the convict-appellant as a student of HSC in Carmicheal College, Rangpur.

50. P.W.5, Md. Abdur Rahman, is also from Badargonj.Regarding the political status of the appellant in 1971, he stated in cross-examination that it is not a fact that he did not know A.T.M. Azharul Islam in 1971. But he did not know whether A.T.M. Azharul Islam knew him or not. This witness spontaneously stated that as a leader of the locality, he is known by all but he did not know whether the leaders know everybody. This witness further stated in

cross-examination regarding participation of the appellant in election campaign in 1970 saying that the appellant took part in the campaign of election of 1970 as a worker of Jamat-E-Islami. He denied that A.T.M. Azharul Islam did not participate in the election campaign as a worker of Jamat-E-Islami. P.W.5 stated that the appellant was the President of Islami Chhatra Sangha and he was a student of Carmicheal College which he knew from before.

51. P.W.6, Md. Mokbul Hossain is also from Badargonj P.S. He stated in his examination-in-chief that during the election of 1970, A.T.M. Azharul Islam along with Afzal Hossain and Moklesur Rahman came to their area to campaign in the election. He knew Azharul Islam from that time. P.W.6 denied the suggestion of the defence stating that A.T.M. Azharul Islam did not come with Afzal Hossain and Moklesur Rahman to campaign in their area in the election of 1970. He denied thatthe statements that A.T.M. Azharul Islam came to their locality during the election campaign in 1970 and he knew him beforehand were concocted and not correct.

52. P.W.7, Md. Aminul Islam was declared hostile. In his cross-examination by the prosecution he stated that he came to depose in the case brought against A.T.M. Azharul Islam for the atrocities committed by him during the War of Liberation in 1971.

53. P.W.8, Md. Mojibur Rahman Master is from Badrgonj. He is a B.A. B.Ed. In 1971 he was a teacher of Syampur High School at Badargonj. At that time he was aged about 33/34. He stated in his examination-in-Chief that during the National and Provincial Assembly Elections,the candidates of Jamat-E-Islami were Muklesur Rahman and Mir Afzal Hossain respectively. He further deposed that he campaigned in favour of the candidates of Awami-League and that on the other hand, A.T.M. Azharul Islam campaigned in favour of the candidates of the Jamat-E-Islami. He further stated in his examination-in-chief that he was saying about Azaharul Islam whom he knew from before 1971. A.T.M. Azharul Islam was a student of Rangpur Carmicheal College. He was the President of Islami Chattra Sangha of Carmicheal College Branch and he was an Al-Badr Commander in 1971. No suggestion was given to him to the effect that the aforesaid statement was false and concocted and rather, suggestion was given to him that he did not disclose the aforesaid fact to anybody.

54. P.W.9, Sova Kar, used to live in the campus of Carmicheal College with her martyred brother Chittya Ranjan Roy. Regarding convict-appellant, she stated that she could recognize one of the persons standing and that he was A.T.M. Azharul Islam, who was a leader of Islami Chhatra Sangha. Suggestion was given to her (P.W.9) that those statements were tutored by her brother Shattaya Ranjan Roy and the Investigation Officer of the casewhich she denied. No suggestion was given to her to the effect that the appellant was not a leader of Islamic Organization in Carmicheal College.

55. P.W.12, Md. Rafiqul Islam @ Nannu was aged about 18 years at the relevant time. He stated in his examination-in-chief that he was involved in the politics of Student League. He used to go to Carmicheal College. At that time, A.T.M. Azharul Islam was the 2$^{nd}$ year student of science of the intermediate section of the college and that the appellant was involved in the politics of Islami Chhatra Sangha. When this witness used to go to Rangpur Press Club to read newspaper, he met A.T.M. Azharul Islam and his friends there. In 1971 he had an altercation with A.T.M. Azharul Islam in connection with political affairs of the country. He further stated that A.T.M. Azharul Islam was not only the President of Islami Chhatra Sangha of Rangpur District but he was also Al-Badr Commander. He further stated that he came to know from his neighbours that A.T.M. Azharul Islam used to maintain

contact with Pak-Army in the Cantonment by riding his 50 C.C. motorcycle. Suggestion was given to this witness regarding those statements but this witness asserted that his statements are true.

56. P.W.13,is Advocate Rathis Chandra Bhowmic. His father was the President of Awami Krisak League in 1971. He stated that his father was in hospital due to bullet injury by Pak-Army. He stated in his examination-in-chief that those who went to hospital to see his father stated that A.T.M. Azharul Islam, President of Islami Chhatra Sangha of Rangpur Branch was involved in murder and torture. Suggestion was given to him regarding the aforesaid statement but he denied the suggestion.

57. P.W.16. is A.Y.M. Moazzem Ali, son of martyred Zorses Ali. He stated in his examination-in-chief that after Liberation, this witness came to know from Montu doctor about the persons responsible for torturing and killing of his father and others in Rangpur Cantonment. He told him that many from Islami Chhatra Sangha were involved in the torture and murder and that among them President of Islami Chattra Sangha, A.T.M. Azharul Islam was also there. He stated that Montu doctor died in 1989. He denied the suggestion of the defence regarding the aforesaid statement.

58. P.W.17, Tapan Kumar Adhikari was a student of Carmicheal College. His father and brother were abducted by Pak-Army on 28.03.1971. He stated in his examination-in-chief that when they went to meet with Montu doctor he told them about the torture on them in Rangpur Cantonment and Montu doctor also toldthat the people of Islami Chhatra Sangha used to go there. Among them A.T.M. Azharul Islam, the President of Islami Chhatra Sangha was present there. The students of Islami Chhatra Sangha used to consult with the Pak-Army. No suggestion was given to this witness to the effect that those are false and concocted and rather, suggestion had been given as to whether he disclosed those facts to anybody and this witness stated that it is not a fact that he did not state the aforesaid facts to others.

59. P.W.19, S.M. Idris Ali, Investigating Officer, collected several documents and of them two have been marked as Exhibits-13 and 16. Exhibit-13 is a newspaper report published in the "Daily Sangram on 13.09.1971 and Exhibit-16 is the report of the Special Branch of police for the month of October,1971.

Relevant portion of Exhibit-13 is quoted below:

"রংপুর জেলা ইসলামী ছাত্র সংঘের সভাপতি জনাব আযম আলী ও শহর ছাত্র সংঘের সভাপতি জনাব আজাহারুল ইসলাম এক বিবৃতিতে শহীদ মেসবাহ উদ্দিনের শাহাদাতে গভীর শোক প্রকাশ করেন। "

Relevant portion of Exhibit-16 is quoted below:

Activities of Islami Chhatra Sangha (ICS):

21.on 17.10.1971, a conference (100) of Pakistan ICS, Rangpur Branch was held in Rangpur Town with A.T.M. Azharul Islam (ICS) in the chair. Amongst others, Ali Ahsan Md. Mujahid, Acting President EPICS addressed the conference explaining the present situation of the country and urging the party workers to mobilise the youths of Islamic spirit and launch strong movement against Anti-Islamic activities. He also urged them to form Al-Badr Bahini at different levels for defending the country from internal and external attack."

60. The aforesaid oral and documentary evidences clearly show that the convict-appellant was a leader of ICS, the Student Wing of Jamat-E-Islami and was known in the locality as leader of ICS and worked for candidate of Jamat-E-Islami in National Election of 1970.

He was not an ordinary worker rather a leader of ICS, the Student Wing of Jamat-E-Islami and actively worked for Jamat-E-Islami since 1970.

61. Role of the convict-appellant prior to 16.04.1971:

Prior to incidents of 16th, 17th and 30th April,1971(in respect of the Charge Nos.2, 3 and 4 respectively) the convict-appellant aided Pakistani Army in committing atrocities. The freedom fighters resisted against Pak-Army at Badargonj but failed. On 8th April,1971, Pak-Army raided Badargongj Thana. At that time, local collaborators aided and supported Pak-Army while Army occupied Badargongj Thanaon 8th April,1971.

62. Regarding the aforesaid resistance of freedom fighters and occupation of Badargonj Thana by Pak-Army, P.W.4, Md. Meseruddin who was the retired Principal of Badargonj College stated that A.T.M. Azharul Islam along with Pak-Army took control of Badargonj Town and occupied the houses of Jagodish Babu, a rich man of the town and that the Offices of Shanti Committee and Rajaker were established in that house. In cross-examination he stated that it is not a fact that he did not state those facts earlier to anybody.

63. P.W.8, Md. Mojibur Rahman Master is from Badrgonj. He is a B.A. B.Ed. In 1971 he was a teacher of Syampur High School at Badargonj. He stated that on 08.04.1971, the people of Shanti Committee occupied the house of Jagodish Babu and established the Office of Peace Committee in that house and meetings were regularly held there. Bachu Mia Paiker, Wahidul Hoque Chowdhury, Mir Afzal Hossain and Doctor Abdul Bari were the leaders of the said Peace Committee. A.T.M. Azharul Islam used to remain present in those meetings of Peace Committee occasionally. This witness further stated that he also came to know that A.T.M. Azharul Islam regularly went to Cantonment and met the Pak-Army there. Suggestion was given to this witness regarding the aforesaid statement which he made in his examination-in-chief but he replied that it is not a fact that A.T.M. Azharul Islam did not go to Cantonment to contact the Pak-Army.

64. The aforesaid fact clearly shows that convict-appellant aided Pakistani Army in committing crimes against humanity even prior to 16.04.1971.

The appellant was acquitted of Charge No.1 and Government did not prefer any appeal against the acquittal given in respect of Charge No.1. Therefore, we refrained from considering Charge No.1.

Charge No.2.

65. On 16th April,1971 at about 1.00 p.m. you A.T.M. Azharul Islam being the President of Islami Chhatra Sangha, Rangpur Unit, along with the armed members of Jammmat-E-Ialami, Islami Chhatra Sangha and Pakistani Army, in continuation of your planning and blue-print, having arrived at your area named Taxerhat Relgumti under Badargonj Police Staiotn by a train, proceeded towards Moksedpur Dhap Para and on the way the Pakistani Army with the help of you and your said accomplices plundered many houses situated beside the road and then set them on fire. Thereafter, you and your said accomplices having reached at Dhap Para area attacked village Moksedpur and started firing indiscriminately and as a result, unarmed civilians namely, (1)Jangoli Bhorosha, (2) Kerad Hossain alias Bishu, (3) Mst. Chini Mye, (4) Ammye, (5) Momtaz Uddin, (6)Mowlovi Abdul Quddus Ali, (7)Tamir Uddin alias Tamiz Uddin, (8)Moriom Nessa Kalti Mye, (9)Sarijannessa alias Sukhi Mye, (10) Yusuf Ali (sustained bullet injury but died after Liberation), (11)Shadhina, (12) Azizar Rahman alias Khoka, (13) Zahir Uddin and (14)Osman Ali and others were killed.

66. Therefore, you are hereby charged for abetting and facilitating the commission of offences of looting, arson and murder as crimes against humanity as specified in section 3(2)(a)(g)and (h) of the International Crimes (Tribunals) Act,1973 which are punishable under section 20(2) of the Act. You are also liable for commission of above offences under sections 4(1)and 4(2) of the Act.

67. In the instant charge, the occurrence took place on 16.04.1971 and the witnesses deposed before the Court from 26.12.2013 onwards. In this connection, it is to be mentioned here is that the World War II trials of alleged German war criminals have continued for many decades after Nuremberg. In Germany and Italy, for example, cases have continued to be tried into 2011. Since the *Einsatzgruppen* trials in 1948 and, the beginning of the *Auschwitz-prozess*in Frankfurt in the early 1960s, the German Courts in particular have increasingly faced difficulties concerning both the credible identification of accused persons, especially because they were for the most part relatively low level perpetrators rather than prominent public figures, and also the connection of individual accused to specific criminal acts.

68. Falsification or substitution of identity documents, together with the difficulty of witnesses in identifying a person 20 years or more after they saw them in a Wehrmacht or SS uniform in a camp or killing site, proved to be stumbling blocks in a number of cases. The chaos following World War II contributed to the ability of some individuals to credibly establish false identities. In one of the most notorious cases, a famous German journalist in Hamburg simultaneously pursued his professional career in that city while under criminal investigation for war crimes in Frankfurt under a different name. It was only much later that his dual identity was revealed.

*69. John Demjanjuk* was taken as a prisoner of war by German forces in the Ukraine in 1942. Recruited by the SS in the POW Camp in *Chelm, Demjanjuk* then served as a guard in various concentration camps. His 1942 SS-ID, or *Dienstausweiss,* provided important documentary evidence in his subsequent prosecutions, both for purposes of identification and for establishing where he served.

What is known with certainty is that *Demjanjuk*emigrated to the United States after World War II and was less than candid about his activities during the war.

70. *Demjanjuk's* legal difficulties in the United States began in 1977, when he was accused of being a war criminal and citizenship revocation proceedings began against him. In 1981, he was stripped of his United States citizenship and in 1983, Isreal requested extradition on the grounds that Ivan "John" *Demjanjuk* was the notorious *Sobibor* camp guard known as "Ivan the Terrible." *Demjanjuk* fought the extradition request for several years, notably on the grounds that he was not in fact the man who had been known as "Ivan the Terrible" and that the Israeli authorities had mistakenly identified him as such. Whether or not this identification was correct eventually turned out to be far from easy to establish beyond a reasonable doubt, but in 1986, *Demjanjuk* was deported to stand trial in Israel.

71. *Demjanjuk's* defence that he had been inaccurately identified as "Ivan the Terrible" proved to be in vain. Numerous Sobibor survivors identified him in the Israeli courtroom as such, and he was convicted on this basis in 1988. *Demjanjuk* appealed and new evidence indicated that "Ivan the Terrible" was in fact a different person, *Ivan Marchenko*. Demjanjuk had been wrongly identified by numerous witnesses. The Israeli Supreme Court overturned his conviction, and in 1993, he was returned to the United States.

72. His legal troubles did not end here, however, as in 2001, he was again accused in the United States of having served as a guard at the Sobibor and Flossenburg camps. He contested this accusation but in 2005, a deportation order was issued, against which he appealed.

73. Deported to Munich in 2009, *Demajanjuk* again stood trial, this time before a German court, where he was charged as an accessory to the murder of 29,000 persons at Sobibor. Unlike the trials of the 1960s, the prosecution did not connect him to specific crimes but rather to his role at Sobibor. They alleged that by working as a guard at a death camp, he was a participant in the killings that took place there. When he was convicted in May 2011, the BBC commented that this was the first time that such an argument had been accepted by a German court. [David Cohen on the Passage of Time, the Vagaries of Memory, and Reaching Judgment in Mass Atrocity Cases]

74. In order to prove charge No.2, the Prosecution examined 6witnesses of whom P.Ws.3 and 6 are eye-witnesses.

P.W.3, Moklesur Rahman Sarker alias Md. Mokles Ali aged about 59 years hails from village Uttar Ramnathpur, under P.S. Badargonj uder District-Rangpur. He is a farmer by occupation. He deposed that on 16.04.1971 a train from Rangpur arrived at rail gate No.6 which is adjacent to Taxerhat and Pakistani Army, A.T.M. Azharul Islam and other accomplicesof Jamet-E-Islami came there. AppellantA.T.M. Azharul Islam and his accomplices and Pakistani Army got down from train and advanced towards the north. On their way, they set houses on fire beside the road and started firing at random. After that, they came to the village of this witness via Millardanga. Seeing the Pakistani Army coming to their village, his mother, brothers and two sisters fled away from their village to Pathnerhut and the appellant and his father Momtaz Sarker stayed back to protect their houses. As soon as Pakistani Army and their accomplices surrounded their village, he concealed himself in a bush and his father was caught-hold of by the Pakistani Army while his father started fleeing away. He saw from inside the bush that appellant-A.T.M. Azharul Islam knocked down his father when he caught hold of his (appellant) legs and then Pakistani Army shot him dead. He knew A.T. M. Azharul Islam as he came to campaign in their locality in the election of 1970. He saw from inside the bush that they also killed Munshi Quddus of their village. Soon after departure of Pakistani Army and their accomplices, this witness saw fifteen dead bodies at different places of their village. Of them the dead bodies of his father Momtaz Ali Sarker, Quddus Munshi, Zahiruddin, Chini Mye, Ammye, Jangli Bhorosha, Bishu, Tamir Uddin, Abu, Tina, Kalti Mye, Shadhina and Yusuf Ali were there. After that, when the villagers gathered there he heard from them that the baby came out from the womb of Kalti Mye when she sustained bullet injury. He came to know from Aminul (P.W.7) and Yeahya that Pakistani Army also killed Yusuf. He identified the appellant in the dock.

75. In cross-examination, this witness stated that Millardanga is an intersection and that a rice mill was there. This witness spontaneously stated that there is a mass-graveyard(বধ্যভূমি) there after 1971. He also stated that Millardanga was about 1 kilometre off from their house. On the date of occurrence more than 100 Pakistani Army came by train at the rail gate and they came down from the train. He knew village Moksedpur. In cross examination, he also stated that Moksedpur-Dhap Para Mass Graveyard is also known as Moksedpur village. He denied the suggestion that on the date of occurrence, he did not go to Mondol Para of Radhanagar with his mother. The deposition of this witness revealed that several unarmed civilians were killed in this incident as stated in Charge No.2. His evidence revealed that the

appellant was a member of a killing party and there is a Mass-Graveyard (বধ্যভূমি) in Moksedpur-Dhap Para.

76. Mr. Khandaker Mahbub Hossain, learned Counsel, appearing on behalf of the appellant, submits that the evidence adduced by this witness should be discarded because he claimed to have seen the appellant getting down from a train from a distance of 5/6 kilometres which is humanly impossible.

77. We have considered the evidence of this witness and found that nowhere in his evidence he claimed to have seen the appellant getting down from a train from a distance of 5/6 kilometres. This portion of the evidence adduced by P.W.3 is hearsay evidence and as such, on this score his entire evidence cannot be discarded.

78. Mr. Mahbub Hossain further submits that this witness hails from Uttar Ramnathpur and that the occurrence took place in Muksedpur and as such, he changed the place of occurrence which is fatal for the prosecution.

79. We have carefully scanned the evidence of P.W.3 and found that Dhap Para was about 1 kilometre to the north-west of his village. He further stated that he knew village Moksedpur and Moksedpur-Dhap Para Mass Graveyard was also known as Moksedpur village.

80. Having gone through the entire evidence of P.W.3, we find that Dhap Para and Moksedpur are situated within the vicinity of Uttar Ramnathpur. This witness in cross-examination stated that Dhap Para is about one kilometre to the north-east of their house. This witness also clarified about the place of occurrence by stating "মোকসেদপুর- ধাপপাড়া বধ্যভূমিকে মোকসেদপুর গ্রাম বলা হয়"। Moreover, during cross-examination this witness was asked about the topography of the land between Dhap Para and Uttar-Ramnathpur. This topographical description of this witness on 05.03.2014 cannot be the same during the War of Liberation in 1971. Therefore, we are of the view that the question of shifting the place of occurrence by this witness did not arise. Moreover he lost his father on the date of occurrence and as such, his evidence should not be taken lightly.

81. P.W.4, Md. Meseruddin aged about 66 years deposed that his occupation was teaching. He retired from service as acting Principal of Badargonj Degree College. During the election of 1970, A.T.M. Azharul Islam campaigned in favour of the candidate of Jammat-E-Islami. Pakistani Army, appellant A.T.M. Azharul Islam and his accomplices arrived at rail gate No.6 from Rangpur by a train and got down there on 16.04.1971. They advanced towards Moksedpur of Ramnathpur Union. On their way, they set the houses on fire and opened fire at random on both sides of the road. The people of the locality became afraid and they started fleeing away towards Uttar Moksedpur and Dhap Para area in order to save their lives and then Pakistani Army and A.T.M. Azharul Islam and his accomplices surrounded that village and killed fifteen persons. Of them there were Jangali Bhorosha, Bishu, Momtaz, Anu Mye, Kalti Mye and Tamir Uddin and others. At the time of occurrence Kalti Mye was nine months pregnant and her baby came out from her womb when she sustained gun shot. MartyredJangali Bhorosha was the father of his paternal aunt. He deposed that he himself did not see the said occurrence, but he heard the same from Aminul (P.W.7), Mokles (P.W.3), Mokbul (P.W.6), Azmal Khan and many others.

82. In cross-examination, he denied the suggestion that in 1970 A.T.M. Azharul Islam did not campaign in the election as student leader of Jammat-E-Islami. In cross-examination, he further stated that he did not know from which educational institutionsand in which years A.T.M. Azharul Islam passed different examinations but he saw him as a student of HSC in Carmichael College in 1970. No suggestion was given to him to the effect that out of enmity he deposed against this appellant.

83. Mr. Khandaker Mahbub Hossain, submits that during cross-examination P.W.4 admitted that 2/3 sons of Jongli Barosha are still alive but the prosecution did not examine such vital witnesses which creates doubt about the prosecution story. It is cardinal principle of law of evidence that each and every witness is not required to be examined. It is the quality of the evidence and not the quantity of the evidence which is required in a criminal case. There is no earthly reason to discard the evidence of P.W.4 for non examination of 2 living sons of Jongli Barosha and as such non-examination is not at all fatal to the prosecution.

84. P.W.5, Md. Abdur Rahman aged about 58 years deposed that on 16.04.1971, they had gone to Taxerhat to see the incident that took place on the previous day. At about noon when they were about to return home they saw a train arrive at rail gate No.6 from Rangpur. They concealed themselves in a nearby pond from where they saw the train stopat rail gate No.6. After that, Pakistani Army, appellant Azharul Islam and many supporters of Jammat-E-Islami came down from the train. They advanced towards Taxerhat. Observing the arrival of Pakistani Army and their accomplices including the appellant A.T.M. Azharl Islam, this witness came back to his village. Sometime afterwards, he saw flame of fire at Dhap Para and heard sound of firing coming from there. At about 5.00 p.m. Pakistani Army and their accomplices went back by that train. After that, P.W.5 and others went to Taxerhat and heard from the persons gathered there that many houses were set on fire and many people were killed at Dhap Para. After that they went to Dhap Para and found many people crying,of whom, one Aminul told them that fifteen people including his aunt were killed. They also found about one hundred and fifty houses burnt and five dead bodies and the other dead bodies had been taken away by their relatives. After seeing the occurrence he came to his house and heard from his brother and other villagers that A.T.M. Azharul Islam along with his accomplices and Pakistani Army committed the killing at Dhap Para. He has identified the accused in the dock.

85. No suggestion was given to him that he did not see A.T.M. Azharul Islam and others coming down from the trainon 16.04.1971. In cross-examination he stated that in 1970 the appellant A.T.M. Azharul Islam campaigned in the election as a worker of Jammat-E-Islami. He denied the suggestion that A.T.M. Azharul Islam did not participate in the election campaign as a worker of Jammat-E-Islami. In cross-examination, he further stated on 16.04.1971 when Pakistani Army came to rail gate No.6, he concealed himself in a pond under the water-hyacinth. He also denied the suggestion that he did not see or hear about the occurrence of Dhap Para. He also denied the suggestion that being tutored he told that on 16.04.1971 the appellant accompanied the Pakistani Army. He also denied the suggestion that on 16.04.1971, the appellant A.T.M. Azharul Islam did not go to the place of occurrence or that he did not participate with the Pakistani Army in the killingsat Dhap Para.

86. Admittedly, P.W.5 is an eye-witness so far as it relates to arrival of Pakistani Army and A.T.M. Azharul Islam at rail gate No.6 by a train from Rangpur on 16.04.1971. The rest of the evidence adduced by this witness is hearsay but he had corroborated the evidence of

eye-witnesses, P.W.3, Muklesur Rahman Sarker and P.W.6 Md. Mokbul Hossain and as such, his evidence cannot be discarded on the ground that he is a hearsay witness.

87. P.W.6, Md. Mokbul Hossain aged about 66 years and he was a farmer by occupation. He deposed that during the election of 1970, A.T. M. Azharul Islam came to their area with Afzal Hossain and Moklesur Rahman to campaign in the election. Appellant A.T.M. Azharul Islam and Pakistani Army arrived at rail gate No.6 of Taxerhat by a train on 16.04.1971 and got down there from the train and advanced towards Taxerhat and set houses on fire of that locality and fired shots there. As soon as Pakistani Army and the appellant came to their village, he (P.W.6) and his mother started running towards Dhap Para and at one stage his mother was unable to run and told him to flee away and she would come later. At that time, he started running through 'Ayl'(আইল). After a while, he heard sound of firing and then he looked back and saw that A.T.M. Azharul Islam and 2 Pakistani Army fired shots at his mother who fell to the ground after making a loud cry. He saw that the Pakistani Army killing one Tamiz and then he concealed himself in a ditch for about three hours and thereafter he saw by raising his head from inside the ditch that appellant A.T.M. Azharul Islam and Pakistani Army set houses on fire of Dhap Para, Mrida Para, Thonthoni Para and Molla Para and killed 14/15 persons by firing shots. After that A. T. M. Azharul Islam and Pakistani Army went towards Taxerhat. Then the people of the village returned home. Then he and his uncle came to Dhap Para and saw there 4/5 persons killed. They were Jongli Bhorosha, Bishu, Shukhi Mye, Kalti Mye, Chini Mye and Tomizuddin. He and his uncle heard from the persons gathered there that the appellant and Pakistani Army committed the killing and arson. After that, he and his uncle brought the dead body of his mother to the house and buried her there. He identified the accused in dock.

88. In cross-examination, he denied the suggestion that A.T.M. Azharul Islam did not come to their area to campaign in the election or that this witness deposed so on being tutored. He also denied that the statement that on 16.04.1971 during the War of Liberation, A.T.M.Azharul Islam came to Taxerhat rail gate No.6 was untrue and that the aforesaid statement was tutored. He also denied the suggestion that he did not see the occurrence from the ditch of Folymari River. He denied the suggestion that A.T.M. Azharul Islam did not go to Taxerhat with Pakistani Army.

89. Admittedly, P.W.6 is an eye-witness to the occurrence and that his mother was brutally killed at that time and as such, his evidence should be relied uponand moreover credibility of the witness could not be shaken by the defence by cross-examining him.

90. Mr. Khandaker Mahbub Hossain, learned Counsel, appearing on behalf of the appellant, submits that this witness claimed to have seen the appellant and Pakistani Army coming to Taxerhat Rail Gate No.6 which was about 3/3.5 kilometres away from the place of occurrence and as such, his evidence should be disbelieved. We have gone through the entire evidence of P.W.6 and found that no where he claimed to have seen the appellant and the Pakistani Army getting down from train at Taxerhat Rail Gate No.6. His evidence in this respect is hearsay but with regard to the occurrence that took place in Dhap Para and Moksedpur, P.W.6 Md. Mokbul Hossain is an eye-witness.

91. The learned Counsel further submits that the appellant claimed that he knew A.T.M. Azharul Islam since 1970 as he participated in the election campaign for Jamat-E-Islami candidate but in cross-examination he stated that he could not remember the number of his children and the name of the leader of the Muslim League and as such the evidence should be

discarded as a whole. Admittedly, the appellant, A.T.M. Azharul Islam was involved in the killing of the mother of this witness and as such, it is natural that being the son, he could not forget the name of the killer of his mother. Therefore, his deposition before the Tribunal that he knew A.T.M. Azharul Islam since 1970 as he participated in the election campaign of Jammat-E-Islamicandidate cannot be brushed aside. He also stated that he saw at the back side that A.T.M. Azharul Islam and two Pakistani Army fired shot at his mother who fell to the ground making a loud cry. A son cannot forgive the killers of his mother and as such, the evidence adduced by P.W.6 is most natural and there is no ground at all to discard his evidence.

92. P.W.7 Md. Aminul Islam, who was declared hostile vividly described the entire occurrence committed by Pakistani Army and their local cohorts in which his aunt Kalti Mye was killed. But he did not mention the name of A.T.M. Azharul Islam and in reply to the cross examination by the prosecution, he stated that it is not a fact that his aunt Moriomnessa alias Kalti Mye was killed in presence of the appellant A.T.M. Azharul Islam. It is apparent that intentionally this witness did not mention the involvement of the appellant. P.W.4 Meseruddin stated that he heard about the incident from P.W.7 Aminul Islam. P.W.5 Abdur Rahman also stated that P.W.7 Aminul Islam told about the incident to him. P.W.8 also told that P.W.7 informed him about the incident and the said P.W.8 stated as follows:

"আমিনুল ইসলামের কাছে জানতে পারি ঐ গোলাগুলির সাথে এটিএম আজাহারুল ইসলাম সংশ্লিষ্ট ছিল।"

93. P.W.8, Md. Mojibur Rahman Master aged about 73 years stated that during the period of Liberation War his age was about 34/35. He further stated that he is a B.A. B.Ed. He had been serving in Shaympur High School of Badargonj during the War of Liberation. On 16.04.1997, he came to know that a train from Rangpur arrived at rail gate No.6 of Taxerhat. The Pakistani Army and members of Jammat-E-Islami including A.T.M. Azharul Islam alighted from the train and advanced towards the Moksedpur by firing shots. At that time, the local people became afraid and started running here and there and 15 persons were killed by gun shots of Pakistani Army and members of Jammat-E-Islami. Of the 15 persons, there were women and babies. One of them was Kalti Mye. When he went to the place of occurrence, he heard from Moklesur Rahman (P.W.3), Mokbul (P.W.6) and Aminul (P.W.7) that accused A.T.M. Azharul Islam was involved in the killing. He knew the appellant A.T.M. Azharul Islam before 1971, who was a student leader of Carmichael College Unit and a Commander of Al-Badr Bahini in 1971. He identified the accused in the dock.

94. In cross-examination, he denied the defence suggestion that he did not know about the occurrence of 16.04.1971 from Moklesur Rahman (P.W.3), Mokbul (P.W.6) and Aminul (P.W.7). In cross-examination he further stated that Taxerhat is about 5 miles away from Badargonj Bazar.

95. P.W.11, Md. Shakhawat Hossain @ Ranga is aged about 57 years. During the War of Liberation he was aged about 15 years. He used to reside with his elder brother at his house at Gupta Para, Rangpur. At that time, he was a student of Class-VIII of Rangpur Zilla School. He came to know that accused A.T.M. Azharul Islam was involved in the killing of Dhap Para, Jharuarbeel and other places. He identified the accused in dock. No question was put to him in cross-examination regarding the facts which werestated in his examination-in-chief. Those statements made in the examination-in-chief remained uncontroverted. Apart from the oral evidence, International Crimes Tribunal No.1 also considered exhibits 13 and 16, relevant portion of which we have already quoted in the judgment earlier.

96. Having considered the evidence of 6 witnesses, we find that the evidence of the witnesses are consistent and they corroborated each other. P.W.3, Moklesur Rahman Sarker and P.W.6, Mokbul Hossain are eye-witnesses to the occurrence. P.W.3 lost his father during the occurrence and P.W.6 lost his mother at the same occurrence. P.W.5 is partly an eye-witness and partly hearsay witness of the occurrence. The remaining witnesses are hearsay witness. P.W.3, Moklesur Rahman Sarker alias Md. Mokles Ali supported Charge No.2 and narrated the alleged incidents that took place on 16.04.1971.What is important to mention here is that P.W.5 Abdur Rahamn is an eye-witness of the part of the incident and hearsay in respect of part of the occurrence. He also corroborated the evidence adduced by P.Ws.3 and 6. P.W.4 Md. Meseruddin, P.W.8, Md. Mojibur Rahman Master and P.W.11, Md. Shawkat Hossain alias Ranga are hearsay witnesses and they corroborated the instant charge and they also corroborated the evidence adduced by P.Ws.3 and 6.P.Ws.3, 4, 5, 6, 8 and 11 directly implicated the appellant with the offences of arson and murder as narrated in the instant charge. All the 6 witnesses had been able to prove Charge No.2 against appellant beyond reasonable doubt. During Liberation War, appellant A.T.M. Azharul Islam was the President of Islami Chhatra Sangha, Rangpur Unit. From the aforesaid witnesses, P.Ws.3, 4, 5, 6, 8 and 11along with exhibits-13 and 16, it appears that during Liberation War,1971, the appellant A.T.M. Azharul Islam was a leader of Islami Chhatra Sangha, the Student Front of Jammat-E-Islami.

97. We, however, noticed some minor inconsistencies and contradictions in the evidence of 6 prosecution witnesses but the cardinal principle of assessment of evidence is that the entire evidence of a witness is to be considered and that a conclusion is to be arrived later. We are of the view that the insignificant inconsistencies in the evidence of the witness should be discarded. In this connection, we have gone through the judgment of the ICTR Appeals Chamber which held in the Case of *MikaeliMuhimana V. The Prosecutor tion*as under:

"The Appeals Chamber reiterates that a trial chamber does not need to individually address alleged inconsistencies and contradictions and does not need to set out in detail why it accepted or rejected a particular testimony."[ICTR Appeals Chamber, judgment of May 21,2007, para-99]

In the case of *Motiur Rahman Nizami vs. The Government of Bangladesh, represented by the Chief Prosecutor, International Crimes Tribunal, Dhaka, Bangladesh, (2017) 2 Law Messenger (AD)446 at paragraph 224,* it has been held as under:

"It has already been observed earlier that the alleged incidents of this case took place long 42 years before. With the passage of this long 42 years many of the documentary evidence might have been destroyed. In an old case like the present one the prosecution faces great challenges in producing necessary evidence, both oral and documentary. Most of the witnesses also, in such old case, are not available due to various reasons, many necessary witnesses may die within such a long period, many others, due to old age, become unable to depose before the court/tribunal and many other witness, for various reasons, may be unwilling to depose against a particular accused after such a long period. However, in this case the prosecution has examined so many witnesses who have deposed before the court supporting the prosecution case. There can be some contradictions or discrepancies in the evidence of the witnesses who depose before the court/tribunal after such a long period. In the present case we have scanned the evidence of the prosecution witnesses attentively. Though there are some minor contradictions and discrepancies in their evidence considering the very fact that these witnesses have deposed before the tribunal after a long period of 42 years, we do not think that these minor discrepancies and contradictions in the evidence of the prosecution witnesses are fatal at all and these can raise any suspicion or doubt about the truth of their evidence or about the trustworthiness of the witnesses."

98. In respect of appreciation of evidence adduced by P.W.3 and P.W.6, the eye witnesses, we may relyon the principle expounded in the case of *State of Uttar Pradesh V. Krishna Master and others, (2010) 12 S.C.C. 324* wherein in paragraph Nos.23 and 24, it has been stated as under:

"23. The record of the case shows that this witness Jhabbulal was cross-examined at great length. He was subjected to gruelling cross-examination which runs into 31 pages. The first and firm impression which one gathers on reading the testimony ofthis witness is that he is a rustic witness. A rustic witness, who is subjected to fatiguing, taxing and tiring cross-examination for days together, is bound to get confused and make some inconsistent statements. Some discrepancies are bound to take place if a witness is cross-examined at length for days together. Therefore, the discrepancies noticed in the evidence of a rustic witness who is subjected to gruelling cross-examination should be blown out of proportion. To do so is to ignore hard realities of village life and give undeserved benefit to the accused who have perpetrated heinous crime.

24. The basic principle of appreciation of evidence of a rustic witness who is not educated and comes from poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness."

99. In view of the discussion of the evidences both oral and documentary, we find that the prosecution had been able to prove beyond reasonable doubt the incident dated on 16.04.1971, Thus the appellant is criminally liable under sections 4(1) and 4(2) of the Act of 1973 and we find him guilty for substantially abetting and facilitating the actual commission of the offences of murder and arson as crimes against Humanity as specified in section 3 (2)(a)(g) and (h)of the Act of 1973 which are punishable under section 20(2) of the Act.

Charge No.3

100. That on 17th April, 1971 between 12.00 noon to 5.00 p.m. you A.T.M. Azharul Islam being the president of Islami Chhatra Sangha, Rangpur Unit, along with the armed members of Jamaat-e-Islami, Islami Chhatra Sangha and Pakistani Army, in continuation of your planning and blue-print, with intent to destroy, in whole or in part, a Bangalee national group and a Hindu religious group, made wide-spread attack bysetting fire to the villages of Jharuarbeel area namely, Hajipur, Jharuapara, Bujruk Bagbar, Ramkrishnapur, Balapara, Bujruk Hajipara, Bairagi Para, Sarder Para, Ramkrishnapur Baniapara, Ramkrishnapur Bithhipara, Jogipara, Khorda Bagbar and Khalisha Hajipur, and then the unarmed civilians of those villages being frightened took shelter at the Jharuarbeel. At that time, you and your said accomplices having surrounded the Jharuarbeel killed about 1200 unarmed women, men, students, babies, etc. by firing indiscriminate shots and, you also having caught hold of about 200 Hindu people and students therefrom took them to unknown place and then killed them. At the time of said atrocities, many houses of that area were plundered and set on fire by you and your accomplices.

101. Therefore, you are hereby charged for abetting and facilitating the commission of offences of looting, arson and murder as crimes against humanity and also genocide as

specified in section 3(2)(a)(g)(h) and 3(2)(c)(g)(h)respectively of the International Crimes (Tribunals) Act,1973 which are punishable under section 20(2) of the Act. You are also liable for commission of above offences under section 4(1) and 4(2) of the Act.

102.In order to bring home Charge No.3, the prosecution examined 5 witnesses, P.Ws.3, 4, 5, 6 and 8 and presented documentary evidence Exhibits-13 and 16.

103. P.W.3, Moklesur Rahman Sarker alias Md. Mokles Ali, aged about 56 yearsis a farmer by occupation. This witness deposed that he came to know that during War of Liberation 2 trains came and stopped at Jharuarbeel which is to the south of their village and that about 1000/1200 people were killed. He identified A.T.M. Azharul Islam before the Court. During cross-examination no question was put to this witness about aforesaid statement which he made in examination-in-Chief and thus those statements remained unchallenged. During cross-examination, he stated that Jharuarbeel is about 7 kilometers away towards north-east from their houses.

104. P.W.4, Md. Meseruddin aged about 66 years deposed that on 17.04.1971 at about noon a train from Parbatipur arrived at rail gate No.6 and a non-Bengali, Bachhu Khan, Quamruzzaman MPA, Badrul, Nayeem Kazi along with many others and Pakistani Army alighted from the train and advanced towards Bakshigonj Ghat under Bishnupur Union. Seeing them coming he and his father, uncle, brother and other members of their family proceeded towards Jharuarbeel and then he saw that another train coming from Rangpur arrived at rail gate No.10. The appellant A.T.M. Azharul Islam and his accomplices along with Pakistani Army alighted from that train and advanced towards Bakshigonj. After that, both the trains were taken to rail gate No.7. The appellant and his accomplices encircled 6 villages of their Union. The villagers of those villages started fleeing away and many took refuge in Jharuarbeel.This witness saw A.T.M. Azharul Islam wearing white trouser and shirt and he was with Pakistani Army. At that time, he saw appellant A.T.M. Azharul Islamand Pakistani Army who were setting houses on fire of the innocent people and firing shots randomly. About 1200 people were killed by bullet shots around Jharuarbeel. Of them Pran Krishna Master, Minajul Islam BSc, Alauddin, Azadul, Faezuddin and his son Nur Islam, Asad Boksh were killed. Many dead bodies of the Hindu Community were also found at the place of occurrence. The appellant and his accomplices chased many villagers and assembled them at rail gate No.7. After that, according to the order of the accused A.T.M. Azharul Islam and the said Bachhu Khan, more than two hundred youths, among the assembled villagers, were taken towards Parbotipur after boarding them in a train. Among those persons his cousins Sambaru and Islam, Abu Bakar Siddeique and two guards of railway were butchered and their dead bodies were thrown out from the train on south side of Ghora Doba Rail Bridge. His cousin Sambaru got married recently and on hearing the news about his death, his wife committed suicide by hanging. Soon after the Liberation War, the accused absconded. He identified the appellant in the dock.

105. In cross-examination this witness stated that he did not know in which years and from which educational institutions A.T.M. Azharul Islam passed his examinations, but in 1970 he saw him (appellant) as student of HSC of Carmichael College. He further stated in cross-examination that village Ram Krishanpur is situated towards north of Jharuarbeel. There were some bushes in Jharuarbeel in 1971. He deposed that he knew Bachhu Khan and Badrul since he was a student of Intermediate of Parbatipur College. He then deposed that most of the villagers took shelter in Jharuarbeel for their safety and some took shelter in bushes around their houses and Jharuarbeel is situated in the middle of those 6 villages

surrounded by the appellant and his accomplices. On seeing the accused and Pakistani Army getting down from the train, he, his father and others took refuge in Jharuarbeel. He denied the defence suggestionthat only Pakistani Army and non-Bengalis committed the atrocity in Jharuarbeel and A.T.M. Azharul Islam was not there. He also denied the suggestion that he deposed falsely.

106. Mr. Khandaker Mahbub Hossain, learned Counsel for the appellant, submits that P.W.4 stated in his evidence that Jharuarbeel is about 3 kilometers away from his residence and as such he did not have the occasion to see the occurrence of Jharuarbeel.

107. In cross-examination, P.W.4 in unequivocal terms stated that Jharuarbeel is about 2 kilometers away to the south of their house and that Pakistani Army, A.T.M. Azharul Islam and his accomplices encircled 6 villages of their Union, Ramnathpur. The names of villages are Ramkrishnapur (village of the appellant), Kismat Ghatabeel, Ghatabeel, Doani Hajipur, Khalisha Hajipur and Khord Bagbar. He then deposed that as soon as the Pakistani Army and A.T.M. Azharul Islam and his accomplices attacked those villages, the villagers took refuge in Jharuarbeel as there were many bushes so that the villagers could conceal themselves in those bushes. He also deposed that the Jharuarbeel was in the middle of the aforesaid 6 villages surrounded by Pakistani Army and A.T.M. Azharul Islam. He further deposed that when A.T.M. Azharul Islam and Pakistani Army alighted from the train and advanced towards their village, he, his father and others took shelter in Jharuarbeel.

108. From the aforesaid deposition of P.W.4, it is crystal clear that P.W.4 was present at Jharuarbeel on the date of occurrence and he witnessed the atrocities committed there. Therefore, the submission made by the learned Counsel for the appellant does not stand to reason.

109. Mr. Khandaker Mahbub Hossain, learned Counsel for the appellant further submits that P.W.4 during his cross-examination admitted that A.T.M. Azharul Islam was not involved in the occurrence of the Jharuarbeel.

110. We have considered the entire cross-examination of P.W.4, who in many places of the cross-examination stated about direct participation of A.T.M. Azharul Islam in the occurrence. In cross-examination, he stated that "ইহা সত্য নহে যে, ঝাড়ুয়ার বিলের হত্যাকান্ড কেবলমাত্র পাকিস্তানি সেনারা অবাঙ্গালিরা সংগঠিত করে বা সেখানে এ টি এম আজহারুল ইসলাম ছিল না বা এই মামলায় তাকে মিথ্যাভাবে জড়ানো হয়েছে।"

During cross-examination, he also deposed that "নামাজ শেষে এ টি এম আজহারুল ইসলাম ও বাচ্চু খাঁন হুকুম দিয়ে বলে যে, 'ইন্দু আদমিরা' একধার হও, যুবক আদমি একধার হও, স্টুডেন্ট আদমি একধার হও।" P.W.4 stated those statements in cross-examination with respect to the occurrence that took place on 17.04.1971.

111. Having considered the entire deposition of P.W.4, we are of the view that the Tribunal committed mistake in recording the statement of P.W.4 that "ঝাড়ুয়ার বিলের ঘটনার সহিত এটিএম আজহারুল ইসলাম সম্পৃক্ত ছিল না" The Tribunal through inadvertence did not mention the words "ইহা সত্য নহে" before the said statement. The cardinal principle of assessment of evidence is that the entire evidence is to be considered as a whole and then a decision is to be arrived. There is no scope to consider one statement made in cross-examination in isolation.

112. P.W.5, Abdur Rahman aged about 58 years deposed that a train arrived at rail gate No.10 from Rangpur on 17.04.1971 and another train arrived at rail gate No.6 from

Parbotipur on the same date. About 100/150 persons wearing uniform and civil dress alighted from the train, which came from Parbotipur and went to Bakshigonj and encircled Jharuarbeel. About 100/150 persons got down from another train and advanced towards Bakshigonj. They encircled the villages and the villagers started running here and there and at that time many people were telling that A.T.M. Azharul Islam and Pakistani Army came from Badargongj and encircled Jharuarbeel. The persons who came to Bakshigonj from 2 trains encircled 5 villages and started firing shots and then came to Jharuarbeel where 500/600 people concealed themselves in bushes. At that time P.W.5 saw accused A.T.M. Azharul Islam in Jharuarbeel.Because of indiscriminate firing of shots about 400 people were killed in Jharuarbeel. Minhajul Islam was a teacher of Badargonj High School. He was killed in Jharuarbeel. The people of Islami Chatra Sangh told that Minjajul Islam should not be allowed to survive and if he was allowed to survive, he might cause harm to them. After that, the persons wearing uniform and civil dresses chased about 1200 people and assembled them to rail gate No.7. Meanwhile, the aforesaid 2 trains were taken to rail gate No.7 from rail gate Nos.6 and 10 and connected them to each other and steps were taken to board them (the people assembled) in the trains. Then Shamsuddin Master, the then house-tutor of the appellant, requested the persons wearing uniforms, Bachhu Khan and accused A.T.M. Azharul Islam to give him 10 minutes' time to say 'Asr' prayer. The persons present there including the Hindus after performing ablution stood up for prayer. After the end of the prayer, the appellant, Bachhu Khan and Pakistani Army chose about two hundred youths and the Hindus, among the persons assembled there, and picked them up in the train and took them away. On the way when the train stopped near Ghoradoba Bridge, five persons of the train were killed and their dead bodies were thrown out therefrom, and among them there were Sombaro, Islam, Abu Bakkar Siddique and two railway guards and the remaining personswere missing. He identified the accused in the dock.

113. During cross-examination, this witness stated that when they were running toand fro, he saw A.T.M. Azharul Islam and Pakistani Army at Jharuarbeel. At that time A.T.M. Azharul Islam told this witness to mingle with the people present there. This witness also mingled with the people assembled there and Pakistani Army and A.T.M. Azharul Islam drove them towards rail line.

114. What is remarkable to note here is that this witness did not make the above statement during examination-in-chief. The defence to its peril asked question following which the above statement was made by this witness. Even no denial was given to the statement during cross-examination. He further stated in cross-examination that A.T.M. Azharul Islam participated in the election campaign of 1970 and denied the suggestion that A.T.M. Azharul Islam did not participate in the election campaign as a worker of Jamaat-E-Islami.

115. Mr. Khandakder Mahbub Hossain, learned Counsel, submits that P.W.5, Md. Abdur Rahman is a tutored witness, who did not state how he came to know the appellant in 1971. From the evidence of P.W.5, we find that he stated in cross-examination that A.T.M. Azharul Islam as a worker of Jammat-e-Islami took part in the election campaign in 1970. He denied the suggestion that A.T.M. Azharul Islam did not participate in the election campaign of 1970 as a worker of Jammat-e-Islami. Therefore, it appears that from the cross-examination of P.W.5 that he knew the appellant since 1970 when he came to the locality of this witness to campaign in favour of the candidate of Jammat-e-Islami.

116. Mr. Khandaker Mahbub Hossain further submits that it was difficult for P.W.5 to identify the appellant in Jharuarbeel where according to this witness indiscriminate firing

resulted in the killing of 400 persons and as such, his evidence should be left out of consideration.

117. During cross-examination, he stated "ছুটাছুটির এক পর্যায়ে আমি ঝাড়ুয়ারবিলে গেলে দেখি যে, পাকিস্তানি আর্মি তাদের সাথে থাকা এটিএম আজহারুল ইসলাম সেখানে উপস্থিত। তখন এটিএম আজহারুল ইসলাম আমাকে বলে উপস্থিত লোকজনের দলে ঢুকে যেতে, আমি ঐ দলে ঢুকে পড়লে দলের সকল লোকজনকে তাড়া করে পাকিস্তানি আর্মি ও এটিএম আজহারুল ইসলাম রেল লাইনের দিকে নিয়ে যেতে থাকে।"

118. In view of the aforesaid statement of P.W.5, in cross-examination, it is crystal clear that P.W.5 was in Jharuarbeel on the date of occurrence and he could identify the appellant.

119. P.W.6, Md. Mokbul Hossain aged about 64 years deposed that on the following day i.e. 17.04.1971 a train from Rangpur and another train from Parbotipur arrived at their area. Pakistani Army and appellant A.T. M. Azharul Islam alighted from one of the two trains and went to Jharuarbeel and killed about 1200 people there and many people were driven away which he heard from others. He identified the accused in dock.

120.In cross-examination he denied that A.T.M. Azharul Islam did not come to his locality in 1970 to participate in the election campaign or he did not know him and that the aforesaid statements were tutored to him. He also denied the suggestion that A.T.M. Azharul Islam did not come to their locality on 16th and 17th April,1971.

121. P.W.8 Mojibur Rahman Master is aged about 77 years. During the War of Liberation, he was aged about 34/35 years. He is a B.A. B. Ed. He deposed that during Liberation War, he was a teacher of Shampur High School at Badargonj. He is a freedom fighter. On 17.04.1971, a train arrived from Parbotipur and stopped at rail gate NO.6 near Korotoa Bridge and another train arrived from Rangpur and stopped at rail gate No.10. Pakistani Army and non-Bengali Bachhu Kha, Quamruzzaman MPA, Nayem Kazi and leaders of Jammat-E-Islami were in the train which came from Parbatipur and Pakistani Army andappellant A.T.M. Azharul Islam and other leaders of Jammat-E-Islami were in the train which came from Rangpur. After that, Pakistani Army and their accomplices alighted from both the trains and encircled the villages, namely, Burjuk Hajipur, Kismat Ghatbeel, Ramkrishnapur and Khord Bagbar and fired shots randomly and set houses of the villages on fire. The residents of those villages took refuge in neighbouring Jharuarbeel and then Pakistani Army and their accomplices went to Jharuarbeel and killed more than 1200 people who took refuge there including Minhajul B.Sc., Prankrishna Master and his (P.W.8)student Nuruddin. They erected a monumental stone locally at the place of occurrence. He went to Taxerhut in the afternoon and heard there from the U.P. Chairman of Badorgonj, Abdul Jabbar Sarker and an organizer of freedom-fighters, Professor Meser Uddin that accused A.T.M. Azharul Islam had been involved in the said brutalities. Bacchu Mia Paiker, Wahidul Huq Chowdhury, Mir Afzal Hossain, Dr. Abdul Bari were leaders of the Shanti Committee. Appellant A.T.M. Azharul Islam occasionally attended the meeting of the Shanti Committee. He also deposed that he used to know the accused before 1971. The appellant was a student of Rangpur Carmichael College and he was the President of Islami Chhatra Sangha of that College Unit and he was also a Commander of Al-Badr Bahani. He identified the accused in the dock.

122. In cross-examination, he stated that A.T.M. Azharul Islam of whom he was stating was known to him before 1971. A.T.M. Azharul Islam was a student of Rangpur Carmichael College and he was the President of Islami Chattra Sangha, Carmichale College Branch and

he was Al-Badr Commander during 1971. He also stated in cross-examination that A.T.M. Azharul Islam was present before the Tribunal on that day. He also denied the suggestion that on 17.04.1971 Abdul Jabbar Sarker and freedom fighter organizer, Meseruddin did not tell him about the occurrence that took place on 17.04.1971. He also denied the fact that A.T.M. Azharul Islam did not go to Rangpur Cantonment to contact the Pakistani Army.

123. Deceased Abdul Jabbar was a local politician and Union Parishad Chairman for 30 years. He made a statement to the Investigating Officer and since he is dead his statement has been marked as Exhibit-27 under section 19(2) of the International Crimes Tribunal Act.

124. The defence filed a written objection on the ground that long before completion of investigation, Abdul Jabber Sarker died and as such, his statement cannot be received under section 19(2) of the Act.

125. Sub-section (2) of section 19 of the ICT Act runs as follows:

"(2) A Tribunal may receive in evidence any statement recorded by a Magistrate or an Investigation Officer being a statement made by any person who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable."

Having gone through Sub-Section (2) of section 19 of the ICT Act, we find that any statement recorded by a Magistrate or Investigating Officers of a person who at the time of trial is dead may be received in evidence. Therefore, contention raised from the defence as regards admissibility of exhibit-27 is devoid of any reason.

126. The statement contained in exhibit-27 relating to charge No.3 is quoted below:

"১৭ই এপ্রিল, ৭১ পার্বতীপুর হইতে ১টা ট্রেন যোগে পাকিস্তানী হানাদার বাহিনী তাদের এদেশীয় দোসরদের সহায়তায় অবাঙ্গালী বাচ্চু খান, এমসিএ কামরুজ্জামান বদরু, নঈম কাজীদের সঙ্গে নিয়া পাবর্তীপুর হইতে এবং রংপুর হইতে পাকিস্তানী হানাদার বাহিনী তাহাদের এদেশীয় দোসর এবং এটিএম আজহারুল ইসলামের যোগসাজসে এবং একতায় অন্য ১টা ট্রেনযোগে বদরগঞ্জে প্রবেশ করে পার্বতীপুরের ট্রেনটি ৬নং ট্যাক্সেরহাট রেলগেট করতোয়া ব্রীজের কাছে থামাইয়া পাকিস্তানী হানাদার বাহিনী তাহাদের এদেশীয় দোসর এবং এটিএম আজহারুল ইসলামের যোগসাজসে এবং একতায় দক্ষিণ দিকে বিষ্ণুপুর ইউনিয়নের বকসিগঞ্জ ঘাটে হাটিয়া যায়। রংপুরের ট্রেনটি বদরগঞ্জ বৈরাগীর গেটে থামাইয়া পাকিস্তানী সেনাবাহিনী এটিএম আজহারুল ইসলাম ও সহযোগীরা পায়ে হাটিয়া দক্ষিণ দিকের বকসিগঞ্জ এলাকা হইতে আওয়ামীলীগ সমর্থিত ও হিন্দু অধ্যুষিত রামকৃষ্ণপুর, কিসমত ঘাটাবিল, খলিশা হাজীপুর, খোর্দ্দ বাগবাড়, বুজরুক বাগবাড়, হাজীপুর মৌজার সমস্ত গ্রাম ঘেরাও করে এবং ঘরবাড়ী জ্বালাইয়া দেয় ও এলোপাথারী গুলি করতে থাকে। এলাকার লোকজন দৌড়াইয়া ঝাড়ুয়ার বিল নিরাপদ মনে করিয়া সেখানে আশ্রয় নিতে থাকে। তখন আমিসহ আরো অনেক লোকজন ঝাড়ুয়ারবিলের দক্ষিণ পূর্ব ঝোপঝাড়ের মাঝে লুটাইয়া ছিলাম। গুলির শব্দ শোনার পর দেখি যে এলাকার লোকজন দিশেহারা হইয়া ঝাড়ুয়াবিলের বিভিন্ন স্থানে দৌড়াদৌড়ি করিয়াছে। ঐ সময় বিলের দক্ষিণ পূর্ব হইতে এটিএম আজহারুল ইসলামের যোগসাজসে এবং একতায় পাকিস্তানী দখলদার বাহিনী ও তাদের এদেশীয় দোসররা উত্তর দিকে গুলি করিতে করিতে অগ্রসর হয়। তাহারা ঝাড়ুয়ার বিল এবং তার আশে পাশে প্রায় ১২ শত এরও বেশি নিরীহ নিরস্ত্র নারী, পুরুষ, শিশু ও ছাত্রদেরকে বিক্ষিপ্তভাবে গুলি করিয়া নির্মমভাবে হত্যা করে। যাহাদের মধ্যে বদরগঞ্জ হাইস্কুলের মিনহাজুর ইসলাম বিএসসি, তার চাচা আলাউদ্দিন, প্রাণকৃষ্ণ মাষ্টার, মেছের উদ্দিন প্রফেসরের মামাতো ভাই এমাজ উদ্দিন সহ তাহার ১৬ জন আত্মীয় শহীদ হন এই নারকীয় হত্যাযজ্ঞের সময় আমি ঝাড়ুয়ার বিলের বর্তমান স্মৃতি ফলকের অনুমান ২০০ গজ দক্ষিণ পূর্ব পাড়ে ঝোপঝাড়ের ভিতর লুকাইয়া থাকা অবস্থায় পাকিস্তানী দখলদার বাহিনী ও তাহাদের এদেশীয় দোসরদের সহিত এটিএম আজহারুল ইসলাম সহ কয়েকজন সিভিল পোষাকধারীদেরকে দেখিয়াছি এবং এটিএম আজহারুল ইসলামকে চিনিয়াছি। বর্তমান স্মৃতিস্তম্ভ সংলগ্ন কাচা রাস্তার উপর অসংখ্য নিরীহ নিরস্ত্র বাঙ্গালীকে তাহারা হত্যা করে। এটিএম আজহারুল ইসলাম এই গণহত্যায় পাকিস্তানী দখলদার বাহিনীকে রাস্তা দেখাইয়া নিয়া আসে এবং গণহত্যায় প্রত্যক্ষ এবং সরাসরি সহায়তা করিয়াছে।৮

127. In respect of Charge No.3, P.W.4 Meser Uddin and P.W.5, Abdur Rahman are eye-witnesses. Abdul Jabbar whose statement has been marked as exhibit-27 was also eye-

witness. 3 other witnesses(P.Ws.3, 6 and 8) are hearsay witnesses. There is no contradiction in their depositions regarding involvement of the convict-appellant. We have already stated the status of the appellant as ICS leader relying upon exhibits-13 and 14. The offences committed in respect of Charge No.3 are heart rending. What is curious to note here is that the defence does not deny the aforesaid incident of killing. Moreover, involvement of the convict-appellant had been clearly proved by the witnesses and the Tribunal committed no illegality in convicting and sentencing him and there is no reason to interfere with the judgment of the Tribunal.

128. In the case of *Prosecutor V. Jean-Paul Akayesu, Case No.ICTR-96-4-T,*the issue of passage of time, trauma and memory as impacting witness testimony havebeen considered. In this case, the defence had argued that there had been systematic collusion among prosecution witnesses to provide false testimony. The court responded, however, by pointing out other factors that could produce the kinds of inconsistencies noted by the Defence. The judgment notes that such discrepancies could be due to the fallibility of perception and memory and the operation of the passage of time:

"The majority of the witnesses who appeared before the Chamber were eye-witnesses, whose testimonies were based on events they had seen or heard in relation to the acts alleged in the Indictment. The Chamber noted that during the trial, for a number of these witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the Chamber, and on the other, their earlier statements to the Prosecutor and the Defence. This alone is not a ground for believing that the witnesses gave false testimony [……] Moreover, inaccuracies and contradictions between the said statements and the testimony given before the Court are also the result of the time lapse between the two. Memory over time naturally degenerates, hence it would be wrong and unjust for the Chamber to treat forgetfulness as being synonymous with giving false testimony."

129. It is contended on behalf of the defence that P.Ws.3, 6 and 8 are hearsay witnesses and that their evidence is inadmissible. We have already found that the evidence of these hearsay witnesses had been corroborated by 2 eye-witnesses (P.Ws.4 and 5). If the evidence of 3 hearsay witnesses has probative value, their evidence cannot be brushed aside. It is the cardinal principle of law of evidence that hearsay evidence is to be considered together with circumstances and the material facts depicted. Hearsay evidence is admissible and the Court can rely on it provided it has probative value.

130. In this connection, we may rely on Rule 56(2) of the Rules of Procedure, which provides that the Tribunal shall also accord in its discretion due consideration to both hearsay and non hearsay evidence, and the reliability and probative value in respect of hearsay evidence shall be assessed and weighed safely at the end of the trial.

131. The above view finds support from the principle enunciated in the case of Prosecutor V. Tharcisse Muvunyi, which is quoted as bellow:

"The Chamber's discretion to admit any relevant evidence which it deems to have probative value also implies that while direct evidence is to be preferred, hearsay evidence is not *per se* inadmissible before the Trial Chamber. However, in certain circumstances, there may be good reason for the Trial Chamber to consider whether hearsay evidence is supported by the credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt." [Prosecutor V. *Tharcisse Muvunyi, ICTR Trial Chamber, September 12, 2006, para-12]*

132. In the instant case, the appellant is being tried long after 4 decades of the atrocities committed. In such cases, direct evidence may not be available. Therefore, even anonymous hearsay evidence can be relied on without any corroboration.

133. It has been argued on behalf of the defence that the appellant was not directly involved in the commission of atrocities as mentioned in Charge No.3.This contention is devoid of reason as we have already found that eye-witnesses P.Ws.4 and 5 stated that accused A.T.M. Azharul Islam was directly involved in the commission of atrocities of arson and killing.

134. Over and above, in order to incur criminal liability in a case of crime against humanity, the accused himself need not have to participate in all aspects of the criminal conduct. Therefore, the accused is criminally liable under section 4(1) of the Act of 1973 and the Tribunal rightly found him guilty for substantially abetting and facilitating the actual commission of the offence of murder and arson as crimes against Humanityas specified in section 3 (2)(a)(c)(g)and (h) of the Act.

Charge No.4

135. On 30th April,1971 between 09.00 P.M. to 12.00 P.M. at night you A.T.M Azharul Islam, being the President of Islami Chhatra Sangha of Rangpur District Branch, along with armed cadres of Jamaat-E-Islami, Islami Chhatra Sangha, under your leadership, accompanied by Pakistani occupation forces having entered the campus of Carmichael College under Kotwali Police Station of Rangpur District abducted Professor Chitta Ranjon Roy, Professor Sunil Baron Chakraborty, Professor Ram Krishna Odhikary, Professor Kalachand Roy of Rangpur Carmichael College and Monjusree Roy, wife of Professor Kalachand Roy from their homes situated inside the college boundary. The above abducted persons were taken to nearby Domdoma Bridge beside western part of Dhaka to Rangpur road at Badhya Bhumi, Mouja-Taluk Dhormadas under Tampat Union of Kotwali Police Station of Rangpur district where all unarmed civilians were killed by you and your accomplices in a pre-planned manner.

136. Therefore, you are hereby charged for abetting or conspiracy, persecuting, complicity in or failure to prevent commission of such crimes and the offences of killing and other inhuman acts as crimes against humanity and genocide and thereby you have substantially contributed to the commission of offences of crimes against humanity and genocide as specified under section 3(2)(a), 3(2)(c), 3(2)(g) and 3(2)(h) of the International Crimes (Tribunals) Act, 1973 which are punishable under section 20(2) of the Act.

You are also liable for commission of above offences under sections 4(1) and 4(2) of the Act.

137. For the purpose of proving Charge No.4, the Prosecution examined 7 witnesses. Of them P.W.9,Sova Kar, P.W.10, Ratan Chandra Das are partly eye-witnesses of the heart rending occurrence and P.W.4 Md. Meseruddin, P.W.8, Md.Mojibur Rahman Master, P.W.13 Advocate Ratish Chandra, P.W.11 Md. Sakhawat Hossain @ Ranga, P.W.12,Md.Rafiqul Hassan @ Nannu are hearsay witnesses of the occurrence.

138. P.W.4, Md. Meseruddin aged about 66 years deposed that he came to learn that during Liberation War A.T.M. Azharul Islam abducted and killed 4 teachers of Rangpur

Carmichael College, namely, Chitta Ranjon Roy, Kalachan Roy, Sunil Baron Chakraborty and another teacher and the wife of Kalachan Roy. He further deposed that after the Liberation War A.T.M. Azharul Islam absconded. After the changeover of 1975, A.T.M. Azharul Islam became active with politics of Jammat-E-Islami.

139. In cross-examination he denied suggestion that in 1970, A.T.M. Azharul Islam did not participate in the election campaign as a student leader of Jammat-E-Islami. In cross-examination, he further stated that he is not aware from which educational institutionsand in which yearsA.T.M. Azharul Islam passed different examinations but he saw him (appellant) as a student of Carmichael College in 1970. At one stage, this witness stated that as he became witness of this case, the people of Jammat-E-Islami and Islami Chhatra Sibir started threatening him and even threatened to kill him. He denied the suggestion that the teachers of Rangpur Carmichael College were not killed. No suggestion was put to this witness in cross-examination to the effect that there was no incident of killing of the teachers of Carmichael College.

140. P.W.8, Md. Mojibur Rahman Master aged about 77 years deposed that he passed B.A. examination from Rangpur Carmichael College in 1968. After Liberation of the country he met Professor Nurul Islam at Rangpur town and came to know from Professor Nurul Islam and other people with him that on 30.04.1971, the Pakistani Army and A.T.M. Azharul Islam had abducted Kalachand Babu, Sunil Baron Chakraborty, Chitta Ranjan Roy and Ram Krishna Adhikari, the teachers of Rangpur Carmichael College and wife of Kalachand Babu and ultimately, they all were butchered by them near Domdoma Bridge.

141. He further deposed that he used to know A.T.M. Azharul Islam since before 1971 as he (appellant) was a student of Rangpur Carmichael College and President of Islami Chhatra Sangha of Carmichael College Unit and a Commander of Al-badr Bahini in 1971. He identified A.T.M. Azharul Islam in the dock.

142. In cross-examination he denied the suggestion that A.T.M. Azharul Islam did not abduct Kalachand Babu, Sunil Baron Chakraborty, Chitta Ranjan Roy, Ram Krishna Adkhikary and wife of Kalachand Babu, teachers of Rangpur Carmichael College who were killed near Domdoma Bridge by firing bullets.

He (P.W.8) heard the incident of the said killing and involvement of the convict appellant but no question was put to him to the effect that he had not heard the incident from Professor Nurul Islam or anybody.

143. P.W.9, Sova Kar aged about 62 deposed that during the War of Liberation in 1971, she was about 19 years old. She deposed that she passed the H.S.C Examination from Rangpur Carmichael College. At present, she is a retired nurse. During the War of Liberation, she used to live in the house with her brother professor Chitta Ranjan Roy, a Teacher of Mathematics Department of the said college,located on the college campus. On 30.04.1971 at about 10.30/11.00 p.m. she was studying in herroom. Kanon Bala, sister-in-law of her brother, was also studying and the door of the house was closed. At that time she could realize that some persons were rapping on the door of the Professor Abdul Jalil. There was a door between the two houses. Sukur Mia, a relative of Professor Jalil then opened the door and after that, 5/6 Pakistani armed Army personnel entered into the house. Then Pakistani Army men crossed the bamboo fence and entered into their house. As many as three Pakistani Army men entered into her room and asked her and Kanon Bala to stand up in a line and meanwhile 2/3 other Pakistani Army personnel entered into the room of their brother Chitta

Ranjan and apprehended him and took him near them. The Pakistani Army also brought her young brother Nittaya Ranjan there who was sleeping at that time. After that, the Pakistani Army blindfolded her brother Chitta Ranjan and tied his hands behind his back. At that time, a Pakistani Army man grabbed her ear rings. Another Pakistani Army man took away her biology box kept on the bed. At that time, Pakistani Army personnel asked her brother about his name but he could not answer being nervous. Then the Pakistani Army grabbed and took her brother Professor Chittya Ranjon Roy in a military vehicle standing outside the house. At the relevant time, she came by the side of the window to see where her brother was being taken. Then she could see through the window that some Bangalee people were standing near the army vehicle. Of whom, she could identify appellant A.T.M. Azharul Islam, a leader of an Islamic Student Organization of their college. Appellant A.T.M. Azharul Islam was her class-mate and she could recognize him by outer side light of their house. After that, his brother Chittya Ranjon Roy was taken in the said army vehicle and then the vehicle departed from that place. She further deposed that Professor Sunil Baron Chakraborty and Professor Ram Krishna Adhikary were also the teachers of Carmichael College. Of them, Ram Krishna Adhikary was staying in their house in that fateful night. Both of them used to stay in the guest house located on the campus. When Liberation War started they used to live in different places. Professor Ram Krishna Adhikary was staying in their house on that night because on the following day it was scheduled to pay the salaries of the teachers. When Professor Ram Krishna opened the back door of the house and tried to escape, Pakistani Army Men also apprehended and took him in the said military vehicle. She further deposed that when Pakistany Army took away her brother and Professor Ram Krishna Adhikary, they cried the entire night. On the following morning Ratan Das, a cook of the guest house of the college, who used to live in the house of Professor Kala Chand Roy at the relevant time, came to their house and on his query, she informed him about the occurrence of the previous night in detail. Then Ratan Das also disclosed to her that the Pakistani Army apprehended Professor Kalachand Roy, his wife Monjusree Roy and another teacher Sunil Baron Chakraborty and took them away. Professor Kalachand Roy had two minor children and Ratan stayed with the said minor children at that house during the whole night and in the morning Professor Reaz and his wife who were the neighbours of Professor Kalachand took the said minor children, and then Ratan came to their house. Ratan also disclosed to her that when the Pakistani Army were picking up Professor Kalachand he saw some Bangalee civilian people and he could recognize A.T.M. Azharul Islam, who was a leader of Islamic Student Organization. Then this witness disclosed to Ratan that she could also identify accused Azharul Islam.

144. She further deposed that she asked Ratan to make contact with Salauddin, a student of her brother to get information about her brother and other teachers. Salauddin had contact with many in the cantonment. Then Ratan contacted Salauddin who told him that after collecting information from the cantonment he would give it to them. About 2 hours later Salauddin came to their house and informed that none of the Professors was alive and they were killed near Dom Doma Bridge. The people of neighbouring village saw the dead bodies and covered those by earth after digging a hole. Because of the prevailing situation Professor Jalil and Professor Reaz advised them to go somewhere in a village. After that, She, Kanon Bala, her younger brother and Ratan went to village home of the Post Master of Carmichael College by a bullock-cart.Nittaya and Ratan returned to the house of her brother after taking them to the house of the Post Master. As it was not safe to stay in that village, they went to the village home of Aynudden, the Bearer of the college and stayed there for about two months. After a few days, Professor Jalil and Professor Reaz sent them with Moslem Alam, another teacher of the college, who had been transferred from there to Dhaka. Lastly they went to their village at Nandipara, Perojpur. After some days she went to India with other

family members and joined a camp of female freedom-fighters at Kobra in India and took nursing training. P.W.9 Sova Kar identified accused A.T.M. Azharul Islam in the dock.

145. In cross-examination, she stated that it is not a fact that A.T.M. Azharul Islam was not a student of Science Group of Charmichael College in 1970 session. She also denied the suggestion that when her brother Chitta Ranjan Roy was abducted by Pakistani Army, A.T.M. Azharul Islam was not with them. She also denied the suggestion that A.T.M. Azharul Islam never attended class with her or appeared in examination or the person whom she identified in the dock had been implicated at the instance of Investigation Officer and her brother Nittaya Ranjan Roy. She also deposed that the pattern of the house in which they staying was like 'L'. She also denied that the aforesaid statement was made by her at the instigation of the Investigation Officer and her brother Nittaya Ranjan Roy.

146. P.W.9 is a natural witness and before the Tribunal she drew a sketch map from where her brother was abducted and she saw the occurrence. No question was put to her to the effect that the aforesaid sketch map drawn by her and marked as exhibit-L by the Tribunal is not correct. The incident as mentioned in charge No.4 is so horrendous that it did not fade out of her memory. The defence contended that the statement of P.W.9 is contradicted by the documentary evidence. The defence further contended that during her testimony, she stated that her SSC session in Rangpur Carmichael College was 1970-1971 but from Exhibit-19(1) it transpires that her SSC session was 1969-1970 and P.W.9 claimed that the appellant was her classmate but exhibit-19(1) shows that they were from different sessions. We shall consider this question later while considering the documentary exhibits.

147. P.W.10, Ratan Chandra Das is aged about 61 years. He was aged about 18 years during War of Liberation.He deposed that during War of Liberation, he lived in Carmichael College campus as cook of Professor Sunil Baron Chakraborty and Professor Ram Krishna Adhikari. As soon as the Liberation War started Professor Sunil and Professor Ram Krishna left the college campus and took refugein a nearby village. He (P.W.10) then used to stay in the house of Professor Kalachand. After a few days, it was disclosed that the salaries of the teachers would be given. Professor Sunil Baron and Professor Ram Krishna went to college campus and came to know that classes of college would be resumed soon. Then Professor Sunil went to the house of Professor Kalachand and Professor Ram Krishna went to the house of Chitta Ranjon Roy and they were staying in the said houses. He further deposed that probably on 15$^{th}$ Baishakh of 1971 at night after dinner, Professor Kalachand, his wife Monjusree, Professor Sunil and he himself were discussing the current situation of the country. At about 9.30/10.00 p.m. they heard rap on the door and hearing the said sound Professor Kalachand opened the door and then some Pakistani Army and 4/5 Bangalee civilian people entered into the room. Of whom he could recognize appellant A.T.M. Azharul Islam. The Pakistani Army blindfolded Sunil Baron Chakraborty and Kalachand Roy. After that, Pakistani Army took Sunil Babu and Kalachand into the army vehicle and at that time Monjusree, the wife of Kalachand Babu, heldthe legs of army personnel and requested them to release her husband and then the Pakistani Army also took her in the vehicle. He further deposed that during the night he stayed at the house of Professor Kalachand with two children of Professor Kalachand. On the followingmorning Professor Reaz, another teacher of the college and his wife took the said children to their house. After that, he went to the house of Professor Chitta Ranjan Royand called Sova Kar who opened the door. He came to know from Sova Kar that the Pakistani Army apprehended his brother, Professor Chitta Ranjan Roy and Professor Ram Krishna and she inquired of him whether there was any Bangalee with the Pakistani Army and then he replied that there were some Bangalees with

the Pakistani Army and he could recognize the appellant A.T.M. Azharul Islam. After that, Sova Kar asked him to make contact with a student who had connection with the Army in the Cantonment to know about the whereabouts of the persons abducted. He then made contact with the said student who informed him (P.W.10) that he would go to Cantonment to collect information about the persons abducted. After about 2 hours, the said student informed that the persons abducted were killed near Domdoma Bridge. Hearing the news, he, Kanon Bala,Nittaya and Sova Kor went to the village home of the Post Master of the college. As the situation aggravated, they went to the village home of Aynuddin, a Bearer of the college. After some days when one of the teachers of the college had been transferred to Dhaka, they came to Dhaka with him. After reaching Dhaka, the said teacher made arrangement for Sova Kar and others to go to their village home from Sadarghat by launch. Initially, they went to Hularhat by launch. From there they went to Nandipara by a boat. This witness stayed in the house of Sova Kar for some days and then he went to his village home, Chandrapara. He identified A.T.M. Azharul Islam in the dock.

148. During cross examination, he denied the suggestion that in 1971 he was not in Rangpur and that the aforesaid statement is false, concocted and tutored.He also denied suggestion that among the Bangalees, he could not recognize one and his name was A.T.M. Azharul Islam. In cross-examination, he further narrated that he told that there were some Bangalees and he could recognize A.T.M. Azharul Islam. He also denied the suggestion that he could not identify the appellant in the dock but he could do so as he was tutored to say so. He also denied the suggestion that he was not the cook of Professor Sunil Babu and Professor Ram Krishna Roy or that he could not recognize A.T.M. Azharul Islam or he did not know him. No suggestion was given to him that he had enmity or conflict of interest with convict appellant or out of grudge he deposed against the appellant.

149. Mr. Khandaker Mahbub Hossain, learned Counsel, appearing on behalf of the appellant, submits that P.W.10 did not specify how he came to know the appellant in 1971 and that it appears that he is a tutored witness. Having gone through his evidence, we find that he being the cook of Professor Sunil and Professor Ram Krishna used to stay in the college campus. A person staying in college campus is supposed to know the student leaders of the college. Having gone through his entire evidence, we find that he is the most natural witness.A prudent man after going through his evidence will not hesitate to accept it as true.

150. Mr. Mahbub Hossain further submits that P.W.10 did not know the name of the Principal of Carmichael College and as such, his evidence should be discarded. Admittedly, the masters of the witness were abducted on the fateful night of the occurrence and he was supposed to know the persons responsible for abducting his masters and for not remembering the name of the Principal, his evidence as regards identification of the appellant during the fateful night could not be discarded altogether.

151. P.W.11, Sawkat Hossain alias Ranga stated in his examination-in-chief that while in Rangpur he came to know that A.T.M. Azharul Islam was involved in the killing of intellectuals during the Liberation War of 1971. He identified the accused appellant in dock. No question was put to him that he had not heard about the fact of killing of intellectuals and involvement of A.T.M. Azharul Islam with it.

152. P.W.12, Rafiqul Islam Nannu aged about 62 years stated that he passed H.S.C. examination in 1972. During the War of Liberation, he was aged about 18 years. During 1971, he used to stay in the house of his elder brother Sajjad. He deposed that as he (P.W.12)

was involved with the politics of Student League, he used to go to Carmichael College in 1969-1970. At that time, the appellant A.T.M. Azharl Islam was the 2nd year student of Science group of that college and he was also involved in the politics of Islami Chattra Sangha. P.W.12 used to go to Rangpur Press Club to read newspaper and there he used to meet A.T.M. Azharul Islam and his friends. He also deposed that A.T.M. Azharul Islam was not only the President of Islami Chattra Sangha of Rangpur District Unit but he was also the Al-Badr Commander of Rangpur Branch. He also deposed that A.T.M. Azharul Islam was involved in the killing of intellectuals and that A.T.M. Azharul Islam is present in the dock before the Tribunal.

153. In cross-examination he denied the suggestion that A.T.M. Azharul Islam was not involved in the killing of intellectuals and the statement made by him in respect of involvement of the appellant in the killing of intellectuals is tutored and concocted. He also denied the suggestion that all the statements made against A.T.M. Azharul Islam were tutored, concocted and motivated.

154. P.W.13, Advocate Ratish Chandra Bhowmik is aged about 55 years. He deposed that soon after the Liberation of the country, he came to know that on 30.04.1971 in pursuance of the plan of the appellant A.T.M. Azharul Islam, Kalachand Babu, Sunil Baron Chakraborty, Chitta Ranjon Roy and Ram Krishna Adhikary, the teachers of Rangpur Carmichael College were killed near Domdoma Bridge.

155. Having scrutinized the evidence of the witnesses, it is apparent that P.W.9, Sova Kar and P.W.10, Ratan Chandra Das are eye witnesses of the occurrence of abduction of the victims and A.T.M. Azharul Islam was known to them and they could identify him who accompanied the Pakistani Army at the time of abduction.

156. P.W.9, Sova Kar, an eye-witness to the occurrence recognized convict-appellant when her brother Chitta Rajan Roy and another teacher Ram Krishna Adhikary were abducted. She also stated that she could recognize the appellant A.T.M. Azharul Islam, the leader of Islami Chattra Sangha standing among the persons outside their house. She also stated that the appellant used to study with her. She further stated that light was always there in front of their houses and that she recognized A.T.M. Azharul Islam in that light. P.W.9 Sova Kar passed Secondary School Examination in the year 1969.

157. Exhibit-19 in serial No.9 shows that she passed the SSC examination in 1969 from Jessore Board. In her application in Serial No.10, she clearly stated that she was a student of Carmaichael College in the year 1969-1971 and the said application, which was filed on 28.01.1971, was duly signed by the Principal of the College on 18.02.1971. Thus it has been proved beyond doubt that she was supposed to appear in HSC examination in the year 1971 and she was a student of the session of 1969-1971.

158. On the other hand, exhibit-22 reveals that convict-appellant appeared in the SSC examination on 04.04.1968 and his Registration number was 10000 of 1966-1967. His elective subjects for SSC examination were Mathematics, Physics, Chemistry and Biology. Exhibit-22(2) is the Tabulation Sheet of SSC examination of the convict-appellant. Exhibit-20(1) is the Tabulation Sheet of the convict-appellant A.T.M. Azharul Islam. The said Tabulation Sheet is for HSC examination Part-I,1969 and the name of the centre had been mentioned as Carmichael College, Rangpur and his group is mentioned as Science Group.

159. From these exhibits, it appears that he was admitted in Carmichael College in 1969 after passing the SSC examination. On the other hand, P.W.9 got admission in the year 1969 after passing SSC examination in 1968. But the Tabulation Sheet of HSC examination Part-1 of 1969 of the convict appellant showed that he only appeared in one subject and not in other subjects. Since he did not pass Part-I of HSC examination, he stayed back in the 1st year and thus when Sova Kar got admitted in 1968, the convict-appellant became her classmate. An admit-card (exhibit-23)was issued for examination which was to commence on 06.05.1971.This also shows that the convict-appellant stayed back in the 1st year as he did not pass the 1st part of the examination of 1969 and he had to attend classes in 1970-1971 and the admit-card was issued to appear in the examination on 06.05.1971 and this examination is for the student who was in final year of HSC class. In admit-card (exhibit-23) his registration was changed as private candidate. It may be mentioned here that he filed an application to appear as a private candidate on 14.01.1971 and on the same day a Lecturer of Carmichael College gave a certificate to the effect that the appellant diligently and regularly pursued his studies and he chose elective subjects as Economics, Civics and Islamic History (Exhibit-23(1).

160. Sova Kar (P.W.9) filed an application on 28.01.1971 to the Controller of examination of Rajshahi Board to appear in the HSC examination mentioning the name of her institution as Carmichael College in Session 1969-1971 and the admit-card of the appellant which was issued with Registration No.10000 of 1966-1967 and the Tabulation Sheet of the HSC Part-I in 1969 also shows his Registration No.10000 of 1967. Therefore, there is no doubt he was a student of Carmichael College and applied to appear as private candidate after shifting from Science Group to Humanities Group.

161. Though he applied to appear as private candidate admit-card was issued before examination with old registration number which was mentioned as student of Carmichael College.

162. Abdul Jobber (since dead) made statement to the Investigating Officer in support of Charge Nos.2, 3 as well as Charge No.4. His statement supporting Charge No.4 is quoted below:

"রংপুর শহরের মুক্তিযুদ্ধের পক্ষের বুদ্ধিজীবিদের হত্যার পূর্ব পরিকল্পনা ও নীল নকশা বাস্তবায়নের লক্ষ্যে ৩০শে এপ্রিল ১৯৭১ রাত অনুমান ৯/৯.৩০ ঘটিকার সময় এটিএম আজহারুল ইসলাম পাকিস্তানী দখলদার বাহিনী সাথে নিয়া কারমাইকেল কলেজের ক্যাম্পাসের ভিতরের বাসা হইতে উক্ত কলেজের অধ্যাপক কালাচাঁদ রায়, সুনীল বরন চক্রবর্তী, চিত্ত রঞ্জন রায়, রামকৃষ্ণ অধিকারী ও অধ্যাপক কালাচাঁদ রায়ের স্ত্রীকে ধরিয়া নিয়া দমদমা ব্রীজের নিকট গভীর রাতে গুলি করিয়া হত্যা করে। যাহা আমি লোক মুখে শুনিয়াছি।"

163. Having gone through the evidence, we find that Sova Kor (P.W.9) and Ratan Chandra Das (P.W.10) had given vivid description of the incident. The defence did not deny the incident that the teachers of Rangpur Carmichael College were brutally killed on the date of occurrence.

164. Mr. Khandaker Mahbub Hossain, learned Counsel, appearing on behalf of the appellant, submits that only the convict-appellant was not present at the time of occurrence. P.W.9, Sova Kor and P.W.10 Ratan Chandra Das are natural witnesses and more so they corroborated each other and there is no reason to disbelieve them. Admittedly, the convict-appellant was the President of ICS in Rangpur Town which is not denied.

165. Having gone through the evidence, we have no hesitation to hold that the prosecution successfully proved the charge that on 30.04.1971 at about 11.30 p.m. A.T.M. Azharul Islam along with Pakistani Army raided the houses of Professor Chitta Ranjan and Professor Kalachand and abducted them and another two teachers Ram Krishna Adhikari and Sunil Baron Chakraborty and thereafter they were killed near Domdoma Bridge. There is no doubt that A.T.M. Azharul Islam was present when the victims were abducted and he was an active accomplice of Pakistani occupation Army. He gave assistance and encouragement and moral support to the co-perpetrators, the Pakistani occupation Army in committing the offence of Genocide as specified in section 3(2)(c)(i)(g) and (h) of the ICT Act,1973 read with section 4(1) of the said Act.

166. Mr. Khandaker Mahbub Hossain, learned Counsel for the convict-appellant, submits that Pakistani Army is the principal offender and that leaving them behind only an abettor has been brought for trial and as such, he cannot be held responsible for the charge alleged in this connection.It has been held by the Appeals Chamber of ICTY, in the case of *Prosecutor V. Radislav Krstic* that-

*"A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified." .....Accordingly, the Trial Chamber's conviction of Krstic as a participant in a joint criminal enterprise to commit genocide is set aside and a conviction for aiding and abetting genocide is entered instead. [April 19, 2004 Para 143 of the judgment]:*

167. In the case of *Prosecutor v. Tharcisse Muvunyi (ICTR, Trial Chamber)*it has also been held that-

*"Aiding and abetting genocide refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide. Although the terms aiding and abetting may appear synonymous, they are in fact different. Aidingmeans giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto. Thus, individual criminal responsibility can be incurred where there is either aiding or abetting, but not necessarily both" [Para-471]*

168. In the case of the Prosecutor V. Jean-Paul-Akayesu (ICTR Trial Chamber), it has been held that-

*"[E]ither aiding or abetting alone is sufficient to render the perpetrator criminally liable. In both instances, it is not necessary for the person aiding or abetting another to commit the offence to be present during the commission of the crime." [Para-484].*

169. The appellant accompanied the Pakistani Army, the principal offenders and as such, the appellant could not have a different intent. The evidence of P.W.9 and P.W.10 revealed that the appellant and the principal offenders attacked with common intent and participated in the killing.

Charge No.5.

170. That between 25th March to 16th December,1971 you A.T.M Azaharul Islam as the President of Islami Chhatra Sangha, a student wing of Jammat-e-Islami of Rangpur District Branch, along with local Behari, workers and leaders of Jammat-e-Islami and Islami Chhatra Sangha, under your leadership, collected locations of pro-liberation supporters and supplied the same to the Pakistani Occupation force at Rangpur cantonment. Thereafter, many of the pro-liberation unarmed civilians and their family members were abducted, confined and

tortured thereof. At your instancemany women were confined and subsequently raped by Pakistani Occupation Forces and were also killed. In the first week of August, 1971 by your instigation, victim Monchura Khatun was raped at her father-in-law's house and she was taken to Rangpur Town Hall where she was repeatedly raped by Pakistani invading force, one after another and she was kept confined in Rangpur Town Hall for nineteen days. Victim Monchura Khatun became pregnant and subsequently had a miscarriage followed by torture and she was released from Rangpur Town Hall as she fell seriously ill. During her confinement in Town Hall she observed, through window, heinous offences and crimes against humanity committed by Al-Badr and Pakistani Occupation force upon the men and women who were brought to Rangpur Town Hall by your instigation.

171.Therefore, you are hereby charged for abetting, facilitating commission of offences of abduction confinement, torture and rape as crimes against humanity as specified in sections 3(2)(a), 3(2)(g) and 3(2)(h) of the International Crimes (Tribunals) Act which are punishable under section 20(2) of the Act.

172. Before evaluating evidence of the witnesses in respect of charge No.5, let us have a glance on the case in *Prosecution V. Kunarac et. al, IT-96-23-T, para 679, the International Criminal Tribunal for the former Yugoslavia (ICTY)*considered the issue of assessing credibility; memory loss, passage of time and trauma as impacting witness testimony. "The Trial Chamber regards this lapse of memory as being an insignificant inconsistency as far as the act of rape committed by the accused Kunarac is concerned. In particular, the Trial Chamber is satisfied of the truthfulness and completeness of the testimony of FWS-95 as to the rape by Kunarac because, apart from all noted minor inconsistencies, FWS-95 always testified clearly and without any hesitation that she had been raped by the accused Kunarac [……] As already elaborated above, the Trial Chamber recognises the difficulties which survivors of such traumatic events have in remembering every particular detail and precise minutiae of these events and does not regard their existence as necessarily destroying the credibility of other evidence as to the essence of the events themselves."

173. Taking into consideration the above opinion it is to be seen whether the Prosecution has been able to prove Charge No.5.

174. In order to bring home this charge, the prosecution examined 6 witnesses of whom, P.W.1 is victim Monsura Khatun who is aged about 60. She deposed that during the War of Liberation in 1971, she was aged about 17 and at that time she had no issue. During the War of Liberation, she was at the residence of her husband. During the War of Liberation of 1971, her husband went to India. Her husband left her behind in her father-in-law's house. Her husband was an activist of Awami League and she was a dealer of rice. Before leaving for India, her husband gave her Tk.1600/-. During the month of Bhadra in 1971 there was a cigarette factory to the south of their house and in that factory, there was non-Bengali Darwan (gateman). The Darwan was an activist of Jammat-E-Islami. The said Darwan came to know that her husband had gone to India for joining Liberation War. As per information of the said Darwan, on $7^{th}/8^{th}$ Bhadra at about 8-9 p.m. Pakistani Army, Rajaker and AL-Badr came to their house in two vehicles. Hearing the sound of firing, the people started running to and fro to save their lives. At that time, she was inside the house and her father-in-law was in the courtyard. The Pakistani Army, Rajakars and AL-Badrs surrounded their house and apprehended her father-in-law. After that, they started beating him. On seeing the incident, she became afraid and started running towards the house of Rahman, a neighbor. At that time, 3 Pakistani Army personnel and a Bangalee started chasing her. As soon as, she reached the

house of Rahman, she found no one there as the inmates of the said house had already taken refuge elsewhere. The Pakistani Army and the Bangalee captured her and sexually abused her one after another despite her request that she was carrying 6 months pregnancy. Hearing whistle blow of another Pakistani Army man, the said Pakistani Army men made her free and they asked the Bangalee addressing A.T.M. Azharul Islam to bring her with them. Then she could understand that the man was A.T.M. Azharul Islam. After that, Pakistani Army men and A.T.M. Azharul Islam took her in her father-in-law's house. In her father-in-law's house, she found her father-in-law lying on the ground like a dead man. The Pakistani Army, the Rajakars and AL-Badrs asked her about the name of her husband and his whereabouts. She replied that the name of her husband Md. Mostafa but she did not know whereabouts her husband. At that time, one of the Rajakars gave 'lathi' blow on her waist. Then they asked her where she had kept bombs. In reply, she said that she never saw bombs. After that, they plundered their house and looted the belongings of the house including gold and cash money. Presuming her father-in-law dead, the Pakistani Army men took him in their vehicle and she was also picked up in the army vehicle. On the way, they threw away the body of her father-in-law beside a road and she was taken to Rangpur Town Hall. In the Town Hall, she found 7/8 other women. The Pakistani Army used to sexually abuse her and the other women confined in the Town Hall every night. During the day time, she used to see accused A.T.M. Azharul Islam at the Town Hall to have talked with the Pakistani Army. When they went out with their vehicle and returned to Town Hall with young boys and girls, the young boys were tortured and the women were sexually abused by the Pakistani Army men. Being sexually abused, she had a miscarriage. After that, as per advice of two Bangalee Rajakars, she was released from the Town Hall and she came back to her house after 19 days. After coming back to her house, she saw that her father-in-law was seriously ill and eventually he died while he was under treatment. After the Liberation of the country her husband met her at his sister-in-law's house and after getting treatment she was taken to their house by her husband.

175. During cross-examination, P.W.1 admitted that her date of birth was correctly written in the National ID card and the voter list. She also admitted that the date of birth of her elder daughter Setara Begum is correctly written in the National ID card. She gave birth of three more daughters, namely, Jaytun, Diljahan and Guljahan after the birth of Setara Begum. Jaytun was born after one year of Setara, Diljahan was born after one year of Jaytun and Guljahan was born after one year of Diljahan. Her two sons namely, Din Mohammad and Monsur Ali were born two years after birth of Diljahan. According to the voter list (exhibit-D), the date of birth of P.W.1 is 01.01.1945 which is admitted by her and as such, she was 26 years old in 1971 although she claimed that she was only 9 yers at the time of marriage. Exhibit-F, NID of Setara Begum, shows that she was born on 01.01.1964 which is admitted by P.W.1. The defence exhibits-D and E show that P.W.1 lied about her age and the age of her children before the Tribunal.

176. In cross-examination, she then admitted that soon after meeting the Investigation Officer, her elder son got a job. Din Mohammad, her 4$^{th}$ son, before his getting a job used to ply rickshaw and also used to engage in agricultural works. She further admitted that her younger son Monsur Ali used to ply rickshaw and that she did not know whether he was also getting any Government job. From the aforesaid admission of P.W.1, it appears that her 1$^{st}$ and 4$^{th}$ son got job after she met with the Investigation Officer. She also stated that she did not know whether her son Monsur Ali was in the process of getting Government job. The aforesaid admissions of P.W.1 show that she was enticed to depose before the Tribunal in lieu of getting service of her sons.

177. P.W.1 during examination-in-chief claimed herself as 'Birongona'(বীরঙ্গনা) but P.W.19, the Investigation Officer, during examination-in-chief admitted that at the time of investigation, he did not collect any list of 'Birongona'(বীরঙ্গনা) of Kashma village under Rangpur District. From the discussion made above, it is crystal clear that P.W.1 testified falsely before the Tribunal. She falsely testified regarding her age and children which created serious doubt about the prosecution story as regards involvement of the appellant in the occurrence and as such, it is difficult to rely upon her evidence.

178. P.W.2, Md. Mostafa Mia is aged about 75 years deposed that he was a freedom fighter. He deposed that he studied upto class-V. As soon as the Liberation War was started, he went to India for participating in the Liberation War. After independence of the country, he came home but saw none of his inmates in the house. His neighbors informed him that his father died due to torture of the Pakistani Army and his wife was in the house of his sister Julekha. After that, he went to his sister's house and met his wife who narrated the whole incident to him. P.W.2 further deposed that the Pakistani Army did not know the location of his house and his father's house. Accused A.T.M. Azharul Islam and Darwan Mostaque identified his house and they brought the Pakistani Army. At this stage, the witness started weeping.

179. In cross-examination, P.W.2 denied that he was not a freedom fighter and that his wife was not a 'Birongona'(বীরঙ্গনা). He, however, admitted in cross-examination that his name was not included in the names of freedom fighters and that the name of his wife was also not included in the list of 'Birongona'(বীরঙ্গনা). In cross-examination, he stated that in India he had been in charge of cooking in the different camps of freedom fighters and that the official would say that the person engaged in cooking for freedom fighters is also a freedom fighter. He denied the suggestion that he did not go to India or that he did not return home from India after independence of the country. He denied the suggestion that A.T.M. Azharul Islam till date did not go to their locality. He also denied that A.T.M. Azharul Islam did not go to their house with Pakistani Army on the date of occurrence.

180. Mr. Khandaker Mahmub Hossain, learned Counsel, appearing on behalf of the appellant, submits that P.W.2 is a hearsay witness in relation to charge No.5 and he is the husband of P.W. Monsura Khatun, who testified falsely before the Tribunal and as such, the testimony of P.W.2 does not inspire confidence and hence liable to be discarded by this Court.

181. P.W.2 is a hearsay witness in relation to Charge No.5. He is the husband of P.W.1. P.W.2 heard about the incident from P.W.1. P.W.2 during examination-in-chief claimed himself as freedom fighter but from the defence exhibits-'G' and 'H', it appears that his name was neither listed as freedom fighter by Bangladesh Muktijuddah Sangsad, Rangpur nor in the Gazette Notification of Badargonj Upazila Parishad published in 2005. From the trend of cross-examination as discussed above, we find that it is very difficult to rely on the evidence adduced by P.W.2. Moreover, as we have disbelieved the evidence adduced by P.W.1 with regard to involvement of the appellant in the occurrence we do not find any ground to give any credence to the deposition of P.W.2.

182. P.W.4, Md. Meseruddin aged about 64 is a teacher by occupation. He retired as Principal-in-charge of Badargonj Degree College in 2009. He obtained M.A. degree from Rajshahi University in Political Science in 1974. He deposed that 2 days after independence of the country he returned from freedom fighters' camp at India. He came to know that young

boys and girls were taken to Rangpur Town Hall where they were tortured in various ways. He went to Rangpur Town Hall and found so many alamats like women's sarees, blouses, patikots and decomposed bodies of the women. He further deposed that he heard that wife of Golam Mostafa was violated by Pakistani Army and A.T.M. Azharul Islam. Accused A.T.M. Azharul Islam was known to him since 1970 when he came to Badargonj for election campaign in favour of Jammet-E-Islami candidate.

183. P.W.4 is a hearsay witness. After returning home he heard that women and young people were detained in Rangpur Town Hall. The appellant and Pakistani Army used to torture them. He also heard that wife of Mostafa, a freedom fighter, was raped by the Pakistani Army and the appellant and consequently, her six months old baby was aborted. Deposition of P.W.4 is not reliable as he has not specified from whom he heard about the involvement of the appellant in the alleged incident.

184. P.W.8, Mojibur Rahman Master aged about 58 years stated in his examination-in-chief that after liberation of the country, he came to Rangpur on 22.12.1971 to see the Rangpur Town Hall and found blood-stain marks sarees, blouses and patikots of women and also found blood-stain marks on the wall of Town Hall and many dead bodies of the women floating in a well (কুয়া) beside the town hall. At that time, Golam Kibria and Abdul Mannan, two Awami League leaders, and many others were also present there. They informed him that appellant A.T.M. Azharul Islam aided the Pakistani Army in bringing the women to Town Hall from various places. Then, he went to village Kamal Kasna and heard from Golam Mostafa about the torture and sexual violence on his wife by the Pakistani Army and accused A.T.M. Azharul Islam and that his wife was confined for 19 days in Rangpur Town Hall.

185. P.W.8 is a hearsay witness. He heard from Golam Kibria and Abdul Mannan that the appellant was involved in detaining, torturing and abusing women in Rangpur Town Hall. From the trend of his examination-in-chief and cross-examination, it is difficult to rely on his evidence. The prosecution did not examine Golam Kibria and Abdul Mannan. It appears from exhibit-25, the memo dated 16.09.2012 containing information about A.T.M. Azharul Islam that P.W.8 did not implicate the appellant in the incident in relation to charge No.5 and as such, the hearsay evidence of P.W.8 is not reliable.

186. P.W.11, Md. Shakhawat Hossain alias Ranga deposed that he heard that during Liberation War accused A.T.M. Azharul Islam used to visit the torture cell of Pakistani Army and that he helped the Pakistani Army in capturing freedom loving people and to collect young women.

187. P.W.11 is a hearsay witness in relation to charge No.5. He heard that the appellant used to visit torture-cell of Pakistani Army and aided to handover beautiful women to Pakistani Army, P.W.11 did not disclose any source from where he received the information that the appellant was involved in the incident of charge No.5.

188. P.W.12, Md. Rafiqul Islam Nannu deposed that A.T.M. Azharul Islam used to make contact with Pakistani Army in the Cantonment. He was also involved in torturing women in Rangpur Town Hall. He denied the suggestion that he deposed falsely at the instance of interested quarter to victimizethe appellant.

189. P.W.12 is a hearsay witness in relation to charge No.5. He heard from his neighbours that the appellant was involved in torturing women in Rangpur Town Hall. However, the prosecution did not examine any of his neighbours.

190. On scrutiny and examination of the evidence, we find that P.W.1 who is the victim of the occurrence clearly stated that she was raped. But she could not prove that the appellant abetted the same. P.Ws.2,4, 8, 11 and 12 are hearsay witnesses.

191. In this connection, we are inclined to refer to the case of *Prosecutor V. Tharcisse Muvunyi*(ibid) wherein paragraph-11, it has been held as under:

"In General, the Chamber can make a finding of fact based on the evidence of a single witness if it finds such evidence relevant and credible. It follows that the Chamber does not necessarily require evidence to be corroborated in order to make a finding of fact on it. Indeed, the Appeals Chamber has held that corroboration is not a rule of customary international law and as such shall ordinarily not be required by Trial Chambers. With respect to sexual offences, Rule 96(i) specially provides that the Trial Chamber shall not require corroboration of the evidence of a victim of sexual violence."

192. The case referred to above reveals that corroboration of the evidence of the victim of rape is not necessary. But in respect of the charge No.5, we find that it is difficult to rely upon the evidence of victim P.W.1. As such, the aforesaid case has no manner of application in respect of charge No.5.

193. Therefore, the prosecution miserably failed to bring home charge No.5 against the appellant.

Charge No.6

194. That in the month of mid November,1971 you A.T.M. Azharul Islam gave a hard slap on the face of victim Shawkat Hossain @ Ranga due to chanting "Joy Bangla" slogan by him and used filthy language to him. You were known to the victim as his brother Rafiqul Hasan @ Nannu was involved in student politics.

195. In continuation to that affect you A.T.M Azharul Islam with the help of Al-Badr Bahini, under your leadership, abducted civilian Rafiqul Hasan @ Nannu, a 1st year student of humanity group in Rangpur Carmichael College and also a worker of Chhatra League of the same college branch, from Bathpatree Mour in Rangpur town at about 09.00 A.M and took him to Al-Badr camp and thereafter he was taken to Shahid Muslim Chhatrabas, the then Al-Badr camp, where he was kept confined and severely tortured and subsequently he was released from the camp with the help of one non-Bangalee named Nasim Osman known to his elder brother Md. Sajjad Jahir (now dead) but he became maimed due to severe torture.

196. Therefore, you are hereby charged for abetting, facilitation commission of offences of abduction, confinement and torture as crimes against humanity as specified in sections 3(2)(a), 3(2)(g) and 3(2)(h) of the International Crimes Tribunal Act,1973 which are punishable under section 20(2) of the Act. You are also liable for the commission of above offences under sections 4(1) and 4(2) of the Act.

197. In order to bring home charge No.6, the prosecution examined 2 witnesses, who are the victims of the occurrence.

198. This charge consists of two incidents. The Tribunal disbelieved the first incident but believed the second incident. Therefore, we refrained from discussing the evidence with regard to the first incident.

199. P.W.11, Md. Shakhawat Hossain @ Ranga is aged about 57 years. During the War of Liberation in 1971, he was aged about 16 years. At that time, he used to reside with his elder brother at Guptapara. During the occurrence, he was a student of Class-VIII of Rangpur Zilla School. He deposed that Rafiqul Islam Nannu, his elder brother was involved in student politics since 1969.

200. In respect of the second incident, he deposed that on 01.12.1971 at about 9 a.m. his elder brother Rafiqul Islam Nannu went to Zerin tailors situated at Beth Pottee Intersection of Rangpur town to bring cloths of his sister-in-law. As soon his brother reached near tailor-shop some persons wearing black cloth attacked and dragged his brother Nannu to the nearby Rajakar Camp. AL-Badr Commander A.T.M. Azharul Islam eventually came to the said camp. According to the instruction of the appellant, A.T.M. Azharul Islam his brother was taken to the AL-Badr Camp at Central Road, Rangpur. Members of AL-Badr Bahani severely tortured him under the leadership of A.T.M. Azharul Islam in the said camp and at one stage his brother lost his senses. On hearing the said incident, his elder brother Sazzad Zahir went to the AL-Badr Camp and requested A.T.M. Azharul Islam to release his brother Rafiqul Islam Nannu but the appellant did not pay heed to the request. After that, his brother took help of Nasim Osman, a non-Bengali and at his request his brother was subsequently released from the said camp. After that, he was taken to their house and got treatment. After regaining senses his brother disclosed about the occurrence to the inmates of the house. Because of the said torture his brother became a disabled person and he could not move freely.

201. He denied the defence suggestion that in order to victimize the accused politically he deposed falsely and that the appellant A.T.M. Azharul Islam was not a leader of AL-Badr Bahini.

202. P.W.12, Rafiqul Islam Nannu deposed that he was involved in student politics of Chhatra League in 1969-1971. At that time, he used to go Rangpur Carmichael College campus and A.T.M. Azharul Islam was a student of science group of Class-XII of that college. He further deposed that he used to go to Rangpur Press Club for reading newspaper where he met the appellant A.T.M. Azharul Islam and his friends. In respect of the second incident, he stated that on 01.12.1971 he went to Beth Pottee area in Rangpur Town. As soon as he reached Zarin tailor shop, some Rajakar captured him and dragged him to a nearby Rajakar Camp. After some times, the appellant A.T.M. Azharul Islam came there and according to his order he (P.W.12) was taken to AL-Badr Camp situated at Rangpur Central Road by a rickshaw. In that camp, he was tied and hung from a ceiling-fan. A.T.M. Azharul Islam and others beat him with electric-wires and he lost his senses at some point of time because of torture. On getting the information, his elder brother Sazzad Zahir came to the camp and requested the appellant A.T.M. Azharul Islam to free him but to no avail. Then his brother Sazzad went to a local leader of Pakistani Peoples Party (P.P.P.), Nasim Osman, who had good relation with victim's family. Nasim and Sazzad went to the camp and requested A.T.M. Azharul Islam to release him and on the request of Nasim Osman, the appellant A.T.M. Azharul Islam freed him in an unconscious condition. He was then taken to their house and after getting treatment, he regained his senses. Because of torture, he became

almost disable and had been living in a miserable condition due to his impairment. He further stated that he lost ability to work and needed help of another person for movement.

203. In Charge No.6, two incidents have been mentioned. The International Crimes Tribunal found that the first incident could not be proved and as such, we refrained from giving any finding in respect of first incident of Charge No.6. From the judgment of the Tribunal, it appears that in respect of second incident of Charge No.6 no date has been mentioned. The prosecution in the midst of the trial filed an application to correct the charge inserting the date 1st December,1971 which was opposed by the defence. The Tribunal kept the said application with the records.

204. It appears from cross-examination of P.W.12 that the defence did not challenge the date of occurrence, that is, 1st December,1971. In the second incident of Charge No.6 as narrated by P.Ws.11 and 12 the defence cross-examined the witnesses on the issue. Therefore, it cannot be said that the defence has been prejudiced in not mentioning the date of occurrence in the charge.

205. In respect of 2nd part of Charge No.6, P.W.12 is an injured witness and he vividly disclosed the torture inflicted upon him. The evidence of P.W.12 in respect of 2nd part of Charge No.6 was corroborated by P.W.11. On consideration of the evidence of the prosecution witnesses, namely, P.Ws.11 and 12, the Tribunal rightly convicted the appellant and sentenced him and there is no reason to interfere with the judgment and sentence passed by the Tribunal.

Sentence:

206. It is the duty of the Courts/Tribunals to award sentence commensurate with the gravity of the crimes. Imposition of lesser sentence causes injustice not only to the victims of crime but also to the whole society. In the case in hand, the appellant has been awarded death sentence by the Tribunal on 3 charges, namely, murder, plunder, arson at village Moksedpur (charge No.2), murder, genocide, plunder and arson in Jharuarbeel and neighbouring villages (charge No.3), genocide, abduction and murder of 4 teachers of Rangpur Carmichael College and another, wife of a teacher, who belonged to Hindu Community (charge No.4).

207. As a leader of Islami Chhatra Sangha and Al-Badr A.T.M. Azharul Islam played significant role in the atrocities and aided Pakistani occupation Army in committing horrific crimes.

208. In charge No.2, the appellant was directly involved in the gruesome killing of 15 persons at village Moksedpur. Apart from that, the appellant is responsible for the killing of Momtez Ali Sarker, father of P.W.2 and Munshi Abdul Quddus.

209. In charge No.3, he actively participated in the killing of 1200 civilians in Jharuarbeel, a wetland in Rangpur's Badargonj Upazila. Terrified of the marauding Pakistani Army and its Collaborators, the villagers left their home and took shelter at Jharuarbeel but men, women and children from dozens of villages still could not save themselves from the cold-blooded savagery on the Summer noon of April 17, 1971.

210. Pakistani Army and members of Islami Chhatra Sangha including A.T.M. Azharul Islam surrounded the villagers crouching in the swamp bushes and unleashed a blood

bath.Within 5 (five) hours they killed 1200 innocent people. The man who planned it all is A. T. M. Azhar and he himself took part in the massacre. He and his men also picked up more than 200 Hindu people and students from the area and killed them after taking them in an unknown place. Among the 1200 people who died in Jharuarbeel on April 17, 1971, the names of 400 people could be collected.

211. The atrocities committed in Jharuarbeel surpassed the genocide committed by the American Army in MYLAI. The MYLAI massacre was the Vietnam war mass murder of unarmed South Vietnamese civilians, by U.S. troops in Son Tinh District, South Vietnam, on 16th March,1968. Between 347 and 504 unarmed people were killed by U.S. Army soldiers. Victims included men, women, children and infants. Some of the women were gang-raped and their bodies mutilated as were children as young as 12.

212. In charge No.4, the appellant abetted the abduction and slaughtering of four teachers of Rangpur Carmichael College, namely, Professor Chitta Ranjan Roy, Professor Sunil Baron Chakraborty, Professor Ram Krishna Adhikary and Professor Kalachand Roy including Monju Sree Roy, wife of Professor Kalchand Roy. The way, in which, four Professors were killed resembles the killing of the intellectuals immediately before our independence.

213. The offences committed by the appellant were no less heinous than those other sentenced to death for committing similar offences against humanity and hence there exists no reason why a sentence lesser than death sentence should be inflicted on him. His culpability was even worse. The commission of series of crimes ofthe most cruel and inhuman nature by the appellant may be considered as aggravating circumstances for the purpose of awarding him maximum sentence of death.

214. The appeal is allowed in part. Appellant A.T.M. Azharul Islam is acquitted of Charge No.5. His conviction in respect of charge Nos.2, 3, 4 and 6 is maintained. His sentence of death in respect of charge Nos.2, 3 and 4 is maintained. His sentence of 5 years is maintained in respect of charge No.6.

CJ.

**Hasan Foez Siddique, J :**

**215.** I have had the benefit of going through the draft judgment and order prepared by the learned Chief Justice. Whiling endorsing the view expressed by the learned Chief Justice, I would like to add a few words expressing my thoughts.

216. Crimes against Humanity, Genocide and War Crimes as defined in the International Crimes (Tribunal) Act, 1973 can not be compared with ordinary crimes. As per provisions of the Act and relevant Rules it is the duty of the International Crimes Tribunal, which heard the witnesses, to decide which evidence it deems to be more probative, and to choose which of the two divergent versions of the same event it may admit. In this case considering the facts, evidence and circumstances, the Tribunal convicted appellant under Section 3(2)(a)(c)(i) (g) and (h) and awarded death sentence in charges No.2,3 and 4 and also awarded sentence of 25 and 5 years imprisonment in charges No.5 and 6 respectively.

217. I shall confine my discussion only in respect of charges No.2, 3 and 4 brought against the appellant since learned Chief justice in his praisable judgment proposed to be delivered elaborately has discussed the facts, evidence, relevant laws and citations to draw

conclusion of the case in respect of all the charges. Since I fully agree with the findings and conclusions arrived at by the learned Chief Justice who considered the evidence elaborately I shall not discuss the evidence and its probative value adduced by the parties again.

218. The trial of this case was heavily based on documents and on the testimonies of eye witnesses as well as circumstantial evidence. From oral and documentary evidence it appears that appellant A.T.M. Azharul Islam was the President of the then Islami Chattra Sangha (ICS), Rangpur town Unit and in 1971, he was a student of Carmichael College, Rangpur. Ext 16, fortnightly report on the political situation for the second half of October, 1971, of the Special Branch of Police of the then East Pakistan, which is an old document, shows that the appellant was an ICS leader. Relevant portion of the said report was as follows:

Activities of Islami Chhatra Sangha (ICS):

"On 17.10.1971, a conference (100) of Pakistan ICS, Rangpur Branch was held in Rangpur town with ATM Azharul Islam (ICS) in the chair. Amongst others, Ali Hasan Md. Mujahid, Acting President. EPICS addressed the conference explaining the present situation of the country and urging the party workers to mobilise the youths of Islamic Spirit and launch strong movement against anti-Islamic activities. He also urged them to form Al-Badr Bahini at different levels for defending the country from internal and external attack."

219. ICS was the student organization of Jamat-e-Islami, Pakistan and 'the Dainik Sangram' was their official newspaper. On 13th September, 1971, 'the Dainik Sangram' published a news report under the caption, "রংপুরে দুষ্কৃতিকারীদের হাতে মেসবাহ উদ্দিনের শাহাদত". In that news item it was inter alia, stated,

"রংপুর জেলা ইসলামী ছাত্র সংঘের সভাপতি জনাব আজম আলী ও শহর ছাত্র সংঘের সভাপতি জনাব আজহারুল ইসলাম এক বিবৃতিতে শহীদ মেসবাহউদ্দিনের শাহাদতে গভীর শোক প্রকাশ করেছেন। বিবৃতিতে তারা হুশিয়ারী উচ্চারন করে বলেছেন, শহীদ মেসবাহ উদ্দিনের মত ইসলামী আন্দোলনের দু একজন মুজাহিদকে হত্যা করে দূস্কৃতীকারীরা ইসলামী আন্দোলনের বিরুপ অভিযানকে বাঞ্চাল করতে পারবে না। বিবৃতিতে ছাত্র নেতাদ্বয় বলেন যে, ভারতীয় চররা এ ধরনের নাশকতামূলক তৎপরতা চালিয়ে কিছুতেই তাদের হীন অভিসন্ধি হাসিল করতে পারবে না "

220. Almost all the prosecution witnesses in their testimonies stated that the appellant was ICS leader of Rangpur town unit in 1971. In view of the evidence, there is no doubt that the appellant was ICS leader of Rangpur town unit.

221. In the case of Ali Ahsan Md. Mujahid V. The Chief Prosecutor, International Crimes Tribunal reported in 20 BLC(AD) page 266 it was observed by this Division that the members of Islami Chatra Sangha were emerged as "Al-Badr Bahini". Exhibit 16 series of the cited case were the identity cards of Al-Badr Force. In those identity cards it was stated that,-

"The bearer of this card belongs to the AL-BADAR FORCE" is a composition of the youths aspiring to implement the ideology of Pakistan and highly imbued with the national consciousness. This FORCE has been extending all out co-operation to the Pakistan Army. The AL-BADAR is a symbol of fear and indomitable challenge to the miscreants and Indian infiltrators."

222. In that case it was further observed that the Badr Bahini was organised for a common purpose and its member committed offence of crimes defined in the ICT Act. They took every possible steps to destroy the people's will and, thereby, fought against our motherland and mercilessly killed the people since the people supported the struggle for creation of Bangladesh. They did not and could not know that united Pakistan had been

finished just after starting the fire of machine guns and tank shells by Pak army on the night of 25th March 1971. In his book "the Cruel Birth of Bangladesh" Archer K. Blood, the then American Consul General in Dhaka narrated that, " we spent a good part on the night of March 25-26 on the flat roof of the house, watching with horror the constant flash of tracer bullets across the dark sky and listening to the more ominous clatter of machine gun fire and the heavy clump of tank guns". That was the dealing of the Pakistan Army with their own countrymen on the night of March 25, 1971. Such aggressive invasion against the people of the country itself was a crime. The appellant, an well educated young man, witnessed of the genocide committed by Pakistan Army in his soil.

223. The stories of genocide committed by Pakistan Army and their collaborators were published in the hundreds of newspapers almost all over the world. Only few news reports, out of those publications, are quoted here:

The New York Post.

Tuesday, March 30, 1971

The Army's American M 24 Tanks, Artillery and Infantry destroyed large parts of East Pakistan's largest city and provincial capital.

"The chief targets were the University, the populous old city where Sheikh Mujibur Rahman and his Awami League were strongest, and the industrial areas on the outskirts of the city of 1.5 million people.

Parhaps 7000 persons were killed in the provincial capital alone.

Touring the still burning battle areas Saturday, and Yesterday, one found the burnt bodies of some students still in their dormitory beds. The tanks had made direct hits on the dormitories."

The Washington Daily News, June 15,1971

Slaughter in East Pakistan

"Eye witnesses reports, one more ghastly than another, continue to filter out of East Pakistan, telling of the massacre of the Bengali people by the Pakistan Army.

Naturally, the military regime of President Yahya Khan denies it is committing selective genocide. But evidence mounts that it is cold bloodedly murdering minority Hindus, Bengali separatists, intellectuals, doctors, professors, students- in short those who could lead a self governing East Pakistan."

The New York Times, June 16, 1971

Appalling Castastrophe

"Hiroshima and Nagasaki and vividly remembered by the minds eye primarily because of the moral means that brought holocaust to those cities. Statically comparable disasters in Humburg and Dresden are more easily forgotten, they were produced by what we already then conceived of a "conventional" methods.

Against this back ground one must view appelling Catastrophe of East Pakistan whose scale is so immense that it exceeds the colorimeter capacity by which human sympathy is measured. No one can hope to count the dead, wounded, missing homeless or sticken whose number grows each days."

The Newsweek, June 28, 1971

"The Terrible Blood Bath of Tikka Khan that the Pakistani Army is visiting a cheadful blood bath upon the people of "East Pakistan is also affirmed by newsmen and others who have witnessed the flight of a 6 million terrified refugees into neighbouring India, Newsweek's Tomy Clifton recently visited India's refugee-clogged border regions and tabled the following report:

Anyone who goes to the camps and hospitals at along India's border with Pakistan comes away believing the Punjabi Army capable of any atrocity, I have seen babies who have been

shot, men who have had their backs whipped raw. I've seen people literally struck dumb by the horror of seeing their children murdered in front of them or their daughters dragged of into sexual slavery. I have no doubt at all that there have been a hundred "Mylais" and "Lidices" in East Pakistan- and I think, there will be more .....

Other foreigners too, were dubious about the atrocities at first, but the endless repetition of stories from different sources convinced them. "I am certain that troops have thrown babies into the air and caught them on their Bayonets," says Briton, John Hastings, a Methodist missionary who have lived in Bengal for twenty years. "I am certain that troops have raped girls repeatedly, then killed them by pushing their Bayonets up between their legs.

All this savagery suggests that the Pakistani Army is either crazed by blood list or, more likely is carrying out a calculated policy amounting to genocide against the whole Bengali population."

The Guardian, London, March 31, 1971

A Massacre in Pakistan

"Only now are we getting Pakistani facts to abet fears. President Yahya Khan has written to suppress these facts, filling his air wares and press with evasive propaganda, deporting every journalist he could find. But a few independent escaped this net and their stories- just emerging- seek with horror: crows indiscriminately machine gunned, student hostels razed by shells, shanty towns burned and bombed, civilians shot dead in their beds. We do not yet know the fate of those arrested in East or the true level of resistance through the province. But we do know first hand and reliably that many unarmed and unready Bangalies have died."

The Guardian Weekly, April 4, 1971

A cry for help

"The situation in Bangladesh is worsening day by day and it is a pathetic and heartrending spectacle, for there is hardly a liberation movement of the twentieth- century that can claim such unanimous support from people of all classes, nor one that was ever so ill- prepared and ill- equipped to fight for its rights."

The New Statesmen, April 16, 1971

The Blood of Bangladesh

"If blood is the price of a people's right to independence, Bangladesh has overpaid. Of all the recent struggles to bring down governments and charge frontiers in the name of national freedom the war in East Bengal may prove the bloodiest and briefest."

The Sunday Times, June 13, 1971

Genocide

By Anthony Mascarenhas

"West Pakistan's Army has been systematically massacring thousands of civilians in East Pakistan since the end of March. This is the horrifying reality behind the news blackout imposed by President Yahya Khan's government since the end of March. This is the reason why more than five million refugees have streamed out of East Pakistan into India, risking cholera and famine.

The army has not merely been killing supporters of the idea of Bangladesh, an independent East Bengal. It has deliberately been massacring others. Hindus and Bengali Muslims, Hindus have been shot and beaten to death with elubs simply because they are Hindus. Villages have been burned."

The Expression, Stockholm, April 12, 1971

Mass murders in Bengal

"Hundreds of thousands of people are fleeing from their homes, starvation threatens. The hostilities are directed against the majority of the country's population under the motivation that the unity of Pakistan must be preserved. The military regime is using violence to sweep

aside the result of the country's first general parliamentary elections. The rulers were not prepared to swallow the consequences of this election; instead they set the military machinery going. It is obvious that this method will never lead to the reunification of East and West Pakistan. Ruthless occupation are drawn out war; these are the only alternatives".

This is a policy that must be condemned."

The Djakarta Times, April 15, 1971

Stop this Genocide

"Politicians, teachers, students, doctors, engineers and even unarmed civilians, inducing women and children are wiped out in East Pakistan. Will the Muslim world in general, suffer this? Does Islam permit Killing of unarmed Muslims by armed Muslims? Can Islamic principles justify, the suppression by a minority of a majority demand for social and economic justice.

Muslim states should act quickly and see that good Muslims are not massacred by fellow Muslims."

The Palaver Weekly. Ghana, July 8, 1971

East Pakistan cry for help

"On March 25, 1971 under cover of darkness, one of the most gruesome crimes in the history of mankind was perpetrated by a blood- thirsty military junta against a whole population of seventy five million, constituting the majority of the people of Pakistan.

Many newspapers, reputed for their objectively, have come out with documentary evidence in the form of photographs and eye-witness reports one of the greatest genocide exercises in the annals of man."

Those are the real pictures of the soil belonged to the appellant. The appellant, knew very well about the actual situation prevailing in his mother land after 25th March 1971.

224. M. Rafiqul Islam, Professor of Macquarie University in his book "National Trials of International Crimes in Bangladesh" has observed:

"The indiscriminate extermination of the distinct national groups of civilian population, particularly the Hindus as a religious group and pro-independence people as a political group has been the deliberate policy of the Pakistani occupation army and its local para-militia forces and collaborators throughout the territory of Bangladesh during its liberation war."

225. 10th March, 1971:

That is, fifteen days before 25th March, 1971, a meeting of Provincial of Mazlish-e-Sura and District Nazems of the then East Pakistan Islami Chattra Sangha (ICS) was held in Dhaka. In that meeting, ICS, upon elaborate discussion of the situation prevailing at that time in the country, resolved that there were 3(three) ways, according to them, to overcome the situation, those were:

"১। পরিস্হিতি নিজের গতিতে চলতে দিয়ে বিচ্ছিন্নতাবাদীদের সঙ্গী হয়ে যাওয়া।

২। পরিস্হিতি নিজের গতিতে চলতে দেয়া এবং নিরপেক্ষ ভূমিকা পালন করা।

৩। পরিস্হিতির মোড় ঘুরিয়ে দেয়া। "

226. It was decided by the ICS that " পাকিস্তানের অক্ষুন্নতা ও মজলুম জনগণের হেফাজতের জন্য ব্যস্ত ময়দানে অবতীর্ণ হয়ে নিজের দায়িত্ব পালন করা। -----চারদিন ধরে ব্যাপক আলোচনা পর্যালোচনার পর ছাত্রসংঘের এই গুরুত্বপূর্ণ বৈঠকে এই সিদ্ধান্ত হয় যে, ইসলামী ছাত্রসংঘ পাকিস্তানের অক্ষুন্নতা ও জনগনের জানমাল ও ইজ্জত হেফাজতের জন্য সামনে অগ্রসর হবে।"

(Material exhibit-7, Al-Badr-translated version.)

227. From the evidence of P.W.4 Principal Messer Uddin, P.W.8 Mujibur Rahman Master and P.W.9 Sova Kor it appears that A.T.M. Azharul Islam (the appellant), at the relevant time, was leader of ICS of Rangpur town unit and Carmichael College, Rangpur

branch. He was a resident of village Lohanipara under the Badargonj Police Station, Rangpur. It is evident that he participated in election campaign as ICS leader in support of Jamate Islami candidates of then Pakistan National Assembly and Provincial Assembly election held in 1970. He was previously known to the P.Ws.3, 4, 5, 6, 8, 9 and 10. Of them, P.W.9 Sova Kor was his classmate.

228. From the evidence of P.W.4 Principal Messer Uddin and P.W.8 Mujibur Rahman, it appears that 26th March, 1971 Captain Anwar and some force of No.3 East Bengal Regiment took shelter at Union land office of village Texsorhat under the Ramanathpur Union, Badargonj, Rangpur. It is evident that the Pak-army attacked them and compelled them to leave the area.

229. 3rd April, 1971:

Pak-army killed 10(ten) unarmed civilians of Mahigonj who were 1) Santi Chaki, 2) Khurrom, 3) Moharrom, 4) Advocate A.B.Y. Mafuz Ali @ Jarjesh 5) Dulal, 6) Durgadas Adhikari, 7) Uttom Adhikari, 8) Khitish Adhikari, 9) Gopal Adhikari and 10) Pagla Dorbesh as evident from the evidence of P.Ws.8, 13, 16 and 17.

8th April, 1971:

Few members of Bengal Regiment were killed and Captain Anwar was injured by the PakistaniArmy. On the same day, that is, on 08.04.1971, member of Peace Committee took over the possession of the house of Jagadish Babu of Badargonj Bazar. Thereafter, the appellant and other members of Peace Committee started using that house for holding their meetings.

15th April 1971:

The Pak-army and local collaborators burnt some area of Ramanathpur Union and killed 1)Zoman, 2)Bhulu Bawla, 3) Mosaru Kaitta and 4) Kandu of Ramnathpur Union as stated by P.Ws.4 and 5.

16th April 1971:

The appellant A.T.M. Azharul Islam and Pak-army in a train from Rangpur rushed to Rail gate No.6 situated near Texsorhat and got down from the train. They proceeded towards Moksedpur area of Ramnathpur Union and started firing abruptly and set fire to the nearby houses of unarmed civilians and, thereafter, they started firing targeting Uttor Moksedpur and Dhappara area. Pak-army and appellant surrounded those villages and killed 15(fifteen) unarmed civilians who were: 2)Kuddus Munshi, 3)Jahir Uddin, 4) Chinimy, 5)Ammy, 6) Jongli Varosha, 7)Bishu, 8) Tamir Uddin, 9) Abu, 10) Tina, 11) Kulti My, 12) Shadina, 13) Yousuf Ali, 14) Sokimy 15) Tomizuddin..

230. Mamtaz Uddin Sarder, father of P.W.3 Moklesh @ Mokles Ali, holding the legs of appellant A.T.M. Azaharul Islam, begged apology to save his life but the appellant kicked him and Pak-army shot him, consequently, he died. P.W.3 Mokles saw that occurrence . Beside him, P.W.6 Md. Mokbul Hossain and his mother also tried to escape. P.W.6 took shelter in a ditch but his mother failed to escape. This witness saw the appellant and two Pak-army to shoot his mother who died receiving bullet injury. Those two witnesses, that is, P.Ws.3 and 6 are the eye witnesses of the occurrences of killing of their father and mother respectively.

231. They also saw the dead bodies of the other victims as mentioned above. The act of these two witnesses in running away to save their own lives and not going forward to help the victims at the time of the incident is a most probable and natural human conduct which most men faced in such situation would resort to.

232. 17th April 1971:

The Pak-army and the appellant again went to the area and surrounded six villages of Badorgonj, Rangpur. People of those villages took shelter in Jharuarbeel. Pak-army abruptly started firing targeted at the unarmed civilians of those villages. Consequently, 1200 unarmed civilians were killed in the spot. P.W.4 Principal Meser Uddin in his testimony stated that he himself saw the appellant A.T.M. Azharul Islam with those Pak-army wearing white coloured shirt and pant. In his evidence, he has stated, "আশেপাশের এলাকার লোকজন ছুটাছুটি শুরু করে এবং অনেকেই ঝাড়ুয়ার বিলে গিয়ে আশ্রয় নেয়। এ সময় আমি আমার বাবাকে হাত দিয়ে ধরে রাখি এবং এ টি এম আজহারুল ইসলামকে সাদা পেন্ট শার্ট পড়া অবস্থায় পাক সেনাদের সঙ্গে দেখি। তখন পাক সেনারা নিরীহ জনসাধারনের বাড়ী ঘরে অগ্নি সংযোগ করে এবং তাদের উপর এলোপাতাড়ি গুলি করতে থাকে এবং উক্ত গুলিতে ঝাড়ুয়ার বিলের আশেপাশের প্রায় ১২০০ লোক নিহত হয়।". The appellant and Pak-army compelled innumerable people to gather at Rail gate No.7. At that time, the appellant's teacher Shamsuddin Master requested the appellant to allow them to say their Asar prayer. After completion of Asar prayer, the appellant A.T.M. Azharul Islam and one Bachchu Khan divided Hindus, young people and students in different categories. Of them, they, taking 200 young people in the train, started proceeding towards Parbortipur. At that time they also killed Sombaro and Ismail, cousin of P.W.4. Abu Bakkar Siddique, two security guard of Railway and threw their dead bodies in a ditch near Railway bridge. Knowing about the fate of Sombaro, his wife Marzina committed suicide. Remaining civilians are still untraced. This witness had described the physical feature of the accused appellant. Aforesaid testimony of P.W.4 was fully corroborated by another eyewitness P.W.5 Md. Abdur Rohman saying that he himself saw appellant A.T.M. Azharul Islam with Pak Army at Jharuarbeel while said massacre was going on. In his cross-examination he specifically stated, "ছোটাছুটির এক পর্যায়ে আমি ঝাড়ুয়ার বিলে গেলে দেখি যে, পাকিস্তানী আর্মি ও তাদের সাথে থাকা এটিএম আজহারুল ইসলাম সেখানে উপস্থিত। তখন এটিএম আজহারুল ইসলাম আমাকে বলে উপস্থিত লোকজনের দলে ঢুকে যেতে। আমি ঐ দলে ঢুকে পড়লে দলের সকল লোকজনকে তাড়া করে পাকিস্তানী আর্মি ও এটিএম আজহারুল ইসলাম রেল লাইনের দিকে নিয়ে যেতে থাকে।". He also said that when Shamsuddin Master requested A.T.M. Azharul Islam and Bachchu khan to allow them to say Asar prayer, they allowed 10(ten) minutes time for them to say Asar prayer. At that time, some Hindu people also participated in Asar prayer but after completion of the prayer, Bachchu Khan and the appellant compelled the young people and Hindu people present there to enter into the train who were about 200 in number. On the way, they killed Sombaru, Islam, Abu Bakkar Siddique and two security guard of the train. Those 200 people are still untraced. There is nothing significant to infer that there was enmity between these two witnesses and the appellant. Those two eye witnesses categorically stated that on 17.04.1971, the appellant, along with Pak Army, went at the place of occurrence through a train and he getting down from the train, participated, helped and facilitated the Pakistan Army to commit such genocide in Jharuarbeel, consequently, about 1200 unarmed civilians including children women and old men were brutally killed. Jharuarbeel was laden with numerous dead bodies. There was nothing left in Jharuarbeel except the dead bodies and blood.

233. While making his submission Mr. Kh. Mahbub Hossain admitted the facts of massacre committed in Jharuarbeel but simply submitted that the appellant was not present at Jharuarbeel at the time of commission of such massacre. In this charge the prosecution failed to narrate the names of the victims of Jharuarbeel massacre. It was not at all necessary when the charge involve hundreds of victims. In this regard Ntakirutimana and Ntakirutimana, Case

No.ICTR-96-17-A Appeal Chamber observed that in situations in which the crimes charged involve hundreds of victims, such as where the accused is alleged to have participated "as a member of an execution squad" "or as a member of a military force", the nature of the case might excuse the prosecution from specifying every single victim that has been killed or expelled. In Gacumbisti (Case No.ICTR-2001-64-A,-Appeals Chamber, Judge Shahabuddin also observed that is settled Jurisprudence that, in the case of mass killing, individual victims do not have to be specifically referred to in the indictment.

234. However, collecting names and particulars of 368 unfortunate unarmed civilians one S.M. Abraham Lincoln in his book "মুক্তিযুদ্ধের আঞ্চলিক ইতিহাস রংপুর"and Mukul Mostafeez in his book "মুক্তিযুদ্ধে রংপুর" published a list of 368 victims of the said saddest occurrence of Jharuarbeel. Names of those unfortunate victims were as follows:-

"1. Most. Jannatun Nessa (12), daughter of Md. Mohor Uddin, of village Khalishahazipur Kutirpar; 2. Md. Abbas Ali, (15) son of Md. Mohor Uddin, of village Khalishahazipur Kutirpar; 3. Most. Zohra Khatun (16), daughter of Md. Abdur Rahim, of village Khalishahazipur Kutirpar; 4. Md. Shamsul Islam (19), son of Md. Abdur Rahim, of village Khalishahazipur Kutirpar, 5. Md. Somser Ali (35), son of Md. Tasir Uddin, of village Khalishahazipur Kutirpar; 6. Most. Nazira Begum (22), wife of Md. Shomser Ali, of village Khalishahazipur Kutirpar; 7. Md. Kafil Uddin (65), son of Md. Alef Uddin, of village Khalishahazipur Kutirpar; 8. Md. A. Bari (35), son of Md. Kafil Uddin, of village Khalishahazipur Kutirpar; 9. Md. Kosidol (30), son of Md. Kafil Uddin, of village Khalishahazipur Kutirpar; 10. Most. Bana Pon (40), wife of Md. Kafil Uddin, of village Khalishahazipur Kutirpar; 11. Most. Abia Khatun (25), wife of Md. Kafil Uddin, of village Khalishahazipur Kutirpar; 12. Most. Anisa Khatun (07), daughter of Md. Kafil Uddin, of village Khalishahazipur Kutirpar; 13. Most. Rokshana Khatun (01), daughter of Md.Kafil Uddin, of Khalishahazipur Kutirpar; 14. Most. Hamida Khatun (18), wife of Md. A. Bari, of village Khalishahazipur Kutrpar; 15. Md. Anowarul Haque (03), son of Md. Abdul Kashem, of Khalishahazipur Kutirpar; 16. Md. Abdul Mondol (35), son of Hesab Uddin, of village Hazipur Jhakuapara; 17. Md. Kashem Ali (16), son of Apaan Ullah, of village Khalishahazipur Kutirpar; 18. Md. Joymuddi (22), son of Bishru, of village Khalishahazipur Kutirpar, 19. Md. Foez Uddin (60), son of Md. Fajil Uddin, of village Khalishahazipur, 20. Md. Anam Uddin (42), son of Md. Khottu Miah, of village Khalishahazipur , 21. Sree Keshob Chandra (50), son of Sree Rum Chandra, of village Khalishahazipur, 22.Sree Nrittunjoy (50), son of Sree Ram Chandra, of village Khalishahazipur, 23.Sree Satish Chandra Roy (25), son of Tailokkha Chandra Roy, of village Khalishahazipur , 24. Sree Provash Chandra Roy (25), son of Sree Satish Chandra Roy, of village Khalishahazipur , 25.Md. Mohaimin (20), son of Barek Sarder, of village Khalishahazipur, 26.Md. Azahar Ali (55), son of Tonej Uddin, of village Khalishahazipur , 27.Md. Esmail Hossian (45), son of Md. Abul Hossain of village Khalishahazipur, 28. Md. Tunu Gachua (40), son of Golam Mostafa, of village Khalishahazipur, 29. Md. Afel Uddin (55), son of Md. Ashraf Ali, of village Khalishahazipur, 30.Md. Abbas Ali (60), son of Amir Uddin, of village Khalishahazipur, 31. Sree Sidam Chandra (42), son of Sree Janki Chandra, of village Khalishahazipur, 32. Sree Vobesh Chandra (30), son of Sree Satish Chandra, of village Khalishahazipur, 33. Sree Atul Chandra (30), son of Janki Chandra, of village Khalishahazipur, 34. Sree Peri Mohon Roy (80), son of Joykista,, of village Khalishahazipur, 35. Sree Shyama Charan (12), son of Sree Tarapada , of village Hazipur Paikpara, 36.Sree Noren Chandra Roy (13), son of Monmohon Chandra Roy , of village Hazipur Paikpara, 37. Sree Gora Chandra (35), son of Horendra Nath Roy, of village Hazipur Paikpara, 38. Sree Pran Kirshno Rai 39. Sree Darpa Chandra (45), son of Harikanta, of village Hazipur Paikpara , 40. Md. Mofizal (32), son of Md. Shahidul Haque of village Hazipur Paikpara 41.

Md. Shafiar Rahman (16), son of Md. Abdus Shobhar, of village Hazipur Paikpara, 42. Most. Nazira Khatun (17), daughter of Md. Azizar Rahman of village Hazipur Paikpara, 43. Most. Shafia Khatun (45), daughter of Md. Mofiz Uddin, of village Hazipur Paikpara, 44. Md. Liakot Ali (26), son of Md. Mofiz Uddin, Ramkrishnapur Khiarpara, 45. Md. Mahatab Uddin (70), son of Hazi Md. Mozaffar, of village Hazipur Paikpara, 46. Most. Aftabonnessa(42), daughter of Md. Momtaz Uddin, of village Hazipur Paikpara, 47. Most. Momeza Khatun (40), daughter of Md. Shafi Uddin, of village Hazipur Paikpara, 48. Most. Labli Khatun (38), daughter of Md. Fazar Uddin, of village Hazipur Paikpara, 49. Most. Shahida Khatun (25), daughter of Md. Afzal Hossain, of village Hazipur Paikpara, 50. Most. Moslema Khatun (24), daughter of Md. Mojibur Rahman, of village Hazipur Paikpara, 51. Md. Shomser Ali (20), son of Md. Yeaz Uddin, of village Khalisha Hajipur, 52. Md. Amzad Ali (45), son of Md. Baser Uddin, of village Hazipur Paikpara, 53. Md. Shamsuddin (45), son of A. Karim Uddin, of village Hazipur Paikpara, 54. Md. Ekramul Haque (35), son of Md. Vola Miah, of village Hazipur Paikpara, 55. Md. Bodiuzzaman (30), son of Md. Afiz Uddin , of village Hazipur Paikpara, 56. Md.Mofazzal Hossain (32), son of Md. Abdus Sobhan, of village Hazipur Paikpara, 57. Md. Shahabuddin (28), son of Md. Nezam Uddin, of village Hazipur Paikpara, 58. Sree Debendra Nath Roy (22), son of Chandi Prosad Roy, of village Hazipur Paikpara, 59. Sree Horendra Nath Roy (25), son of Sree Darikanath Roy, of village Hazipur Paikpara, 60. Sree Ramna Kantha (28), son of Sree Sushil Sutradhor, of village Hazipur Paikpara, 61. Sree Harikanta(32), son of Sree Jogesh Chandra of village Hazipur Paikpara, 62. Md. Ohidul Huq (45), son of Md. Abdul Gaffar Prang of village Ramkrishnapur Masandoba, 63. Md. Omar Ali (33), son of Md. Abdul Gaffar Prang of village Hazipur Paikpara, 64. Md. Rajab Ali (25), son of Md. Abdul Gaffar Prang of village Hazipur Paikpara, 65. Md. Abdul Mazid Prang (22), son of Md. Abdur Rashid Prang of village Hazipur Paikpara, 66. Md. Iman Ali (35), son of Abdul Mia of village Hazipur Paikpara, 67. Delbar Hossain (48), son of Jabir Uddin of village Hazipur Paikpara, 68. Ahammad Ali (27), son of Md. Jamir Uddin, of village Bashupara Parbortipur, 69. Md. Mahatab Uddin (65), son of Md. Choyen Uddin, of village Ramkrishnapur Jhakuapara, 70. Md. Jametullah(70), son of Md. Jeharotullah, of village Hazipur Paikpara, 71.Md. Sahazuddin (25), son of Md. Solaiman of village Hazipur Paikpara, 72. Most. Sajeda Khatun (45), daughter of Md. Solaiman of village Hazipur Paikpara, 73. Md. Abdur Rashid (35), son of Md. Monir Uddin of village Ramkrishnapur Jhakuapara, 74. Md. Ekabbor Ali (25), son of Md. Kafil Uddin, of village Ramkrishnapur Jhakuapara 75. Md. Mofez Uddin (65), son of Md. Choyen Uddin of village Ramkrishnapur Jhakuapara 76. Md. Tanna Chowkidar (65), son of Abdullah, of village Ramkrishnapur Jhakuapara, 77. Md. Atiar Rahman (25), son of Md. Ain Uddin, of village Ramkrishnapur Jhakuapara, 78 Md. Ain Uddin (65), son of (unknown), of village Ramkrishnapur Jhakuapara 79 Md. Mokbul Hossain (30), son of Md. Jabir Uddin of village Ramkrishnapur Jhakuapara, 80. Md. Fazlul Huq (26), son of Md. Kobbad Ali of village Ramkrishnapur Mashandoba, 81. Md. Emaj Uddin (25), son of Md. Gafur of village Ramkrishnapur Mashandoba, 82. Md. Somchar Uddin (32), son of Sofar Uddin of village Ramkrishnapur Mashandoba, 83. Md. Menhajul Islam (45), son of Md. Mofizuddin of village Ramkrishnapur Sarkarpara, 84. Md. Alauddin (50), son of Okibullah of village Ramkrishnapur Sarkarpara, 85. Md. Azadul Huq (30), son of Md. Afaz Uddin of village Ramkrishnapur Sarkarpara, 86. Md. Islam Uddin(30), son of Md. Hossen Ali of village Ramkrishnapur Sarkarpara, 87. Md. Somobay Mia (30), son of Md. Kailta Mamud of village Ramkrishnapur Sarkarpara, 88. Md. Akbor Ali (40), son of Md. Mahatab Uddin of village Ramkrishnapur Sarkarpara, 89. Md. Nur Mohammad (32), son of Md. Khidir Uddin of village Ramkrishnapur Sarkarpara, 90. Md. Khairul Islam (25), son of Md. Khidir Uddin of village Ramkrishnapur Sarkarpara, 91. Md. Yousuf Uddin (70), son of Md. Kasimuddin of village Ramkrishnapur Sarkarpara, 92 . Md. Jashim Uddin (20), son of Kharia Sarker of

village Ramkrishnapur Balapara, 93. Md. Bharu Mia (45), son of (unknown) of village Ramkrishnapur Balapara, 94. Most. Futala Begum (40) daughter of Md. Nazir Sarder of village Ramkrishnapur Balapara, 95. Md. Nur Islam (25), son of Md. Foyez Uddin of village Ramkrishnapur Balapara, 96. Md. Moyez Uddin (40), son of Ponir Gachua of village Ramkrishnapur Balapara, 97. Md. Taillah Mia (45), son of Md. Nasar Uddin of village Ramkrishnapur Balapara, 98. Md. Syed Ali (25), son of Obej Uddin of village Ramkrishnapur Balapara, 99. Md. Abdul Gafur (35), son of Md. Rotibullah of village Ramkrishnapur Balapara, 100. Md. Bhulu Mia (55), son of Md. Nezan Uddin of village Ramkrishnapur Bittipara, 101. Md. Juman Ali (18), son of Md. Johurul Huq, of village Ramkrishnapur Bittipara, 102. Md. Masharu Mia (65), son of (unknown) of village Ramkrishnapur Bittipara, 103. Md. Kandu Mia (55), son of Md. Kanchia Prang of village Ramkrishnapur Bittipara, 104. Md. Tamir Uddin (65), son of Md. Nasar Uddin, of village Ramkrishnapur Bittipara, 105. Md. Wahidul Huq (25), son of Md. Tonna Fakir, of village Ramkrishnapur Bittipara, 106. Md. Changtu Mamud (50), son of (unknown) of village Khordda Baghbar, 107. Most. Rahela Khatun (50), daughter of Md. Ashraf Ali, of village Khordda Baghbar, 108. Sree Keshob Chandra Roy (60), son of Hor Gobinda Roy, of village Bujrugh Baghbar Brishnapur, 109. Sree Montu Sarker (30), son of Sree Krishta Sarker, of village Khordda Baghbar, 110. Sree Surendra Nath Roy (40), son of Sree Dhoni Ram Roy, of village Khordda Baghbar, 111. Sree Dodi Ram Roy (80), son of unknown, of village Bujrugh Baghbar, 112. Sree Avoy Charan (40), son of Sree Kandura Chandra, of village Ramnathpur Kumarpara, 113. Most. Moriyam Nessa (23), daughter of Md. Yeakub Ali, of village Uttor Moksedpur, Dhappara, 114. Md. Avrosa Sarker (70), son of Md. Nimutullah, of village Uttar Ramnathpur Hazipara, 115. Most. Sorizon Nessa (50) daughter of Vorosa Sarker, of village Uttor Ramnathpur Hazipara 116. Md. Kerad Hossain (50), son of Nimutullah, of village Uttor Ramnathpur Hazipara 117. Md. Chinimy (50), son of Md. Ashraf Ali, of village Uttor Ramnathpur Hazipara, 118. Most. Amena Khatun (65), wife of unknown, of village Uttor Ramnathpur Hazipara, 119. Md. Shahzahan Ali (33), son of Dr. A. Gafur, of village Uttor Ramnathpur Hazipara, 120. Md. Momtaz Uddin (60), son of Md. Uzir Mamud, of village Uttor Ramnathpur Hazipara, 121. Md.A. Kuddus, (38), son of Md. Taslim Uddin, of village Uttor Ramnathpur Hazipara, 122. Md. Abu Bakkar Siddique (45), son of Md. Hamidullah Prang, of village Uttor Ramnathpur Hazipara, 123. Md. Kina Mamud, (45), son of Md. Aynullah Prang, of village Uttor Ramnathpur Hazipara, 124. Sree Dodiram (45), son of unknown, of village Mondalpara, Brishnapur Union, 125. Md. Badiuzzaman (21), son of Hazi Romiz Uddin, of village Khalisha Hazipur, 126. Shams Uddin (40), son of late Karim Baksh, of village Khalisha Hazipur, of village Khalisha Hazipur, 127. Mohaimin (42), son of late unknown, of village Khalisha Hazipur, 128. Amzad Uddin (40), son of Baser Mamud, of village Khalisha Hazipur, 129. Shamser Ali (35), son of Shahaz Uddin, of village Khalisha Hazipur, 130. Foyez Uddin (38), son of late Fazil Uddin, of village Khalisha Hazipur, 131. Shahabuddin (35), son of Nizam Uddin, of village Khalisha Hazipur, 132. Abul Kashem (40), son of late Afan Uddin, of village Khalisha Hazipur, 133. Joyef Uddin, son of late Ayen Uddin, of village Khalisha Hazipur, 134. Sree Mritunnjoy Roy ( 40), son of late Ramchandra Roy, of village Bujrokh Hazipur, 135. Sree Keshob Chandra Roy (45), son of late Ram Chandra Roy, of village Bujrokh Hazipur, 136. Satish Chandra Roy, son of late Tailakkha Roy, of village Buzruk Hazipur,137. Probesh Chandra Roy (17), son of Satish Chandra Roy, of village Bujruk Hazipur, 138. Atul Chandra (30), son of Lalith Chandra Roy, of village Bozruk, 139. Lalith Chandra Roy (55), son of late Gopi Chandra Roy, Buzrok Hazipur, 140. Pran Krishna Master (45), son of--- of village Krishnapur Buzrok Hazipara, 141. Sreedam Nath (30), son of Janoki Nath, of village- Hazipur, 142. Mohfel Uddin (20), son of late Shobhan Dafadar, of village- Parbotipur, Hazipara, 143. Ashwini Kumar Roy (42), son of Jogeshwar Roy, of village Khalisha Hazipur, 144. Sree Haripada, son of late Rampada,

of village Khalisha Hazipur, 145. Pran Krishna Sutar (45), son of late Goda Keshta, of village Khalisha Hazipur, 146. Sree Vhobani Chandra Biswas (40), son of late Razchandra Biswas, of village Bujrok Hazipur, 147. Sree Bongsha Chandra Biswas (35), son of Raj Chandra Biswas, of village Bujrok Hazipur, 148. Lalit Chandra ( 45), son of late Kina Chandra, of village Bujrok Hazipur, 149. Haripada, son of late Kina Chandra, of village Bujrok Hazipur, 150. Anil Chandra (45), son of Darika Babu, of village Bujrok Hazipur, 151. Kafil Uddin (55), son of late Alek Uddin, of village Hazipara, 152. Bala Pon, wife of Kafil Uddin, of village Hazipara, 153. Kasidol (25), son of Kafil Uddin, of village Hazipara, 154. Rabeya (20), daughter of Kafil Uddin, of village Hazipara, 155. Azizul (11), son of -- of village Hazipara 156. Furkuni (9), daughter of Kafil Uddin, of village Hazipara , 157. Rafia (14), son of Kafil Uddin, of village Hazipara, 158. Rokeya (12), son of Kafil Uddin, of village Hazipara , 159. Momena (09), son of Kafil Uddin, of village Hazipara,160. Mojibur Rahman (45), son of Mofiz Uddin, of village Hazipara , 161. Moslema Khatun (30), wife of Mojibur Rahman, of village Hazipara, 162. Motiar Rahman (20), son of Mojibur Rahman, of village Hazipara, 163. Mosiar Rahman, son of Mojibur Rahman, of village Hazipara, 164. Tonni (10), daughter of Mojibur Rahman, of village Hazipara, 165. Halima Khatun (40), wife of Abdul Bari, of village Hazipara, 166. Shomser Ali (55), son of Tasir Uddin, of village Hazipara, 167. Abdul Mondal, son of Sohib Uddin, of village Hazipara, 168. Bishadu Bormon, son of Pran Gopal Bormon, of village Hazipara, 169. Suresh Chandra Bormon, son of Haripada Barmon, of village Hazipara, 170. Wahidul Haque (45), son of late Abdul Gaffar Pramanik, of village Ramkrishnapur Masandoba, 171. Rajob Ali (18), son of late Abdul Gaffar Pramanik, of village Ramkrishnapur Masandoba, 172. Omar Ali (35), son of late Abdul Gaffar Pramanik, of village Ramkrishnapur Masandoba, 173. Abdul Majid , son of Abdur Rashid Pramanik, of village Ramkrishnapur Masandoba, 174. Fazlul Haque son of late Soleman Pramanik, of village Ramkrishnapur, 175. Delowar Hossain (45), son of late Soleman Pramanik, of village Ramkrishnapur, 176. Iman Ali (30), son of late Abdul Miah, of village Ramkrishnapur, 177. Nasir Uddin ( 45) of village Bujrook Hazipur, 178. Abdul Jabbar (35), of village Bujrook Hazipur, 179. Alauddin (40), of village Bujrook Hazipur, 180. Prankrishna Master (45) of village Bujrook Hazipur, 181. Ramendu (35), of village Bujrook Hazipur, 182. Gonesh Chandra (35), of village Bujrook Hazipur, 183. Kaltu Sarder (35), of village Bujrook Hazipur, 184. Shoshi Doctor, (48), of village Bujrook Hazipur, 185. Ananda Mohon (40), of village Bujrook Hazipur, 186. Ramananda (38), of village Bujrook Hazipur, 187. Taruni @ Bang (30), of village Bujrook Hazipur, 188. Anil Master (48), of village Bujrook Hazipur, 189. Horlochon Sheel (45), of village Bujrook Hazipur, 190. Lolin Sheel (42), of village Bujrook Hazipur, 191. Haripada (45), of village Bujrook Hazipur, 192. Pano Sheel (40), of village Bujrook Hazipur, 193. Shoshee Mohonta, of village Bujrook Hazipur, 194. Biroh Mahanta (42), of village Bujrook Hazipur, 195. Mono Mahanta (38), of village Bujrook Hazipur, 196. Mohindra (32), of village Bujrook Hazipur, 197. Shukra (22), of village Bujrook Hazipur, 198. Montu Mahanta (25), of village Bujrook Hazipur, 199. Binod Mahanta (40), of village Bujrook Hazipur, 200. Babu Mahanta (5) ( child of Binod Mohonta, of village Bujrook Hazipur, 201. Peri Mohon (42), of village Bujrook Hazipur, 202. Shoshi Mohon (35), of village Bujrook Hazipur, 203. Shyamapada (52), of village Bujrook Hazipur, 204. Gora Joytish (55), of village Bujrook Hazipur, 205. Debendra Dash (40), of village Bujrook Hazipur, 206. Noren (52), of village Bujrook Hazipur, 207. Rup Narayan (45), of village Bujrook Hazipur, 208. Bhobani Chandra (55), of village Bujrook Hazipur, 209. Lalit Das (55), of village Bujrook Hazipur, 210. Choyon Das (55), of village Bujrook Hazipur, 211. Pulin Das (60), of village Bujrook Hazipur, 212. Prankrishna Sutrodhar (55), of village Bujrook Hazipur, 213. Lutfa Khatun (7), daughter of Ajgor Ali of village Bujrook Hazipur, 214. Darpa Chandra (65), of village Bujrook Hazipur, 215. Mritunnjoy (42), of village Bujrook Hazipur, 216. Keshob Chandra (45), of village Bujrook

Hazipur, 217. Azahar Ali (38), of village Bujrook Hazipur, 218. Tunu (35), of village Bujrook Hazipur, 219.Alef Uddin (46), of village Bujrook Hazipur, 220. Barun(2)(child), son of Satish Bairagi of village Bujrook Hazipur, 221. Afsar Ali (30), of village Ramkrishnapur Baniapara, 222. Dinesh Master, of village Ramkrishnapur Baniapara, 223. Mahtab Uddin (50), of village Ramkrishnapur Baniapara, 224. Jeharat Ullah (35), of village Ramkrishnapur Baniapar, 225. Afiz Uddin (34), of village Ramkrishnapur Baniapara, 226.Choyen Uddin (45), of village Ramkrishnapur Baniapara, 227. Akbor Hossen (40), of village Ramkrishnapur Baniapara, 228. Falta Mia (45), of village Ramkrishnapur Baniapara, 229. Tamir Uddin (55), of village Ramkrishnapur Baniapara, 230. Ovoy Chandra (40), of village Ramkrishnapur Baniapara, 231 . Kandu Sheikh (32), of village Ramkrishnapur Baniapara, 232. Bhulu Mia (30), of village Ramkrishnapur Baniapara, 233. Jotsna Begum (18), of village Ramkrishnapur Baniapara, 234. Menhajul Master (55), of village Ramkrishnapur Baniapara, 235. Yousuf (40), of village Ramkrishnapur area Baniapara 236. Esamuddin (32), of village Ramkrishnapur area Baniapara, 237. Fatema Khatun (22), of village Ramkrishnapur area Baniapara, 238. Alauddin (60), of village Ramkrishnapur area Baniapara, 239. Sombaru (40), of village Ramkrishnapur area Baniapara, 240. Mokbul Hossain (35), of village Ramkrishnapur area Baniapara, 241.Khairul Alam (40), of village Ramkrishnapur area Baniapara, 242. Nur Mohammad (45), of village Ramkrishnapur area Baniapara, 243. Ekabbor Ali (40), of village Ramkrishnapur Baniapara, 244. Sazzadi Begum (32), of village Ramkrishnapur Baniapara, 245. Unma Chowkider (48) of village Ramkrishnapur Baniapara, 246.Abdur Rashid (42), of village Ramkrishnapur Baniapara, 247.Abdul Mondal (35), of village Ramkrishnapur Baniapara, 248.Shomser Ali (35), of village Ramkrishnapur Baniapara, 249.Abul Mamud (40), of village Ramkrishnapur Baniapara, 250.Emazuddin (52), of village Ramkrishnapur Baniapara, 251. Fazlul Hoque (45), of village Ramkrishnapur Baniapara, 252. Rahela Khatun (18), of village Ramkrishnapur Baniapara, 253. Wahidul Huq (45), of village Ramkrishnapur Baniapara, 254. Azab Ali(42), of village Ramkrishnapur Baniapara, 255. Omar Ali (35), of village Ramkrishnapur Baniapara, 256. Dilder Ali (32), of village Ramkrishnapur Baniapara, 257. Iman Shah (55), of village Ramkrishnapur Baniapara, 258. Abdul Bari (35), of village Ramkrishnapur Baniapara, 259 Abdul Majid (32), of village Ramkrishnapur area Baniapara, 260. Atahar (45), of village Ramkrishnapur area Baniapara, 261. Anjuara Begum (22), of village Ramkrishnapur Baniapara, 262. Monjuara Begum (18) of village Ramkrishnapur Baniapara, 263. Akhtara Khatun(40), of village Ramkrishnapur Baniapara, 264. Nalo Begum (35), of village Ramkrishnapur Baniapara, 265.Monjila Khatun (30), of village Ramkrishnapur Baniapara, 266. Afjalun Ked (32), of village Ramkrishnapur Baniapara, 267. Nindu Mia (45), of village Ramkrishnapur Baniapara, 268. Wahidul Hoque (40), of village Ramkrishnapur Baniapara, 269. Sapud Mia (40), of village Ramkrishnapur Baniapara, 270.Mofazzal Dafadar (48), of village Ramkrishnapur Baniapara, 271.Shamser Mia (30), of village Ramkrishnapur Baniapara, 272. Ekramul Huq (42), of village Ramkrishnapur Baniapara, 273.Korban Ali (45), of village Ramkrishnapur Baniapara, 274. Bodiuzzaman(35), of village Ramkrishnapur Baniapara, 275. Momen(8), of village Ramkrishnapur Baniapara, 276.Shamsuddin Mia (32) of village Ramkrishnapur Baniapara, 277.Kashem (28), of village Ramkrishnapur area Baniapara, 278. Jogpu Mia (32), of village Ramkrishnapur area Baniapara, 279. Amjad Hossain (45), of village Ramkrishnapur area Baniapara, 280. Foez Uddin (41), of village Ramkrishnapur area Baniapara, 281. Khorshed Lohani (45), of village Lohanipara, 282. Kharia (55), son of Jamir Uddin, of village Gopalpur, Shampur, Rangpur, 283.Alauddin (40), son of Abdul Sobhan, of village Bashantapur, Shampur, Badargonj, Rangpur, 284.Tonna Chowkidar (55), son of late Abdulla, of village Ramkrishnapur, Jhakuapara, 285. Ainuddin (42), son of Aman of village Ramkrishnapur, Jhakuapara, 286. Atiar Rahman(32), son of Aunuddin of village

Ramkrishnapur, Jhakuapara, 287. A. Rashid(42), son of Monir Uddin, of Ramkrishnapur Jhakuapara, 288. Mahaj Uddin (35), son of Soleman of village Ramkrishnapur, Jhakuapara,

289.Sajeda Khatun (22), wife of Soleman of village Ramkrishnapur, Jhakuapara, 290.Mahatab Uddin(42), son of Choyen Uddin of village Ramkrishnapur, Jhakuapara, 291. Jometullah (47), son of late Jehartullah of village Ramkrishnapur, Jhakuapara, 292.Mofez (43), son of Choyen Uddin, of Ramkrishnapur, Jhakuapara, 293.Ekabbar Ali, son of Kafil uddin , of Ramkrishnapur, Jhakuapara, 294. Akbar Ali (32), son of Mahatab , of Ramkrishnapur, Jhakuapara, 295.Nur Mohammad, son of Bidir Uddin, of Ramkrishnapur, Bidirpara, 296.Khairul (32), son of bidir Uddin, of village Ramkrishnapur, Bidirpara, 297.Sahidar Rahman ( 55), son of Hessha Paikar, of village Ramkrishnapur Noyapara, 298.Ohidul Haque (32), son of Goffar, of village Ramkrishnapur Mashandoba, 299. Omar Ali (42), son of Goffar, of village Ramkrishnapur Mashandoba, 300. Rojob Ali (30), son of Goffar, of village Ramkrishnapur Mashandoba, 301. Delbar (25), son of Soleman, of village Ramkrishnapur Mashandoba, 302.Emaj (22), son of Gafur, of village Ramkrishnapur Mashandoba, 303. Fazlul Haque (19), son of late Kobat Ali, of village Ramkrishnapur Mashandoba, 304.Liakot (18), son of late Mofiz, of village Ramkrishnapur Mashandoba, 305.Mahatab (34), son of Hazi Mojib, of village Ramkrishnapur Khiyarpara, 306. Mokbul Hossain (45), son of Jabir Uddin , of village Ramkrishnapur Moddyapara, 307.Alauddin (48), Rajibullah, of village Ramkrishnapur Baniapara, 308.Menhajul Islam (55), son of Mofiz Uddin, of village Ramkrishnapur Baniapara, 309. Sombaru (22), son of Kalta, of village Ramkrishnapur Baniapara, 310.Mojid (32), son of A. Rashid, of village Ramkrishnapur Baniapara, 311. Azadul , son of Afaz, of village Ramkrishnapur Baniapara, 312. Islam, son of Hosain Chaprashi, of village Ramkrishnapur Baniapara, 313.Modi, son of Sobhan, of village Ramkrishnapur Baniapara, 314.Foyzuddin, son of Panchkari, of village Ramkrishnapur Balapara, 315. Islam (33), son of Atkur Uddin, of village Ramkrishnapur Balapara, 316.Adab Baksh (33), son of Foez Uddin, of village Ramkrishnapur Balapara, 317. Tonna Mamud (48), son of Akabbar Rahman, of village Ramkrishnapur Balapara, 318. Fatulli, wife of Nazir Hossain, of village Ramkrishnapur Balapara, 319. Shahidar Rahman (32), son of Rahe Miah, of village Ramkrishnapur Balapara, 320. Veru Miah (55), son of Sahar Miah, of village Ramkrishnapur Balapara, 321.Iman (18), son of Abdullah, of village Ramkrishnapur Mashandova, 322.Shomser (33), son of Chapar Miah, of village Ramkrishnapur Mashandova, 323. Joyjuddin (42), son of Banech, of village Bangarpar, 324. Azizar Rahman (52), son of Jahir Uddin, of village Uttar RAmpara, Parbotipur, Dinajpur, 325. Ohidul Haque, son of Nomer Miah, of village Uttar Rampara, Parbotipur, Dinajpur, 326. Abu Bakkar (55), son of Jamir, of village Uttar RAmpara, Parbotipur, Dinajpur, 327. Momeja Khatun (24), wife of Safi Uddin, of village Ghotabil Khiarpara, 328. Shahida (22), wife of Afzal, of village Ghotabil Khiarpara, 329. Sabila, daughter of Safiuddin, of village Ghotabil Khiarpara, 330. Atarul, son of Momtaz, of village Ghotabil Khiarpara, 331. Lalmai, son of Fazar Miah, of village Ghotabil Khiarpara, 332. Fatema , wife of Mahatab, of village Ghotabil Khiarpara, 333. Moslema, wife of Kohor Miah, of village Ghotabil Khiarpara, 334. Anju Ara, wife of Hobi Miah, of village Ghotabil Khiarpara, 335. A.Karim, son of Sahaj Miah, of village Ghotabil Khiarpara, 336. Munja Khatun, wife of Sahaj Miah, of village Ghotabil Khiarpara, 337. Tulli Mai (24), of village Ghotabil Khiarpara, 338. Somjan (18), daughter of Mojibur, of village Ghotabil Khiarpara, 339. Anjan, daughter of Mojibur, of village Ghotabil Khiarpara, 340. Kafil Uddin, son of Anej Miah, of village Ghotabil Kutirpara, 341. Sohidul (45), son of Kafil Uddin, of village Ghotabil Kutirpara, 342.Fuljan Mai (24) daughter of Kafil Uddin, of village Ghotabil Kutirpara, 343. Ashra (18), daughter of Kafil Uddin, of village Ghotabil Kutirpara , 344. Enteja Khatun (22), son of Kafil Uddin, of village Ghotabil Kutirpara, 345. Majeda (15), daughter of Kafil Uddin, of village Ghotabil

Kutirpara, 346. Anifa (12) daughter of Kafil Uddin, of village Ghotabil Kutirpara, 347. Hamida (22), wife of A. Bari, of village Ghotabil Kutirpara, 348. Kumaresh Chandra (24), son of Bhupen, of village Kishmot Bhotabil, 349. Mohesh (32) son of Velshu Chandra, of village Kishmot Bhotabil, 350. Ratan Chandra (38), son of Bhaduram, of village Kishmot Bhotabil, 351. Beren (36), son of Bhaduram, of village Kishmot Bhotabil, 352. Gonesh (18), son of Bhaduram, of village Kishmot Bhotabil, 353. Dhiren (15), son of Ajit, of village Kishmot Bhotabil, 354. Upen (18), son of Budaru, of village Kishmot Bhotabil, 355.Md. Mofazzal (42), son of A. Sobhan, of village Dapakol Balapara, Parbotipur, Dinajpur, 356.Badiuzzaman (55), son of Haji Ramiz Uddin, of village Khalisha Hazipur, 357. Sree Debendra Nath, son of Chandi Proshad, of village Gotabil, 358. Horendra Nath Sarkara (32), son of unknown, of village Ghotabil, 359. Md. Amzad (35), son of Based, of village Khalisha Hazipur, 360. Md. Shamser (38), son of Reyaz ( Buda), of village Khalisha Hazipur, 361. Nomer (22), of villge Hazipur, 362. Ohidul Haque (38), son of late Abdul Gaffar Pramanik of village Ramkrishnapur Mashandoba, 363. Omar Ali (35), son of late Abdul Gaffar Pramanik, of village Ramkrishnapur Mashandoba, 364. Rajab Ali (18), son of late Abdul Gaffar Pramanik, of village Ramkrishnapur Mashandoba, 365.Abdul Majid (15), son of Abdur Rashid Pramanik, of village Ramkrishnapur Mashandoba, 366. Fazlul (30), son late Kobad Uddin, of village Ramkrishnapur Mashandoba, 367. Delowar Hossain (45), son of late Soleman Pramanik, of village Ramkrishnapur Mashandoba, 368. Iman Ali (43), son of Abdul Miah, of village Ramkrishnapur Mashandoba."

235. Jharuarbeel massacre was one of the most horrific and saddest incident of cold blooded massacre in the history. They were the worst victims of the Genocide committed by Pakistan Army taking aid of the local culprits. They brutally killed most of the people who took shelter in Jharuarbeel. From the names and age of the victims it appears that rifles and machine guns of Pak Army did not select their victims. They killed women, children and old men. They dired against defenseless citizens. The world shocked seeing the harrowing accounts of genocide perpetrated against the unarmed people of Badargonj. It was widespread killing of civilians and the atrocities on massive scale. The people of the whole world were stunned by the brutality committed by Pakistan Army. Slaughtering of civilians in Jharuarbeel was only for mere sake of slaughter. On 24th April, 1971, the Daily Anandabazar published as news report with following language, "পূর্ব বংগে গণহত্যা সম্পর্কে বৃটিশ পার্লামেন্টের প্রশাসনিক দলীয় সদস্য মিঃ ক্রস ডগলাস ম্যান এর বক্তব্য ।

"ভিয়েতনামে "মাইলাই" একটি ব্যতিক্রম, আর গোটা পূর্ববঙ্গই মাইলাই- বায়াফ্রার সঙ্গে তুলনা করেছেন। কিন্তু শ্রী ম্যানের মতে, বায়াফ্রার সঙ্গে পরিস্থিতির তুলনাই হয় না। বায়াফ্রাতে পূর্ববাংলার মত এক নির্বাচন হয়নি। "

236. The My Lai massacre was one of the most horrific of violence committed against unarmed civilians during Vietnam War. A company of American soldiers brutally killed most of the people women, children and old men in the village of My Lai on March, 1968. More than 500 people were slaughtered in the My Lai massacre. In Jharuarbeel, Pakistan Army accompanied with the appellant and other collaborators slaughtered 1200 civilians.

237. The Guardian, London, May 27, 1971 published a news report regarding brutality committed by the Pakistan Army in Bangladesh. A portion of said news item was as follows:

"Villages have been surrounded, at any time of day or night, and the frightened villagers have fled where they could, or been slaughtered where they been found, or enticed out to the fields and mown down in heaps, women have been raped, girls carried of barracks, unarmed peasants battered or bayoneted by the thousands.

The pattern after seven weeks, is still the same. Even the least credible stories of babies thrown up to be caught on bayonets, of women stripped and bayoneted vertically, or of

children sliced up like meat, are credible not only because they are told by so many people, but because they are told. By people without sufficient sophistication to make up such stories for political motives."

238. Inspite of looking dead bodies of 1200 children, women, old men and other civilians, the conscience of the appellant did not restrain him to aid the Pak Army to kill his own teachers of Carmichael College. The appellant assisted, lend encouragement and supported to the commission of such genocide. In Kayishema and Ruzindana ICTR-95-1 Appeals judgment observed that presence as an "approving spectator" in the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct, is also abetting and aiding to the commission of a crime. Complicity to commit genocide refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide. Even after the occurrence of genocide in Jharuarbeel the appellant on 30.04.1971 went to the residence of his teachers along with Pak Army for abducting and killing them.

30th April 1971:

At about 10.30- 11.00 p.m. on 30.04.1971 Pak-army and the appellant surrounded the houses of professors of Carmichael College and confined professor Chitta Ranjon Roy, brother of P.W.9 Suva Kor , Professor Kalachand Roy , Professor Ram Krishna Adhikari and Sunil Baron Chakraborty . They abducted those professors of Carmichael College and, thereafter, killed them near Damdoma bridge. At the time of confining and abducting Professor Chitta Ranjon Roy, his sister P.W. 9 Sova Kor herself saw the appellant along with Pak-army. She identified the appellant with the help of street light. P.W. 9 in her testimony stated that appellant A.T.M. Azharul Islam was her classmate at Carmichael College . So, he was previously known to her. P.W. 10 Ratan Chandra Das, who was the cook of Professor Sunil and Ram Krishna, had also been able to identify the appellant at the time of confinement and abduction of those victims. P.W.9 and 10 proved that the appellant aided, supported, encouraged and prompted the Pakitani Army to commit such brutal killing.

239. From the occurrences dated 03.04.1971, 08.04.1971, 15.04.1971, 16.04.1971, 17.04.1971 and 30.04.1971 it appears that there was a continuing news of terror in Rangpur area. Aforesaid killings of those defenseless people became a habit of Pak army like smoking cigarettes or drinking wine. Those genocide and genocidal atrocities were perpetrated by the Pak army in collaboration with the human being like the appellant as evident from evidence of P.Ws. 3, 4, 5, 6 ,9 and 10 who are the eye witnesses of the occurrences. The Pakistan Army, taking aid of the collaborators, killed three million people during the holocaust in 1971. For month after month in all the regions of Bangladesh the massacres went on. Four hundreds of years, the name of Chenghis Khan has echoed through history as a byword for cruelty and butchery. In the 20th century it seems a Pakistani namesake of the great killer is determined to out do his grisly predecessor. Jharuarbeel incident was one of those thousands of incidents committed in Bangladesh by Pak Army in collaboration with some collaborators of this soil. The incident of Jharuarbeel was cold blooded savagery and such deliberate killings were occurred on a massive scale. Such barbaric, gruesome and brutal crime which the Pak Army committed with aid of the appellant is comparable with Hitler's gas chamber genocide. The offences committed by the Pak army, with aid of the appellant, at Jharuarbeel, Ramnathpur, Mokshedpur, Carmical College teachers residence were undoubtedly heinous, atrocious, cruel and those were widespread and systematic attack targeting the civilian population. Particularly, massacre of Jharuarbeel was deliberate crime of crimes which was of the worst heinous form that could possibly exist in the human civilization. The appellant

acted with knowledge of the broader context of the attack on the civilians gathered in Jharuarbeel.

240. There are overwhelming evidence of Jharuarbeel massacre. It was a senseless slaughter of men, women and children. When international community came to help the helpless people of Bangladesh the appellant aided the Pakistan army and participated in the occurrence of Jharuarbeel which is considered as the most atrocious, appaling and terrible killings.

241. Professor Rafiqul Islam in his book, "National Trials of International Crimes in Bangladesh," considering the cases of Prosecutor V. Dusko Tadic (ICTY Appeals Chamber), Prosecutor V. Mitar Vasiljevic (IT-98-32-T), Prosecutor V. Milomir Stakic (IT-97-24A), Prosecutor V. Radaslav Brdarin (IT-99-36-A) observed that the *actus reus* and *mens rea* of joint Criminal Enterprise are based on some objective elements:

"• A plurality of persons in any form and structuring it in an organised military, political, or administrative setup is not necessary and its *mens rea* is the shared intent as co-perpetrators to perpetrate a certain crime/s;

• A common plan, design, or purpose to commit a crime's, which need not be formally pre-arranged, understood, or agreed between the accused and the principal perpetrator/s of the crime as it can be executed extemporaneously and inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise'; its *mens rea* is the personal knowledge of the accused proved by witness testimonies or reasonable inference from the relevant circumstances revealing the intent to further the common plan, design, or purpose;

• Direct and/or indirect participation of the accused in the common plan, design , or purpose and its *mens rea* is the intentional participation in and contribution to the criminal activities of the group.

•The crime committed must form a part of the common plan, design, or purpose regardless of whether its perpetrator is a member of JCE and in case of non- member perpetrators, *actus reus* may be inferred from relevant circumstances such as the accused or other JCE member/s closely cooperated with the non-member principal perpetrator in order to materialise the common criminal purpose; hence a JCE member may be held responsible for crimes perpetrated by a non-member, who does not necessarily share the *mens rea* of JCE members.

• The link between the accused and the crimes of the principal perpetrator/s is the actual contribution of the accused to the commission of the crimes, not the JCE membership of the perpetrator/s. In other words, the JCE liability purports to reflect the exact degree of responsibility for JCE members who in some way made it possible for the principal perpetrator/s to physically carry out the crimes within the common plan of JCE."

242. In Prosecutor V. Bisegimana (Case No. ICTR-00-60-T) Trial Chamber observed that the prosecution is required to demonstrate that the accused carried out an act of substantial practical assistance, encouragement, or moral support to the principal offender, culminating in the latter's actual commission of crime. In Kajelijeli ( Case No. ICTR-98-44A-A) Appeals Chamber and Nabimana, Barayagwiza and Ngeze (ICTR-99-52-A) Appeals Chamber consistently held that "a Trial Chamber is in the best position to evaluate the probative value of evidence and that it may, depending on its assessment, rely on a single witness's testimony for the proof of a material fact". In this case, the ICT scanning the evidence of the eye witnesses, particularly, P.W.3 Moklesur Rahman, P.W.4 Meseruddin, P.W.5 Abdur Rohman , P.W.6 Mokbul Hossain, P.W.9 Shova Kor and P.W.10 Ratan Das

and circumstances observed that the prosecution has been able to prove that the appellant personally being present in the crime scene at the time of commission offences, committed or aided, abetted and assisted to commit crimes against humanity and genocide. In the case of Prosecutor V. Bagilisbema, Case No. ICTR-95-1A-A Appeals Chamber held that it is well settled that ' the testimony of a single witness on a material fact may be accepted as evidence without the need for corroboration. P.Ws 3 and 6 proved the presence and activities of the appellant regarding the killings of 15 unarmed civilians dated 16.04.1971, P.Ws. 4 and 5 proved the activities and presence of mass massacre of 1200 unarmed civilians at Jharuarbeel on 17.04.1971. Even after observing the ocean of blood and large scale massacre at Jharuarbeel the appellant's conscience did not strike him which clearly indicated the lacking of human quality of the appellant. Does Islam permit such killings? Naturally Hindu teachers of Carmichael College were not known to the Pakistan Army. P.Ws. 9 and 10 proved that the appellant personally being present helped, added and assisted the Pak Army going to the residences of the Professors and abducted them and, thereafter, killed them brutally. His participation has substantially contributed to and has had substantial affect on the consummation of a crime under the statute.

243. It is of the essence of the crime of abetment that abettor should assist the principal culprits towards the commission of the offence. Participation *de facto* may sometimes be obscure in detail, it is established by the presumption *Juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. From the evidence of P.Ws. 3, 4,5 6, 9 and 10 that the appellant not only gave assistance, he participated in the acts of commission of the offences. When a person who abets the commission of an offence is present and helps in the commission of the offence, he is guilty of such offence. In the case of Semanza Vs. Prosecutor, Case No. ICTR-97-20A (Appeal Chamber), it was held,

"For an accused to be convicted as perpetrator or co-perpetrator of genocide, it is not necessary that he or she fulfils a 'key coordinating role' or that a 'high level genocidal plan' be established even if the existence of a plan to commit genocide can be useful to prove the specific intent required for genocide".

244. Moreover, it has been observed by the ICTY in Prosecution V. Radoslav Brdanin that existence of a pre- arranged common plan or policy is not necessary for crimes against humanity, which can be committed extemporaneously and inferred from the fact that a plurality of persons act in unisons to put into effect a joint criminal enterprise. In Kadar Molla's case reported in 22 BLT (AD-8) it was observed by this Division that-

a) "the terrible brutality of the Pakistan army was preplanned and in furtherance of a government policy to wipe out the pro-independence Bengali 'civilians, including women and children in a deliberate plan to achieve submission by stark terror'.

b) any argument in terms of the requirements of law and the 1973 Act 'that there must be existence of prior plan or policy and that there must be an attack on political, racial, ethnic or religious grounds are not only misleading but also foreign to the Act, 1973; and

c) there was no need to prove that there was any predetermined plan and/or policy for the attack as it was enough to prove that any person committed such offence during the liberation war period or participated or attempted or conspired to commit any such crime in collaboration with the Pakistani regime upon the unarmed civilian as a part of an orchestrated collective punishment aimed to defuse and frustrate the independence of Bangladesh."

245. In Akayesu (Case ICTR -96-4-T Trial Chamber) the Trial Chamber noted that in the absence of a confession or other admission, it is inherently difficult to establish genocidal intent of an accused. At the same time, it noted that a Chamber may make a valid inference

about the mental state of the accused on the basis of a number of factors. Thus, where it is impossible to adduce direct evidence of the perpetrator's intent to commit genocide, such intent may be inferred from the facts and circumstances. In Mpambara (Case No.ICTR01-65-T) Trial Chamber observed that intent may be proven by drawing inferences from circumstantial evidence, such as any connection to a wide-scale attack against the targeted group.

246. Testimonies of the witnesses, circumstances, previous and past conduct of the appellant before and after Jharuarbeel massacre as reflected in the evidence, it appears that the findings and conclusion arrived at by the Tribunal as to the culpability and criminal responsibility of the appellant in respect of Ramnathpur, Jharuarbeel massacre and killing of teachers of Caramical College are based on evidence. Pak Army and the appellant persecuted and murdered civilian populations solely on political reason.

247. It is obligatory on the part of the Court to keep in mind the impact of the offence on the society and its ramification including the repercussion on the victims. It is the duty of the Court to award proper sentence having regard to the nature of the offence and depending upon the degree of criminality the manners in which those were committed and all attended circumstances. In view of the facts and circumstances, I do not find any wrong in the ultimate decision of the Tribunal.

**Md. Nuruzzaman, J.**

248. I have had the advantage of going through the judgments proposed to be delivered by Syed Mahmud Hossain, the learned Chief Justice and Zinat Ara,J. I concur with the judgment and order passed by the learned Chief Justice.

**Zinat Ara, J. (Minority View):**

249. This appeal has been filed by the convict-appellant, A.T.M. Azharul Islam (hereinafter referred to as the appellant/ convict- appellant/condemned-prisoner) against the judgment and order dated 30.12.2014 passed by the International Crimes Tribunal No.01, Dhaka (hereinafter referred to as the Tribunal) in ICT-BD Case No. 05 of 2013 finding the convict-appellant guilty of charge Nos. 2, 3, 4, 5 and 6 brought against him under the International Crimes (Tribunals) Act, 1973 (shortly, the Act of 1973) and convicting and sentencing him to death in respect of charge Nos. 2, 3 & 4 and convicting and sentencing him to rigorous imprisonment for 25 (Twenty five) years in respect of charge No. 5 and rigorous imprisonment for 5(five) years in respect of charge No. 6.

250. I have had the privilege of going through the judgment proposed to be delivered by the learned Chief Justice, Syed Mahmud Hossain. But, with due respect,I am unable to concur with the judgment so far as it relates to affirmation of conviction and sentence of the appellant on charge Nos. 2 and 3 and sentence on charge No. 4 of the Tribunal in ICT-BD Case No. 05 of 2013.

251. For the sake of better understanding of my adjudication of the appeal on charge Nos. 2 and 3, the said charges are quoted below:

**Charge No.2**

"On 16.04.1971 at about 1.00 P.M. accused A.T.M. Azharul Islam being the President of Islami Chhatra Sangha, Rangpur Unit, along with armed members of Jamaat-Islami, Islami Chhatra Sangha and Pakistani army, in continuation of their planning and blue-print, having

arrived at his area named Taxerhut Railgomti under Badorgonj Police Station by a train, proceeded towards Moksedpur Dhap Para and on the way the Pakistani army with the help of the accused and his said accomplices plundered many houses situated beside the road and then set them on fire. Thereafter, the accused and his accomplices having reached at Dhap Para area attacked the village Moksedpur and started firing indiscriminately and as a result unarmed civilians namely, (1) Jangoli Bhorosha (2) Kerad Hossain alias Bishu (3) Mst. Chini Mye (4) Ammye (5) Momtaz Uddin (6) Mowlovi Abdul Quddus Ali (7) Tamir Uddin alias Tamiz Uddin (8) Moriom Nessa Kalti Mye (9) Sarijannessa alias Sukhi Mye (10) Yusuf Ali [sustained bullet injury but died after Liberation] (11) Shadhina (12) Azizar Rahman alias Khoka (13) Zahir Uddin (14) Osman Ali and others were killed.

252. Thus, the accused has been charged for abetting and facilitating the commission of offences of murder, plundering and arson as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973".

**Charge No.3**

253. "On 17.04.1971 between 12.00 noon and 5.00 P.M. accused A.T.M. Azharul Islam being the president of Islami Chhatra Sangha, Rangpur unit, along with armed members of Jamaat-e-Islami, Islami Chhatra Sangha and Pakistaniarmy, in continuation of their planning and blue-print, with intent to destroy, in whole or in part, a Bangalee national group and a Hindu religious group, made attack widespreadly by setting fire to the villages of Jharuarbeel area namely, Hajipur, Jharuapara, Bujruk Bagbar, Ramkrishnapur, Balapara, Bujruk Hajipara, Bairagi Para, Sardar Para, Ramkrishnapur, Baniapara, Ramkrishnapur Bithhipara, Jogipara, Khorda Bagbar and Khalisha Hajipur and, then the unarmed civilians of those villages being frightened took shelter at the Jharuarbeel. At that time,the accused and his said accomplices having surrounded the Jharuarbeel killed about one thousand and two hundred unarmed women, men, students, babies, etc. by firing indiscriminate shots and they also having caught hold of about more than two hundred Hindu people and students there from took them to unknown place and then killed them. At the time of said atrocities, many houses of that area were plundered and set on fire by them. Thus, the accused has been charged for abetting and facilitating the commission of offences of plundering, arson and murder as crimes against Humanity and also genocide as specified in section 3(2)(a)(c)(g)(h) read with section 4(1) and 4(2) of the Act of 1973."

**Arguments of the Appellantside**
**on Charge Nos. 2 and 3**

254. Mr. Khondker Mahbub Hossain, the learned Advocate for the appellant, at the very beginning submits that the appellant side does not deny the atrocities of Pakistani army (shortly, Pak army) with the help of some evil persons of our soil during liberation war, committing offences like murder, plundering and setting fire to houses (arson) as crimes against humanity but adds that the convict-appellant was a boy of 18/19 years at the relevant time and he was neither a perpetrator nor an abettor/facilitator of any of those offences.

255. Mr.Hossain takes us through the judgment and order of conviction and sentence of the appellant passed by the Tribunal, the testimonies of the witnesses, other materials on record and put forward the following arguments before us:

1) Charge Nos. 2 and 3 were brought against the convict-appellant for his individual responsibility/liability but not for superior command responsibility. Therefore, the prosecution has to prove the said charges against the convict-appellant beyond any shadow of

reasonable doubt in view of the provision of rule 50 of the International Crimes (Tribunal-1) Rules of Procedure, 2012 (hereinafter referred to as the Rules).

2) On charge No.2, the learned Judges of the Tribunal have relied on the depositions of P.W.3-Moklesar Rahman Sarker, P.W.4-Md. Meser Uddin, P.W.5-Md. Abdur Rahman, P.W.6-Md. Mokbul Hossain, P.W.7-Md. Aminul Islam, P.W.8-Md. Mujibur Rahman Master and P.W.11- Md. Sakhawat Hossain alias Ranga, while convicting and sentencing the appellant on this charge. But, reliance upon the depositions of the aforesaid witnesses was erroneous as the testimonies of the witnesses were inconsistent in material particulars and it was not humanly possible for the eye-witnesses i.e. P.W.3 and P.W.6 to witness the incident, which is evident from their testimonies. Their depositions were not true and thus, not worthy of credence.

3) The Tribunal convicted and sentenced the appellant on charge No.3 relying on the depositions of P.W.3-Moklesar Rahman Sarker, P.W.4-Md. Meser Uddin, P.W.5-Md. Abdur Rahman, P.W.6-Md. Mokbul Hossain, P.W.8-Md. Mujibur Rahman Master but from the depositions of the aforesaid witnesses it appears that the versions of the said witnesses were discrepant in material particulars and were not worthy of credence.

4) The versions of prosecution witnesses on both charge Nos.2 and 3 as well as other charges were discrepant in three ways,- the first being their stories as placed before the Tribunal are inconsistent/contradictory with the previous statements made before the Investigating Officer during investigation stage, the second being the testimonies as made before the Tribunal by different prosecution witnesses are inconsistent/ contradictory with each other and the third being the depositions made before the Tribunal in their examination-in-chief and cross-examinations are discrepant in material particulars.

5) An investigation report dated 16.09.2012 (exhibit No. 25) as adduced by the prosecution, clearly shows that the appellant was not found involved in the war crimes of 1971.

6) The prosecution could not place any iota of documentary evidence like newspaper cutting, books, etc printed during liberation war and immediately after liberation up to 1975 or onwards at least for a period of 40 years, that the appellant was involved in abetting and facilitating the commission of offences of plundering, arson, rape and murder by Pak army during liberation war. Thus, the convict-appellant ought to have been found not guilty by the Tribunal of all the charges brought against him.

7) Relatives of the deceased persons were not mostly examined in the Tribunal to prove the prosecution case. The evidence of the relatives examined was not credible.

8) Most of the hearsay witnesses did not state the name/names of the person/persons from whom they had heard the incident. Where the witnesses claimed to have heard the incident from certain persons, the depositions of the said persons were not credible.

9) The most important and natural eye-witness P.W.7 Aminul Islam did not mention the name of the appellant at all, although he was the most natural eye-witness and he vividly narrated the incident.

10) The Tribunal failed to appreciate that the ingredients of crimes against humanity were not brought home against the convict-appellant by the prosecution. The Tribunal relying on the discrepant testimonies of the witnesses erroneously found the appellant guilty.

11) The prosecution witnesses were partisan.

12) From the testimonies of the witnesses it was found that the appellant was only a boy of 18/19 years old and so, it was/is not believable that a boy of 18/19 years old would lead and command Pak army in series of incidents.

13) The judgment and order of conviction and sentence of the appellant has been passed by the Tribunal ignoring series of material contradictions and inconsistencies in the evidence on record. The Tribunal also ignored that it was humanly impossible for the eye-witnesses to

witness the incidens as narrated by them and, as such, the appeal is liable to be allowed and the order of conviction and sentence of the appellant is liable to be set aside.

256. Mr. Hossain, in fact, made lengthy and threadbare submissions on contradictions, inconsistencies, etc. of the witnesses and exhibited documents on both charge Nos.2 and 3 as well as other charges. But, I do not like to elaborate the same at this stage to avoid unnecessary repetition thereof as the testimonies of the witnesses would be examined and assessed independently by me at the time of my deliberation.

**Arguments for the Chief Prosecutor**
**i.e. the Respondent on Charge Nos. 2 and 3**

257. Mr. Mahbubey Alam, the learned Attorney General, representing the Chief prosecutor of the Tribunal, on the other hand, takes us through the testimonies of the witnesses, other materials on record and submits on charge Nos. 2 and 3, as under:

a. There are no material contradictions in the testimonies of the witnesses. The minor contradictions or omissions are not fatal to the prosecution case. During cross examination, the defence failed to bring out any material or gross inconsistency/ contradiction in the depositions made by the witnesses. Therefore, the Tribunal following and relying upon the war tribunal cases of Delwar Hossain Sayedee, reported in 15 ADC 593, Ali Ahsan Md. Mujahid, reported in 20 BLC (AD) 266, Salauddin Quader Chowdhury, reported in 67 DLR (AD) 295, Motiur Rahman Nizami, reported in 13 ADC 607, Mir Quasem Ali, reported in 2 Law Messenger (AD) 364 and the unreported judgment and order dated 03.11.2014 passed by this Division in the case of Quamaruzzaman, legally found the appellant guilty of charge Nos. 2 and 3 and convicted and sentenced him thereunder. There is hardly any scope to interfere with the judgment and order of conviction and sentence of the Tribunal.

b. The incidents took place 41/43 years back. Therefore, it is quite natural that the witnesses may not remember every detail of the incidents and there would be minor contradictions and omissions in the depositions of witnesses due to lapse of such a long period.

c. The eye-witnesses at the time of giving their depositions in court supported the prosecution case without any discrepancy that condemned-prisoner A.T.M Azharul Islam (Azhar) was the leader of Islami Chhatra Shanga, Carmichael College, Rangpur. He on 16/04/1971 at about 1.00 pm actively abetted Pak army in the killing of (1)Jangoli Barasha, (2) Kerad Hossain alias Bishu (3) Mst. Chini Mye (4) Ammye, (5) Momtaz Uddin (6) Mowlovi Abdul Quddus Ali (7) Tamir Uddin alias Tamiz Uddin (8) Moriom Nessa Kalti Mye (9) Sarijannessa alias SukhiMye (10) Yusuf Ali [sustained bullet injury but died after liberation] (11) Shadhina (13) Azizar Rahman alias Khoka (13) Zahir Uddin (14) Osman Ali and others and also abetted Pak army in setting fire at various houses atDhap Para, Moksedpur. Thus, the Tribunal rightly found him guilty of the charges of abetting and facilitating the commission of offences of murder, plundering and arson i.e. crimes against humanity and convicted and sentenced him under section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973.

d. The prosecution also proved that on 17.04.1971 between 12.00 noon and 5.00 pm the convict-appellant abetted and facilitated the commission of offences of murder, plundering and arson i.e. crimes against humanity at Jharuar Beel. So, the Tribunal rightly found him guilty of the charges under section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and convicted and sentenced him thereunder.

e. The prosecution examined as many as seven witnesses to bring home charge No.2 against the appellant. Among them P.W.3 Moklesar Rahman Sarker, P.W.6 Md.

Mokbul Hossain, P.W.7 Md. Aminul Islam are eye-witnesses relating to this charge. These witnesses well proved the charge against the appellant beyond any shadow of reasonable doubt. Moreover, their depositions are also corroborated by P.W.4, P.W.5, P.W.8 and P.W.11, who heard the incident immediately after the occurrence.

f. The prosecution also examined 5 witnesses so far as it relates to charge No.3 against the appellant. Among them P.W.4 Md. Meser Uddin and P.W.5 Md. Abdur Rahman are eye-witnesses to the occurrence and they categorically in a voice supported the prosecution case against the appellant. P.W.3, P.W.6 and P.W.8 are hearsay witnesses, who heard the incident immediately thereafter. They also corroborated the depositions of P.W.4 and P.W.5.

g. The appellant does not deny the historical facts but denies his involvement in the charges brought against him as an abettor/facilitator of the above offences committed by Pak army.

h. Applications of the provisions of the Code of Criminal Procedure, 1898 and the Evidence Act, 1872 have been specifically excluded by the Act of 1973.

i. Moreover in the case of the Chief Prosecutor Vs. Abdul Quader Mollah, International Crimes Tribunal, Dhaka reported in 22 BLT (AD)08, it has already been decided that the accused should not be allowed to take contradiction between the depositions of witnesses made before the Tribunal and their previous statements made during investigation.Therefore, the appellant was not legally allowed to take contradictions of the statements made before the Tribunal with their previous statements made during investigation.

j. Under rule 53 of theInternational Crimes (Tribunal-1) Rules of Procedure, 2012, historical facts need not be proved. However, the culpability of an accused relating to the charges brought against him has to be proved by the prosecution beyond reasonable doubt. In this case, the prosecution could prove the same beyond reasonable doubt.

k. The Tribunal while deciding the case correctly noted that the incident took place in 1971 and witnesses were examined before the Tribunal in 2012 i.e. about 41/43 years after. The witnesses who had seen the incident did not come forward to depose in the Tribunal for fear of reprisal previously and due to such delay most of the material evidence has been destroyed by reason of death of some vital witnesses and change of political atmosphere during intervening period.

l. In the circumstances, the prosecution has collected the best evidence which is available to prove the charges. Therefore, the Tribunal considering the facts,circumstances and the materials placed before it believed the witnesses adduced by the prosecution as reliable. So, it should not be ignored considering the fact that a huge number of persons were brutally killed, some women were raped and many houses were destroyed by fire. The appellant actively abetted in the perpetration of the offences for which he has been charged with and convicted.

m. The appellant failed to show any reasonable ground or material contradiction in the depositions of witnesses so as to disbelieve them.

258. In the above circumstances, the appeal is liable to be dismissed.

Mr. Mahbubey Alam, in detail, read out the relevant incriminating part of the depositions of witnesses in support of his arguments.

However, I do not like to discuss the detail of the said arguments to avoid unnecessary repetition as I intend to assess the evidence independently while deciding the appeal under consideration.

**Reply of the Appellant side**

259. In reply Mr. Khondker Mahbub Hossain, contends as under:

I. Rule 44 of the Rules provides that the Tribunal should exclude any evidence which does not inspire any confidence in it. Rule 56(1) provides that the Tribunal shall give due weight to the circumstantial evidence of any fact of the case. Rule 50 provides that the burden of proving the charge shall lie upon the prosecution beyond reasonable doubt.

II. The prosecution could not produce any document to the effect that any case/GD was filed/ entered against the appellant immediately after liberation war or within a period of about 40 years since liberation.

III. The prosecution brought allegations against the appellant for the commission of offences on 16.04.1971; 17.04.1971 and 30.04.1971 i.e the second and the last week of April, 1971 and August, 1971 and Mid November, 1971. Out of those five incidents, the appellant has been awarded sentence of death for first three incidents. It appears from the documents submitted by the prosecution that the Al-Badar was established at the end of May, 1971. Exhibit 13 was published on 13.09.1971 and Exhibit 16 was prepared on 17.10.1970. Therefore, it can be safely concluded that the appellant was convicted and sentenced to death for the incidents, when Al-Badar was not even established.

IV. There are number of decisions to the effect that when the question of awarding death sentence comes, the court should be extremely careful. In a case involving capital punishment, the Court should not lightly accept the plea of involvement of the accused without excluding all other rival theories as to the innocence of the accused. If there is any iota of doubt as to the guilt of the accused, the Court should take lenient view in awarding sentence.

V. The prosecution-respondent relying upon the cases of Delwar Hossain Sayedee reported in 15 ADC 593, Ali Ahsan Md. Mujahid reported in 20 BLC (AD) 266, Salauddin Quader Chowdhury reported in 67 DLR (AD) 295, Motiur Rahman Nizami reported in 13 ADC 607 and Mir Quasem Ali reported in 2 Law Messenger (AD) 364 and an unreported judgment and order dated 3.11.2014 passed by this Division in the case of Quamaruzzaman asked for considering 'Old evidence' and the involvement of Islami Chhatra Shangha in the context of 1971 as the facts of common knowledge. But the appellant has been specifically charged for abetting and facilitating commission of offences of murder, rape, abduction, arson as crimes against humanity and genocide. So, in order to determine his culpability, the prosecution-respondent was/is liable to prove specific occurrence with the help of oral, documentary and circumstantial evidence, which it failed to prove beyond reasonable doubt. The convict-appellant was/is the victim of political vendetta. Had he not held the leading position of opposition political party, he would not have been implicated in the instant case.

VI. The prosecution-respondent, excluding all other the then leaders and activists of Jamaat, chose an intermediate student aged 18/19 years, who has now become a leader of opposition political party. Therefore, the trial of the appellant can be safely termed as 'selective prosecution'.

VII. The findings of the Tribunal, that all the living witnesses have directly implicated the appellant with the offences of arson, plundering and murder as narrated in charge Nos. 2 and 3 and that the learned defence counsel has cross-examined these living witnesses thoroughly, but could not shake their evidence and, as such, there is no reason to disbelieve their evidence are totally based on misreading of evidence on record. The Tribunal utterly failed to consider that the testimonies of the eye-witnesses are unreliable, tutored and unnatural, they made serious contradictory depositions and, as such, their depositions had no probative value.

VIII. In the facts and circumstances, the judgment and order dated 30.12.2014 passed by the Tribunal finding the appellant guilty of charges brought against him and

convicting and sentencing him thereunder to death is based on surmise and conjectures without considering gross contradictions and unreliability of the witnesses and of Exhibits. Therefore, it is erroneous and liable to be set aside by allowing the appeal.

**Reply of the Prosecution side**

260. Mr. Mahbubey Alam, in his reply, finally submits that the Tribunal in consideration of the evidence on record believed testimonies of the witnesses to be natural and the Tribunal correctly observed that there were only some minor inconsistencies and contradictions while convicting and sentencing the condemned-prisoner. So, there is no reason to interfere with the self-contained and well-reasoned judgment and order of conviction and sentence on the charges brought against the convict-appellant. Therefore, the appeal is liable to be dismissed.

**Examination of Records**

261. I have examined the depositions of prosecution witnesses, the exhibited documents as adduced by the prosecution, the judgment and order of conviction and sentence of the Tribunal and the other connected materials on record. I have also gone through the relevant provisions of law.

**Deliberation of the Court**

262. The history of partition of India and birth of two countries- India and Pakistan, the history of our liberation war, genocide committed by Pak army with the aid of Rajakar, Jamaat-E-Islami, Islami Chhatra Sangha, Shanti Committee, Al-Badar, Al-Shams, etc, Freedom Fighters' role in liberation war and eventual liberation and freedom of Bangladesh have been discussed by my learned brother elaborately at the beginning of the judgment. So, it needs no further discussion. However, before starting my deliberation I must say that the barbaric act of Pak army in committing rape, genocide (mass killing), arson, plundering i.e. crimes against humanity during the war of liberation of Bangladeshwith the help of some evil persons of our soil causing immensehuman sufferings are absolutely condemnable. However, while deciding the case, I must confine myself in assessing the evidence adduced by the prosecution judiciously without any favour towards anyone in accordance with the Act of 1973 and the Rules made thereunder.

**Charge No. 2**

263**.** The date, time and place of occurrence of charge No.2 are on 16.04.1971 at about 01:00 pm for mass killing at Dhap Para, Moksedpur and plundering and arson of many houses from taxerhut on the way to Dhap Para, Moksedpur.

At the outset, I would like to note that while deciding the merit of the charge, the learned Judges of the Tribunal have not made any elaborate discussion pointing out the contradictions/omissions, etc. of the witnesses. Tribunal observed that:

"We find some minor inconsistencies and contradictions among the evidence of the above mentioned prosecution witnesses but an assessment is to be made on the basis of the totality of the evidence presented in the case. The Tribunal, however, is not obliged to address insignificant inconsistencies, if occur in witnesses' testimonies. In this context, we may refer to the decision of **ICTR Appeals Chamber held in the case of Muhimana as under:**

*"The Appeals Chamber reiterates that a trial chamber does not need to individually address alleged inconsistencies and contradictions and does not need to set out in detail why it accepted or rejected a particular testimony."*

***[ICTR Appeals Chamber, judgment May 21, 2007, para-99]"***

(Underlined by me)

264. However, under rule 53 of the Rules, which is the law of our land,-"the party shall be at liberty to cross examine such witness on his credibility and to take contradiction of the evidence given by him."

Therefore**,** I am of the view that in order to decide whether the contradictions are minor or major, those contradictions ought to have been addressed by the Tribunal, at least for the purpose of enabling the appellate court to assess the nature of those contradictions or omissions or inconsistencies.

265. Be that as it may, before entering into the merit of the charge under consideration, I would like to quote firstly, the provision of rule 53 of theInternational Crimes (Tribunal-1) Rules of Procedure, 2012 which was prevalent during trial and at the time of pronouncement of judgment and till date. The provisions of this rule read as under:

"53.(i) The testimony of the witness shall be recorded either in Bangla or in English through the process of computer typing or otherwise as the Tribunal directs.

(ii) The cross-examination shall be strictly limited to the subject-matter of the examination-in-chief of a witness but **the party shall be at liberty to cross examine such witness on his credibility and to take contradiction of the evidence given by him.**

(iii)The Tribunal shall have jurisdiction to regulate the matter of time management as and when deems necessary, for ensuring effective and expeditious trial."

(Bold, emphasised)

266. Therefore, under rule 53(2) of the Rules the Tribunal has to allow cross examination on the **credibility** of the witnesses. So, evidently, it has to consider and decide the credibility of the witnesses. There is no scope to decide otherwise.

In the above context, I would like to discuss the credibility of the witnesses first.

267. P.W.3 Moklesar Rahman Sarker is a prosecution eye-witness of the case. This witness stated on oath-"১৯৭১ সালের ১৬ই এপ্রিল তারিখে রংপুর থেকে একটি ট্রেন টেকশোরহাট সংলগ্ন ৬নম্বর রেল গেইটে পৌছে। উক্ত ট্রেনে পাকিস্তান আর্মি, এটিএম আজহারুল ইসলাম এবং আরো জামায়াত ইসলামীর লোকজন সে জায়গায় আসে...পাকিস্তান আর্মি, এটিএম আজহারুল ইসলাম এবং জামায়াত ইসলামীর লোকজন তখন উক্ত ট্রেন থেকে নেমে উত্তর দিকে অগ্রসর হতে থাকে এবং পথের দুই ধারে বাড়ি ঘর আগুন দিয়ে পুড়িয়ে দেয় এবং গুলি ছুড়তে থাকে। ফলে মানুষজন ভয়ে এদিক সেদিক পালাতে থাকে। তারপর তারা মিলেরডাঙ্গা হয়ে আমাদের বাড়ি ও গ্রামে এসে পৌছায়। পাকিস্তান আর্মি ও তাদের সহযোগীরা আমাদের গ্রামের দিকে আসা লক্ষ্য করে আমার মা, দুই ভাই ও দুই বোন ০৪ কিলোমিটার উত্তর দিকে পাঠানোর হাট নামক এলাকায় চলে যায়, আমি ও আমার বাবা বাড়ি পাহারা দেওয়ার জন্য বাড়িতে থেকে যাই। পাকিস্তানী আর্মি ও তাদের সহযোগীরা আমাদের গ্রাম ঘেরাও করে ফেললে আমি একটি ঝোপের মধ্যে লুকিয়ে পড়ি এবং আমার বাবা পালাতে গিয়ে তাদের হাতে ধরা পড়ে। তখন আমি ঝোপের ভিতর থেকে দেখতে পাই যে , আমার বাবা এটিএম আজহারুল ইসলামের পা ধরলে তিনি ধাক্কা দিয়ে ফেলে দেন এবং তখন পাকিস্তানী আর্মিরা আমার বাবাকে গুলি করে হত্যা করে । আমি জামায়াত নেতা এটিএম আজহারুল ইসলামকে চিনতাম কারণ তিনি ১৯৭০ সালের নির্বাচনে জামায়াতে ইসলামীর প্রার্থীর পক্ষে ভোট চাইতে আমাদের এলাকায় এসেছিল। আমি ঝোপের ভিতর থেকে আরো দেখতে পাই যে, আমাদের গ্রামের মুন্সী কুদ্দুসকে তারা একই ভাবে হত্যা করে। পাকিস্তানী আর্মি ও তাদের সহযোগীরা চলে যাওয়ার পরে আমাদের গ্রামের বিভিন্ন জায়গায় ১৫ জনের লাশ পড়ে থাকতে দেখি। তাদের মধ্যে আমার বাবা মমতাজ আলী সরকার, কুদ্দুস মুন্সী, জহির উদ্দিন, চিনি মাই, আম মাই, জঙ্গলি ভরসা, বিষু, তমির উদ্দিন, আবু, টিনা, কালটি মাই, সাধিনা, ইউসুফ আলী ছিল।...

During cross examination, he stated that- "পরে গ্রামের লোকজন জমায়েত হলে তাদের কাছে শুনি... আমরা তিন ভাই দুই বোন। আমার ভাই বোনদের মধ্যে সবচেয়ে বড় মোজাম্মেল সরকার, এরপর আমি। আমার পরে আমার এক ছোট ভাই ও দুই বোন রয়েছে। আমার বড় ভাই বর্তমানে জীবিত আছেন।

"৬ নম্বর রেল গোমটি হতে ৪/৫ কিলোমিটার উত্তরে ধাপপাড়া অবস্থিত। ধাপপাড়া থেকে ০১ কিলোমিটার উত্তর-পশ্চিম দিকে আমাদের বাড়ি। ধাপপাড়া থেকে আমাদের বাড়িতে যেতে মাঝে অনেকগুলি বাড়ি ঘর আছে, সে বাড়িগুলোর মধ্যে নুর মন্ডল, মজিবর, নূর আলম, তহিদুল ডাক্তার, শহিদুল মন্ডল, আশিক আলী মন্ডল ও আরো অনেকের বাড়ি ঘর আছে।... আমি স্কুলে লেখাপড়া করি নাই। আমার বড় ভাই ও ছোট ভাই লেখাপড়া করেছে।...

(Underlined by me)

268. Thus, from his deposition, the following facts stand revealed:

(I) This witness did not mention the time of occurrence. He did not even mention if the incident took place in the morning, noon, afternoon, evening or at night.

(II) The house of this witness was/is at least 3/4 kilometers far from No. 6 Goumti/Rail Gate.

(III) The witness did not say that he had seen or heard the incident from any one. He gave testimony before the Tribunal in such a manner, which shows that he has seen the whole incident himself, including getting down of Azhar from the train with Pak army and others. Thus, his deposition about this part of the incident is vague.

(IV) It is humanly impossible to see or recognize any person from a distance of 3/4 kilometers with naked eyes. So, testimony of this witness to the effect that A.T.M Azharul Islam got down from the train with Pak army is concocted.

(V) P.W.3 started giving deposition on oath before the Tribunal with falsehood. It is true that if a part of deposition of a witness is found to be false, it would not make the evidence of such witness as false in entirety. However, it creates a serious doubt about the genuineness of the rest part. So, the rest part must be assessed very cautiously by the court while dealing with such witness.

(VI) Subsequent part of deposition of P.W.3 shows that his mother, two other brothers including his elder brother and sisters all left for Pathan Hat after Pak army came to their village and their house. But, this witness remained in the house with his father and witnessed the incident.

(VII) This witness stated that he was 56 years old on the date of his deposition on 05.03.2014. So, he was a boy of only 12/13 years old at that time. Therefore, if all others left their house including his mother and elder brother out of fear of Pak army and their accomplices, there was no earthly reason for him to stay with his father. It is not a natural human conduct.

(VIII) He admitted that,- "আমার মা মারা যাওয়ার তারিখ মনে নাই, তবে মা মারা যাওয়ার এখনো দুই বৎসর পূর্ণ হয় নাই। আমার বিয়ের তারিখ মনে নাই, তবে ১৯৭৫ সালে আমার বিয়ে হয়েছিল। আমার ছেলে মেয়ের জন্ম তারিখ আমি বলতে পারব না, তবে সেগুলি সব লেখা আছে|....."| He also deposed that,-"আমাদের গ্রামের মসজিদের ওয়াকফ্ সম্পত্তি নিয়ে একটি ফৌজদারী মামলায় ৩১ জন আসামীর মধ্যে আমিও আসামী ছিলাম।" and that "আমি জামায়াত নেতা এটিএম আজহারুল ইসলামকে চিনতাম কারণ তিনি ১৯৭০ সালের নির্বাচনে জামায়াতে ইসলামীর প্রার্থীর পক্ষে ভোট চাইতে আমাদের এলাকায় এসেছিল।....." (vide cross-examination)

(IX) This witness was unable to remember the date of his mother's death, which occurred within two years, the date of his marriage and also the dates or years of birth of his son and daughter. Therefore, it is totally unbelievable that he would remember the exact date of occurrence i.e. 16.04.1971, though, he may only remember the year of 1971, because it is an important year due to liberation of Bangladesh, our beloved country.

(X) He is/was an accused of a criminal case.

(XI) His elder brother is alive but neither his elder brother nor any member of his family came forward to support the prosecution case that only P.W.3 remained with his father while all other members of the family left their house at the time of occurrence. Even as a hearsay witness none of the family members came forward to depose before the Tribunal.

(XII) From his evidence it is found that the house of the witness is at NorthRamnathpur,P.S-Badarganj, District-Rangpur and his father's name is Momtaz Ali Sarkar. But, the place of occurrence of charge No.2 about firing and killing is Dhap Para, Moksedpur. So, it is not believable that he saw the incident of Dhap Para, Moksedpur a different village.

(XIII) The incident of killing at North Ramnathpur of Badarganj is not at all included in charge No.2.

(XIV) According to P.W.3, his father's name was/is Momtaz Ali Sarkar and not Momtaz Uddin as mentioned in the charge. But Momtaz Uddin of Moksedpur and others were killed by Pak army according to charge No.2 and not Momtaz Ali Sarker of North Ramnathpur.

(XV) The witness mentioned that his name was/is Moklesar Rahman Sarker @ Md. Mokles Ali but he did not say that his father's name was Momtaz Ali Sarkar alias Momtaz Uddin.

269. In consideration of the totality of deposition of P.W.3 and for the reasons discussed hereinabove, I am of the considered view that the evidence of P.W.3 is neither believable nor credible. So, his testimony has no probative value.

270. P.W.6 Md. Mokbul Hossain is a prosecution eye-witness. He stated that "১৯৭০ সালে যে নির্বাচন হয় সেই নির্বাচনে আফজাল হোসেন, মোখলেছুর রহমানের সঙ্গে এটিএম আজহারুল ইসলাম নির্বাচনী প্রচারণার কাজে একাধিকবার আমাদের এলাকায় আসে। তখন থেকেই তাকে আমি চিনি। ১৯৭১ সালে ১৬ই এপ্রিল তারিখে মুক্তিযুদ্ধের সময় এটিএম আজহারুল ইসলাম পাক সেনাদের সাথে ট্রেনে করে টেকশোর হাটের ৬নং রেল গোমটিতে আসে। তারা ট্রেন থেকে নেমে টেকশোর হাটের উত্তর দিকে ধাবিত হয় এবং ঐ এলাকার বাড়ি ঘরে অগ্নিসংযোগ ও গোলাগুলি করে। পাক সেনারা ও এটিএম আজহারুল ইসলাম আমাদের গ্রামে আসলে আমি আমার মাকে নিয়ে ধাপপাড়ার দিকে দৌড়াইতে থাকি। আমার মা এক পর্যায়ে দৌড়াইতে না পারিয়া আমাকে বলে তুমি দৌড়ে পালাও আমি ধীরে ধীরে রাস্তা দিয়ে যাব। আমি তখন ক্ষেতের আইল দিয়ে দৌড়াইতে থাকি, কিছুদূর যাওয়ার পরে গুলির আওয়াজ শুনি। আমি ফিরে দেখি এটিএম আজহারুল ইসলাম ও দুই জন পাক সেনারা আমার মাকে গুলি করেছে। আমার মা আত্মচিৎকার দিয়ে মাটিতে পড়ে মারা যায়। আমি জীবন ভয়ে ফলিমাড়ি নদীর দিকে দৌড় দেই। মাঝ পথে দেখি এটিএম আজহারুল ও পাক সেনারা তমিজ নামে এক লোককেও গুলি করে হত্যা করে। আমি ঐ নদীর পাশের গর্তে লুকাই। সেখানে আনুমানিক তিন ঘন্টা লুকিয়ে ছিলাম। **তারপর মাথা উচু করিয়া দেখি এটিএম আজহারুল ইসলাম ও পাক সেনারা ধাপপাড়া, মৃদ্দা পাড়া, ঠনঠনি পাড়া, মোল্লা পাড়ার বিভিন্ন বাড়ি-গরে অগ্নিসংযোগ করে এবং প্রায় ১৪/১৫ জন লোককে গুলি করে হত্যা করে। এরপরে এটিএম আজহারুল ইসলাম ও পাক সেনারা টেকশোর হাটের দিকে চলে যায়।** এরপরে গ্রামের লোকজন গ্রামে ফিরতে শুরু করে। আমিও গ্রামে ফিরার পথে মামার সঙ্গে দেখা হয়। মামাসহ আমি ধাপপাড়ায় আসি। সেখানে এসে দেখি ৪/৫জন লোককে হত্যা করা হয়েছে।

During cross examination on 30.03.2014, he stated that " আমরা চার ভাই, কোন বোন নাই। আমার এক ছেলে এক মেয়ে। When cross-examination resumed on the next day that is on 31.03.2014, he stated that,- "আমার প্রথম স্ত্রীর নাম ছিল মোসলেমা, সে আমার কাছ থেকে তালাক নেয় ১৯৭১ সালে যুদ্ধের সময়, তার বাবার ইচ্ছায়। ফজিলা খাতুন নামে আমার আরেক জন স্ত্রী ছিল। সে বর্তমানে আমার সাথে নাই, অন্যের সাথে চলে গেছে। আমার বর্তমান স্ত্রীর নাম রেহেনা। বর্তমান স্ত্রীর ঘরে দুই মেয়ে আছে, তাদের নাম মাজিদা ও মনিজা। ফজিলা খাতুনের ঘরে এক ছেলে, তার নাম নূরন্নবী, এক মেয়ে মঞ্জিলা। নূরন্নবীর বর্তমান বয়স ৩৩ কিনা তাহা আমি বলতে পারব না। মঞ্জিলা নূরন্নবী থেকে বয়সে বড়। **সঠিক ভাবেস্মরণ করতে না পারায় গতকাল আমি বলেছি আমার এক ছেলে এক মেয়ে আছে।** মতিয়ার, মজিবুর, আমজাদ ও আমি মকবুল এই আমার চার ভাই। আমার বাবারা দুই ভাই ছিলেন। আমার তিন ভাই ১৯৭১ সালের পূর্বেই মারা গিয়েছে। ১৯৭১ সালে আমি অন্যের জমি চাষাবাদ করতাম। আমি লেখাপড়া জানি না। ১৯৭১ সালের ১৬ই এপ্রিল কি বার ছিল তাহা আমি বলতে পারব না। বর্তমানে আমি অন্যের বাড়িতে কৃষি কাজ করি। ১৯৭০ সালে আমাদের এলাকায় মুসলিম লীগের নেতা কে ছিল তাহা আমার স্মরণ নাই। আমাদের বাড়ি ৮নং ইউনিয়নে অবস্থিত। ১৯৭০/৭১ সালে আমাদের ইউনিয়নের চেয়ারম্যান ছিল জহির

উদ্দিন। বর্তমানে আমাদের ইউনিয়নের চেয়ারম্যানের নাম জাহাঙ্গীর। আমার বাড়ি থেকে ৬নং রেল গোমটি দক্ষিণে আনুমানিক তিন/সাড়ে তিন কিলোমিটার দূরে হবে। ঐ রেল গেইট ও আমার বাড়ির মাঝখানে বাড়ি-ঘর ছিল তবে এখনকার থেকে কম। আমি এটিএম আজহারুল ইসলামের বাড়িতে কখনও যাই নাই তাই তার বাড়ি চিনি না, তবে শুনেছি তার বাড়ি লোহানি পাড়ায়। .....১৬ই এপ্রিল ১৯৭১ সালে আমি যখন আমার মাকে রাস্তায় ছেড়ে ক্ষেতের আইল দিয়ে যাচ্ছিলাম তখন ক্ষেতের মধ্যে ফসল ছিল কিনা তাহা আমার স্মরণ নাই। আমি যখন আইল দিয়ে যাচ্ছিলাম তখন আমার মা যে রাস্তা দিয়ে যাচ্ছিল সেই রাস্তা থেকে আমাকে দেখা যেত না, কেননা ঐ সময় আমি হামাগুড়ি দিয়ে লুকিয়ে যাচ্ছিলাম, তবে আমি রাস্তার লোক চলাচল দেখতে পাচ্ছিলাম। মাকে রাস্তায় রেখে দৌড়ে আধা কিলোমিটার দূরে নদীর কাছে যাই।

আমি ফিরে দেখি এটিএম আজহারুল ইসলাম ও দুই জন পাক সেনারা আমার মাকে গুলি করেছে।.....

271. It appears from the above testimony of P.W.6 that in the examination-in-chief he stated that he was running through the ail of fields (জমির আইল) and he saw A.T.M. Azharul Islam with Pak soldiers shooting and killing his mother. But, according to charge No.2, the convict-appellant A.T.M. Azharul Islam being President of Islami Chhatra Sangha helped Pak army for committing the offences of plundering, setting fire and killing. There is no allegation that A.T.M. Azharul Islam himself shot at the mother of Md. Mokbul Hossain.

Moreover, during examination-in-chief he stated that he was running through the ail of fields (জমির আইল) and heard the sound of shots. It is impossible to see who had shot at a person if anyone looks back after hearing the sound of shots. Therefore, this witness exaggerated about seeing Azharul to fire shot at his mother.

He could not even remember the number of his own chidren. During cross-examination he told before the Tribunal that he has one son and one daughter but from later part of his testimony it is found that he had/has several children. He is illiterate and could not say "১৯৭১ সালের ১৬ এপ্রিল কি বার ছিল আমি বলতে পারবো না।" So, it was impossible for him either to remember or to say the date of occurrence unless he is tutored.

At the time of examination-in-chief he stated that he was running but during cross examination, he stated that he was crawling, which is contradictory to each other.

Further he stated that he took shelter in a hole of a river side and was hiding himself for 3 hours and then looked out. If he was hiding himself there for 3 hours, it was not possible for him to witness various incidents of 16.04.1971 and that too of several villeges namely, Dhap Para, Murdapara, Thonthonipara and Mollapara as stated by him. He also stated that he and his maternal uncle came to the place of occurrence and heard that A.T.M Azharul Islam with the help of Pak army committed the offences of killing, setting fire. During cross-examination, he admitted that his maternal uncle is still alive but his maternal uncle Abdul Kaleque was not examined by the prosecution.

It is hardly believable that he would know the name of A.T.M. Azharul Islam and recognize him, who is a person from another locality/area. No doubt, he is a tutored witness.

272. Considering the totality of the testimony of Md. Mokbul Hossain, I am constrained to hold that his deposition is exaggerated, not natural and contradictory with the deposition made in the examination-in-chief and cross-examination. It was not possible for him to see the incidents for the reason discussed above. Therefore, his deposition as to charge No.2 is not believable. It may be mentioned that he did not also state the time of occurrence of charge No.2. Thus, his deposition has no probative value.

273. P.W.7 Aminul Islam is another prosecution eye-witness. In his examination-in-chief he stated- "মুক্তিযুদ্ধের সময় আমি পড়াশোনা করতাম এবং আমি মুক্তিযুদ্ধের একজন সংগঠক ছিলাম। ১৯৭০ সালে আমাদের এলাকায় জামায়াতে ইসলামীর প্রার্থী ছিলেন আফজাল হোসেন এবং মোখলেছুর রহমান এবং আওয়ামী লীগের প্রার্থী ছিলেন আনিছুল হক চৌধুরী ও মজিবুর রহমান মাষ্টার।

১৯৭১ সালের ১৬ই এপ্রিল দুপুরের দিকে রংপুর থেকে একটি ট্রেন পাকিস্তানী আর্মি ও তাদের এদেশীয় দোসর সহ সেই ট্রেনে টেকশোর হাট ৬নং রেল গোমটিতে এসে দাঁড়ায় এবং ট্রেন থেকে নেমে তারা সকলেই উত্তর দিকে অগ্রসর হতে থাকে এবং

রাস্তার দুই ধারে অবিস্থত বাড়ি ঘর অগ্নিসংযোগ এবং এলোপাতারি গুলি করতে করতে ধাপপাড়া গ্রাম ঘেরাও করে ফেলে। ঐ সময় আমার চাচা ইউসুফ আলীর বাড়িতে একটি মাটির ঘরে আমার বড় আম্মা (চাচী) মরিয়ম নেছা ওরফে কালটি মাই, যিনি নয় মাসের অন্তঃস্বত্তা ছিলেন এবং আমি অবস্হান করছিলাম। তারপর আমার চাচী আম্মা বলে পাকিস্তানী আর্মিরা খুব কাছাকাছি এসে গেছে, চলো আমরা বাড়ি থেকে পালিয়ে যাই। আমার বড় আম্মা বাড়ি থেকে বের হয়ে যায় কিন্তু আমি ঘরেই অবস্হান করতে থাকি। বাড়ি সংলগ্ন রাস্তায় পাকিস্তানী আর্মিরা আমার বড় আম্মাকে ধরে ফেলে। তখন আমার বড় আম্মা পাকিস্তানী আর্মিদের পা জড়িয়ে ধরে চিৎকার করে বলে, আমি নয় মাসের অন্তঃস্বত্তা, আমাকে মেরো না- আমাকে মেরে ফেললে আমার গর্ভের সন্তানও মারা যাবে। আমি তখন মাটির ঘরের জানালা দিয়ে ঐ ঘটনা দেখছিলাম। পিছন দিক থেকে একজন পাক সেনা এসে আমার বড় আম্মাকে গুলি করে। বড় আম্মা মারা যায় এবং তার গর্ভের সন্তানটি নষ্ট হয়ে যায়। এরপর পাকিস্তানী আর্মিরা সেখান থেকে আরো উত্তর দিকে অগ্রসর হতে থাকে। পাকিস্তানী আর্মিরা আমাদের গ্রামে এলে আমার চাচা ইউসুফ আলী আত্মরক্ষার জন্য বাড়ির কাছে একটি বড় বট গাছের উপরে আশ্রয় নেয়। আমার বড় আম্মাকে গুলি করে হত্যা করার পর পাকিস্তানী আর্মিরা ঐ স্হান থেকে আরো উত্তর দিকে চলে গেলে আমার চাচা ইউসুফ আলী গাছ থেকে নেমে বাড়িতে আসে, বাড়ির অবস্হা দেখার জন্য। তিনি তার নিজ ঘরে ঢুকে দেখেন তার জীবিকা নির্বাহের মাছ ধরা জাল ও টেবিলে রক্ষিত একটি রেডিও পাকিস্তানী আর্মিরা নিয়ে গেছে। পাকিস্তানী আর্মিরা কিছু সময় পরে যখন পুনরায় গ্রামের দিকে ফিরে আসছিল তখন আমার চাচা রাস্তায় গিয়ে পাকিস্তানী আর্মিদের ঐ জাল ও রেডিওটি ফেরত দেওয়ার জন্য অনুরোধ করে। আমি তখন বাড়ির বাহিরে ঝোপের মধ্যে লুকিয়ে দেখছিলাম। তখন একজন পাকিস্তানী আর্মি বলে ম্যারা ঝুট বাদ বলেগা-এই কথা বলে তাকে গুলি করে হত্যা করে। ঐ দিন আমার চাচা ও বড় আম্মাসহ প্রায় ১৫ জনকে ঐ পাকিস্তানী আর্মি ও তাদের এদেশীয় দোসররা হত্যা করে। যারা নিহত হয়েছিলেন তাদের মধ্যে জঙ্গুলী ভরসা, আম মাই, চিনি মাই, বিষু, ওসমান আলী, ছহির আলী, জহির আলী, মৌলভী আব্দুল কুদ্দুস, মমতাজ, তমির উদ্দিন, আজিজার রহমান খোকা, সাধিনা, আমার চাচী মরিয়ম নেছা কালটি মাই, চাচা ইউসুফ আলী ছিলেন।"

274. Thereafter, this witness was declared hostile by the prosecution as he did not mention the name of the appellant. During cross examination by the prosecution he stated- "……আমি পাকিস্তানী আর্মিদের সাথে আসা এদেশীয় দোসরদের কারো নাম বলতে পারব না। আমার মনে কোন ভয় কাজ করছে না।মুক্তিযুদ্ধের সংগঠক হিসাবে নিজ এলাকায় যারা মুক্তিযুদ্ধের পক্ষে এবং যারা বিপক্ষে ছিল তাদের নাম জানা স্বাভাবিক এবং আমার নিজ এলাকার মুক্তিযুদ্ধের ইতিহাস মুক্তিযুদ্ধ সময়কালীন সময় হতে এ পর্যন্ত আমাদের এলকার সকলে জানে আমিও জানি। আমার এলাকায় যে সমস্ত রাজনৈতিক দল আছে সে সমস্ত দলগুলো সম্পর্কে জানি এবং সেই সমস্ত দলের নেতা কর্মীদের ভূমিকা সম্পর্কে আমার যথেষ্ট জ্ঞান আছে। ১৯৭১ সালে মুক্তিযুদ্ধ চলাকালীন সময় স্বাধীনতা বিরোধী রাজনৈতিক দলের নেতাকর্মীদের আমি চিনি, তাদের নাম ও ভূমিকা সম্পর্কেও জানি। আমার এলাকা বদরগঞ্জের ১৯৭১ সালের মহান মুক্তিযুদ্ধের সময় স্বাধীনতা বিরোধী জামায়াতে ইসলামীর ছাত্র সংগঠন ইসলামী ছাত্র সংঘের নেতা এটিএম আজহারুল ইসলাম সাহেবের মামলায় তার বিরুদ্ধে সাক্ষ্য দিতে এসেছি। এটিএম আজহারুল ইসলাম ১৯৭০ সালের নির্বাচনে জামায়াতে ইসলামীর প্রার্থীর পক্ষে নির্বাচনী প্রচারনায় আমাদের এলাকায় গিয়েছিলেন কিনা তাহা আমার জানা নাই। ইহা সত্য নহে যে, আমি মুক্তিযুদ্ধের সংগঠক হিসাবে নিজেকে দাবী করে মুক্তিযুদ্ধ চলাকালীন সময়ে আমার গ্রামে পাকিস্তানী আর্মিদের এদেশীয় সহযোগীদের প্রকৃত নাম গোপন করিয়াছি। ইহা সত্য নহে যে, আমার চাচী মরিয়ম নেছা ওরফে কালটি মাইকে পাকিস্তানী আর্মিরা তাদের এদেশীয় দোসর আসামী এটিএম আজহারুল ইসলামের উপস্থিতিতে এবং তার নির্দেশে হত্যা করা হইয়াছে, তাহা আমি গোপন করিয়াছি।"

So, this eye-witness, who is a very close-relative of deceased victim Yusuf Ali(Chacha) and kaltimai(Chachi) did not support the prosecution case that the appellant was involved in the incident of charge No. 2.

275. P.W.4 is Md. Meser Uddin and he is hearsay witness to this charge. Vital part of his testimony is that ল...ঐ নির্বাচনে জামায়াতে ইসলামীর প্রার্থীদের পক্ষে এটিএম আজহারুল ইসলাম জামায়াতে ইসলামীর ছাত্র নেতা হিসাবে এবং ঐ এলাকায় (বদরগঞ্জ থানাধীন) তাহার বাড়ি হওয়ায় তিনি তাদের পক্ষে সক্রিয় ভাবে নির্বাচনী প্রচারণায় অংশ নেয়।...আমার বাড়ি থেকে পূর্ব দিকে ৩ কিলোমিটার দূরে ১০ নং রেল গেইট। আমাদের বাড়ি থেকে ৩ কিলোমিটার দক্ষিণ দিকে ঝাড়ুয়ার বিল। ১৫ই এপ্রিল ১৯৭১ সালে পাক বাহিনী ও তাদের এদেশীয় দোসরেরা রামনাথপুর ইউনিয়নের আমাদের পাড়াসহ কয়েকটি পাড়ায় অগ্নিসংযোগ করে এবং জুম্মন, ভুলু বাউলা, মুসারো কাইলটা এবং কান্দুকে হত্যা করে। পরদিন ১৬ই এপ্রিল রংপুর থেকে একটি ট্রেনে করে পাক বাহিনী ও এটিএম আজহারুল ইসলামের নেতৃত্বে তার সহযোগীরা ৬নং রেল গেইটে আসে। ট্রেন থেকে নেমে ঐ পাক বাহিনী এবং এটিএম আজহারুল ইসলাম সহ উত্তর দিকে রামনাথপুর ইউনিয়নের মোকছেদপুর এলাকার দিকে অগ্রসর হতে থাকে এবং দুই পাশের বাড়ি-ঘরে অগ্নিসংযোগ ও গুলি বর্ষণ করতে থাকে। উক্ত এলাকার লোকজন ভয়ে আতংকিত হয়ে জীবন বাঁচানোর জন্য উত্তর মোকছেদপুর এবং ধাপপাড়া এলাকার দিকে পালাতে থাকে। তখন পাক বাহিনী ও এটিএম আজহারুল ইসলাম এবং তার সহযোগীরা ঐ গ্রাম ঘেড়াও করে ১৫ জনকে হত্যা করে। যাদেরকে হত্যা করে তাদের মধ্যে জঙ্গলী ভরসা, বিষু, মমতাজ, আনু মাই, কালটি মাই, তমির উদ্দিন ছিল। ঘটনার সময় কালটি মাই নয় মাসের গর্ভবতী ছিল।

তাকে যখন গুলি করা হয় তখন তার পেটের বাচ্চা বের হয়ে যায়। শহীদ জঙ্গলী ভরসা আমার আপন চাচীর বাবা। এই ঘটনা আমি নিজে দেখি নাই, তবে আমিনুল, মোখলেছ, মকবুল, আজমল খান সহ আরো অনেকের নিকট থেকে ঐ ঘটনার কথা আমি শুনেছিলাম।.....

During cross-examination P.W.4 stated that "জঙ্গলী ভরসার দুই বা তিনজন ছেলে বর্তমানে জীবিত আছে। তাদের নাম সম্ভবত আব্দুল হালিম ও আবু তাহের।"

Thus, it is evident that,-

(I) This witness is a hearsay witness on charge No.2 and that he heard the incident from Aminul, Mokles, Mokbul and Ajmal Khan.

(II) The testimony of P.W.3 Moklesar Rahman Sarker and P.W.6 Mokbul Hossain are not believable for the reasons discussed earlier.

(III) The other vital witness P.W.7 Aminul Islam (P.W.7) who had witnessed the entire incident, did not at all mention the name of A.T.M Azharul Islam as an abettor or facilitator of the offences charged with. The hearsay witness shall corroborate the eye-witness from whom he has heard the incident. Unless the eye-witness in his testimony states the name of an accused, the testimony of a person who claims to have heard it from him cannot be believed. In this case, the victim is a close relative of P.W.7 and he vividly described the incident, but he did not mention the name of the convict-appellant to fasten him with the charge. The prosecution has failed to explain as to why P.W.7 did not mention the name of Azhar. We find no reason as to why this witness would not disclose the name of Azhar if Azhar was physically present at the time of occurrence and abetted Pak army. There is no scope to presume that this witness did not mention the name of Azhar intentionally if we consider his testimony as a whole.

(IV) Ajmal Khan has not been examined by the prosecution.

(V) According to charge No.2 Jangoli Bhorosha was killed on 16.04.1971. His two sons named Abdul Hakim and Abu Taher are still alive but they were not examined by prosecution.

Therefore, the testimony that P.W-4 heard the name of A.T.M. Azharul Islam from Aminul and others cannot be true.

276. P.W.5 Md. Abdur Rahman stated that " আমার বাবাকে কে মেরেছে তাহা আমি নিজে দেখি নাই, আমার বাবাও আমাকে বলে নাই। সাক্ষী পরে বলেন যে, ঘটনার সময় আমাকে আমার বাবা বলেন নাই, তবে পরে বাবা আমাকে ঘটনার কথা বলেছেন। লোকমুখে শুনতে পাই যে, আমার বাবা গুলিবিদ্ধ হইয়া আহত হয়েছেন। পরে আমরা আহত অবস্থায় তাকে উদ্ধার করি, কিন্তু সুচিকিৎসা করতে না পারায় স্বাধীনতার পরে তিনি মারা যান। আমার বাবা আমাকে বলেন বাঙ্গালীই আমাকে গুলি করেছে, হত্যা করার জন্য নয় শাস্তি দেওয়ার জন্য।

Thus, it appears that this witness did not mention the date, time and place of occurrence of killing his father Yusuf Ali Sarkar. It is also found that his father was alive but he did not utter the name of the person who was responsible for his father's injury. This witness testified that his father had died for lack of proper treatment. This is evident that he did not support the prosecution case about involvement of the appellant in the killing of his father on charge No.2.

277. P.W.8 Mojibur Rahman Master is the last prosecution hearsay witness. He was the General Secretary of Awami League, Badarganj in 1970. He stated that "...জাতীয় পরিষদে ও প্রাদেশিক পরিষদে জামায়াতে ইসলামীর প্রার্থী ছিলেন যথাক্রমে মোখলেছুর রহমান এবং মীর আফজাল হোসেন। আমি আওয়ামী লীগের প্রার্থীদের পক্ষে নির্বাচনী প্রচারণা কাজে অংশ নেই, অন্যদিকে এটিএম আজহারুল ইসলাম জামায়াতে ইসলামী প্রার্থীদের পক্ষে নির্বাচনী প্রচারণায় অংশ নেয়। নির্বাচনে আওয়ামী লীগের উভয় প্রার্থী জয় লাভ করেন।..... " ১৬ই এপ্রিল আমি জানতে পারলাম যে, রংপুর থেকে একটি ট্রেন ৬নং রেল গোমটি টেকশোর হাটের নিকট এসে থামে। ঐ ট্রেন থেকে পাকিস্তানী আর্মি, জামায়াতে ইসলামীর লোকজন ও এটিএম আজহারুল ইসলাম নেমে উত্তর দিকে মোকশেদপুর গ্রামের দিকে গুলি করতে করতে অগ্রসর হয়। ঐ সময় ভয়ে এলাকার লোকজন ছোটাছুটি শুরু করলে পাকিস্তানী আর্মি ও জামায়াতে ইসলামীর লোকজনের গুলিতে ১৫জন লোক নিহত হয়। নিহতদের মধ্যে নারী ও শিশুও ছিল। নিহতদের মধ্যে একজনের নাম আমার মনে আছে, তার নাম কালটি মাই। পরবর্তীতে আমি ঘটনাস্থলে গেলে মোখলেছুর রহমান, মকবুল এবং আমিনুল ইসলামের কাছে জানতে পারি যে, ঐ

গোলাগুলির সাথে এটিএম আজহারুল ইসলাম সংশ্লিষ্ট ছিল। Thus, it appears that he did not witness the incident of 16 April, 1971. Subsequently, he came to know about the incident from Moklesar Rahman Sarker, Mokbul and Aminul.

I have already found that testimonies of Moklesar Rahman Sarker and Mokbul Hossain are not believable and P.W.7 Aminul has not at all mentioned the name of A.T.M. Azharul Islam as an abettor or facilitator of the offence.

(All underlined by me)

Therefore, it is not believable that he heard the name of the appellant from these witnesses.

278. P.W.11 is Md. Sakhawat Hossain alias Ranga is a hearsay witness. In examination-in-chief he has stated that,-"আমি পরবর্তীতে আরো শুনি যে, এটিএম আজহারুল ইসলাম ১৯৭১ সালে বদরগঞ্জের ঝাড়ুয়ার বিল ও ধাপের পাড় এলাকাসহ বিভিন্ন এলাকায় সংঘটিত হত্যাকান্ডের সাথে জড়িত ছিল।"

This witness did not mention the date and time of occurrence of Dhap Para and also from whom he had heard the incident of Dhap Para and Jharuar beel. Therefore, his testimony has no probative value so far as it relates to charge No.2.

**Charge No. 3**

279. The date, time and place of occurrence of charge No. 3 are on 17.04.1971 between 12.00 noon and 5.00pm at Jharuar Beel and neighboring villages. The offences are murder, genocide, plundering and arson.

280. P.W.4 Meser Uddin is an eye-witness on charge No.3. He stated that-" ১৯৭০ সালের সাধারণ নির্বাচন অনুষ্ঠিত হয়। উক্ত নির্বাচনে আমাদের এলাকায় জাতীয় পরিষদ সদস্য হিসাবে আওয়ামী লীগ প্রার্থী ছিলেন জনাব নুরুল হক এডভোকেট এবং জামায়াতে ইসলামীর প্রার্থী ছিলেন মোখলেছুর রহমান এবং প্রাদেশিক পরিষদের নির্বাচনে আওয়ামী লীগের প্রার্থী ছিলেন এলাহী বক্স সরকার এবং জামায়াতে ইসলামীর প্রার্থী ছিল মীর আফজাল হোসেন। উক্ত নির্বাচনে আওয়ামী লীগের ঐ দুই প্রার্থী বিজয়ী হন। ঐ নির্বাচনে জামায়াতে ইসলামীর প্রার্থীদের পক্ষে এটিএম আজহারুল ইসলাম জামায়াতে ইসলামীর ছাত্র নেতা হিসাবে এবং ঐ এলাকায় (বদরগঞ্জ থানাধীন) তাহার বাড়ি হওয়ায় তিনি তাদের পক্ষে সক্রিয় ভাবে নির্বাচনী প্রচারণায় অংশ নেয়।.....আমার বাড়ি থেকে পূর্ব দিকে ৩ কিলোমিটার দূরে ১০নং রেল গেইট। আমাদের বাড়ি থেকে ৩ কিলোমিটার দক্ষিণ দিকে ঝাড়ুয়ার বিল।.....১৯৭১ সালের ১৭ই এপ্রিল তারিখে দুপুরের দিকে একটি ট্রেন পার্বতীপুর থেকে এসে ৬নং রেল গেইটের কাছে দাঁড়ায়। তারপর ঐ ট্রেন থেকে অবাঙ্গালী বাচ্চু খান, কামরুজ্জামান এমপিএ, বদরুল, নয়িম কাজীসহ আরো অনেকে এবং খান সেনারা বিষ্ণুপুর ইউনিয়নের বকশীগঞ্জ ঘাটের দিকে চলে যায়। তাদের এ ধরনের আসা দেখে আমি, আমার বাবা, চাচা, ভাই সহ বাড়ির লোকজন ঝাড়ুয়ার বিলের দিকে সরতে থাকি। ঐ সময় দেখতে পাই যে, রংপুরের দিক থেকে আরেকটি ট্রেন ১০নং বৈরাগির গেইটে এসে দাঁড়ায় এবং ঐ ট্রেন হতে এটিএম আজাহার ও তার সহযোগীরা পাক বাহিনীসহ নেমে তারাও বকশি গঞ্জের দিকে অগ্রসর হতে থাকে। পরে উভয় ট্রেনকে ৭নং রেল গেইটের কাছে এনে দাঁড় করায়। তারা আমাদের ইউনিয়নের ছয়টি গ্রাম কৌশলে চারিদিক থেকে ঘিরে ফেলে। তখন গ্রামের লোকজন ও উক্ত গ্রামে আশ্রয় নেওয়া আশেপাশের এলাকার লোকজন ছুটাছুটি শুরু করে এবং অনেকেই ঝাড়ুয়ার বিলে গিয়ে আশ্রয় নেয়। এসময় আমি আমার বাবাকে হাত দিয়ে ধরে রাখি এবং এটিএম আজহারুল ইসলামকে সাদা পেন্ট শার্ট পড়া অবস্থায় পাক সেনাদের সঙ্গে দেখি। তখন পাক সেনারা নিরীহ জনসাধারণের বাড়ি-ঘরে অগ্নিসংযোগ করে এবং তাদের উপর এলাপাথাড়ি গুলি করতে থাকে এবং উক্ত গুলিতে ঝাড়ুয়ার বিলের আশেপাশে প্রায় ১২০০ লোক নিহত হয়। নিহতদের মধ্যে প্রাণ কৃষ্ণ মাস্টার, মিনাজুল ইসলাম বিএসসি, আলাউদ্দিন, আজাদুল, ফয়েজ উদ্দিন ও তার ছেলে নূর ইসলাম, আসাদ বকশ ছিলেন। ঘটনাস্থলে অসংখ্য হিন্দু সম্প্রদায়ের মানুষের লাশ দেখা যায়। এটিএম আজাহারুল ইসলাম তার সহযোগী ও পাক সেনারা গ্রামের অসংখ্য লোককে তাড়া করে ৭নং রেল গেইটের কাছে জড়ো করে। এসময় আসরের নামাজের সময় হলে প্রাইমারী স্কুলের শিক্ষক শামসুদ্দিন মাস্টার আসরের নামাজ পড়তে চাইলে নামাজ পড়ার অনুমতি দেয়। নামাজ শেষ হলে এটিএম আজহারুল ইসলাম ও বাচ্চু খাঁন হুকুম দিয়ে বলেন যে, ইন্দু আদমিরা একধার হও, যুবক আদমি একধার হও, স্টুডেন্ট আদমি একধার হও। এদের মধ্যে দুইশতের অধিক যুবককে ট্রেনে তুলে পার্বতীপুরের দিকে নিয়ে যায়। তাদের মধ্যে আমার খালাতো ভাই সম্বারু, আমার পাড়ার জেঠাতো ভাই ইসলাম, আবু বক্কর সিদ্দিক ও রেলের দুইজন নিরাপত্তা কর্মীকে জবাই করে হত্যা করে ঘোড়া ডোবা রেল ব্রীজের দক্ষিণ পাশে ফেলে যায়।..... ১৯৯৬ সালে এটিএম আজহারুল ইসলাম ও আমি রংপুর-২ বদরগঞ্জ, তারাগঞ্জ আসনে জাতীয় সংসদ নির্বাচনে প্রতিদ্বন্দ্বিতা করি।

পরবর্তীতে জামায়াতে ইসলামীর প্রার্থী হিসাবে এটিএম আজহারুল ইসলাম ২০০১ এবং ২০০৮ সালে ঐ একই এলাকা থেকে নির্বাচনে প্রতিদ্বন্দ্বিতা করি। ....." ঝাড়ুয়ার বিল আমাদের বাড়ির দক্ষিণে আনুমানিক দুই কিলোমিটার দূরে অবস্থিত। আমাদের বাড়ি ও ঝাড়ুয়ার বিলের মাঝখানে একটি পাড়া আছে এবং ঐ পাড়ায় অনেক বাড়ি ঘর ছিল। পার্বতীপুর থানা ৬নং রেল গেইট হতে পশ্চিমে আনুমানিক ১০ কিলোমিটার দূরে।১৯৭১ সালে ঝাড়ুয়ার বিলে ঝোপঝাড় ছিল, তার মধ্যে কিছু উঁচু গাছ ছিল এবং কিছু নিচু গাছ ছিল্ল।

During cross-examination he stated,-"ঝাড়ুয়ার বিলের ঘটনার সহিত এটিএম আজহারুল ইসলাম সম্পৃক্ত ছিল না।"

281. From the material incriminating part of the above testimony, it transpires that on 17.04.1971 one train came from Parvatipur to Rail Gate No. 6 and another train came to Bairagirgate/Rail Gate No. 10 from Rangpurand A.T.M. Azhar with Pak army got down from the later and proceeded to Bakshiganj. This witness earlier said that his house is 3 kilometers far from Rail gateNo.10, so it is not humanly possible for him to recognize A.T.M. Azharul Islam at the time of getting down from the train at Rail Gate No.10. He further stated that he saw A.T.M. Azharul Islam wearing white colour pant and shirt with Pak solders. But, from the prosecution evidence exihibit-26, it appears that the convict-appellant A.T.M. Azharul Islam used to wear black dress during the war of liberation in 1971.

282. Thus, the deposition of P.W.4 and the written report i.e exhibit-26 are absolutely inconsistent with one another. Possibly, white colour pant and shirt was introduced as a measure of recognition. A person with the black dress cannot be recognized even from a short distance. However, with white dress also a person can not be recognized from a long distance of 3 kilometers far from the place of occurrence. The prosecution's own witness, P.W.5 stated that he could not recognize any one from a distance of $1\frac{1}{2}$ kilometers. It needs to be mentioned that according to this witness his house is 3 kilometers east from Rail Gate No. 10 and 3 kilometers south from the Jharuar Beel. He did not clearly state wherefrom he saw the incident of Jharuar Beel. Morevoer, it appears that he contested the National Elections with the convict-appellant in 1996, 2001 and 2008. Therefore, he has strong political rivalry/enmity with the convict-appellant.

Thus, I am of the view that the testimony of this witness so far as it relates to charge No.3, against the appellant is doubtful and has no probative value.

283. P.W.5 Abdur Rahman claimed himself to be an eye-witness to the incident of 17.04.1971. He stated that-"১৯৭১ সালের ১৭ই এপ্রিল তারিখে একটি ট্রেন রংপুর থেকে এসে ১০নং রেল গেইটে এবং অপর ট্রেনটি পার্বতীপুর থেকে ৬নং রেল গেইটে এসে দাঁড়ায়। পার্বতীপুর থেকে যে ট্রেনটি এসেছিল সে ট্রেন থেকে আনুমানিক দেড়শত লোক নেমে দক্ষিণ দিকে চলে যায় এবং তারা বালা পাড়া, বাগবাগ, বুঃবাগ হয়ে বকশীগঞ্জে গিয়ে ঝাড়ুয়ার বিল ঘেরাও করে। ঐ লোক গুলোর মধ্যে অনেকের পড়নে খাকী পোষাক এবং অনেকের পরনে সিভিল পোষাক ছিল, আমি অনেক দূর থেকে দেখার কারণে তাদেরকে চিনতে পারি নাই। আমি ঐ সময় ১০নং রেল গেইট থেকে আনুমানিক দেড় কিলোমিটার দূরে অবস্থান করছিলাম। ঐ খাকী পোষাক ধারী ও সিভিল পোষাক পরিহিত লোকজন যখন বকশিগঞ্জের দিকে যাচ্ছিল তখন লোকজন ভয়ে পূর্ব দিকে পালাচ্ছিল। এই সময় ১০নং রেল গেইটে অবস্থানরত ট্রেন হতে এক/দেড়শ লোক নেমে দক্ষিণে বকশিগঞ্জের দিকে রওনা হয়। ঘেরাও-র মধ্যে পরে গ্রামের সাধারণ মানুষ দিশেহারা হয়ে এদিক-সেদিক ছোটাছুটি করতে থাকে। তখন অনেকেই বলাবলি করতে থাকে যে, বদরগঞ্জ হতে জামায়াতে ইসলামীর সমর্থক লোকজন, এটিএম আজহারুল ইসলাম ও পাক সেনারা এসে ঘেরাও করেছে তোমরা সেদিকে কেন যাচ্ছ। ৬নং রেল গেইট ও ১০ নং রেল গেইটের ট্রেন থেকে নেমে খাকী পোষাক ধারী ও সিভিল পোষাকের লোকজন বকশীগঞ্জ অভিমুখী হইয়া দুই দিক থেকে পাঁচ ছয়টি মৌজা ঘেরাও কের এলোপাতারি গুলি করতে থাকে। এক পর্যায়ে খাকী পোষাক ধারী ও সিভিল পোষাকের লোকেরা এলোপাতারি গুলি করতে করতে ঝাড়ুয়ার বিল এলাকায় আসে। তখন সেখানে আনুমানিক ৫০০/৬০০জন লোক ঝোঁপের মধ্যে লুকিয়ে ছিল। সেখানে এক/দেড় ঘন্টা গুলি বর্ষণ করে। আমি ঝাড়ুয়ার বিলে ঐ সময় এটিএম আজহারুল ইসলামকে দেখতে পাই। ঐ গুলি বর্ষণের কারণে শুধুমাত্র ঝাড়ুয়ার বিলে আনুমানিক ৪০০ লোক মারা যায়। ঝাড়ুয়ার বিলে অবস্থানরত অপর এক/দেড়শত লোককে ধাওয়া করে পার্বতীপুরে নিয়ে যাওয়ার জন্য ট্রেনের দিকে নিয়ে যায়, অন্যান্য লোকজনদের সাথে। মিনাজুল ইসলাম বদরগঞ্জ হাই স্কুলের একজন শিক্ষক ছিলেন। তাকে ঐ ঝাড়ুয়ার বিলে হত্যা করা হয়। ইসলামী ছাত্র সংঘের লোকেরা বলে মিনাজুল ইসলামকে বাঁচতে দেওয়া উচিৎ হবে না, সে বেঁচে থাকলে

আমাদের ক্ষতি হতে পারে। ঐ খাকী পোষাক ধারী ও সিভিল পোষাকের লোকজন আনুমানিক প্রায় ১২০০ লোককে ৭নং রেল গেইটের কাছে নিয়ে এসে জড়ো করে, এই সময় ৬নং ও ১০ নং রেল গেইটে অবস্থানরত দুইটি ট্রেনকে ৭নং রেল গেইটে এসে সংযুক্ত করা হয়। সংযুক্ত করে ঐ সকল লোককে ট্রেনে উঠানোর উদ্যোগ নেওয়া হয়। সেই সময় শামসুদ্দিন মাষ্টার যিনি এটিএম আজহারুল ইসলামকে প্রাইভেট পড়াতেন। তিনি আসরের নামাজ পড়ার জন্য খাকী পোষাক ধারী ব্যক্তিদের, বাচ্চু খান ও এটিএম আজহারুল ইসলামের নিকট অনুরোধ করেন। এটিএম আজহারুল ইসলাম খাকী পোষাকধারী লোকজনদের কিছু বললে নামাজের জন্য ১০ মিনিট সময় দেওয়া হয়। তখন শামসুদ্দিন মাষ্টার হাত তুলে বলেন যারা যারা নামাজ পড়তে চান তৈরি হয়ে নেন। তখন উপস্থিত সকলেই যাদের মধ্যে অনেকেই হিন্দু ছিলেন তারাও অজু করে নামাজের সারিতে দাড়িয়ে যান। নামাজ শেষ হলে এটিএম আজহারুল ইসলাম ও বাচ্চু খান উপস্থিত লোকজনদের বলেন হিন্দু আদমি এক ধার হও, যুবক আদমি একধার হও। তারপরে বেছে বেছে প্রায় দুইশত যুবক ও হিন্দুকে এটিএম আজহারুল ইসলাম, বাচ্চু খান ও পাক সেনারা ট্রেনে তোলে এবং তাদেরকে নিয়ে যায়।

ঐ ট্রেনটি খোলাহাটির নিকটে ঘোড়াডোবা ব্রীজের কাছে গেলে ট্রেনটি থামে এবং ঐ ট্রেন থেকে পাঁচ জনকে হত্যা করে ফেলে দেওয়া হয়। যার মধ্যে ছিল সম্ভারো, ইসলাম, আবু বক্কর সিদ্দীক এবং অপর দুইজন ছিল ট্রেনের নিরাপত্তা কর্মী। ট্রেনে করে অন্যান্য যাদের নিয়ে যাওয়া হয়েছিল আজ অবদি তাদের কোন সন্ধান পাওয়া যায়নি।

284. Thus, this witness also did not state the time of occurrence and he stated that he was one and half kilometers far from the Rail gate and that he could not recognize the persons who got down from the train and they were in khaki and civil dresses.

Moreover, the depositions of P.W.4 and P.W.5 are also inconsistant with each other about Asarer namaz incident and involvement of the appellant.

Further, during cross-examination this witness clearly stated that-" আমি লেখাপড়া করি নাই।আমি ইংরেজী বার মাসের নাম জানি না। ইংরেজী কোন মাসের কত তারিখে আমি বিয়ে করেছি তাহা আমি বলতে পারব না। আমার বাবার ভাইও নাই, বোনও নাই। আমার বিমাতার ঘরে তিন ভাই এক বোন এবং আমরা আপন তিন ভাই, চার বোন।"

It is not humanly possible for a person to state the English dates of 17.04.1971, 15.04.1971 and 16.04.1971 in detail (vide examination in chief) who does not know the names of months of English calendar year and also the name of month of his marriage in English, unless he is tutored by someone.

Further, he stated that when the army started firing, he had gone towards the Jharuar Beel, where firing was going on. This is against human nature.

Furthermore, he stated that "..... ১৯৭০ সালেআমি কোন রাজনৈতিক দলের সাথে জড়িত ছিলাম না, তবে ছাত্রলীগের মিছিল মিটিং করলে অংশ নিতাম। ১৯৭০ সালে ছাত্র লীগের নেতা কে ছিল তাহা আমি বলিতে পারিব না। জামায়াতে ইসলামের নেতা কে ছিল তাহা আমি বলতে পারব না, ....." Thus, it appears thathe had participated in the rallies of Chattra League but he could not say the name of the leader of Chattra League and even the name of the leader of the Jammati Islami.So it is not believable that he would be able to say the name of A.T.M. Azharul Islam, a member of Islami Chattra Shanga, unless he is tutored by someone. This shows that he is a tutored witness so far as it relates to his deposition about the involvement of the appellant, his recognization of him and the dates mentioned by him. Thus, deposition of this witness so far as it relates to the involvement of the convict-appellant on charge No. 3 has no probative value.

285. P.W.3 Moklesar stated that " আমি আরো শুনতে পাই যে, যুদ্ধ চলাকালীন সময়ে আমাদের গ্রামের দক্ষিণ দিকে ঝাড়ুয়ার বিল নামক জায়গায় দুই দিক থেকে দুইটি ট্রেন এসে থামে এবং দিনে ও রাতে মিলে প্রায় হাজার বারশ লোককে হত্যা করে।"

This witness did not see the incidents and he heard that about 1200 persons were killed at Jharuar Beel. He did not also state the date, time of occurrence on charge No. 3. He stated that "দিনে ও রাতে মিলে প্রায় ১২০০ লোককে হত্যা করে". But in the charge it has been stated that the occurrence took place between 12 noon and 5.00 pm. Therefore, it was not at night as stated by him. So, he could not prove the involvement of the convict-appellant in the occurrence at Jharuar Beel. Moreover, earlier at the time of discussions on charge No.2, I have already found that his testimony is not worthy of credence relating to charge No.2. P.W.3 Moklesar

Rahman Sarker's testimony has no probative value so far as it relates to charge No.3 agaisnt the appellant.

286. P.W.6, Mokbul Hossain is a hearsay witness relating to charge No.3. He stated that- " পরের দিন ১৭ই এপ্রিল একটি ট্রেন রংপুর থেকে অপর আরেকটি ট্রেন পার্বতীপুর থেকে আমাদের এলাকায় আসে। একটি ট্রেন থেকে এটিএম আজহারুল ইসলাম ও পাক সেনারা ঝাড়ুয়ার বিলের দিকে যায় এবং সেখানে আনুমানিক ১২০০ লোককে হত্যা করে এবং কিছু লোককে ধরে নিয়ে যায় তাহা আমি লোক মুখে শুনতে পাই।"

Thus, his testimony relating to charge No.3 is hearsay and he did not say wherefrom he heard the incident. He did not also state the time of occurrence. So, his deposition relating to charge No.3 has no probative value as well.

287. P.W.7 Aminul Islam did not mention about any involvement of A.T.M. Azharul Islam on charge No.3 or on any other charges.

P.W.8 Mojibur Rahman Master, on charge No.3, has stated that,- " পরদিন ১৭ই এপ্রিল একটি ট্রেন পার্বতীপুরের দিক থেকে এসে ৬নং রেল গেইটের কাছে করতোয়া ব্রীজের নিকট এসে থামে এবং অপর আরেকটি ট্রেন রংপুর থেকে এসে ১০নং বৈরাগী রেল গেইটের নিকট থামে। পার্বতীপুর থেকে যে ট্রেনটি আসে সেই ট্রেনে পাকিস্তানী আর্মিদের সাথে অবাঙ্গালী বাচ্চু খান এবং জামায়াতে ইসলামের এমপি কামরুজ্জামান এবং অপর জামায়াত নেতা নঈম কাজী ছিল। রংপুর থেকে যে ট্রেনটি আসে সেই ট্রেনে পাকিস্তানী আর্মিদের সাথে এটিএম আজহারুল ইসলামসহ অপর কয়েকজন জামায়াতে ইসলামীর নেতা ছিল। উভয় ট্রেন থেকে নেমে পাকিস্তানী আর্মি ও তাদের সহযোগীরা দক্ষিণে বুজরুক হাজীপুর, কিসমত ঘাটাবিল, রামকৃষ্ণপুর, খোর্দ বাগবাড় ঐ সমস্ত গ্রাম ঘেরাও করে এলোপাতারি গুলি করে ও বাড়ি-ঘরে অগ্নিসংযোগ করে। ঐ সময় আক্রান্ত গ্রাম সমূহের লোকজন নিরাপদ আশ্রয়ের জন্য পার্শ্ববর্তী ঝাড়ুয়ার বিলে আশ্রয় গ্রহণ করেন। পাকিস্তানী সেনাবাহিনী ও তাদের সহযোগী জামায়াতের কর্মীরা ঝাড়ুয়ার বিলে গিয়ে আশ্রয় গ্রহণকারী প্রায় বারশত এর উর্ধ্বে মানুষকে নির্বিচারে হত্যা করে। ঝাড়ুয়ার বিলে নিহতদের মধ্যে মিনহাজুল বিএসসি, প্রাণকৃষ্ণ মাষ্টার এবং আমার ছাত্র নূর উদ্দিন ছিল। ঘটনাস্থলে আমরা স্থানীয়ভাবে স্মৃতিফলক নির্মাণ করেছি, বর্তমানে সরকার কর্তৃক একটি স্মৃতিসৌধ কমপ্লেক্স নির্মাণের কাজ চলছে। আমি বিকাল বেলা টেকশোর হাটে গেলে বদরগঞ্জ ইউনিয়নের চেয়ারম্যান আব্দুর জব্বার সরকার ও মুক্তিযুদ্ধের সংগঠক অধ্যাপক মেছের উদ্দিনের কাছে শুনি যে, ঐ হত্যাকান্ডের সাথে এটিএম আজহারুল ইসলাম জড়িত ছিল।

This witness stated that he heard the incident from P.W.4 Meser Uddin and one Abdur Jabbar Sarker. But earlier with detailed discussions I found that the testimony of Md. Meser Uddin has no probative value. Abdur Jabbar Sarker could not be examined by the prosecution side since he had died.

Therefore, the deposition of P.W.8 is not worthy of credence so far as it relates to charge No.3 against the appellant.

288. P.W.11 is Md. Sakhawat Hossain alias Rangais a hearsay witness. In examination-in-chiefhe has stated that,-"আমি পরবর্তীতে আরো শুনি যে, এটিএম আজহারুল ইসলাম ১৯৭১ সালে বদরগঞ্জের ঝাড়ুয়ার বিল ও ধাপের পাড় এলাকাসহ বিভিন্ন এলাকায় সংঘটিত হত্যাকান্ডের সাথে জড়িত ছিল।"

However, this witness did not mention the date and time of occurrence of Jharuar Beel and also from whom he had heard the incident of Jharuar Beel. Therefore, his deposition has no probative value so far as it relates to charge No.3.

The Tribunal rightly has not considered the evidence of P.W.11 while deciding the merit of charge No.3.

289. Thus, considering the totalily of evidence on record, I am of the view that there are material contradictions/ discrepancies as well as unreliabity in the testimonies of the witnesses.

(All underlined by me)

**Charge Nos.2 and 3 exhibited documents and another book**

290. I have already discussed the credibility-cum-probative value of the witnesses.

Now, I would like to discuss the exhibits having any link/connection with the charge Nos.2 and 3 brought against the appellant and I would further like to refer another book on the associates of Pak army.

It appears from exhibit No. 1, a seizure list containing a secret report, that on 17.10.1971 a conference of Islami Chhatra Sangha (shortly, ICS) Rangpur Branch was held in Rangpur town with A.T.M Azharul Islam in the chair. Exhibit No. 13, a newspaper report dated 13 September, 1971 of Daily Sangram, shows that a condolence meeting of ICS was held on 12 September, 1971 at Rangpur town and in that meeting Azharul Islam, President of ICS Rangpur town, had expressed his condolence about the killing of two Muzahids.

From exhibit No. 16, it transpires that there was a meeting of ICS on 17.10.1971 with A.T.M Azharul Islam in the Chair, who had explained the situation of the country and urged the party workers to mobilize the youth of Islamic spirit and launch a strong movement againstanti-Islamic activities.

Thus, from the above three documents, it appears that convict-appellant was the President of ICS Rangpur town, at least from September, 1971. However, these three documents do not show the involvement of the convict-appellant with the offences of charge Nos.2 and 3 brought against him.

From exhibit No. 25, it appears that a confidential letter was issued on 16.09.2012 by the Additional Inspector General of Police, wherein he sent a report on the subject,-"৭১ এ দখলদার পাকিস্তান হানাদার বাহিনীর দোসর জনাব এটিএম আজহারুল ইসলাম, জামায়াতে ইসলামীর কেন্দ্রীয় সহকারী সেক্রেটারী জেনারেল পরবর্তীতে ভারপ্রাপ্ত আমীর, পিতা মৃত-ডাঃ নাজির হোসেন, সাং-বাতাসন লোহানী পাড়া, বর্তমানে বালুয়া ভাটা প্রফেসর পাড়া, থানা-বদরগঞ্জ, জেলা-রংপুর এর বিরুদ্ধে ১৯৭১ সালে মহান মুক্তিযুদ্ধের সময় সংঘটিত গণহত্যা ও মানবতাবিরোধী অপরাধ তদন্তের স্বার্থে তাহার "Personal Profile" ও অন্যান্য তথ্যাদি সরবরাহ প্রসঙ্গে।"

291. In this report itis written that the convict-appellant completed SSC from Rangpur Zilla School, HSC & Degree from Rangpur Carmicheal College and M.A.from Rajshahi University (?). In paragraph 7(L)(M)(N) it is written-

"৭। মুক্তিযুদ্ধকালীন তার ভূমিকা

| | |
|---|---|
| ক। ১৯৭১ সালের পূর্বে কোন রাজনৈতিক দলের সাথে সংশ্লিষ্ট ছিলেন এবং উক্ত রাজনৈতিক দলে তার ভূমিকা। | ১৯৭১ সালের পূর্বে কোন রাজনৈতিক দলের সহিত সংশ্লিষ্টতার বিষয়ে কোন তথ্য পাওয়া যায়নি। তবে ১৯৭১ সালে ইসলামী ছাত্র ফ্রন্টের নেতা ছিলেন বলে স্থানীয় ভাবে জানা যায়। |
| খ। ১৯৭১ সালে রাজনৈতিক ভূমিকা | তিনি ১৯৭১ সালে স্বাধীনতা যুদ্ধের সময় কারমাইকেল কলেজের ছাত্র হিসাবে কলেজের আশপাশ এলাকায় ও লোহানী পাড়া ইউনিয়নসহ রংপুর ও দিনাজপুর জেলায় বিচ্ছিন্নভাবে মুক্তিযুদ্ধের স্বপক্ষের লোকজনের উপর বিভিন্ন ধরণের জুলুম, অত্যাচার, সম্পদ লুণ্ঠনসহ নির্যাতন চালিয়েছেন মর্মে স্থানীয় মুক্তিযোদ্ধা ও জনসাধারণের নিকট হতে জানা যায়। |
| **গ। ১৯৭১ সালে গণহত্যা, ধর্ষণ, অগ্নি সংযোগ এবং লুটপাটের মত কার্যক্রমে জড়িত থাকলে বা সমর্থন দিয়ে থাকলে তার সুস্পষ্ট বিবরণ** | **কোন তথ্য পাওয়া যায়নি।**" |

Thus, it appears from exhibit No. 25 that no information was found about the appellant's involvement in 1971 in genocide, rape and arson.

292. However, from the deposition of Md.Sakhawat Hossain recorded in this exhibit, it was found that Rofiqul Hasan Nannu was tortured by the appellant. For this offence separate charge i.e. charge No.5 was brought against the appellnat.

In Exhibit No. 26 it is mentioned about convict-appellant that,- "মুক্তিযুদ্ধকালীন তিনি কালো কাবলী পোষাক পরিধান করতেন এবং তার একটি মোটর সাইকেলের সামনে পাকিস্তানী পতাকা লাগিয়ে এলাকায় চলাফেরা

করতেন বলে জানা যায়।" "১৭ ই এপ্রিল/১৯৭১, বদরগঞ্জ উপজেলার ঝাড়ুয়ার বিলে পাকসেনারা কয়েকশত লোক হত্যা করে, ও হত্যাকান্ডে তিনি ইন্ধন দেন বলে গোপনসূত্রে জানা যায়।"

Thus, in this exhibit it is mentioned that the appellant instigated the killing of several hundred persons on 17 April 1971 at Jharuar Beel. But in this report the name of source i.e. the persons who narrated this incident has not been mentioned. Further, it is not mentioned here that the appellant himself was present at Jharuar Beel at the time of occurrence. Thus, it appears that, even in the **report, dated 22 July, 2012 prepared long after 40 years from the date of occurrence,**the involvement of Azharul on charge Nos. 2 and 3has not been clearly mentioned.

293. Moreover, the exhibits 25 and 26 have been prepared recently in the year 2012 respectively by police and NSI. It should not be given much importance as it is not an old document and not prepared immediately after liberation. However, from the old documents exhibits 1, 13 and 16 it is only found that Azharul Islam was a leader of Islami Chhatra Sangha. But merely because he was the leader of Islami Chhatra Sangha, it would not make him guilty of the offences charged with. Every charge must be established against him individually by the prosecution.

Further it may be mentioned that from the Book named "Associates of Pakistan Army, 1971" compiled and edited by A S M Shamsul Arefin, published by Bangladesh Research and Publications and others (firstly published in December, 2008), it transpires that the names of main 45 associates of Pak army were included in it with the offences committed by them but the name of the convict-appellant is not mentioned in this book relating to any incident of war crimes.

**Conclusion on charge Nos.2 and 3**

294. Admittedly, no case was filed by anyone against the appellant till the date of filing of the case in the year 2012 and some other cases in 2010 and 2011 vide exhibit No.25.

It is a historical fact of which judicial notice may be taken that Bangladesh achieved its liberation after the liberation war on 16 December, 1971. The political scenario changed after the brutal killing of Bangabandhu Sheikh Mujibur Rahman, father of our nation, on 15.08.1975. There was absolutely no reason not to file any case against the convict-appellant within the period of 16.12.1971 up to 14.08.1975 i.e. within 3½ years. During the relevant period of 3½ years, the evil collaborators/ abettors/ facilitators of crimes against humanity i.e. Rajakar, Al-Badars, Al-shams and others were hiding themselves. It is also the case of the prosecution that the appellant was hiding himself from the date of liberation of 1971 till the change of political scenario in 1975. There was unusual negligence in not filing cases immediately after liberation by anyone, including close relatives of the victims of crimes against humanity and delaying in filing the case for 40 years. Due to such inordinate delay in filing of the case, there is every possibility of destroying the evidence of the offences committed during the liberation war on the one hand and on the other, there is also possibility of creation of concocted case against the appellant as well.

295. In a criminal case the prosecution must prove the charge brought against an accused beyond any shadow of reasonable doubt. Criminal cases are not like civil cases. In criminal case the accused may only take the plea of not guilty and the burden is entirely upon the prosecution to prove its case. Cross-examination is not also necessary on the entire deposition of a witness as it may damage the defence case. Non-cross-examination on a certain fact would not make the deposition of a witness on that point admitted facts.

For example, if a witness did not say the means of recognization of a person at night or whether it was possible to recognize a person from a certain distance or how he came to know a certain person etc., it is not necessary for the defence to cross-examine a prosecution

witness on those matters because the reply may bring out some facts which the prosecution had failed to bring out at the time of examination in chief. Such cross-examination would not help an accused rather damage the defence case. The defence would only argue on the said facts at the time of arguments to bring out the lacuna of the prosecution.

296. Rule 50 of the Rules provides,- "The burden of proving the charge shall lie upon the prosecution beyond reasonable doubt." Thus, in the instant case the prosecution must prove the charges against the convict-appellant beyond any shadow of reasonable doubt.

Rule 56 of the Rules provides as under:

"56. (1) **The Tribunal shall give due weight to the primary and secondary evidence and direct and circumstantial evidence of any fact as the peculiar facts and circumstances of the case demand having regard to the time and place of the occurrence**.

(2) The Tribunal shall also accord **in its discretion due consideration to both hearsay and non-hearsay evidence**, and the reliability and probative value in respect of hearsay evidence shall be assessed and weighed separately at the end of the trial.

(3) Any statement made to the investigation officer or to the prosecutor in course of investigation by the accused is not admissible in evidence except that part of the statement which leads to discovery of any incriminating material."

(Bold by me)

Therefore, under rule 56 of the Rules regard must be given relating to time and place of occurrence and all evidence and circumstances must be considered.

297. I have already seen that the Tribunal considered the testimony of the prosecution witnesses as reliable. However, from the detailed discussions made hereinbefore, it is found that there are material contradictions/inconsistencies/ omissions in the depositions of the witnesses. The credibility of the witnesses is also doubtful. Moreover, it is also found that some witnesses did not mention the time of occurrence, some wrongly mentioned the time of occurrence in part and a witness mentioned the incident of killing at Uttar Ramnathpur but the incident of said charge was at Dhap Para, Mokshedpur. Ignoring the said contradictions/ omissions/ inconsistencies/ unrelibalities of the witnesses and the documentary evidence as discussed, the Tribunal erroneously decided the convict-appellant guilty of charge Nos. 2 and 3 and convicted him thereunder, which cannot be sustained.

I would further like to note that meanwhile many decisions have been passed by this Division, which is binding upon all lower courts including the Tribunal. So, I do not think it necessary to discuss the decisions as referred to by the Tribunal in this case i.e. International Tribunal of Rwanda, International Criminal Tribunal for Former Yugoslavia, etc.

298. The Appellate Division in the case of *Abdul Quader Mollah Vs The Chief Prosecutor, International Crimes Tribunal, Dhaka*, reported in 22 BLT (AD) 541, regarding contradictions in the depositions of witnesses made during investigation and before the Tribunal, decided as under:

"41. Reading section 19(2) and rule 53 (ii), a conclusion that can be arrived at is that statement of a witness recorded by an investigation officer could be admitted in evidence if his presence before the Tribunal could not be procured or that he is not alive, otherwise not. Contradicting the statements of a witness can be drawn subject to the condition that it must be strictly limited to the subject-matter of the examination-in-chief only. Apart from contradiction of his earlier statements made to an investigation officer, a witness' credibility can be impeached by extracting his knowledge about the subject on which he deposed, his motives to depose in the case, his interest, his inclination, his means of obtaining correct facts to which he deposes, the manner in which he has used those means, his powers of

discerning facts in the first instance, his capacity for retaining and describing them etc. The witness may also be cross-examined for the purpose of ascertaining his credibility."

Thus, the convict-appellant did not get any opportunity to take contradiction of witnesses with that of their previous statements made during investigation.

299. Be that as it may, in view of the discussion made hereinbefore, I am of the view that the contradictions, omissions, human impossibility to see the occurrence, etc. as discussed hereinbefore create a serious doubt about the credibility of the witnesses and that the prosecution failed to prove charge Nos. 2 and 3 against the convcit-appellant beyond reasonable doubt. Thus, the judgment and order of conviction and sentence on charge Nos.2 and 3 is erroneous, and, as such, liable to be interfered with.

In such view of the matter, the appeal is liable to be allowed in part and the order of conviction and sentence dated 30.12.2014 passed by the International Crimes Tribunal No.1, Dhaka in ICT-BD Case No.05 of 2013 so far as it relates to charge Nos. 2 & 3 i.e. charges under section 3(2)(a)(c)(g) and (h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973 are liable to be set aside.

**Sentence on charge No.4**

300. Before entering into the sentence relating to charge No. 4, firstly I would like to reproduce charge No. 4 which is quoted below:

"On 30 April, 1971 between 09.00 P.M. and 12.00 P.M. accused A.T.M. Azharul Islam, being the president of Islami Chhatra Sangha of Rangpur district branch, along with armed cadres of Jamaat-e-Islami, Islami Chhatra Sangha, accompanied by Pakistani occupation forces having entered the campus of Rangpur Carmichael College abducted Professor Chitta Ranjan Roy, Professor Sunil Baron Chakraborty, Professor Ram Krishna Adhikary, Professor Kalachand Roy of Rangpur Carmichael College and Monjusree Roy, wife of Professor Kalachand Roy from their houses situated inside the college boundary and thereafter they all were killed by the accused and his accomplices in a pre-planned manner."

At the outset, I would like to mention that I agree with the decision of my learned brother about the convict-appellant being guilty of charge No. 4. However, with due respect I am unable to concur with the affirmation of sentence of death as proposed by my learned brother on this charge No.4 for the reaons discussed hereinafter.

P.W.4, P.W.8, P.W.11, P.W.12 & P.W.13 are all hearsay witnesses. I do not like to discuss their testimonies. I already discussed the credibility of most of them earlier. Moreover, their testimonies have already been discussed by my learned brother. So, I would confine myself to the eye-witnesses only.

P.W.9 Suvakar, an eye-witness, has proved the prosecution case as has been decided by my learned brother.

301. However, P.W.10 Ratan Chandra Das stated that he could recognize one Bangalee namely, Azhar at the time of abduction of Sunil Babu, Kalachand Babu and his wife Monjusree Roy by Pak army. But during cross-examination he stated that "১৯৭০/৭১ সালে কারমাইকেল কলেজের ছাত্রলীগ বা ছাত্র ইউনিয়নের সভাপতি এবং সাধারণ সম্পাদক কে ছিলেন তাহা আমি বলতে পারবো না।..... "১৯৭১ সালে মুক্তিযুদ্ধের সময় কার মাইকেল কলেজের অধ্যক্ষ কে ছিলেন তাহা আমি বলতে পারব না.....।"

He claims himself to be a cook at the house of Carmichael College Teacher Sunil Babu and Ram Krishna Babu. But, this witness could not say the names of the President and General Secretaries of Chattra League and Chattra Union and the Principal of Carmichael College. So, it is not understood how he could know the name of Azhar. His deposition relating to the incident of abduction of Sunil Babu, Monjusree Roywife of Professor Kalachand Roy and Kalachand Roy by Pak army may be believed but his testimony about

Azharul's recognization by him in the incident appears to be unreliable and tutored as suggested by the defence.

However, on the night of 30.04.1971 Chittra Ranjon Roy and Ram Krishna Adhikary were abducted from the house of Chitta Ranjon Roy and on the very same night Sunil Baron Chakraborty, Kalachand Roy, Monjusree Roy wife of Kalachand Roy were abducted from the house of Kalachand Roy. Therefore, I may safely conclude that A.T.M. Azharul Islam was involved as an abettor in both the abduction incidents.

302. Be that as it may, it is evident from the testimony of other eye-witness P.W.9 Suvakar that the Pak army abducted her brother Carmichal College teacher Chittra Ranzan Roy and another teacher Ram Krishna on the night of occurrence in presence of her another brother Nittro Ranzan Roy and her brother's sister-in-law Kannon Bala. But neither Nitto Ranzan Roy, full brother of Chittra Ranzan Roy nor his sister-in-law Kannon Bala has been examined by the prosecution.

From the deposition of this witness it is found that his brother Nittro Ranzan Roy was/is still alive and his another brother Shotto Ranzan Roy was/is present in court and that Shotto Ranzan Roy was/is the Investigation Officer of investigation side of Antorjatik Oparad Tribunal though he was not engaged in the instant case. Therefore, other eye-witnesses present were neither produced nor examined in the Tribunal. They were withheld for reasons best known to the prosecution.

It transpires from exhibit No. 26 as under:

"৩) রংপুর কারমাইকেল কলেজে **০৬ জন শিক্ষক এবং ০৫ জন ছাত্রকে ৩০ শে এপ্রিল ১৯৭১ তারিখে আজাহারুল এর নির্দেশে আলবদর বাহিনীর লোকেরা ধরে নিয়ে গিয়ে** নিকটস্থ দমদমা ব্রিজের কাছে হত্যা করে বলে জানা যায়।"

303. Therefore, it appears that according to prosecution's own document dated 22.07.2012 six teachers and five students of Carmaichael College were abducted by Al-Badar Bahini at the instruction of A.T.M Azharul Islam on 30.04.1971.

But, from quotations of judgment in the case of Motiur Rahman Nizami Vs Government of Bangladesh, reported in 2 LM (AD) 446, it appears that Al-Badar was established in May, 1971.

Whereas, the charge on the incident dated 30.04.1971 i.e. charge No.4 against the convict-appellant is that four teachers of Carmicheal College and wife of one teacher were abducted by Pak army with the help of the convict-appellant. Thus, it appears that there are minor inconsistencies in the prosecution's documentay evidence and oral evidence. Though such inconsistencies may not be fatal to the prosecution case but at the time of awarding capital punishment it ought not to be overlooked.

The Tribunal passed the judgment and order of conviction and sentence of the appellant's death on 30.12.2014. So, he is in condemned cell suffering the pangs of death for about 5(five) years.

Further, from the judgment of the Tribunal it is found that the appellant was born on 25 February, 1952. So, at the time of occurrence his age was only 19 years. Therefore, now he is an old man of about 67/68 years. In such a scenario, if a sentence of imprisonment for life is awarded to him, there is no scope of his coming out of the jail after serving the sentence of imprisonment for life.

304. Thus, considering the totality of the aforesaid facts and circumstances, I am of the view that justice would be sufficiently met if the sentence of death is commuted to one of imprisonment for life with fine on charge No. 4.

305. **My decision**

**Charge No.2**

The appeal be allowed in part and the order of conviction and sentence of the convict-appellant/condemned-prisoner for the offences of murder, plundering and arson at Dhap Para, Moksedpur as crimes against humanity as specified in section 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973 (charge No. 2) be set aside and thus, he be acquitted of the said charge.

**Charge No.3**

The appeal be allowed in part and the order of conviction and sentence of the convict-appellant/condemned-prisoner for the offences of murder, genocide, plundering and arson in Jharuarbeel and neighbouring villages as crimes against humanity as specified in section 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973 (charge No. 3) be set aside and he be acquitted of the said charge.

**Charge No.4**

I agree with the decision of the learned Chief Jutice about the affirmation of conviction of the convict-appellnat for the offence of genocide, abduction and murder of 4(four) teachers of Rangpur Carmichael College and another, wife of a teacher as specified in section 3(2)(c)(i)(g) and (h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973 (charge No.4). But I respectfully differ with the sentence of affirmation of death. Therefore, the sentence of death of the condemned-prisoner be commuted to imprisonment for life with a fine of Tk. 10,000/- (ten thousand), in default, to suffer rigorous imprisonment for a further period of 2(two) years more.

**Charge No.5**

I agree with the decision of the learned Chief Justice.

**Charge No.6**

I agree with the dicision of the learned Chief Justice.

J.

**Order of the Court**

**The appeal is allowed in part. Appellant A.T.M. Azharul Islam is acquitted of Charge No.5. His conviction in respect of charge Nos.2 and 3 is maintained by majority. His conviction in respect of charge Nos.4 and 6 is maintained. His sentence in respect of charge Nos.2, 3 and 4 is maintained by majority. His sentence in respect of charge No.6 is maintained.**

14 SCOB [2020] AD

Appellate Division

**PRESENT**

***Mr. Justice Muhammad Imman Ali***
***Mr. Justice Mirza Hussain Haider***
***Mr. Justice Abu Bakar Siddiquee***

**CIVIL APPEAL NO. 150 OF 2015**

(From the judgement and order dated the 2nd of June, 2014 passed by the High Court Division in Civil Revision No.1134 of 2005)

| | | |
|---|---|---|
| **Palash Chandra Saha** | | **... Appellant** |
| = Versus = | | |
| **Shimul Rani Saha and others** | | **... Respondents** |
| For the Appellant | : | Mr. A.J. Mohammad Ali<br>Senior Advocate, instructed by<br>Mr. Zainul Abedin<br>Advocate-on-Record |
| For Respondent Nos.1-3 | : | Mr. Mahbubey Alam<br>Senior Advocate with<br>Mr. Probir Neogi, Senior Advocate, instructed by<br>Mr. Md. Taufique Hossain<br>Advocate –on-Record |
| For Respondent No.4 | : | None represented |
| Date of hearing | : | 05.11.2019 and 14.01.2020 |
| **Date of judgement** | **:** | **The 22nd day of January, 2020** |

## Suit for declaration, Adoption;

**The adoptive father of the child to be adopted must belong to the same caste and that adoption would be valid if they belong to different sub-division of the same caste.**
**... (Para -12)**

**According to Hindu Law any act done in contravention of the Hindu texts which are in their nature mandatory cannot be said to be lawful by applying the principle of *factum valet.* Hence, the principle of *factum valet* is ineffectual in the case of adoption in contravention of the provision of legal texts. ... (Para -12)**

**Even if he was accepted as a family member, the legality of the adoption must be considered. The provision of Hindu Law is clear that there cannot be adoption across castes. In other words, a child from one caste cannot be legally adopted by a member of another caste. ... (Para -25)**

# J U D G E M E N T

**MUHAMMAD IMMAN ALI, J:-**

1. This civil appeal, by leave, is directed against the judgement and order dated 02.06.2014 passed by a Single Bench of the High Court Division in Civil Revision No.1134 of 2005 making the Rule absolute.

2. The facts of the case, in short, are that Palash Chandra Saha, the petitioner herein as plaintiff filed Title Suit No.31 of 2000 in the Court of the Senior Assistant Judge, Dagonbhuiya, Feni seeking a declaration that he is the adopted son of Khitish Chandra Saha, who was the husband of Gouri Rani Saha (defendant No.4) and the father of Simul Rani Saha (defendant No.1).

3. The plaintiff stated, *inter alia,* that he was born on 3rd Bhadra 1375 B.S. His natural parents were late Nishi Kanta Das and late Charubala Das. His natural mother died when he was six months old. Since late Khitish Chandra Saha and his wife defendant No.4 had no child they decided to adopt the plaintiff. Their offer/proposal to adopt the plaintiff was accepted by his natural father. Accordingly, late Nishi Kanta Das handed over the plaintiff to Gouri Rani Saha (defendant No.4) and her husband Khitish Chandra Saha. On 15th Falgun, 1375 B.S. the adoption ceremony of the plaintiff was held and since then he had been living in his adoptive father's house. After his adoption, the plaintiff had no relationship with his natural father. While he was brought up in his adoptive parents' house, their only daughter Simul Rani Saha, defendant No.1 was born. Khitish Chandra Saha got the plaintiff admitted to school and wrote his own name as the father of the plaintiff in all his school documents. In the S.S.C. and H.S.C. certificates of the plaintiff and also in the voter lists the father's name of the plaintiff has been recorded as Khitish Chandra Saha. On 07.09.1993 Khitish Chandra Saha filed Title Suit No.69 of 1993 and in that suit also he admitted the plaintiff as his adopted son. After the death of Khitish Chandra Saha the plaintiff performed all rituals as his son. Defendant No.4 has been living with the plaintiff and his wife. After the death of Khitish Chandra Saha the plaintiff allowed defendant No.1 and her family to stay with him for a temporary period. Defendant No.1 in order to deprive the plaintiff from the property he inherited from Khitish Chandra Saha, has been declaring that the plaintiff is not the adopted son of late Khitish Chandra Saha. Hence, the plaintiff was constrained to institute the suit.

4. Defendant No.1 and her 2 sons-defendant Nos.2 and 3 contested the suit by filing written statement. They contended, *inter alia*, that the plaintiff is not the adopted son of Khitish Chandra Saha. Khitish Chandra Saha never adopted the plaintiff as his son. Khitish Chandra Saha was a rich man having huge property including a sweetmeat shop. The plaintiff was a cashier in that shop. In order to avoid income tax Khitish Chandra Saha purchased some property in the benami of the plaintiff and others. Khitish Chandra Saha having learnt that the plaintiff was trying to dispose of those property purchased by Khitish Chandra Saha in the benami of the plaintiff, filed Title Suit No.69 of 1993 in the Court of Assistant Judge, Dagonbhuiyan against the present plaintiff for declaration that the present plaintiff was a mere 'benamdar' of the said property. The said suit was decreed. Since Khitish Chandra

Saha had no son, defendant No.l and her husband stayed in the house of Khitish Chandra Saha even after her marriage. According to Hindu Law, defendant Nos.2 and 3, the sons of defendant No.l, have inherited all the moveable and immovable properties of late Khitish Chandra Saha. Defendant No.4 developed some bitter feelings with her daughter-defendant No.l and taking advantage of this situation the plaintiff has filed this present suit. The plaintiff is neither the foster son nor the adopted son of late Khitish Chandra Saha which he himself stated in the plaint of Title Suit No.69 of 1993. The plaintiff also did not claim himself to be the adopted son of late Khitish Chandra Saha in his written statement filed in Title Suit No.69 of 1993. The plaintiff filed the present suit long after the death of Khitish Chandra Saha on false claim and allegations.

5. Upon hearing the parties and considering the evidence and materials on record the learned Senior Assistant Judge, Dagonbhuiyan, Feni by his judgement and decree dated 22.05.2002 decreed the suit finding that the plaintiff was the legally adopted son of Khitish. Then defendant Nos.1 to 3 preferred Title Appeal No.59 of 2002 before the learned District Judge, Feni. On transfer the appeal was heard by the learned Joint District Judge, First Court, Feni, who by his judgement and order dated 02.11.2004 dismissed the appeal affirming the judgement and order passed by the trial Court. 6. Being aggrieved, the contesting defendants filed Civil Revision No.1134 of 2005 before the High Court Division and obtained Rule, which upon hearing the parties was made absolute. Hence, the plaintiff filed Civil Petition for Leave to Appeal No.2407 of 2014 and leave was granted to consider the following grounds:

> "I. That in this suit the plaintiff adduced sufficient evidence, both-oral and documentary, to prove that he was adopted as son by Khitish Chandra Saha and that both the Courts of facts have examined and considered all these evidence adduced by the plaintiff and came to a concurrent decision that the plaintiff is adopted son of late Khitish Chandra Saha.
>
> II. That these concurrent findings and decision of the Court of facts is not at all based on the findings and decision arrived at in earlier Title Suit No.69 of 1993 as to adoption of the plaintiff by Khitish Chandra Saha; the High Court Division without adverting to the concurrent findings and decision of the Courts of facts and without considering the evidence adduced by the plaintiff, most erroneously held that the Courts below decreed the suit of the plaintiff relying on the decision of the earlier Title Suit No.69 of 1993 only.
>
> III. That the High Court Division did not at all apply its judicial mind in setting aside the concurrent finding of the Courts of facts and most erroneously set aside the concurrent findings of the Courts below without considering the evidence on record at all.
>
> IV. That this impugned judgment of the High Court Division is erroneous and cannot be sustained in law and in the circumstances leave to appeal needs to be granted."

7. Mr. A.J. Mohammad Ali, learned Senior Advocate appearing on behalf of the appellant made submissions in line with the grounds upon which leave was granted. He also submitted that the appellate Court as well as the trial Court concurrently found on evidence, adduced in the present suit, aside from the finding of adoption given in Title Suit No.69 of 1993, that Khitish Chandra Saha adopted the plaintiff-petitioner and brought him up as his son as per the relevant rules of the Hindu Law, but the High Court Division without referring to the evidence and without adverting to the concurrent findings of fact of the courts below set aside their judgements and decrees. As such, the impugned judgement and order cannot be sustained. He further submitted that the High Court Division could not point out any sort of misreading or non-consideration of evidence by the Courts below in arriving at the concurrent finding that the plaintiff-petitioner was validly adopted and brought up as the adopted son by Khitish Chandra Saha. He also submitted that neither the trial Court nor the appellate Court considered the finding as to adoption given in the judgement of Title Suit

No.69 of 1993 to be a *res judicata* and the Courts below did not base their decision on such finding, which was considered as a piece of evidence simply. He submitted that in earlier Title Suit No.69 of 1993, although no issue was framed as to adoption, both the parties chose to join issue upon that point without protest, and impliedly the said issue was dealt with in the suit; so, the decision on the point will operate as *res judicata* between the parties.

8. Mr. Mahbubey Alam, learned Senior Advocate appearing for respondent Nos.1-3, made submissions in support of the impugned judgement and order of the High Court Division. He also submitted that the High Court Division rightly set aside the judgement and decree of both Courts of facts holding that the findings and decision arrived at in earlier Title Suit No.69 of 1993 as to adoption of the plaintiff by Khitish Chandra Saha will not operate as *res-judicata* in the present suit and that both the courts below failed to appreciate this vital legal aspect, and thus the Courts committed wrong in decreeing the suit in relying on the incidental findings made in the judgement of the previous Title Suit No.69 of 1993. He further submitted that the appellate Court failed to consider that the limitation for filing the present suit started from the date of filing Civil Suit No.69 of 1993 by late Khitish Chandra Saha who claimed in his plaint that the plaintiff is not his adopted son and as such the appellate Court committed an error of law resulting in an error in the decision occasioning failure of justice in not holding that the suit in question was barred by limitation having been filed long after six years of accrual of cause of action under clause 119 of Limitation Act, 1908 and as such, the appeal is liable to be dismissed. He submitted that the appellate Court committed an error of law resulting in an error in the decision occasioning failure of justice in dismissing the appeal in mis-appreciating the evidence of late Khitish Chandra Saha in Civil Suit No.69 of 1993 denying the present plaintiff as his adopted son, and in taking into consideration the evidence of witnesses in Civil Suit No.31 of 2000 in that the witnesses and both the courts below confused a foster son with an adopted son, the former having no legal status of a son. He lastly submitted that both the Courts below failed to appreciate the distinction between fostering and adoption and in not considering the evidence of plaintiff's witnesses in the light of the assertion of late Khitish Chandra Saha that the plaintiff was not his adopted son but foster son and thus committed error of law resulting in an error in the decision occasioning failure of justice in decreeing the suit and dismissing the appeal and as such the appeal is liable to be dismissed.

9. We have considered the submissions of the learned Advocates appearing for the parties concerned, perused the impugned judgement and order of the High Court Division and other connected papers on record.

The moot question in this appeal concerns the validity of the adoption of the appellant Polash Chandra Saha by Khitish Chandra Saha, husband of Gouri Rani Saha-respondent No.4, father of respondent No.1 Shimul Rani Saha and grandfather of Chayan Chandra Saha and Dahan Chandra Saha (minor).

10. Polash Chandra Saha as plaintiff claims that he was adopted by Khitish Chandra Saha and his wife Gouri Rani Saha under Hindu Law. In support of his claim he relied upon the findings in an earlier judgement in Title Suit No.69 of 1993 where it was found that he was legally adopted. The earlier Title Suit No.69 of 1993 was filed by Khitish Chandra Saha against Krishna Chandra Das @ Polash Chandra Saha with a claim that certain property purchased in the name of Polash was his *benami* property.

11. When delivering the judgement in Title Suit No.69 of 1993 the trial Court, while decreeing the suit, observed that Polash had been taken into the family of Khitish Chandra

Saha at the age of 6(six) months, his name had been changed in all the records, the business established by Khitish was named "Polash Cabin" and the purchase of the property in that suit in the name of Polash was evidence of his adoption. It was further observed that in Bangladesh apart from 'Duttohom' if the formalities are observed the adoption will be lawful according to the principle of factum valet. The trial Court in that suit concluded that defendant No.1 of that suit Polash Chandra Saha was indeed the adopted son of the plaintiff of that suit, Khitish Chandra Saha.

12. According to Hindu Law any act done in contravention of the Hindu texts which are in their nature mandatory cannot be said to be lawful by applying the principle of *factum valet.* Hence, the principle of *factum valet* is ineffectual in the case of adoption in contravention of the provision of legal texts.

So far as adoption under Hindu Law is concerned, we may refer to Molla's Principles of Hindu Law (18th Edition) wherein article 480 provides as follows:

**"480. WHO MAY BE ADOPTED**

Subject to the following rules, any person who is a Hindu, may be taken or given in adoption:

(1) the person to be adopted must be a male;

(2) he must belong to the same caste as his adopting father; thus, a Brahman cannot adopt a Kshatriya, a Vaisya or Sudra; it is not necessary that he should belong to the same sub-division of the caste;

(3) he must not be a boy, whose mother the adopting father could not have legally married; but this rule had been restricted in many cases to the daughter's son, sister's son, and mother's sister's son. This prohibition, however, does not apply to Sudras. Even as to the three upper classes, it has been held that an adoption, though prohibited under this rule, may be valid, if sanctioned by custom."

Thus it is quite clear according to article 480(2) that the adoptive father of the child to be adopted must belong to the same caste and that adoption would be valid if they belong to different sub-division of the same caste.

13. There are 4(four) primary castes in the Hindu religion namely, Brahman, Kshatriya, Vaisya and Sudra.

The claim of the appellant before us is that Saha is a sub-caste of Sudra and for that reason the ritual after his death was done after 30 days which is the customary period in case of a person belonging to the Sudra caste. The learned Advocate for the appellant empathetically argued that Saha is a sub-caste of Sudra and hence the adoption was legal.

14. In support of his argument Mr. A.J. Mohammad Ali, produced before us information obtain from the internet (Quora) where it has been opined that "although most Saha may be of trading community/Baisya but there are some Saha mostly from West Bengal are bootleggers by profession, they are Shudra/ Scheduled Caste. So a Saha can either be Baishya or Sudra community. So for practical purpose some use the term Sunri (bootleger) Saha to avoid this confusion."

The learned Advocate for the respondent submitted that Saha is of the Vaisya caste and the appellant whose name at birth was Krishna Chandra Das was of the Sudra caste and, therefore, the adoption was unlawful under provisions of Hindu Law as the adoptive father and the adopted son were of two different castes.

15. Mr. Probir Neogi, learned Advocate who appeared for the respondent placed before us certain information obtained from the internet (Wikipedia) where it has been stated that

**Baishya Saha** is a Bengali Hindu trading caste traditionally known to have the occupation of grocers, shopkeepers, and dealers of various goods. Some are money lenders and farmers. Some use *Saha* as their surname, but others use Bhowmik, Chowdhury, Das, Majumder, Mallick, Poddar, Roy Chowdhury, Sarker and Sikder, Roy, among others.

16. We find from the case of **Pankaj Kumar Saha Vs. Sub-Divisional Officers, Islampur and Ors.(1996) 8SCC 264** that in the State of West Bengal Sunri excluding Saha has been declared to be Scheduled caste. It was observed as follows: "Sunri (excluding Saha) is a Scheduled Caste for the purpose of State of West Bengal. The petitioner admittedly bears the name Saha. The authorities found as a fact that for over a century the petitioner's family are Saha by caste. The President after consultation with the Governor, has excluded 'Saha', a liquor business community as Scheduled Caste. Though some Scheduled Castes by name Sunri adopted tapping as profession, they suffer from untouchability while Sahas, liquor business community like Sethi balija, Edigal or Gowda in Andhra Pradesh are not Scheduled Castes."

17. In view of the above, we conclude that Saha are of the business community and are not of the scheduled caste, therefore not Sudra. Hence, Khitish Chandra Saha being a Baishya could not adopt a child from the Sudra caste.

18. Both the trial Court and the appellate Court found that the plaintiff was able to prove that he was the lawfully adopted son of Khitish Chandra Saha. We note that the trial Court, in particular relied upon the evidence of defendant No.4 who is the adoptive mother of the plaintiff, who deposed in support of the adoption in spite of the fact that the evidence would deprive her of her life interest in the property as well as the interest of her own biological daughter (defendant No.1). However, this conclusion is only partly correct in law because Gouri Rani (defendant No.4) would benefit from having life interest in her late husband's property whether or not the plaintiff is the lawfully adopted son of her late husband. It is true that her biological daughter and the sons from that daughter (defendant Nos.2 and 3) would be totally deprived if the plaintiff inherited the property as the adopted son of Khitish. In fact Gouri Rani Saha did not depose to the detriment of her own interest.

19. We also see in the record papers relating to Miscellaneous Case No.62 of 1996 wherein Gouri Rani prayed for a succession certificate claiming herself to be the only heir of late Khtish Chandra Saha. This was admitted by defendant No.4 and the plaintiff in their respective cross examinations.

20. The trial Court also considered the evidence to the effect that the "Shradha" ritual after death takes place after 15 days in case of Baishya and after 30 days in case of Sudra and, therefore, Khitish was Sudra by caste. However, it appears that the trial Court did not consider the evidence of P.W.2 who deposed that he is Purohit for Polash's biological father who was Sudra and he did not attend any rituals of the Saha gutra, thereby confirming that they are a different caste. In his cross examination P.W.2 categorically stated that he conducts the Puja of the Namasudras and does not attend "Shradha" of Sahas. He also explained that he only attended the adoption ceremony of Polash because he was his follower. It is, therefore, clear from the evidence of P.W.2 that Saha and Sudra are two separate castes. We do not find any evidence from the deposition of the witnesses to the effect that Polash and Khtish are of two sub-castes of Sudra caste.

21. In decreeing the suit the trial Court took into consideration the finding of another Court in the earlier Title Suit No.69 of 1993. In that suit, Khitish as plaintiff had claimed that property purchased in the name of Polash was 'benami' property which he (Khitish) had purchased with his own money. That suit was decreed holding that the property was purchased by Khitish and that Polash was his benamder. However, although there was no issue with regard to Polash being adopted by Khitish, that Court found that there was a legal adoption. In the instant suit the trial Court took the finding of adoption in the earlier suit as res-judicata observing that Khitish did not challenge the finding that Polash was legally adopted.

22. However, we cannot ignore the fact that the finding in Title Suit No.69 of 1993 with respect to adoption of Polash by Khitish was a mere obiter. It was not an issue in the suit and since the suit was decreed in favour of Khitish he was not required to appeal against an observation which was not the subject matter of that suit.

23. We note from the judgement in Title Suit No.69 of 1993 that having concluded that the defendant (Polash) was the plaintiff's (Khitish's) benamder the Court then went on to consider the relationship of the parties as an afterthought for the sake of completeness. That was not at all necessary. We also note that the consequent appeal filed by Krishna Chandra Saha (Polash's name at birth) being Civil Appeal No.73 of 1994 was dismissed on 17.08.1998 thereby declaring title in the suit land in favour of Khitish finding Polash as his benamder.

24. Although defendant No.4 Gouri Rani deposed in favour of the plaintiff and also submitted a Solenama in his favour, she categorically stated in her cross examination that she is from the Saha gutra and the plaintiff is from Namasudhra caste and that each caste has different Brahman. However, both the trial Court and the appellate Court appear to have overlooked this admission that they are from two distinct castes. She also admitted that after her husband's death the tax returns for their business was submitted in her name. This tends to support Khitish's claim in Title Suit No.69 of 1993 that Polash was not his adopted son but only taken as a foster son due to the fact that his mother had died when he was a baby and his wife was childless at that time.

25. From the above discussion of facts and evidence it transpires that Polash was certainly taken into the family of Khitish and he adopted the title Saha. However, even if he was accepted as a family member, the legality of the adoption must be considered. The provision of Hindu Law is clear that there cannot be adoption across castes. In other words, a child from one caste cannot be legally adopted by a member of another caste.

26. Initially Mr. A.J. Mohammad Ali argued that the prohibition of cross-caste adoption had been lifted due to the promulgation of the Caste Disabilities Removal Act, 1850. But he abandoned the argument when Mr. Neogi pointed out that the said law was not applicable in Bangladesh.

27. Mr. Neogi has sought to distinguish between the concept of adoption "`ËK" and fostering "cvjK". He drew our attention to the written statement filed by Polash in Title Suit No.69 of 1993 wherein he stated "...৫-৬ বৎসর বয়স হইতে বাদীর আপন পুত্রের ন্যায় বাদীর সংসারের হাল শক্ত হাতে ধরিয়া বাদীর সংসারের যাবতীয় কার্য সুষ্ঠুরূপে পরিচালনা করিয়া বাদীর সংসারের যথেষ্ট উন্নতি সাধন করিয়াছে এবং করিতেছে। ..... ..... ..... এই বাদী বাদীর পালক পুত্র হইলেও কখনো বাদীকে পালক পিতা হিসাবে না জানিয়া জন্মদাতা পিতার ন্যায় শ্রদ্ধা ভক্তি করিত এবং করিতেছে।" He submitted that Polash never claimed himself to be

"adopted son" (`ËK cyÎ) of Khitish Chandra Saha. We find substance in such submission particularly in view of the admission by Gouri Rani in her application for a succession certificate that Khitish did not have any other heir.

28. Moreover, we cannot overlook the fact that there was no evidence to support the contention that Saha is a sub-caste of Sudra. On the contrary the evidence of Gouri Rani and P.W.2 clearly suggest that the two families are from two distinct castes. Furthermore, the case of **Pankaj Kumar Saha** cited above clearly shows that Saha are not of a Schedule Caste. Hence there could not be any adoption by a person of the Saha gutra (not being a schedule caste) of a child from a Sudra gutra (being a schedule caste).

29. We find from the cross examination of the Purohit (P.W.2) that as a Brahmin he conducted the ritual/ceremonies of the Sudra caste. He categorically stated that Khitish was a Saha and he never attended any of their Puja or Shradha ceremony. He only conducted the dattak function for Polash because he was his RRevb-(follower). The question of limitation was not discussed by the High Court Division. However, the learned Advocate for the respondents submitted that the appellate Court erred in not holding that the suit was barred by limitation.

30. The relevant law is found in article 119 of the Schedule to the limitation Act, which provides that in order to obtain a declaration that an adoption is valid the suit must be filed within six years from the date when the rights of the adopted son, as such, are interfered with. Mr. Alam submitted that Khitish in his plaint in Title Suit No.69 of 1993 claimed that Polash was not his adopted son, and therefore, the period of limitation commenced in 1993. Hence the suit filed in the year 2000 was barred. We find substance in the submission of Mr. Alam. We find from the plaint of Title Suit No.69 of 1993 that Khitish categorically stated that the defendant (Polash) had no right in law to lay claim as an adopted son. Such denial by the claimed adoptive father gives rise to the cause of action. Hence, we are of the view that the suit is barred by limitation.

31. In view of the above discussion, we do not find any illegality in the impugned judgement, and accordingly the appeal is dismissed, without, however, any order as to costs.

**14 SCOB [2020] AD**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Syed Mahmud Hossain**
**Chief Justice**
**Mr. Justice Hasan Foez Siddique**
**Ms. Justice Zinat Ara**
**Mr. Justice Md. Nuruzzaman**

***CRIMINAL APPEAL NOS.63-66 OF 2017.***
(From the judgment and order dated 31.08.2016 passed by the High Court Division in Criminal Appeal Nos.2116-2119 of 2016.)

**Md. Abul Kaher Shahin** **:** -- Appellant.
(In all the cases)

**=Versus=**

**Emran Rashid and another:** --Respondents.
(In all the cases)

For the Appellant: (In all the cases)
For the Respondent No.1: (In all the cases)
For the respondent No.2 (In all the cases)

Mr. Mansurul Haque Chowdhury, Senior Advocate,
instructed by Mr. Zainul Abedin, Advocate-on-Record.

Mr. Moudud Ahmed, Senior Advocate, instructed by
Mr.Syed Mahbubar Rahman, Advocate-on-Record.
Mrs. Shirin Afroz , Advocate-on-Record.

*Date of hearing : 04.12.2019 & 29.01.2020. Date of Judgment: 18-02-2020.*

**Dishonour of cheque, Section 118,138 of The Negotiable Instrument Act, 1881 ;**

**Once there is admission of the execution of the cheque or the same is proved to have been executed, the presumption under section 118(a) of the Act is raised that it is supported by consideration. The category of "stop payment cheque" would be subject to rebuttal and hence it would be an offence only if the drawer of the cheque fails to discharge the burden of rebuttal. The accused person can prove the non-existence of a consideration by raising a probable defence. If the accused discharges the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the complainant. He will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to grant of relief on the basis of negotiable instrument . ... (Para-17)**

**Where the amount promised shall depend on some other complementary facts or fulfillment of another promise and if any cheque is issued on that basis, but that promise is not fulfilled it will not create any obligation on the part of the drawer of the cheque or any right which can be claimed by the holder of the cheque. ... (Para-24)**

**JUDGMENT**

**Hasan Foez Siddique, J:**

1.These Criminal Appeals being Appeal Nos. 63-66 of 2017 are directed against the common judgment and order dated 31.08.2016 passed by the High Court Division in Criminal Appeal Nos.2116-2119 of 2016 reversing those dated 17.02.2016 passed by the learned Metropolitan Sessions Judge, Sylhet in Sessions Case Nos.3079 of 2013, 172 of 2014, 174 of 2014 and 3080 of 2013.

2. Learned Sessions Judge, Sylhet convicted the respondent No.1 (the respondent) under Section 138 of the Negotiable Instrument Act, 1881 ( the Act) in all the cases and sentenced him to suffer simple imprisonment for a period of 1(one) year and to pay tk.2,00,00,000/-(two crore) in Session Case No.3079 of 2013, simple imprisonment for a period of 1(one) year and to pay fine tk.2,00,00,000/- (two crore) in Session Case No.172 of 2014, simple imprisonment for a period of 1(one) year and to pay fine of tk.3,00,00,000/- (three crore) in Session Case No.174 of 2014 and simple imprisonment for a period of 1(one) year and to pay fine of tk.2,00,00,000/- (two crore) in Session Case No.3080 of 2013.

3. The complainant, in all the petitions of complaint, stated that the respondent, in order to pay the demand pursuant to the agreement No.1897 of 2012 of Gulshan Sub-Registry Office, issued 4(four) Cheques on 01.07.2013 in favour of the complainant for a sum of tk.1,00,00,000/- (one crore) vide Cheque No.0559568, tk.1,00,00,000/- (one crore) vide Cheque No. 0559569, tk.1,00,00,000/- (one crore) vide cheque No.0559570, tk.1,50,00,000/- (one crore fifty lac) vide cheque No. 0559571. The complainant presented those 4(four) cheques in the bank for encashment but all those cheques were dishonoured by the bank with endorsement that, "Payment stopped by drawer". The appellant served notices upon the respondent requesting him to pay the cheques amount who received the same but he did not pay any amount.

4. Thereafter, the complainant appellant observing all legal formalities as contemplated under the Act had filed four separate complaint cases. The trial Court convicted and sentenced the respondent under section 138 of the Act and sentenced him as aforesaid. The respondent, after making statutory deposit, preferred aforesaid 4(four) criminal appeals in the High Court Division and the High Court Division heard and disposed of all the appeals analogously and acquitted the respondent of all the charges by the impugned judgment and order dated 31.08.2016. Thus, the complainant appellant has preferred these 4(four) appeals in this Division upon getting leave.

5. Mr. Mansurul Haque Chowdhury, learned Senior Counsel appearing on behalf of the appellant, submits that the High Court Division committed subsential error in acquitting the respondent ignoring the spirit and object of the provision section 138 of the Act. He submits that after deletion of the words "for the discharge in whole or in part of any debt or other liability" by the Act No. XVII of 2002 , the Court is empowered to consider the contents of the cheque and cheque only and it can not examine whether same was issued for the discharge of any debt or liability or not. He, lastly, submits that the High Court Division improperly dealt of the issues and points outside the purview of the registered agreement between the complainant and accused respondents, thereby erroneously interfered with the order of conviction. Mr. Chowdhury relied upon the case of Alauddin (Md.) Vs. State,

reported in 24 BLC (AD)139.

6. Mr. Moudud Ahmed, learned Senior Counsel appearing for the respondent, submits that though the words "for the discharge in whole or in part of any debt or other liability" from section 138 of the Act have been deleted from the statute, the Court is empowered to examine the defence case as well as the bonafide of the claim of the drawee. He submits that the provision of section 138 of the Act is not an isolated provision and said provision has not been started with non-obstante clause rather it has been specifically mentioned that the said provision shall have to be effective, "without prejudice to any other provisions of this Act", the High Court Division upon proper appreciation of the evidence and law related to the case rightly disbelieve the claim of the appellant. He submits that the provisions of sections 4, 6, 8, 9, 43, 58, 118 and 138 of the Act should be read and consider together to find out the true intent of legislation and to ascertain the bonafide of the demand of the drawee and to fix liability of the drawer, the High Court Division right did so and acquitted the respondent. He further submits that in the petitions of complaint and evidence, the complainant admitted that the disputed cheques were issued pursuant to an agreement dated 13.03.2012 but complainant did not act as per terms and conditions of the said agreement, so, he was not entitled to get any amount on the basis of the agreement, the High Court Division elaborately discussed and considered the evidence and found the defence case acceptable and, thereby, acquitted the respondent. In support of his submission, Mr. Moudud Ahmed relied upon the case of Shahidul Islam Vs. Bangladesh and Others , reported in 2 SCOB (2015)HCD-1.

7. Admittedly, the respondent No.1 issued 4 different cheques for the amount mentioned above which were dishonoured with endorsement, "Payment stopped by drawer". The complainant, issuing statutory notices upon the respondent and upon complying all other legal provisions, filed four separate petitions of complaint. The trial court framed charge against the respondent No.1 for commission of offence punishable under section 138 of the Act in each case. The respondent denied the charges framed against him in all the cases and claimed to be tried. The prosecution examined 1(one) witness in support of its case and defence examined none. P.W.1 complainant Md. Abul Kaher Shahin produced the copy of agreement No.1897 of 2012 dated 13.03.2012 (Exhibit-"5"). From the trend of cross examination of the P.W. 1 it appears that the defence case was that the complainant did not work as per terms and conditions of the agreement (exhibit-5) and in the event of transfer of the property of the respondent, the complainant did not play any role so he was not entitled to get any commission pursuant to the agreement and, thus, the respondent stopped the payment of the amount to the appellant by giving information to the bank.

8. The important question in this case is that while considering the charge brought under section 138 of the Act, the Court is empowered to examine the defence case or not. In other words, whether the Court shall examine the authenticity of the cheque only or it shall examine and consider the bonafide of the claim of the complainant and the defence case appeared in materials available on record.

9. A statute is not enacted to create a vacuum but in a framework of circumstances so as to give a remedy for a known state of affairs. The intention for the legislation of the Act has been stated in the preamble where it has been mentioned; "whereas it is expedient to define and amend the law relating to promissory notes, bills of exchange and cheques, it is hereby enacted as follows:" Though the preamble is not of the same weight as an aid to construction of the section of the Act as are other relevant enacting words to be found elsewhere in the Act, or even in related Acts it may be legitimately consulted for the purpose of solving any

ambiguity or fixing the meaning of words which may have more than one, or of keeping the effect of the Act with its real scope, whenever the enacting part is in any of these respects open to doubt.

10. Old Chapter XVII of the Act was titled, "Notaries Public" of the Negotiable Instrument Act, 1881. The same was substituted by new Chapter XVII i.e. "On penalties in case of dishour of certain cheques for insufficiency of funds in the Account" in the year 1994. Perhaps new chapter XVII was enacted with a view to encourage the culture of use of cheque and enhancing the credibility of the instrument. In the case of Dalmia Cement (Bharat) Ltd. V. Galaxy Traders and Agencies Ltd ( AIR 2001 SC 676) the Supreme Court of India has referred to the object of section 138 of the Act holding that the Act was enacted and section 138 of the Act thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instruments is the law of commercial world legislated to facilitiate the activities in the trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. To achieve the objectives of the Act, the legislature has, in its wisdom, thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged.

11. The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and procedure provided for the redressal of the grievances to the litigants.

In the case of Alauddin V. State (Supra), while disposing the case arising out of an application under section 561A of the Code of Criminal Procedure, we have observed that the offence punishable under section 138 of the Act is not a natural crime like hurt or murder. It is an offence created by a legal fiction in the statute. It is a civil liability, transformed into criminal liability under restricted conditions by way of amendment of the Act. This is to be remembered that the principle "*quando lex aliquid alicui concadit concedere videturet id sine quo res ipsel esse non potest",* that is, all the course whether civil or criminal, possess, in the absence of any express provision as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice. The intention of the legislature is to see that the concerned is made to pay the amount to the payee. Indeed, the complainant's interest lies primordial in recovering the money given rather than sending the drawer of the cheque to jail.

12. It is relevant here to reproduce the provisions of Sections 5, 6, 43, 118, 138 and 141 of the Act which are necessary for adjudication and to draw conclusion over the dispute in hand. The contents of those sections are as follows:

"Section 5. "Bill of exchange", - "A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay on demand or at a fixed or determinable future time a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument."

6. Cheque- A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand." 43.**Negotiabe instrument made, etc., without consideration.-** A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without indorsement

to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

Exception 1.-No party for whose accommodation a negotiable instrument has been made, drawn, accepted or indorsed can, if he has paid the amount thereof, recover thereon such amount from any person who became a party to such instrument for his accommodation.

Exception II.- No party to the instrument who has induced any other party to make, draw, accept, indorse or transfer the same to him for a consideration which he has failed to pay or perform in full shall recover thereon an amount exceeding the value of the consideration (if any) which he has actually paid or performed.

118. Presumptions as to negotiable instruments of consideration.- Until the contrary is proved, the following presumptions shall be made:

(a) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) that every negotiable instrument bearing a date was made or drawn on such date;

(c) that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) that every transfer of a negotiable instrument was made before its maturity;

(e) that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that the holder of a negotiable instrument is a holder in due course: provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

138. [(1)] Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to [thrice] the amount of the cheque, or with both:

(underlined by us)

(3) Notwithstanding anything contained in sub- section (1) and (2), the holder of the cheque shall retain his right to establish his claim through civil Court if whole or any part of the value of the cheque remains unrealized.]

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within [thirty days] of the receipt of information by him from the bank

regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within [thirty days] of the receipt of the said notice.

[(1A) The notice required to be served under clasue (b) of sub- section (1) shall be served in the following manner-

(a) by delivering it to the person on whom it is to be served; or

(b) by sending it by registered post with acknowledgement due to that person at his usual or last known place of abode or business in Bangladesh; or

(c) by publication in a daily Bangla national newspaper having wide circulation.]

(2) Where any fine is realized under sub-section (1), any amount upto the face value of the cheque as far as is covered by the fine realized shall be paid to the holder.

(3) Notwithstanding anything contained in sub- section (1) and (2), the holder of the cheque shall retain his right to establish his claim through civil Court if whole or any part of the value of the cheque remains unrealized."

"141. Notwithstanding anything contained in the Code of Criminal Procedure , 1898 (Act V of 1898),-

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138;

[(c) no court inferior to that of a Court of Sessions shall try any offence punishable under section 138.]]"

13. A cheque is a bill of exchange drawn on a banker payable on demand. A bill of exchange is a negotiable instrument in writing containing instruction to a third party to pay a stated sum of money at a designated future date or on demand . A cheque on the other hand, is a bill of exchange drawn on a bank by the holder of an account payable on demand. Thus, a cheque under section 6 of the Act is also a bill of exchange but it is drawn on a banker and is payable on demand. An instrument can be construed as a cheque only if such document satisfies the requirements under section 5 read with section 6 of the Act. So on the facts and circumstances of each case, the Court will have to examine whether the instrument involved in cheque as defined under section 5 read with section 6 of the Act or not.

Though section 141 of the Act begins with non-obstante clause carving out an exception to the provisions of the Code of Criminal Procedure. Section 141 (C) of the Act clearly provides that Court of Sessions shall try the offence punishable under Section 138 of the Act. That is, offence alleged to have committed under section 138 of the Act is Sessions triable.

14. Chapter XXIII of the Code of Criminal Procedure consisting of sections 265A to 265L deal with the procedure to be followed when the case is tried. Those provisions cast a duty upon the Sessions Judge to apply his judicial mind in considering the materials and evidence adduced by the prosecution in order to come to a decision whether charge framed against accused person is proved or not. If after recording evidence and on perusal of the

same and hearing the parties the Sessions Court considers that the evidence adduced by the prosecution are not sufficient and reliable to convict the accused, the Court shall record order of acquittal under section 265H of the Criminal Procedure Code. Since the case under section 138 of the Act is Sessions triable case, the trial Judge shall follow the aforesaid provisions of the Code of Criminal Procedure for holding trial.

15. Mr. Moudud Ahmed, learned Senior Counsel, giving more emphasis upon the words, "without prejudice to any other provisions of this Act" in section 138 of the Act, submits that those words clearly indicate that section 138 is not an isolated provision and other provisions of the Act have not been excluded in deciding the case under section 138 of the Act.

The word "without prejudice to any other provisions of the Act" mentioned in section 138 clearly indicate that anything contained in the provisions following this expression is not intended to encapsulate the generality of the other provisions of the Act. It is well settled that the enumeration of specific matter "without prejudice to the generality" of a particular provision does not restrict the general application of that provision to the matters enumerated because the words "without prejudice" have the effect of preserving the full effect of the general provisions and also because the Rule of *ejusdeme generis* has no universe application. Those words clearly indicate that the provision of section 138 did not make any embargo in the application of other provisions of the Act. In the case of Raja Gowl Rajasima Rao V. State of AP. reported in AIR 1973 AP236 it has been observed that when general provisions are followed by certain particular provisions and when it is stated that the particular provisions are without prejudice to the general provision the particular provisions do not cut down the generality of the meaning of the preceding general provisions. That is the submission made by Mr. Ahmed has got force.

16. In this case prosecution was launched by the complainant for the offence punishable under section 138 of the Act basing on an agreement between the complainant appellant and the respondent pursuant to which the respondent issued the disputed cheques. Agreement (ext.5) produced by the complainant shows that he claimed the cheques amount as commission if he is able to sell the respondent's property.

17. There were 4 cheques issued by the respondent pursuant to one agreement which were presented for collection and those were returned with the endorsement, "payment stopped by drawer". Merely, because the draweer issued notice to the bank for stoppage of the payment will not preclude an action under section 138 of the Act by the drawer or the holder of a cheque in due course. A person issuing the cheque cannot escape liability even if there is a stoppage of payment of cheque, unless he disproves the same for the other reasons. In case a cheque issued by a person in favour of another is dishonoured by the bank for want of funds, the holder of the cheque is entitled to the amount as reflected in the cheque since cheque is a negotiable instrument governed under the Act. Once there is admission of the execution of the cheque or the same is proved to have been executed, the presumption under section 118(a) of the Act is raised that it is supported by consideration. The category of "stop payment cheque" would be subject to rebuttal and hence it would be an offence only if the drawer of the cheque fails to discharge the burden of rebuttal. The accused person can prove the non-existence of a consideration by raising a probable defence. If the accused discharges the initial onus of prove showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the complainant. He will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to grant of relief on the basis of negotiable instrument.

18. Where the accused person fails to discharge the initial onus of proof by showing the non existence of the consideration, the complainant would invariably be held entitled to the benefit of presumption arising under section 118(a) of the Act in his favour . To disprove the presumption, the accused person has to bring on record such facts and circumstances upon consideration of which the Court may either believe that the consideration did not exist or its non existence was so probable that a prudent man would under the circumstances of the case, shall not act upon the plea that it did not exist. We find support of the aforesaid views in the cases of Bharat Barrel and Drum Manufacturer Co. Vs. Amin Chand Payrelal, reported in AIR 1999(SC) 1008 and Mallavarapu Kasivisweswara Rao V. Thandikonda Ramulu Firm and others reported in AIR 2008 SC 2898.

19. The Supreme Court of India in Kundan Lal Rallaaram vs. Custodian Evacuee Property, Bombay (AIR 1961 SC 1316) has declared that section 118 of the Act lays down a prescribed special rule of evidence applicable to negotiable instruments. The presumption contemplated thereunder is one of law which obliges the court to presume, inter alia, that the negotiable instruments or the endorsement was made or endorsed for consideration and the burden of proof of failure of consideration is thrown on the maker of the note or the endorser as the case may be. Relying upon the law laid down in Rameshwar Singh Vs. Bajit Lal (AIR 1929 PC 95) approved by Indian Supreme Court in Hiralal Vs. Badkulal (AIR 1953 SC 225), it was held:

"This section lays down a special rule of evidence applicable to negotiable instruments. The presumption is one of law and thereunder a court shall presume, inter alia that the negotiable instrument or the endorsement was made or endorsed for consideration. In effect it throws the burden of proof of failure of consideration on the maker of the note or the endorser, as the case may be. The question is, how the burden can be discharged? The rules of evidence pertaining to burden of proof are embodied in Chapter VII of the Evidence Act. The phrase 'burden of proof' has two meanings - one the burden of proof as a matter of law and pleading and the other the burden of establishing a case, the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence, i.e., oral or documentary evidence or admissions made by opposite party it may comprise circumstantial evidence or presumptions of law or fact."

20. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the cheque in question was not supported by consideration. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of consideration apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. The burden of proof of the accused to disprove the presumption under sections 118 and 138 of the Act is not so heavy. The preponderance of probability through direct or substantial evidence is sufficient enough to

shift the onus to the complainant. Inference of preponderance of probabilities can be drawn from the materials on record and also by reference to the circumstances upon which the party relies.

21. It is clear from the agreement exhibit -5 and other materials on record in the cases that the respondent issued cheques for a sum of taka 4,50,00,000/- (four crore fifty lac) on condition that complainant shall sell the disputed property of the accused respondent as per market value and if he is able to sell the same he would be entitled to get a percentage of consideration of the property sold in view of such act. It is the defence case that the condition under which the cheque was issued had not been complied with by the complainant appellant. Thus, the respondent instructs the bank to stop the payment of cheque, accordingly, the bank returned the cheques with endorsement "payment stopped by the drawer".

22. The High Court Division being last court of facts upon elaborate consideration of the evidence both the oral and documentary has come to the conclusion that the complainant failed to take any step to sell the property of the respondent, rather the respondent and his brother and sister sold the said property to the U.S.A. Embassy and the complainant did not help the respondent in any way in that regard.

It is relevant here to quote the evidence of the complainant which he adduced before the trial court as P.W.1 which are as follows:

"আমি অত্র মামলার বাদী। আসামী ইমরান রশীদের সাথে ১৩/৩/১২ খ্রিঃ তারিখে

রেজিঃকৃত Memo নং Agreement যার নাম্বার ১৮৯৮/১২। আসামী হাজির উপস্থিত নাই। উক্ত Agreement এর শতনযায়ী আগামী ১/৭/১৩ খ্রিঃ তারিখে ১টা cheque

দেয় ১ কোটি টাকা। যার নং ০৫৫৯৫৭০ ইস্যু আমার নামীয় ব্যাংক Account এ বিগত ১৮/৭/১৩ খ্রিঃ তারিখে জমা দেই। stop payment এর কারনে Dishonour হয়। ২৫/৭/১৩ খ্রিঃ তারিখে ইহা পনরায় জমা দিলে অনরুপ ভাবে Dishonour হয়। উক্ত বিষয়ে আমি ১৩/৮/১৩ খ্রিঃ তারিখ আসামীর Legal Notice প্রদান করি। কিন্তু আসামী পাওনা পরিশোধ না করার কারণে অত্র মামলা দায়ের করি। অতঃপর ১০/৯/১৩ খ্রিঃ অত্র মামলা দায়ের করি। এই নালিশ (ঊীঃ- ১) আমার

স্বাক্ষর (ঊীঃ-১/১) এই সেই পযবয়ঁব (ঊীঃ-২), এই সেই দইটা Dishonour slips (Ext-3 series), এই সেই Legal Notice with postal receipts (Ext 4 series), এবং এই আমার Memo of Agreement (ঊীঃ-৫) মূলকপি দায়রা৩০৭৯/১৩ মামলায় দাখিল আছে।"

23. Nowhere in his examination-in-chief the complainant claimed that in terms of agreement (Ext-5) he had brought the purchaser to sell the respondent's property and, accordingly, the same was sold. In his cross examination, the complainant has admitted the fact saying, "Avgvi memo. of understanding এর ১নং শর্তে উল্লেখ আছে ৯০ কার্যদিবসের মধ্যে positive out coming নিয়ে আসতে হবে। ২(ধ) শর্তে উল্লেখ আছে বাজার মূল্যে ক্রেতা আনতে পারিলে আমি (বাদী) কমিশন পাব।"
(emphasis supplied)

He further said that, " কথিত শর্তের কারণে আসামী নং ৮ ৫.২৫ M dollar G H plot বিক্রির প্রস্তাব দেয় মার্কিন দূতাবাসের নিকট "। He further said that, "০৩/০৭/১৩ খ্রিঃ তারিখে sale deed ( deed of transfer) সম্পাদন ও রেজিষ্ট্রি হয়। তেজগাঁও Registry office এ registration হয়। ঐ deed এ আমি উপস্থিত ছিলাম না। " That is accused respondent offered the proposal to sell their property to the American Embassy and even, at the time of execution and registration of sale deed, the appellant was not present in the Sub-Registrar's office. Ext.5 would create a liability of the respondent to pay commission under the agreement only when the appellant secured net market price of the respondent's property by sale what did not happen in this case. In his cross examination the complainant has said, "২ (ধ)শর্তে উল্লেখ আছে বাজার মূল্যে ক্রেতা আনতে পারিলে আমি (বাদী) কমিশন পাব।" There is no such averment, in the petition of complaint or

in the evidence that the complainant has stated that he had brought any purchaser who offered market price of the property. From the evidence quoted above it appears that the condition under which the cheques were issued was not fulfilled by the complainant appellant.

24. Thus, the respondent instructed the bank not to encash the impugned cheques. Accordingly, the bank returned the cheques with endorsement, "payment stopped by the drawer". Where the amount promised shall depend on some other complementary facts or fulfillment of another promise and if any cheque is issued on that basis, but that promise is not fulfilled it will not create any obligation on the part of the drawer of the cheque or any right which can be claimed by the holder of the cheque. As such dishonesty or fraud cannot be attributed to the respondent in giving stop payment instructions. Consequently, the question of committing an offence by the accused respondent punishable under section 138 of the Act does not arise.

25. Thus, we are of the view that these appeals do not deserve any consideration. Accordingly, all the appeals are dismissed.

**14 SCOB [2020] AD**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Muhammad Imman Ali**.
**Mr. Justice MirzaHussainHaider.**
**Mr. Justice Abu BakarSiddiquee.**

**CIVIL APPEAL NO.17 OF 2010.**
(From the judgment and order dated 22.04.2009, passed by the High Court Division in First Miscellaneous Appeal No. 224 of 2001**).**

**Abul Kasem Md. Kaiser** .....**Appellant**.

-Versus-

**Md. Ramjan Ali and others.** : .....**Respondents**.

| | | |
|---|---|---|
| For the **Appellants**. | : | Mr.ProbirNeogi, Senior Advocate,instructed by Mrs.SufiaKhatun, Advocate-On-Record. |
| For **Respondent Nos.1-5** | : | Mr. M. QumrulHaqueSiddiqui, Advocate instructed by Mr. ZainulAbedin, Advocate-On-Record. |
| **Respondent Nos.6-19** | : | Not represented. |
| Date of Hearing | : | 21st& 22nd January,2020. |
| Date of Judgment | : | 05February, 2020 |

**Pre-emption, Extinguishment of Co-sharership;**

**The 62 DLR case has not overruled the contention that 'only by a partition suit or partition deed the co-sharership is extinguished'. So in this case by separating the Jama the pre-emptor and/or his predecessor having already lost her/his character of co-sharership in the case jote so the pre-emptor is no more a co-sharer and as such his right to pre-empt as a co-sharer does not exist anymore ... (Para-41)**

**Not only separation of Jama/Khatian by a party will cause him to cease to be a co-sharer in the jama but co-sharership will also be ceased by a final decree in a partition suit or by a registered deed of partition. That means either of the two will cause a person to cease his co-sharership in the case jote. ... (Para-41)**

**The appellant cannot take the plea of non-service of notice upon the other party once he has taken benefit of such mutation or separation of "Jama". Such plea,if any, can be taken only by the party affected by it or to whose disadvantage the same has been obtained and upon whom the notice was required to be served. But not the person at whose prayer separation has been made and who takes the benefit of such separation. ... (Para-16)**

**J U D G M E N T:**

**MIRZA HUSSAIN HAIDER J.:**

1.This appeal, by leave, is directed against the judgment and order dated 22.4.2009, passed by the High Court Division in First Miscellaneous Appeal (FMA) No. 224 of 2001 allowing the appealand setting aside the order of the learned Subordinate Judge, Second Court, Manikganjby which the pre-emption Miscellaneous Case No. 5 of 2001was allowed.

2. Short facts, leading to this appeal, are:

That, the present appellantfiled Pre-emption Miscellaneous Petition No. 6 of 1998 in the 1st Court of Subordinate Judge (now Joint District Judge), Manikganj which subsequently being transferred to the 2nd Court of Subordinate Judge, Manikganjwas renumbered as Pre-emption Miscellaneous Petition No. 5 of 2001, against the present respondents claiming pre-emption in respect of .16 acre of land appertaining to SA Plot Nos. 767 and 763 of SA Khatian Nos. 4, 5, 6and 201 underBandutiaMouja.

3. It is stated in the pre-emption petition that the original owner of the case land was Abdul MoyedBiswas who transferred .16 acre of land (.12 acre from Plot No. 767 and .04 acre from Plot No. 763) to RawshanJahanMalek by a registered deed dated 10.3.1978, who, subsequently exchanged the same with the Pre-emptor-appellantby a deed of exchange (Ewaz) dated 19.1.1987. That Abdul MoyedBiswas, the original owner, also transferred another .16 acre of land (.12 acre from Plot No. 767 and .04 acre from Plot No. 763), as described in the schedule annexed to the petition, to RoyesUddin, Saiful Islam, Shofiqul Islam and RokeyaBegum by another deed dated 10.3.1978 which they, in their turn subsequently, transferred to the pre-emptee-respondent Nos. 1-5 by deed dated 13.11.1987. It was further stated that before the said transfer to the pre-empteesno notice was served upon the pre-emptor.Hence, the petition for pre-emption.

4. The pre-emptee-opposite party-respondents contested the case by filing written objection denying the material allegations made in the pre-emption petition contending, *inter alia*, that the pre-emptor who got his portion of land by Ewaz with a co-sharer, is not a co-sharer in the case land. So, he has no preemptory right over the case land. It is further contended that RowshanJahanMalek, from whom the pre-emptor got his land by Ewaz, having already mutated her name before making the ewaz, and the pre-emptor himself also having got his name mutated by JamaBhag Case No. 32/1987-88 and thereby opening a new holding being No. 631, has lost his co-ownership. Thus the pre-empteesprayedfor dismissal of the petition.

5. The trial Court after hearing the parties and on perusal of the materials on record allowed the case by judgment and order dated 19.3.2001. The pre-emptee-respondents being aggrieved by and dissatisfied with the same preferred First Miscellaneous Appeal Nos. 224 of 2001 before the High Court Division.

6. A Division Bench of the High Court Division heard the aforesaid appeal and allowed the same by the impugned judgment and order dated 22.4.2009 and set aside the order of the trial Court and thereby dismissed the pre-emption case.

7. Being aggrieved by and dissatisfied with the aforesaid judgment and order of the High Court Division, the pre-emptor preferred Civil Petition for Leave to Appeal No. 1449 of 2009

before this Divisionwherein leave was granted to consider whether separation of jama by mutation without physical division of land by partition decree or by deed extinguishes the right of pre-emption, as decided in 62 DLR(AD)250 and also to consider whether the High Court Division failed to distinguish between co-sharer in the holding and co-sharer in the land and thereby took the view that co-sharership in the land cannot exist without co-sharership in the holding and once the jama is separated, person in possession of the portion of a piece of land ceases to be a co-sharer in the land.Hence this appeal.

8. Mr. ProbirNeogi, the learned Senior Advocate appearing on behalf of the pre-emptor-appellant, submits thatin view of the decision of this Division reported in 62 DLR (AD) 250separation of Jama by mutation without physical division of the land by partition decree or partition deed does not extinguish the right to pre-emption as such the decision of the High Court Division is liable to be set aside. He next submits that the High Court Division in its decision relied on the principle laid down in the case reported in54 DLR 181and 55 DLR 214but such principle has been overruled by this Division in the case reported in62 DLR (AD) 250. He further submits that the High Court Division failed to distinguish between 'co-sharer in the land' and 'co-sharer in the holding' and took the erroneous view that "co-sharership in the land cannot exist without co-sharership in the holding and once the "Jama" is separated, persons in possession of portion of a piece of a land ceases to be co-sharers in the land." So, the judgment and order of the High Court Division is liable to be set aside.

9. On the other hand Mr. QumrulHoqueSiddique, learned Advocate appearing on behalf of the pre-emptee-respondents, submitsthatthe High Court Division rightly decided that through mutation the jama has been separated and through separation of "Jama" (holding) the pre-emptor had sub-divided the original holding, so he has ceased to be a co-sharer of the holding of the land sought to be pre-empted, and thereby hehas lost the right of pre-emption. He next submits that the case reported in 62 DLR (AD) 250 and those of 11 DLR (SC) 78, 52 DLR (AD) 41, 35 DLR (AD) 230 and 33 DLR (AD) 323 are distinguishable in view of the facts and circumstances of the present case. So, the High Court Division was right in allowing the appeal.

10. Considering the submissions advanced by the learned advocates for both the parties and on perusal of the materials on record it appears that admittedly, Abdul MoyedBiswas was the owner of .90 acre of land (.36 acre of land of SA Plot No.767 under SA khatian No. 4, 5 and 201 and .54 acre of land in SA Plot No. 763 under SA khatian No. 6) who transferred .16 acre of land to RowshanJahanMalek by deeds dated 10.3.1978 [Exhibits-1 (ka) &1(kha)] who, in her turn exchanged the same with the pre-emptor-appellant, AbulKasem Md. Kaiser, by a deed of exchange dated 19.1.1987 (Exhibit-1) and as such, the pre-emptor-appellant has been owning and possessing the same since then. Abdul MoyedBiswasalsotransferred another .16 acre of land to RoyesUddin and others by another deed of the same date i.e. 10.3.1978 who, in their turn, transferred the same to Md. Ramzan Ali,Md.DeloarHossen, Abdul Latif, Md. AnwarHossen and AfrozaAkter (pre-emptee Nos. 1-5) by deed dated 13.11.1997 [Exhibit-1 (Ga)] which is the subject matter of this pre-emption case.

11. It further appears that the pre-emptor appellant separated his Jama by mutation (Exhibit-Ka). But relying on the principle laid down in the case reported in 62 DLR (AD) 250, the pre-emptor-appellant claimed that mere separation of the Jama shall not take away his right of pre-emption as the land sought to be pre-empted has not been separated by physical division by means of partition decree or by partition deed without which co-sharership does not cease to exist.

12. On the other hand the pre-emptee-respondents claimthat RowshanJahanMalek, from whom the pre-emptor-appellant got his portion of land by Ewaz, got the "Jama"separated before the Ewaz was made and after exchange the pre-emptor also got his name mutated by filing an application before the Assistant Commissioner (Land) and is accordingly paying rents in the separated Jama. Thus he has ceased to be a co-sharer in the case land.

13. It appears from the record that such separation has been admitted by the pre-emptor-appellant in his evidence as PW-1 saying "আক্তার জাহান মালেক তাহার খরিদা নালিশী ৭৬৩/৭৬৭ নং দাগের ১৬ শতাংশ সম্পত্তি বিগত ১৯.১.১৯৮৭ তারিখে আমার নিকট এওয়াজ মূলে হস্তান্তর করে এবং আমি তথায় বসতবাড়ি নির্মাণ করিয়া বসবাস করিয়া আসিতেছি। আমি উক্ত সম্পত্তি বাবদ নাম খারিজের দরখাস্ত এসিল্যান্ড এর নিকট দিয়াছি। তবে তাহা আমার খাজনা আদায়ের সুবিধার জন্য (আপত্তিসহকারে)। উক্ত দরখাস্ত আমার নিজের হাতে লিখা।"(underlined for emphasis).

14. It also appears that the pre-emptor appellant claimed that though he separatedthe"Jama"of the land in question,but such separation has not been made following the proceduresas detailed in section 117(1)(c) of the State Acquisition and Tenancy Act (SAT Act). On examination of section 117 of the SAT Act it appears that the same has laid down the procedure for subdivision of joint tenancy stating '*No mutation can be made or no Jama/holding can be separated without subdivision of the holding and the revenue officer cannot initiate the procedure of such subdivision without an application of the person who wants his holding to be separated'*.

15. Thus there is no other way by which mutation or separation ofthe"Jama" can be made without subdivision of holding under section 117 of the SATAct.In the present case the appellant admitted that he applied tothe Assistant Commissioner (Land) for separation of "Jama" of his exchanged land and the concerned officer subdivided/separated the holding following the prescribed procedures of law. Once the Jama is separated, at the risk and benefit of a person, he cannot now say that the separation was not done following the procedure laid down in section 117(1)(c) of the SAT Act. In this respect the principle is he who takes advantage of his own act/action cannot subsequently claim that such act/action was not done in accordance with law as he is estopped from claiming so under section 115 of the Evidence Act.

16. Moreover, the appellant cannot take the plea of non-service of notice upon the other party once he has taken benefit of such mutation or separation of "Jama".Such plea,if any, can be taken only by the party affected by it or to whose disadvantage the same has been obtained and upon whom the notice was required to be served. But not the person at whose prayer separation has been made and who takes the benefit of such separation.

17. Apart from this aspect it appears from the contention of the pre-emptee respondent that the property was mutated in the name of RowshanJahanMalekand then it has been again mutated in the name of the pre-emptor vide Mutation Case No. 32/1987-88 (Exhibit "Ka") which has been proved by the Kanungo of the land office of ManikganjSadar(OPW 2) on the basis of SA record after the pre-emptor exchanged the same and got possession along with the houses situated thereon and as such the pre-emptee contended that the pre-emptor thus falls within the purview of section 24(11)(a) of the Non-Agricultural Tenancy Act, 1949(NAT Act).

18. In the present case, admittedly the pre-emptor became a co-sharer in the case land not by purchase but by exchange. So his existing interest in the case jote has accrued otherwise

than by purchase and as such he falls within the prohibition of section 24(11)(a) of the NAT Act wherein it has been provided that: " Nothing in this section shall apply to (a) a transfer to a co-sharer in the tenancy whose existing interest has accrued otherwise than by purchase." Meaning it has protected such transfer if the existing interest of such co-sharer claimant accrues otherwise than by purchase. 19. This provision clearly enumerates the cases and classes of transfer which are not affected by this section 24 and on which no right of pre-emption arises under this Act. Again this Division in the case of **SM Bashiruddin Vs. Z. Islam Chowdhury (35 DLR(AD)230)** protected a transfer to a co- sharer in the tenancy from pre-emption holding that "Transfer of a portion of share of the non agricultural land to a stranger opens right of pre-emption to one or more co-sharer tenants of such land but when a portion or share of such land is transferred to a co-sharer in the tenancy, this is protected."

20. However, in respect of the terms "Co-sharer in land" and "Co-sharer in holding" it is necessary to mention that under section 24 of the Non-Agricultural Tenancy Act (NAT Act)the legislature used the term 'land' saying 'one or more co-sharer tenants of such "land" may within 4 (four) months apply to the Court for pre-emption'. Whereas under section 96 of the SAT Act the term "holding" has been used saying 'a co-sharer tenant in the holding by inheritance may apply for pre-emption'.The distinctive feature in these two provisions of law is clearly in respect of the term 'co-sharer tenant of such land' in one and 'co-sharer tenant in holding' in the other.

21. The term 'holding' has been defined in section 2(13) of the SAT Act in following terms:

*"holding means a parcel or parcels of land or an undivided share thereof, held by a raiyat or an under-raiyotand forming the subject of a separate tenancy".*

Whereas the term 'non-agricultural land' has been defined in section 2(4) of the NAT Act, in general terms saying " Non-agricultural land means land which is used for the purpose not connected with agriculture or horticulture and includes any land which is held on lease for purpose not connected with agriculture or horticulture irrespective of whether it is used for any such purpose or not," but it does notinclude homestead/land as described in clauses, a, b and c of the said provision. But, the term 'non-agricultural land', as has been used in section 24 of the NAT Act, has not been interpreted elsewhere. In section 24(1) of the NAT Act the term "Non Agricultural land" has been used, not "Non Agricultural Tenancy". This has been done by the legislature intentionally only to keep the number of pre-emptors limited to the co-sharers in the land, so that the land on pre-emption may not become unfit for use.

22. The legislature has consciously used the distinctive term "non agricultural land" not "tenancy". A Non Agricultural tenancy may be owned and possessed separately by different owners by constructing their respective houses registering as separate holdings under the Municipal/Pourashouva Act but "Jama" of the tenancy, as khatian, remaining undivided with liability of paying rents jointly. That means there remains nothing common amongst the co-sharer tenants excepting their joint liability of paying rents, and thereby they cease to be co-sharers for all practical purpose thereby debarring all other co-sharers from pre-empting the transfer to a stranger. By using the expression "Non Agricultural land" the legislature has recognized the same as an entity or unit separate from "Non Agricultural tenancy". 23. Thus, it is clear that the right of pre-emption under section 24 of the NAT Act has been provided only to the co-sharer tenants in the land. But in the present case "Jama" of the case land being separated by RowshanJahanMalek, earlier to her exchange with the pre-emptor and thenthe pre-emptor himself again having separated his "jama" after the exchange, he or his predecessor is no more a co-sharer in the land and as such though he may be a co-sharer in

the tenancy, the right of pre-emption did not accrue to him and as such his application for pre-emption cannot succeed.Again in the case of **Aminullah vs. SerajulHuq and others,** reported in **65 DLR (AD) 82** it has been held: *"the word 'one or more co-sharer tenants of such land' occurring in section 24 of the Act means a co-sharer in the 'plot'not the 'holding' as mentioned in section 96 of the Act"* (underlined for emphasis).

24. On the other hand, though the term "khatian" has not been defined in the statute but it generally means a document prepared by the government which contains 'complete information regarding the land or property'. In the "Glossary of Certain Settlement and Vernacular Terms"in common use in the sub-continent and well known in the Bengal Tenancy Act, the word 'khatian' has been described as under:

"Khatian is the form in which the record-of-rights is prepared, showing all the details relating to any particular 'interest'."

In the 'আইনশব্দকোষ'compiled and edited by Mr. Justice Muhammad HabiburRahman and Dr. Anisuzzaman, the meaning of the term 'Khatian' has been given as under:

"খতিয়ান জমি-জমার বিবরণ সংবলিত জরিপকালে প্রণীত সরকারি দলিল। খতিয়ানে জমির দাগ নম্বর, পরিমাণ, প্রকৃতি, খাজনার পরিমাণ, প্রজা ও ভুম্যধিকারীর নাম ইত্যাদি লিপিবদ্ধ থাকে।"

25. So, from the above meanings of the term 'khatian' it can be concluded saying Khatianis a 'form' prepared and maintained by the government containing the complete information regarding the land or property with the name and particulars of the owner/tenants and possessor.Khatian is prepared and published generally on the publication of record of rights and when the "Jama" is separated by mutation in accordance with law.

26. In the record of rightsa particular plot may be recorded in different khatians under the name of different tenants.If that be so then another question may arise as to whether co-sharershipof those tenants extends to the whole of the plot or only to that portion of the plot which has been recorded in a particular khatian?In this respect it is pertinent to see what is the intention of the legislature behind incorporation of provision with regard to pre-emption?

27. Onreading all the statutes dealing with pre-emption, it appears that the legislature incorporated the same to provide privilege to the co-sharers over the strangers in purchasing/enjoying the land/property that has been sold out by one or more of his co-sharer(s) to stranger(s) and also to prevent the stranger(s) from coming into such co-sharership. Entrance into co-sharership is possible as long as the land remains undivided but it is not possible rather it becomes impossible as soon as such land has been separated or physically partitioned by demarcation.In such case co-sharership extends only to the portion of the plot that has been recorded in a particular Khatian and has not been separated by creating new "jama".

28. Now,it is necessary to seewho is a "co-sharer tenant of land" and what has been meant by "co-sharer tenant in the holding". Generally co-sharer means joint owners (in Bengali what is called "kwiKevkwiKcÖRv").When the term is used in respect of property it means-'a person who shares his right, title and interest with some other person(s) ina holding or plot or in an undivided share thereof'.Land in connection with section 24 of the NAT Act, appears to be a plot or a parcel of plots owned by two or more co-sharers jointly. So, in order toexercise the right of pre-emption under the aforesaid Act, the person so claimingmust be a co-sharer inan undivided plot or parcel thereof.

29. Side by side it is also to be seen whether such co-sharershipcomes to an end, if so, how?In **54 DLR 181** case it has been observed that 'the word land as used in section 24 of NAT Act should not mean the quantum of land in one plot only. As the word co-sharer always implies the existence of more than one person jointly owning, similarly, such joint ownership may be in respect of land in one plot or in several plots. The land is always recorded under a holding for the purpose of revenue record and payment of rents. This holding may be joint or of several persons. The holding of any land could only be sub divided and rents distributed in accordance with the procedure spelt out under section 117 of the SAT Act which will affect the land appertaining to such holding.

30. A holding is popularly known as "Khatian" comprising of such land. The concept of co-sharer cannot be conceived independent of any holding or tenancy. If the holding is recorded in the name of more than one person then each of such person or their successors in interests becomes co-sharers to each other in such land. Such co-sharer will be deemed to continue as such co-owner in both holding as well as in land so long the holding will continue to be joint.

31. Contrary to such proposition, that sub-division of such holding will not affect the land in any way is fallacious in as much as sub-division of the holding and creation of new plot in subsequent survey or by mutation by the acts of parties, the previous co-sharer in the holding and/or the land cannot be deemed to still continue as such co-sharer'.

32. From the discussions made above it is clear that co-sharershipof a plot/holding definitely comes to an end with mutation of the holding and separation of Jama.In case of holding, as it relates to section 96 of the SAT Act, it obviously comes to an endby separation of Jama/mutation or by final decree in a partition suit or by a registered partition deed and in case of Plot, as it relates to section 24 of theNAT Act, it comes to an end when any of those measures take place which are applicable in the case of section 96 of the SAT Act and also by physical partition by the co-sharers by demarcation. Otherwise, if the quantum of land, as recorded in one plot in the name of more than one person in a survey, is deemed to be an independent unit and in the joint ownership of those persons as recorded, then till partition by metes and bounds to declare all such land still joint for the purpose of pre-emption will go against the public policy as well.

33. In the present case,RawshanJahanMalek, with whom the pre-emptor-appellant exchanged his portion of land,by dint of which he claims to be a co-sharer,physically partitioned her portion of land from those of the land in question and accordingly got her name mutated by opening a separate jama. Thereafter the pre-emptor in his turn, after exchange, also split up his Jama and got his name mutatedas evident from Exhibit 'Ka' and such physical partition and mutation was complete and continuedtill filing of the pre-emption case. So, neither RowshanJahanMalek was,northe pre-emptor-appellant is, a co-sharer in the jote of RoyesUddin Ahmed and others in the land in question.

34. As the Jama of Khatianhas been split up vide Exhibit "Ka" in respect of the case land and separate khatian in their respective names have been opened before the transfer to the pre-emptee and consequent thereto they ceased to be co-sharers in the case khatianandboth of them lost their character as a co-sharer in the case land and as such neither of them had/has the right of pre-emption. This Division in the case of **Alfazuddin Ahmed Vs. AbdurRahman and others (55 DLR(AD)108)** has taken such view. Similar view was also taken by this Division in several other cases as referred to by Mr. Siddique. Interestingly

none of those decisions have been overruled by this Division. The trial court having failed to consider thisaspect, erroneously allowed the pre-emption case which the High Court Division considered and set asideupon allowing the appeal.

35. The learned Advocate for the pre-emptor appellant contended that the principles laid down in the **54 DLR 181** and **55 DLR 214**caseshave been overruled by the case reported in **62 DLR (AD) 250**. On perusal of all the decisionsit appears that in**54 DLR 181**case pre-emption was sought for where the land was partitioned earlier by *final decree passed in a partition suit which terminatedthe co-ownership in such land till subdivision of rents takes place.* And the principle laid down in the **55 DLR 214**case relates to *separation of jama or sub-division of a holding or tenancy made under section 117(1)(c) of the State Acquisition and Tenancy Act and on such separation the co-sharership in such land came to an end.*

*36.* Whereas the moot question in **62 DLR (AD) 250**case was whether a final decree in a partition suit or a registered partition deed puts an end to the co-sharership in the land so partitioned or such co-sharership continues till separation of the Jama.ThisDivision in the aforesaid case held that "a final decree in a partition suit or a registered deed of partition puts an end to co-sharership extinguishing his right of pre-emption." In the said case no question as to whether co-sharership in a land comes to an endby mere separation of the Jama/mutation without a decree in partition suit or by a registered partition deed was raised.So, the case reported in **62 DLR (AD) 250**has not overruled the principle laid down in the case reported in **54 DLR.** Rather that has dealt with only to the extent that a decree in partition suit or a registered partition deed is enough to separate the co-sharership in the land.

37. But the principle laid down in the **55 DLR 114**case has not been overruled apparently by the aforesaid decision of 62 DLR. In the case of **Alfazuddin Ahmed Vs. AbdurRahman 55 DLR(AD) 108**, this Division held that '…… because of the decree in the partition suit as there has been ceasing of the co-sharership of the parties and that the pre-emptors got the Jama of the khatian split up in respect of their land and got a separate khatian/Jama opened in their names before the transfer in question to the pre-emptee and consequent thereupon they ceased to be the co-sharers in the case khatian.' From the above finding it can be easily concluded that by partition decree or partition deed co-sharership ceases but the finality of such ceasing occurs by splitting up of the Jama/khatian.

38. Accordingly, it cannot be said that co-sharership does not cease bymere separation of the Jama/khatian by mutation, which in the present case has already been done firstly by RowshanJahanMalek, the predecessor of the pre-emptor appellant and subsequently by the pre-emptor-appellant himself. Thus the pre-emptor appellant having got the already separated property by exchange cannot be said to be a co-sharer in the property in question. Moreover, the facts of the present case beingquite distinguishable from those of the **62 DLR (AD) 250**case,the pre-emptor cannot take advantage of the said decision.

39. Another important aspect of this case is that the pre-emptor's claim to be a co-sharer in the case land by exchange not by purchase from RowshanJahanMalek who, before exchanging the same with the pre-emptor, got her Jama separated/split up and the pre-emptor after the exchange also got his name mutated by Exhibit "Ka" and thereby also got his jama/khatian separated by which he ceases to be a co-sharer in the case jote. This Division in the case of **Abdul Munim alias TanuMiah Vs. MahfuzurRahman and others (1 ADC 515)** held "Since in the instant cases the holding in question has been separated or sub-divided upon opening a new khatian at the instance of the pre-emptor, the pre-emptor ceased

to be a co-sharer in the holding in question." The facts of the present case are similar to those of the aforementioned reported cases.

40. Again in the case of **Hiran Chandra Dey and others Vs. Md. Abdul Quyum and another (54 DLR(AD)126)** this Division held "In pre-emption proceeding one is deprived of one's property through the coercive process of the Court, unless pre-emptor has a positive case of his being a co-sharer the Court upon finding a prima facie case of co-sharer is not permitted by law to grant pre-emption."

41. From a reading of the aforesaid decisions namely, **55 DLR(AD)108(Alfazuddin Ahmed Vs. AbdurRahman)**, **1 ADC (Abdul Munim alias TanuMiah Vs. MahfuzurRahman and others (1 ADC 515), 54 DLR (AD)126 (Hiran Chandra Dey and others Vs. Md. Abdul Quyum and another) and 62 DLR(AD)250**cases, it appears that this Division held that not only separation of Jama/Khatian by a party will cause him to cease to be a co-sharer in the jama but co-sharership will also be ceased by a final decree in a partition suit or by a registered deed of partition. That means either of the two will cause a person to cease his co-sharership in the case jote. Thus, the **62 DLR** case has not overruled the contention that 'only by a partition suit or partition deed the co-sharership is extinguished'. So in this case by separating the Jama the pre-emptor and/or his predecessor having already lost her/his character of co-sharership in the case joteso the pre-emptor is no more a co-sharer and as such his right to pre-empt as a co-sharer does not exist anymore.

42. Following the above position it appears that the pre-emptor's prima facie case of co-sharership having not been proved he is not permitted by law to succeed in this case.

43. Thus the finding and decision arrived at by the High Court Division being based on proper appreciation of fact and law the same does not call for any interference by this Division.

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

**14 SCOB [2020] AD**

**APPELLATE DIVISION**

**PRESENT**
**Mr. Justice Syed Mahmud Hossain, Chief Justice**
**Mr. Justice Hasan Foez Siddique**
**Ms. Justice Zinat Ara**
**Mr. Justice Md. Nuruzzaman**

CIVIL APPEAL NOs.31-32 OF 2017
With
CIVIL APPEAL NO.30 OF 2017
And
CIVIL PETITION NO.4232 OF 2018

(From the common Judgment and Order dated 24th August, 2015 passed by the High Court Division in F.A. No.167 of 2010 and T.A. Nos.7-11 of 2014.)
Noor Mohammad Khan being dead his heirs:

**Firoza Noor Khan and others……Appellants**
**(In C.A. No.31-32 of 2017)**
**Jamila Khatun……Appellant**
**(In C.A. No.30 of 2017)**
**Jamila Khatun and another…….Petitioners**
**(In C.P. No.4232 of 2018)**
**-Versus-**
**Raisa Aziz Begum and others……Respondents**
**(In C.A. No.31 of 2017)**
**Khadija Islam and others……Respondents**
**(In C.A. No.32 of 2017)**
**Haji Md. Sujauddin and others……Respondents**
**(In C.A. No.30 of 2017)**
**Raisa Aziz Begum and others……Respondents**
**(In C.P. No.4232 of 2018)**

For the appellant (In C.A.No.31/17) : Mr.Nozrul Islam Chowdhury, Senior Advocate, instructed by Mr. Zainul Abedin, Advocate-on-record

For the appellant (In C.A.No.32/17) : Mr. Khair Azaz Maswood, Advocate, instructed by Mr. Zainul Abedin, Advocate-on-record

For the appellant (In C.A.No.30/17) : Mr. Farooque Ahmed, Advocate, instructed by Mr. Serajur Rahman, Advocate-on-record

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|---|---|
| For the petitioner (In C.P.No.4232/18) | : Mr. Farooque Ahmed, Advocate, instructed by Mr. Sirajur Rahman, Advocate-on-record |
| For the Respondents (In C.A.Nos.31-32/17 & 30/17) | : Mr. A.M. Aminuddin, Senior Advocate, instructed by Ms. Madhumaloti Chowdhury Barua, Advocate-on-record |
| For the Respondent (In C.P.No.4232/18) | : Not represented |
| For the Government (In all the appeals) | : Mr. Murad Reza, Additional Attorney General, with Mr. Sk. Saifuzzaman,Deputy Attorney General (appeared with the leave of the Court) |

Date of Hearing: 08.01.2019, 09.01.2019, 15.01.2019, 20.02.2019, 24.04.2019 & 30.04.2019
And
Judgment on: The 14th May, 2019.

**Khas Mohal property of the Government, Article 104 of the Constitution, Complete Justice;**

**Any property owned by the Government is the property of the People's of the Republic of Bangladesh and the citizens of this country are the actual owners of such property. Therefore, no one can dispose of valuable Government properties at his/their sweet will to anyone else unlawfully. ... (para 65)**

**The power of this Court under article 104 of the Constitution is an extensive one though it is not used often or randomly. It is generally used for doing complete justice in any cause or matter pending before it in rare occasions in exceptional or extra-Ordinary cases for avoiding miscarriage of justice.. Article 104 widens our hands so that this Division is not powerless in exceptional matters. The matters (appeals/CPLA) in our hands are matters requiring exercise of this power, to save a valuable property of the Government from the clutches of greedy land/property grabbers, that too with the active collaboration and help from the Government Officials. ... (para 114)**

**J U D G M E N T**

**Zinat Ara, J:**

1. Civil Appeal Nos.30-32 of 2017 and Civil Petition for Leave to Appeal No.4232 of 2018 have arisen out of the common judgment and decree/Order dated 24th August, 2015 passed by the High Court Division in First Appeal No.167 of 2010, heard analogously with Transfer Appeal Nos.7, 8, 9, 10 & 11 of 2014 disallowing First Appeal No. 167 of 2010, Transfer Appeal Nos.07 of 2014, 09 of 2014, 10 of 2014 and 11 of 2014 and thereby, affirming the judgment and decree dated 18.08.2009 of the 1st Court of Subordinate Judge,

Dhaka (shortly, the trial court) in Title Suit Nos. 483 of 1974, 112 of 1984, 113 of 1984 and 66 of 1990 dismissing the aforesaid suits but allowing Transfer Appeal No.08 of 2014 and decreeing Title Suit No.224 of 1997, thereby reversing the judgment and decree dated 18.08.2009 of the 1st Court of Joint District Judge, Dhaka in Title Suit No.224 of 1997.

2. The aforesaid Civil Appeals and Civil Petition for Leave to Appeal have arisen out of the common judgment and decree of the High Court Division in First Appeal (FA) No.167 of 2010 with Transfer Appeal(TA) Nos.7, 8, 9, 10 and 11 of 2014 and the aforesaid first and transfer appealsarose out of the common judgment and decree dated 18.08.2009 of the trial court in the above mentioned suits and the parties are all claiming the same property in the aforesaid appeals/suits and the present civil appeals and the civil petition. Therefore, the Civil Appeal Nos.30-32 of 2017 and Civil Petition No.4232 of 2018 have been heard together and are being disposed of by this common judgment.

**Jamila Khatun's case in**
**Title Suit (TS) Nos.483 of 1974**
**as Plaintiff and as defendants of other suits**

3. Plaintiff-appellant-Jamila Khatun (briefly, Jamila) on 27.09.1974 filed Title Suit No.483 of 1974 in the 1st Court of Subordinate Judge, Dhaka(the trial court)against Raisa Aziz Begum (shortly, Raisa) and others for specific performance of contract and also for some other reliefs stating, inter alia, that Raisa, defendant No.1 of the suit had entered into an agreement with plaintiff-Jamila on 20.01.1972 to transfer 29.36 decimals of land with buildings, structures and shop rooms standing thereon of Holding No.10, Purana Paltan, Dhaka, present Plot No.1184, Khatian No.217 of Mouza-Ramna beingold Dag Nos.26, 27 and 28, Ward No.3, Sheet No.22 of Mouza-Sahar Dhaka, (hereinafter referred to as the suit property). The price of the suit property was fixed at Rs.1,10,000/- and Raisa received a sum of Rs.3,000/- as earnest money on the terms and conditions that Raisa would obtain necessary clearance certificates and complete all other formalities within six months and intimate the same to Jamila and Jamila, within three months of such intimation would pay the balance consideration amount of Rs.1,07,000/- to Raisa and then Raisa would execute and register a saledeed in favour of Jamila. Subsequently, Raisa received Tk.92,000/- from Jamila on different occasions between 15.03.1972 to 19.08.1974 and Raisa admitted/acknowledged about receiving of the said amountthrough some money receipts. Thus, Tk.15,000/- remained outstanding out of the total consideration money. Raisa did not execute the sale deed on receiving the balance amount. Therefore, Jamila filed TS No.483 of 1974.

**Initial result of the Suit &**
**subsequent events, etc.**

4. The suit was decreed ex-parte on 18.07.1978 against Raisa. So, plaintiff Jamila deposited the balance consideration of Tk.15,000/- through Chalan No.561 dated 13.07.1978. Subsequently, Raisa filed Miscellaneous Case No.34 of 1979 to set-aside the ex-parte judgment and decree. Whereupon, the learned judge of the trial court by order dated 24.03.1980 allowed the saidmiscellaneous case, set asidethe ex-parte judgment and decree and restored the suit to its original file and number.

5. Jamila thereafter amended the plaint of the suit alleging that after filing of the suit by Jamila, defendant Nos.3-7 knowing fully well about the agreement between Raisa and Jamila

created some forged and fraudulent documents including sale deed and they were engaged in a conspiracy to deprive Jamila from the suit property.

**Jamila Khatun's Case in TS No.66 of 1990**
**as plaintiff and as defendants of other suits**

6. Plaintiff-Jamila of TS No.483 of 1974 filed another suit being TS No.66 of 1990 for cancellation of sale deed as well as lease deed in favour of Khadiza Islam (briefly stated as Khadiza), contending, inter alia, that Raisa did not sale/transfer the suit property to Syed Badiur Rahman (briefly, Badiur) as claimed by him inasmuch as Badiur negotiated the Baina agreement dated 20.01.1972 between Jamila and Raisa and so, the alleged sale deed in favour of Badiur is forged. Khadiza purchased the suit property from Badiur knowing about her agreement for purchase the suit property from Raisa dated 20.01.1972 and also about the fact that the sale deed in favour of Badiur was/is forged. Khadiza created the sale deed in her favour knowing the aforesaid facts. Therefore, the deed of purchase as well as the deed of lease extension in her favour is liable to be cancelled. It was specifically alleged that there was no agreement of sale between Raisa and Badiur dated 11.09.1969 and that the alleged agreement of sale and registered deed dated 15.01.1982 are all forged and fraudulent documents without consideration. Badiur did not get any possession of the suit property through his forged deed of purchase at any time. Similarly, Khadiza did not get possession of the suit property at any time through her alleged deed of purchase. After knowing about the alleged forged deeds of BadiurandKhadiza, Jamila filed this subsequent suit for cancellation of the aforesaid deeds.

**Noor Mohammad Khan's(being dead his heirs)**
**Case as plaintiff in Title Suit No.113 of 1984**
**(original Title Suit No.364 of 1982)**
**and as defendants of other suits**

7. Noor Mohammad Khan(Khan), defendant No.5 of Title Suit No.483 of 1974, as sole plaintiff, filed Title Suit No.364 of 1982 in the 3rd Court of Subordinate Judge, Dhaka against Raisa, Badiur, Jamila and some others for specific performance of contract against Raisa on the basis of an agreement for sale dated 23.07.1969 as well as an agreement dated 10.07.1977 renewing the previous agreement for sale and also for khas possession of the suit property contending, inter alia, that Raisa for raising cash money wanted to sell the suit property. Whereupon, Khan offered to purchase the same at Tk.45,000/-. Raisa accepted the said offer. Thereafter, on receipt of Tk.15,000/- as earnest money she entered into an agreement for sale of the suit property with Khan on 23.07.1969. Raisa's cousin Badiur was a witness to the agreement for sale. It was decided that after procuring clearance certificate Raisa would execute and register the sale deed in favour of Khan but Raisa could not procure all necessary documents for registration of the deed and on her request Khan paid her Tk.5,000/- on 23.10.1970 but due to political disturbance at the relevant period Khan could not obtain the deed of sale from Raisa. After liberation of Bangladesh, Khan traced out Raisa and Badiur in September, 1973 and came to know from Raisa that some miscreants took over possession of the suit property and that the suit property was enlisted as an abandoned property. Raisa disclosed that after release of the suit property, she would execute and register necessary deed of sale in favour of Khan. At her request, Khan paid further amount of Tk.3,000/- in the 1st part of January, 1977. Raisa and Badiur demanded a further amount of Tk.50,000/- to meet the expenses for release of the suit property from the list of abandoned property and to evict the unauthorized occupants therefrom. Considering all those aspects another instrument was

executed between them on 21.01.1977 in the form of an agreement. This agreement provided that Mr. Yakub Ali, the learned Advocate for Raisa would take steps to release the suit property and Khan would pay Tk.50,000/- for this purpose. Accordingly, Khan paid Tk.20,000/- and a cheque of Tk.30,000/- to Raisa and the said instrument was kept in the custody of Mr. Yakub Ali. Subsequently, Raisa and Badiur told Khan that Mr. Yakub Ali, trapped them and if the transaction of cash as well as the encashment of cheque was made with the knowledge of Advocate Mr. Yakub Ali, he would keep a major portion thereof. They requested Khan to stop payment of the cheque. Subsequently, on mutual understanding Raisa issued a notice rescinding the agreement dated 21.01.1977 through Mr. Yakub Ali and then Raisa and Khan entered into a new agreement dated 01.05.1977 fixing the price of suit property at Tk.4,50,000/- out of which Tk.1,35,500/- was paid earlier according to the previous agreement and Tk.92,500/- was paid on 01.05.1977. It was also decided that Khan would pay Tk.60,000/- for release of the suit property. Then, Raisa disclosed that she would go to Pakistan to attend the marriage ceremony of her daughter and she appointed her brother as her attorney by an instrument dated 17.05.1977 to complete the transaction. Badiur showed a photocopy of the said power of attorney to Khan. On 11.07.1977 Khan departed for London after paying Tk.10,000/- to Badiur on 10.07.1977 for release of the property. He returned to Bangladesh in the middle of 1979 and Badiur told him that they were processing the matter. Badiur also asked him to pay further amount as Raisa was badly in need of some money. So, he again paid Tk.1,80,000/- in cash out of the balance consideration money as well as Tk.10,000/- to Badiur for the purpose of release of the suit property and then left for London. He returned in November, 1980 and requested Badiur to complete the transaction and paid Tk.40,000/- in cash and further amounts on different dates against written money receipt issued by Badiur on behalf of Raisa. The suit property was accordingly released from the list of abandoned property on 12.01.1982. Accordingly, Memo No.Sec.XVI/AP-28/77/20 dated 21.01.1982 was issued by the abandoned property authority releasing the suit property from the list of abandoned property. So, Khan came back to Dhaka on 18.01.1982 for getting the sale deed registered from Raisa. He paid Tk.40,000/- on 25.01.1982 to Raisa but again Raisa informed him that she would go to Syedpur for seven days and asked him to get ready with necessary papers for obtaining income tax certificate. Accordingly, Khan procured necessary papers but Raisa did not return in time. Thereafter, she refused to execute and register the sale deed in his favour. Subsequently, Badiur also disclosed that he purchased the suit property from Raisa and he would not transfer it to him, unless he pays an amount of Tk.25,00,000/-. Then, on search he found out that Badiur has created a forged sale deed on 15.01.1982 and has been claiming the suit property through it illegally.

8. Title Suit No.364 of 1982 was subsequently, transferred to the trial court and renumbered as Title Suit No.113 of 1984.

**Khadiza Islam's case**
**as plaintiff in Title Suit No.224 of 1997**
**(original Title Suit No.75 of 1996)**
**and defendants of other suits**

9. Khadiza, defendant No.7 of Title Suit No.483 of 1974, as sole plaintiff, filed Title Suit No.75 of 1996 in the 5th Court of Subordinate Judge, Dhaka on 27.04.1996 impleading Md. Waziuddin, Jamila, Salauddin, Mobarak Hossain, Noor Mohammad Khan and Bangladesh as defendant Nos.1, 2, 3, 4, 5 and 6 respectively for cancellation of sale deed No.4722 dated 30.11.1982 obtained through Court by Md. Waziuddin as well as for declaration of her right, title to and interest in the suit property and also for recovery of khas possession thereof by

evicting Md. Waziuddin therefrom and permanent injunction upon Md. Waziuddin not to transfer the suit property to anyone stating that Raisa left the suit property under lock and key in the wake of liberation war of Bangladesh and in her absence, some miscreants took over possession thereof. The Government erroneously included the suit property in the list of abandoned property. However, on Raisa's application, the Government released the suit property on 12.01.1982 and handed over possession thereof to her. Then Raisa transferred the suit property to Badiur by a registered deed of sale dated 15.01.1982 in pursuance of an agreement dated 11.09.1969 and delivered possession to him. He got his name mutated and then with the permission of the Government sold it to Khadiza for a sum of Tk.10,00,000/- by a registered deed of sale dated 04.09.1984. Badiur also delivered vacant possession of the suit property to her after execution of sale deed. She, after renewal of the lease deed from Government, had been in possession thereof till 05.05.1993, by using it as storage of construction materials of her construction company namely, Nirman Construction Company Limited (shortly, Nirman). Md. Waziuddin (Waziuddin) dispossessed her therefrom through Court on 05.05.1993 in Title Execution Case No.06 of 1992 arising out of the judgment and decree in First Appeal No.23 of 1984 arising out of Title Suit No.541 of 1982. Khadiza Islam was neither a party to Title Suit No.541 of 1982 nor in First Appeal No.23 of 1984 and she had no knowledge about the suit or appeal. Khadiza and the Managing Director of Nirman filed Civil Petition for Leave to Appeal (CPLA) No.195 of 1993 before the Appellate Division against the judgment and decree of First Appeal, but it was rejected as not being pressed. Thereafter, Khadiza filed the suit. In the plaint, it was further stated that according to the decree of First Appeal No.23 of 1984, Waziuddin was to deposit the balance consideration money within ninety days from the date of judgment and decree failing which the suit would stand dismissed. Waziuddin deposited the balance consideration money on 12.02.1992 by Challan No.24047, which was beyond the period of ninety days and, as such, the said suit stood dismissed but the execution case was filed on the basis of an inoperative decree and Khadiza was dispossessed from the suit property illegally.This suit on transferred to the trial court and was renumbered as Title Suit No.224 of 1997.

**Title Suit No.112 of 1984**
**Plaintiffs-Salauddin and Mobarak's case**

10. Plaintiffs Salauddin and Mobarak also filed Title Suit No.436 of 1982 before the 3rd Court of Subordinate Judge, Dhakafor specific performance of contract against Raisa, relating to the suit property. The suit was transferred to the 1st Court of Subordinate Judge, Dhakai.e. the trial court and renumbered as Title Suit No.112 of 1984. They claimed specific performance of contract relating the suit property on the basis of an agreement of sale dated 04.05.1979 with Raisa.

**Written statement case of defendant No.1 Md. Waziuddin in Title Suit No.224 of 1997**

11. It needs be mentioned that previously in the year 1997, one Waziuddin filed Title Suit No.541 of 1982 before the Subordinate Judge, Dhaka for specific performance of contract against Raisa on the basis of an oral agreement for sale of the suit property. The said suit was dismissed. Then Waziuddin filed First Appeal No.23 of 1984 before the High Court Division and the said appeal was allowed and the suit was decreed. Thereafter, Waziuddin got the sale deed registered through Court on 30.11.1992 and in execution of the said decree got possession of the suit property. Whereupon, Khadiza filed CPLA No.195 of 1993 before this Division against the said judgment and decree but it was dismissed as not pressed by

Khadiza. Subsequently, Khadiza, as plaintiff, filed TS No. 224 of 1997 challenging the said judgment and decree of Waziuddin as discussed hereinbefore.

**Written statement case of Raisa**
**(defendant No.1 in T.S. No. 483 of 1974)**

12. Raisa filed written statement on 10.08.1976 denying all the allegations made in the plaint of Title Suit No.483 of 1974 and stating that she was not acquainted with Jamila and she did not enter into any agreement for sale with Jamila and that Jamila filed the suit with forged and created Bainapatra/agreement for sale and so, the suit is liable to be dismissed. However, Raisa eventually did not contest the suit.

**Written statement case of Syed Badiur Rahman**
**(defendant No.6 in T.S. No.483 of 1974)**

13. Defendant No.6 Badiur also filed a written statement and an additional written statement denying the plaint caseand stating that Raisa left the suit property under lock and key in the wake of liberation war of Bangladesh and in her absence some miscreants took over possession thereof. The Government erroneously included the suit property in the list of abandoned property. However, on Raisa's application, the Government released the suit property on 12.01.1982 and handed over possession thereof to her. Then Raisa transferred the suit property to Badiur by a registered deed of sale dated 15.01.1982 in pursuance of an agreement dated 11.09.1969 and made over possession to him. He got his name mutated and then sold it to Khadiza for a sum of Tk.10,00,000/- by a registered deed of sale dated 04.09.1984 and delivered possession to Khadiza.

**Written statement case of**
**Defendant Government in the suits**

14. The Government as defendant of Title Suit Nos. 483 of 1974, 112 of 1984, 113 of 1984, and 66 of 1990 contested the suits by filing separate written statements denying all material allegations made in the plaints of the aforesaid suits. However, the Government admitted part of plaint case of Title Suit No.224 of 1997 filed by Khadiza. In the written statements the Government stated,inter alia, that original owner and possessor of the suit property was Norendra Mohan Sen by virtue of a long term lease granted by the then Secretary of the State for India Council through registered deed dated 24.04.1924. While Remendra Sen was in physical possession of the suit property, he transferred his lease-hold interest to Aswimi Kumar Bhowmik, who subsequently transferred the same to Raisa by Deed No.8497 dated 11.12.1957. Raisa being a non-bengali Urdu speaking person abandoned the suit property during liberation war. She was not traceable after liberation. So, the suit property was legally declared as abandoned property and some persons including the plaintiffs of the suits were trying to grab the suit property by creating forged bainapatra, deeds, etc.

15. However, mysteriously the Government subsequently changed its stand, released the suit property from the list of abandoned property allegedly on an application filed by Raisa. Thereafter, Raisa allegedly transferred her lease-hold interest to Badiur by registered deed No. 1204 dated 15.01.1982. While Badiur had been exercising his right to and possession in the suit property as lessee under the Deputy Commissioner, Dhaka, he transferred his lease-hold interest of the suit property to Khadiza through deed No. 368 dated 04.09.1984. Khadiza

got the lease renewed from the Government on 03.07.1985 in continuity for a further period of 30 years as provided under section 170 of the Government Estate Manual, 1958. The suit property is the Khas Mohal Property of the Government. The transferees acquire only lease hold interest in the suit property subject to the terms of the renewal deeds, both Badiur and Khadiza mutated their names in the record of right maintained by the Revenue Department and she has been possessing the suit property as a lessee under the Government. Khadiza became a recognized lessee under the Government through Misc. Case No. 48 of 1984. The suit property is being administered by the Dhaka Collectorate. The documents like bainapatra or otherwise must be false, fabricated and inoperative and are not binding upon the Government in anyway. The decree, if any, must have been obtained by practicing fraud.

**Issues, trial and decisions in Title Suit Nos.483 of 1974, 112 of 1984, 113 of 1984, 66 of 1990 and 224 of 1997.**

**Issues**

16. The following issues were framed by the trial courts together for deciding the merit of Title Suit Nos.483 of 1974, 112 of 1984, 113 of 1984, 66 of 1990 and 224 of 1997, as the suits were being tried analogously.

17. **বিচার্য বিষয় সমূহঃ**

১) দেওয়ানী ৪৮৩/৭৪, দেওয়ানী ১১২/৮৪, দেওয়ানী ১১৩/৮৪, দেওয়ানী ২২৪/৯৭, ও দেওয়ানী ৬৬/৯০ নং মামলা গুলো বর্তমান আকারে ও প্রকারে চলিতে পারে কি?

২) নালিশী সম্পত্তি বাবদে মিসেস জামিলা খাতুন চুক্তি প্রবলের ডিক্রী এবং মিসেস খাদিজা ইসলাম ও ভূমি মন্ত্রণালয়ের সচিবের মধ্যে ০৩/০৭/৮৫ ইং তারিখের সম্পাদিত ও ১১/১০/৮৬ ইং তারিখের ১৪৫৯৫ নং লীজ দলিল বেআইনী ভাবে করা হইয়াছে কি?

৩) রাইসা আজিজ কর্তৃক সৈয়দ বদিউর রহমান ( বর্তমানে মৃত) এর সম্পাদিত ও রেজিষ্ট্রিকৃত ১৫/০১/৮২ ইং তারিখের ১২০৮ নং দলিলটি বে-আইনী ও যোগযোগী ভাবে সৃজিত করা হয় কি?

৪) সৈয়দ বদিউর রহমান কর্তৃক (বর্তমানে মৃত) আজিজুল ইসলামের অনুকূলে রেজিস্ট্রিকৃত ১৪৮৭ নং বায়না পত্রটি যোগাযোগ ও তঞ্চকতামূলে সৃজন করা হইয়াছে কি?

৫) ৩০/১১/৯২ ইং তারিখের ৪৭২২ নং দলিলটি ওয়াজ উদ্দিন কর্তৃক যোগাযোগীভাবে সম্পাদন ও রেজিস্ট্রি করা হইয়াছে কি?

৬) অত্র মোকদ্দমায় প্রার্থীত মতে ডিক্রী পাইতে পারে কি?"

**Recording of evidence**

18. The plaintiff of Title Suit Nos.483 of 1974 and 66 of 1990-cum-defendants of some other suits examined five witnesses in support of her case and they were cross-examined by the various defendants- cum-plaintiffs of some other suits. The defendants-cum-plaintiffs of some other suits examined totally fifteen witnesses in support of their respective cases, who were cross-examined by the contesting parties. The witnesses also produced some documents and those were marked as exhibits by the trial Court.

**Decision of the trial Court**

19. The trial Court on examination of the evidence on record by the common judgment and decree/order dated 18.08.2009 dismissed in Title Suit Nos.483 of 1974, 112 of 1984, 113 of 1984, 224 of 1997 and 66 of 1990 on contest against the contesting defendants and ex-parte against the rest.

**First Appeals**

20. Jamila filed Title Appeal Nos.454 of 2009 and 455 of 2009 before the High Court Division. The said appeals on transfer were re-numbered as Transfer Appeal(T.A) Nos.09 of 2004 and 10 of 2004.

21. On the other hand, Salauddin and Mobarak filed First Appeal No.167 of 2010 before the High Court Division. Noor Mohammad Khan filed First Appeal No.74 of 2010 and on transfer it was re-numbered as T.A. No.07 of 2014.

22. Khadiza filed First Appeal No.398 of 2009 and Waziuddin filed First Appeal No.488 of 2009 and on transfer the appeal of Khadiza was re-numbered as T.A. No.08 of 2014 and the appeal filed by Waziuddin was re-numbered as T.A. No.11 of 2014.

**Decision of the High Court Division in appeals**

23. The High Court Division, upon hearing all the appeals together, by a common judgment and decree/order dated 24th August, 2015 decided the appeals as under:

"In the result, the F.A. No.167 of 2010, T.A. No.7 of 2014, T.A. No.9 of 2014, T.A. No.10 of 2014 and T.A. No.11 of 2014 are dismissed without any order as to costs. The Transfer Appeal No.6 of 2014 arising out of Title Suit No.224 of 1997 is hereby allowed and the Title Suit No.224 of 1997 is decreed. The impugned Judgment and decree so far as it relates to Title Suit No.224 of 1997 is set-aside. The appellant of T.A. No.11 of 2014 is directed to handover vacant possession of the suit property in favour of Khadiza Islam, appellant of T.A. No.8 of 2014 within 6(six) months from the date of receipt of this judgment, in default, the appellant T.A. No.8 of 2014 is at liberty to get possession of the same through process of law."

**Civil Petition for Leave to Appeals**

24. Feeling aggrieved-

Jamila filed CPLA No.1846 of 2016 before this Division, against the disallowance of her Transfer Appeal No.10 of 2014 by theHigh Court Division, for granting leave to appeal and leave was granted by this Division, which resulted in Civil Appeal No.30 of 2017.Jamila also filed CPLA No.4232 of 2018 against the dismissal of Transfer Appeal No.9 of 2014.

25. The heirs of Noor Mohammad filed CPLA No.1119 of 2016 before this Division against disallowance of Transfer Appeal No.07 of 2014 by theHigh Court Division and leave was granted by this Division. This resulted in Civil Appeal No.31 of 2017.The heirs of Noor Mohammad also filed CPLA No.2557 of 2016 before this Division against the judgment and decree, allowing Transfer Appeal No.08 of 2014 by the High Court Division, for granting leave to appeal. Leave was also granted in this CPLA which resulted in Civil Appeal No.32 of 2017.

26. However, Salahuddin and Mobarak did not take any further steps by filing CPLA after disallowance/dismissal of their F.A.No.167 of 1984. Similarly, Waziuddin did not take any further steps by filing CPLA after the High Court Division allowed T.A. No. 08 of 2014 of Khadiza and dismissedT.A. No.11 of 2014 filed by Waziuddin.

**Grounds for granting leave by this Division in CPLA Nos.1119 of 2016, 1846 of 2016 and 2557 of 2016.**

27.

(I) Because, the High Court Division has committed a manifest error of law in not considering the evidences and materials on record adduced from the side of the plaintiff in Title Suit No.113 of 1984 and also judgment of the trial Court, particularly when the trial Court itself failed to consider those evidence and materials on record while dismissing the aforesaid Title Suit No.113 of 1984 and, as such, the impugned judgment and decree warrants interference by this court and therefore, the impugned judgment and decree is liable to be set aside.

(II) Because, the High Court Division as a last Court of facts misdirected itself in dismissing Transfer Appeal No.7 of 2014 by not taking into consideration the main point at issue involved in a suit for specific performance of contract such as whether or not the contract of sale between the parties was a genuine one or not and, as such, the impugned judgment and decree is liable to be set-aside.

(III) Because, both the courts below fell into an error of law by not considering that a contract for sale subject to subsequent registration of a deed of sale in respect of the property involved and that the transferor is debarred from enforcing any subsequent transfer in favour of a third-party and, as such, the impugned judgment and decree is liable to be set-aside.

(IV) Because, the High Court Division misdirected itself in law in decreeing the respondent's Title Suit No. 224 of 1997 without considering the petitioners' case that the plaintiff-respondent purchased the schedule suit land with prior notice of the contract for sale (bainapatra) dated 23.04.1969, exhibit-B, executed by defendant No.1, the original owner of the schedule suit land in favour of the petitioners' predecessor, namely, Noor Mohammad Khan, the original plaintiff and, as such, the impugned judgment and decree is liable to be set-aside."

**Arguments on behalf of the contending parties**

**Arguments for Jamila Khatun**

**Appellant of Civil Appeal No.30 of 2017 and Petitioner of CPLA No.4232 of 2018**
**(Plaintiff of Title Suit Nos.483 of 1974 and 66 of 1990 and defendants of other suits)**

28. Mr. M. I. Farooqui, the learned Advocate for the appellant of Civil Appeal No.30 of 2017 takes us through the judgments and decree of the trial court, the first appellate court, the connected materials on record and submits as under:

i) Jamila Khatun examined several witnesses to prove her case for specific performance of contract as well as cancellation of the deed of transfer infavour of Khadiza and lease renewal document in Khadiza's favour. She also produced the original bainapatra which is a document of more than 30 years old and submitted before the court from the custody of the proper person claiming the suit property. The witnesses of Jamila proved the case of execution of bainapatra by Raisa, admitted lease holder. The bainapatra was also proved through Ashfaq Ahmed (husband of Jamila) and other three witnesses.

ii) Raisa subsequently accepted consideration money for the suit property on various occassions and those money receipts were also proved by Jamila by producing money receipts with revenue stamps.

iii) After receiving most of the considering price upon executing bainapatra Raisa was infact merely a trusty of Jamila under sections 91 and 99 of the Trust Act and therefore, there was no scope for selling the suit property to any one by Raisa.But the trial court as well as the High Court Division (1st Appellate Court) without considering the said facts and circumstances unlawfully dismissed the suits as well as the appeals of Jamila.

iv) Raisa never sold the property to Badiur and the document of alleged sale by Raisa was a forged document and that is why Khadiza did not produce the original deed of such sale to Badiur by Raisa. Khadiza claimed that all the original documents were/are lying with

her but she did not produce the most vital document of alleged sale by Raisa to Badiur as it was a forged document. The trial court legally dismissed the suit of Khadiza but the High Court Division allowed the appeal of Khadiza and decreed the suit infavour of Khadiza unlawfully without considering that the original deed of alleged transfer of the suit property by Raisa infavour of Badiur was not produced before the courts below.

v) In the facts, circumstances and evidence on record, Jamila's suits ought to have been decreed,but the trial court dismissed the suits. The High Court Division erroneously dismissed the appeals of Jamila and allowed the appeal of Khadiza and decreed the suit filed by Khadiza illegally.Therefore, the civil appeal and CPLA of Jamila are liable to be allowed, decreeing the suit for specific performance of contract in favour of Jamila and cancelling of documents infavour of Khadiza by setting aside the judgment and decree of the High Court Division in Transfer Appeal No.8 of 2014.

In support of his submissions, Mr. Farooqui has relied on the decisions of the following cases:

a) Lal Miah (Hajee) Vs. Nurul Amin and others reported in 57 DLR (AD) 64,

b) Joynab Begum and others Vs. Shaheb Ali Akunji and others reported in 12 MLR (AD) 337 and 60 DLR (AD) 14.

c) Md. Akbar & another Vs. Md. Aslam & another reported in 22 DLR (SC) 146.

**Arguments for the heirs of**
**Noor Mohammad Khan**
**Appellant of Civil Appeal No.31 of 2017**
**(Plaintiff of Title Suit No.364 of 1982 renumbered as Title Suit No.113 of 1984 and defendants of other suits)**

29. Mr. Nozrul Islam Chowdhury, the learned Senior Advocate for the heirs of Khan in Civil Appeal No.31 of 2017 takes us through the original bainapatra dated 23.07.1969allegedly executed by Raisa infavour of Khan, legal notice dated 21.01.1977 allegedly issued by Raisa to Khan through her learned Advocate cancelling Bainapatra dated 23.07.1969, the agreementdated 01-05-77 i.e. the alleged Novation deed between Raisa and Khan, the other evidence on record and put forward the following arguments before us:

1) The bainapatra dated 23.07.1969, the legal notice dated 21.01.77 sent by Raisa to Khan cancelling bainapatra and the new agreement for sale i.e. novation deed dated 01.05.1977 and the money receipts clearly show that Raisa had entered into an agreement to sell the suit property in favour of Khan and she also received various amounts of money from Raisa on difference dates by issuing money receipts.

2) Raisa admitted in her legal notice (Exhit-1) about the execution of bainapatra dated 23.07.1969 and subsequently, Raisa also executed a fresh agreement of Novation dated 01.05.1977 infavour of Khan.

3) All the documents produced by Khan's heirs clearly proved that Raisa entered into an agreement of sale with Khan on 23.07.1969 long before liberation war. Therefore, their case is genuine.

4) Khadiza, Badiur, Jamila and others created some fraudulent bainapatra/deed of sale, etc. after liberation with the knowledge about original agreement between Khan and Raisa.

5) Khadiza did not produce the original document of alleged sale to Badiur by Raisa as it was a forged document. Moreover, Badiur himself was a witness of the agreements of Raisa with Khan.

6) Badiur subsequently, created a forged deed after release of the suit property from the list of abandoned property with the money of Khan and then he illegally transferred it infavour of Khadiza and Khadiza knowingfully well that the bainapatra as well as transfer

deed between Raisa and Badiur dated 23.07.69 and 01.05.77 are both forged documentscreated transfer document from Badiur.

7) Badiur neither acquired any lease hold right nor possession to the suit property from Raisa as she never transferred it to him. Therefore, Khadiza had not acquired any lease hold right to the suit property by her alleged purchase of leasehold right from Badiur.

8) The trial court considering all the facts dismissed the suit of Khadiza but the appellate court without considering the material evidence on record erroneously allowed the appeal filed by Khadiza and decreed the suit in her favour. Therefore, the judgment and decree allowing Transfer Appeal No.8 of 2014 and decreeing Title Suit No.224 of 1997 areliable to be set aside and the judgment and decree of dismissal by the trial court of the suit is liable to be restored.

9) Khan's heir proved the agreement of sale by Raisa with Khan by a series of documents marked as exhibits by the trial court since the year 1969, long before liberation and by examining witnesses. So, suit filed by Khan (Title Suit No.113 of 1984) is liable to be decreed in their favour.

**Arguments for the heirs of**
**Noor Mohammad Khan**
**Appellant of Civil Appeal No.32 of 2017**
**(Plaintiff of Title Suit No.364 of 1982 renumbered as Title Suit No.113 of 1984 and defendants of other suits)**

30. Mr. A. J. Mohammad Ali, the learned Senior Advocate for the heirs of Khan in Civil Appeal No. 32 of 2017 adapts the arguments of Mr. Nozrul Islam Chowdhury and adds that Nuru Miah as a witness of the novation dated 01.05.1977 proved deed of novation executed by Raisa apart from other witnesses. Khan also filed Title Suit No. 364 of 1982 on 20.07.1982, it was renumbered Title Suit No. 113 of 1984. Therefore, the suit was also filed by Khan long before the alleged purchase of the property by Khadiza. He next submits that Khan's heirs are entitled to have a decree for specific performance of contract as all other claimants to the suit property are bound by the contract, which was executed earlier on 23.07.1969, under section 27B of the Specific Relief Act. Therefore, Civil Appeal No. 32 of 2017 is liable to be allowed and the suit filed by Khadiza is liable to be dismissed by setting aside the judgment and decree passed by the High Court Division in Transfer Appeal No. 8 of 2014.

31. In support of the contentions, Mr. A. J. Mohammad Ali has relied on the decisions in the cases of- (a) I.C.I (Bangladesh) Limited Vs. M/s. G. K. Brothers reported in 36 DLR (HC) 114 (b) Ezaher Meah and others Vs. Shaher Banu and others reported in 2 BLC (AD) 30 and (c)Lal Miah(Hajee) Vs. Nurul Amin and othersreported in 57 DLR (AD) 64.

**Arguments on behalf of respondent Khadiza**
**in Civil Appeal Nos.30-32 of 2017**
**(Plaintiff of Title Suit No.224 of 1997, original Title Suit No.75 of 1996 and defendants of other suits)**

32. Mr. A.M. Aminuddin, the learned Senior Advocate for Khadiza takes us through the copy of the deed of transfer by Badiur infavour of Khadiza, renewal of lease by Government infavour of Khazida and the other documents filed by her and contends as under:

1) Admittedly, Raisa had lease-hold right to the suit property through registered document dated 11.12.1957. Raisa, being non-bengali left suit property immediately after liberation by keeping it under lock and key and some miscreants took over possession of it.

2) The suit property was then declared as abandoned property.

3) Raisa filed an application for its release and got the suit property released in her favour on 15.01.1982. Raisa then transferred the suit property to Badiur. Thereafter, Badiur transferred the suit property to Khadiza in 1984. Then Khadiza extended the lease from Government for another 30 years by paying taka one lac.

4) Khadiza had been in possession of the suit property by using it as a storage for building construction materials of her company 'Nirman' till she was dispossessed on 05.05.1993 in Execution Case No.6 of 1992, arising out of judgment and decree in First Appeal No.23 of 1984.

5) Khadiza was never a party to the suit, appeal or execution case and she had no knowledge about the suit, appeal or execution case and after her knowledge she filed the suit.

6) The trial court erroneously dismissed the suit but the High Court Division in consideration of the evidence on record allowed T.A. No.08 of 2014 in favour of Khadiza and decreed the suit legally.

7) The bainapatra and other documentsof Khan, Jamila, Wajiuddin, Mobarak and others are all forged documents. Therefore, dismissal of the suits and appeals filed by those persons are legal and Civil Appeal Nos.31-32 and CPLA No.4232 of 2018 are all liable to be dismissed.

**Arguments on behalf of the Government:**

33. Mr. Murad Reza, the learned Additional Attorney General with the leave of the Court appearing on behalf of the Government in all the appeals and the CPLA takes us through the materials on record, specially the original record/file of abandoned property authority since middle of the year1977, and submits as under:

1) It is clear from the record of abandoned property authority that once the prayer for releasing the suit property by alleged Raisa Aziz Begum was rejected by the Government, considering all the facts and circumstances of the case. The original file relating to the suit propertyfrom the beginning of 1972 up to part of 1977 was not traceable and missing.

2) Subsequently, most curiously the then Chief Election Commissioner issued a letter in favour of Raisa Aziz Begum certifying that he knew her. Whereupon, abandoned property authority with reference to the said letter again considered alleged Raisa's case and eventually released the suit property from the list of abandoned properties. However, immediately after such release order,there is a note in the relevant file showing that the release of the suit property from the list of abandoned property should be immediately stopped.

3) Many documents in connection with this case were also seized by CID and now they are not traceable. Similarly, it is noted in the file that original file were sent to the then learned Government Pleader, but the said original file was not traceable and the learned Government Pleader denied to have received any such file.

4) The original alleged deed of sale by Raisa to Badiur was neither produced before the abandoned property authority/Dhaka collectorate i.e. Khas Mohal property management authority nor in the Court by Khadiza in support of her case. She has not also filed the said most important document in any other court or Government authority. This clearly proves that Raisa did not sale/transfer her lease-hold right to the suit property to Badiur or anyone else.

5) From the record of the abandoned property authority, it is crystal clear that the suit property was rightly included in the list of abandoned property, but unfortunately in connivance with some dishonest Government Officials a valuable property of the Government was unlawfully released from the list of abandoned property authority. There is

no evidence on record to prove that Raisa was in Bangladesh after liberation. Everything was done through a fictitious person.

6) Even if the suit property is released from the list of abandoned property, the suit property is a Government khas mohal property. Khadiza could not produce the original documents of alleged sale by Raisa to Badiur and, therefore, she was not entitled to extend the leasehold right as Raisa never transferred the property to Badiur.

7) As the original deed of purchase by Badiur could not be produced, Khadiza miserably failed to prove her title to or leasehold right to the suit property. Therefore, the subsequent extension of lease by Khadiza is exfacie collusive, illegal and void.

8) Waziuddin also obtained a decree in F.A. No.283 of 1983 for specific performance of contract by forged document. So, the said decree ought to be set-aside and his registered deed is liable to be cancelled.

9) All the suits including that of Khadiza are fictitious suits filed through some forged documents and therefore, all the suits were legally dismissed by the trial court on examining the evidence on record and all the appeals are legally dismissed by the High Court Division except the appealfiled by Khadiza. The appeal filed by Khadiza ought to have been dismissed as she failed to prove her case but the High Court Division without properly examining the evidence on record erroneously allowed Khadiza's appeal and decreed the suit. Thus, Civil Appeal No.32 of 2017 and CPLA 4232 of 2018 are liable to be allowed to the extent of Khadiza's decree in appeal for khas possession and the judgment and decree passed by the trial Court dismissing all the suitsincluding that of Waziuddinis/are liable to be restored.Civil Appeal Nos.30 and 31 of 2017 are liable to be dismissed.

10) The matters/appeals/civil petition are of exceptional in nature as a deed for lease extension was obtained by Khadiza through forged documents and several influencial parties are fighting for grabbing the valuable Government property i.e. suit property and one of them i.e. Khadiza almost succeeded to do soin collusion with the Government Officials. Thus in these matters, the Court's power under article 104 of the Constitution needs to exercised for doing complete justice to protect a Government property, otherwise other land/property grabbers would be encouraged to do so.

**Examination of records:**

34. We have examined the leave granting order, the judgment and decree passed in the various suits, in the appeals, the CPLAs of the respective parties and carefully examined the evidence on record including the documents marked as exhibits by the trial court and the testimonies of the witnesses. We have also carefully studied the file of Abandoned Property Authority, produced before us as per our direction.

**Admitted facts:**

35. The suit property is the khas Mohal property of the Government vide plaint and the schedule of the plaint of Title Suit No.112 of 1984 filed by Khadiza. Norendra Mohan Sen (Norendra) was a long term lessee under the Government by virtue of a long term lease granted by the then Secretary of State of India Council through a registered deed. Norendra transferred his leasehold right to Aswini Kumar Bhowmik(Aswini) and Aswini transferred his leasehold right to Raisa by a registered deeddated 11.12.1957 vide judgments of the trial Court and the High Court Division, testimonies of D.W.1 and other witnesses and the materials on record. Khan's heirs claim that Norendra was the owner of the suit property and he transferred it Aswini by a registered deed. Aswini then transferred the suit property to Raisa by a registered deed dated 11.12.1957. However, during their arguments before us, the learned Senior Advocates/ Advocates for all the contending parties admitted that the suit property is the Khas Mohal property of the Government and Raisa was a long term lessee

under the Government. The suit property bearing Holding No.10 is situated at Purana Paltan, Dhaka i.e. at the heart of Capital and is a valuable property. All the plaintiffs of respective suits claimed the suit property through Raisa. Raisa was a non-bengali. So, immediately before liberation of Bangladesh, Raisa left the suit property. Whereupon, the suit property was declared as an abandoned property and was enlisted in the list of abandoned properties. The suit property being enlisted as an abandoned property was included in the 'ka' list of the abandoned properties published in the Gazette Notification. But subsequently it was dropped from the list of abandoned properties by another Gazette Notification. It was released on prayer of a person allegedly claiming herself to be Raisa, the leaseholder of the suit property.

**Deliberation of the Court:**

36. At the beginning, we would like to discuss the merit of the case of Khadiza, as allowing of her appeal is challenged by the heir of Khan in Civil Appeal No.32 of 2017 and by Jamila in CPLA No.4232 of 2018.

37. The learned Additional Attorney General in his arguments strenuously argued that the suit property is an abandoned property and Raisa never executed any bainapatra or deed of transfer in favour of Badiur and that those are forged documents but the Government Officials in collusion with Badiur and Khadiza excluded this valuable property from the list of abandoned property.

38. Khadiza filed a suit for declaration of her 16 annas title to the suit property, recovery of khas possession, perpetual injunction and some other relief. Therefore, we would first examine how far Khadiza has been able to prove her title to the suit property.

39. For this purpose, we would first study the abandoned property record/file relating to the suit property, which has been submitted by the concerned authority as per order of this Court.

40. Some of the notes of this file are quite mysterious and so, we would like to quote those relevant notes hereinafter:

"**দরখাস্ত তাং- ১৩-৭-৭৭ হইতে আঃ রহিম খান,**
**দরখাস্ত তাং- ১৩-৭-৭৭ হইতে নুর হোসেন খান,**
**দরখাস্ত তাং- ১৩-৭-৭৭ হইতে আরফান উদ্দীন আহমদ**
১। আলোচ্য পত্র গুলি দেখা যাইতে পারে । মূল নথি ১০/১১/৭৬ তারিখে কনফতর দনরর প্রেরণ করা হইয়াছিল। এখন পর্য্যন্ত ফেরত পাওয়া যায় নাই। কনফতর দনরর নথিটি ফেরত দেওয়ার জন্য তাগিদ দেওয়া যাইতে পারে।
আবেদনকারীগণ ভাড়া দিয়াছেন কিনা জানা যায় না। ভাড়া পরিশোধের চালান কপি দাখিল করিতে নির্দেশ দিতে পারি।
খসড়া জারী করা যাইতে পারে।
স্বাঃ দুষ্পাঠ্য
১৮/৭/৭৭
বিলি নং- ৬২৬(২) তাং- ২৮-৭-৭৭
দরখাস্ত তাং- ২০-৭-৭৭ হইতে আরফান উদ্দীন
দরখাস্ত তাং- ২০-৭-৭৭ হইতে আঃ রহিম খান
দরখাস্ত তাং- ২০-৭-৭৭ হইতে নুর হোসেন খান
২। আলোচ্যপত্রগুলি দেখা যাইতে পারে। ভাড়া দেওয়ার জন্য নির্দেশ দেওয়া যাইতে পারে।
খসড়া জারী করা যাইতে পারে।
স্বাঃ দুষ্পাঠ্য
৬/৮/৭৭
পত্র তাং- ২০-৮-৭৭ হইতে নুর হোসেন খান,
পত্র তাং- ২৩-৮-৭৭ হইতে আঃ রহিম খান

পত্র তাং- ২৩-৮-৭৭ হইতে আরফান উদ্দীন

৩। আলোচ্য পত্রটি দেখা যাইতে পারে।

১০ নম্বর পুরানাপল্টনস্থ পরিত্যক্ত বাড়ীটিতে পুরাতন ভাড়াটিয়া হিসাবে ডিমান্ড নোটিশ পাইয়া জনাব নূর হোসেন, আবদুর রহিম খান এবং আরফান উদ্দিন আহমেদ ভিন্ন ভিন্ন দোকানে ব্যবসা চালাইতেছেন। ডিমান্ড নোটিশ মোতাবেক দেখা যায় মাসিক ৯০/- টাকা হিসাবে ১/১/৭২ হইতে টাকা জমা দেওয়ার নির্দেশ দেওয়া হয় পত্রাংশ ৫,৩৩ ও ৭ পৃঃ)। তাহারা ৩১/৭/৭৭ তারিখ পর্য্যন্ত নির্ধারিত হারে ভাড়া পরিশোধ করিয়াছেন (পত্রাংশ ২৪ ,২৯ ও ৩৬পৃঃ)। পুরাতন ভাড়াটিয়া হিসাবে তাহারা প্রত্যেকেই পুর্বত পুরাতন ভাড়াটিয়া রশিদ দাখিল করিয়াছেন (পত্রাংশ ১৬, ১৫, ১২ ও ১১ পৃঃ) প্রয়োজন বোধে আরো ভাড়াটিয়া রশিদ চাওয়া যাইতে পারে।

এমতাবস্থায় পুরাতন ভাড়াটিয়া হিসাবে তাহাদের **বরাদ্দ**দেওয়ার ব্যাপারে বিবেচনা করা যায় কিনা সদয় আদেশের জন্য পেশ করা হইল।

স্বাঃদুস্পাঠ্য

৭/১০/৭৭

৪। উপ সচিবের সহিত আলোচনা হইয়াছে খসড়া জারী করা যাইতে পারে।

স্বাঃ দুস্পাঠ্য

১৭/১০/৭৭

জারী নং ৯৩৬ তাং-১৮/১০/৭৭

৫। ১০ এ নম্বর পুরানাপল্টনে পুরাতন ভাড়াটিয়া হিসাবে ডিমান্ড নোটিশ পাইয়া জনাব নূর হোসেন, আবদুর রহিম খান এবং আরফান উদ্দিন আহম্মদ ভিন্ন ভিন্ন দোকানে ব্যবসা করিতেছেন। পুরাতন ভাড়াটিয়া হিসাবে ভাড়ার রশিদ দাখিল করিয়াছেন। (পত্রাংশ ১১, ১২ ও ১৫ ও ১৬) ডিমান্ড নোটিশ মোতাবেক মাসিক ৯০/- টাকা হিসাবে ১/১/৭২ হইতে টাকা জমা দেওয়ার জন্য নির্দেশ দেওয়া হয় (পত্রাংশ ৫, ৭, ২২ ও ৩৩ পৃঃ)। তাহারা ৩১/১২/৭৭ পর্য্যন্ত ভাড়া পরিশোধ করিয়াছেন। (পত্রাংশ ৩৯ হইতে ৪০ পৃঃ)।

তাহারা **বরাদ্দ** চাহিয়া আবেদন করিয়াছেন (পত্রাংশ ৩২ পৃঃ)। তাহাদের আবেদন বিবেচনা করা যায় কিনা। সদয় আদেশের জন্য পেশ করা হইল।

স্বাঃদুস্পাঠ্য

২৩/১২/৭৭

৬। How can it be determined if they are old tenants or not without the original file ? The file from L.C. may be brought such for the purpose.

s/d- illegible

26.12.77

Legal cell কে মূলনথি ফেরত দিতে অনুরোধ করা হইতেছে।

স্বাঃ দুস্পাঠ্য

৩১/১২/৭৭

৭। নথি নং ১ই -৫২/৭২ অংশ হোল্ডিং নং ১০/এ, পুরানা পল্টনস্থ নথি খানা গত ২২/১২/৭৬ তারিখে সরকারী উকিল সাহেবের নিকট পাঠানো হইয়াছিল । উক্ত নথি খানা অদ্যাবধী ফেরত আসে নাই। সদয় বিবেচনার জন্য পেশ করা হইল। জানানো হউক।

ট.অ.কার্যক্রম নিন ।

স্বাঃ দুস্পাঠ্য

৯.২.৭৮

৮। তদন্ত রিপোর্টের জন্য নির্বাহী প্রকৌশলী এপি বিভাগ এর নিকট লেখা যাইতে পারে।

খসড়া জারী করা যাইতে পারে।

স্বাঃ দুস্পাঠ্য

১১.২.৭৮

বিলি নং- ১৬৬ তাং- ১৩-২-৭৮ (পৃ ৪৫)

৯। Pl. send an urgent requisition to the G.P. Dacca to send the file lese. Put up with it on 25.3.78. who had asked to call for a report on 10, where the file is on 10/A PP? will he clarify please?

স্বাঃ দুস্পাঠ্য

১৭.৩.৭৮

১০। Be the drafted letter issued at once to G.P. The draft for the letter at page 45 was ready put up by the former S.A. that in his writing is not available now. Whether the

typist made any mistake or the Asstt. through inadvertence or otherwise, cannot be determined now D.S. may see this with reference to his query dt. 17.03.1978
স্বাঃ দুষ্পাঠ্য
১৭.৩.৭৮
বিলি নং- ৩৫২ তাং ২১-৩-৭৮ ( পৃঃ ৪৬)
11.Pl. issue reminder to G.P. to send back the file under mention in our memo at p-46/C. Pl. do not delay.
স্বাঃ দুষ্পাঠ্য
১১/৬
Orders above.
Draft put up below may issue.
স্বাঃদুষ্পাঠ্য
১২/৬/৭৯
Page No. 47 issue.
পত্রাংশ ৪৮ জারি
পত্রাংশ ৪৯ জারি।
১২। অনুচ্ছেদ নং ৭ এ উল্লেখিত নথিটি শাখা প্রধান সাহেবের সম্মুখে বিজ্ঞ জি,পি, সাহেবের অফিসে খোজ করা হইয়াছে । আলোচ্য নথিটি পাওয়া যায় নাই। এমনকি তাহাদের ডায়রীতে উল্লেখিত মামলার কোন প্রকার উল্লেখ পাওয়া যায় নাই। কোর্টে কয়েকবার উল্লেখিত মামলার **বর্তমান পরিস্থিতি জানিতে গেলে কোর্টের সেরেস্তা অফিসের পেশকার মেসবাহ্ সাহেব জানাইয়াছেন যে , উল্লেখিত মামলার রেকর্ড পাওয়া যাচ্ছে না।**
স্বাঃ দুষ্পাঠ্য
২৯/১০/৮১
১৩। শাখা প্রধান(আইন) মহোদয়ের সহিত আলোচনা হইল।
**আইন কোষের সমস্ত রেকর্ড অনুসন্ধান করিয়া নথি রক্ষক জানাইয়াছেন ১০/এ পুরানা পল্টনস্থ বাড়ীর আর কোন নথি আইন কোষে নাই।**
স্বাঃ দুষ্পাঠ্য
৩১/১০/৮১
শাখা প্রঃ(আইন)
১৪। ১০ নং পুরানা পল্টনস্থ বাড়ীটি খারিজ করার জন্য জনাবা রায়সা আজিজ বেগমের আবেদন।
আলোচ্য পত্রটি দেখা যাইতে পারে। জনাবা রায়সা আজিজ ১০ নম্বর পুরানাপল্টনস্থ পরিত্যক্ত মালিকানা দাবী করিয়া আবেদন করেন। মালিকানার স্বপক্ষে দলিল সহ সংশ্লিষ্ট কাগজপত্র এবং পাকিস্থান যাইবার জন্য ইচ্ছা প্রকাশ করেন নাই - এই মর্মে স্বরাষ্ট্র মন্ত্রণালয় হইতে প্রতিবেদন চাওয়া যাইতে পারে।
খসড়া জারী করা যাইতে পারে।
স্বাঃ দুষ্পাঠ্য
৩০/১১/৭৭
বিলি নং- ১১১৮ তাং ৩০-১১-৭৭( পৃঃ৭
পত্র তাং- ১০-৭-৭৮ হইতে Legal cell (পৃঃ ৮
১৫।As desired by the OSD (Legal Cell) the file may be sent to S.O. Law.
S/d- illegible
১৮/৭
বিলি নং- ১৩৭ তাং ১৭-৫-৭৯( পৃঃ-৯
বিলি নং- ১৩৮ তাং ১৭-৫-৭৯( পৃঃ-১০
নং ২১৩ তাং ২২.৫.৭৯ হইতে এ হাকিম( পৃঃ ১১
১৬।বিবেচ্য পত্র দ্রষ্টব্য- আবেদনকারিনীর নিকট একখানা Forwarding letter সহ স্বরাস্ট্র মন্ত্রণালয়ের Form পূরণ করার -খসড়া উপস্থাপন করা যাইতে পারে।
স্বাঃ দুষ্পাঠ্য
২৪/৫/৭৯
১৭।----------
পত্রাংশ ৪২ জারি
পত্রাংশ ৪৩ জারি

No. ১৬৪৬- Im/III(IN-40/780 dt. 4-7-80 from M/O Home Affairs.

১৮।মিসেস রইসা আজিজ ১০ নং পুরানা পল্টন বাড়ীর মালিকানা দাবী করিয়াছেন। দাবীর সমর্থনে তিনি দলিল (তিনখানা), খতিয়ান এবং সদর মহকুমা অফিসার, ঢাকা/ দক্ষিন) **এর নিকট লিখিত ২/৫/৭২ তারিখের পত্রের ফটোস্ট্যাট কপি দাখিল করিয়াছেন।** মন্ত্রণালয় নন অপশন ও নাগরিকত্ব সার্টিফিকেট স্বরাষ্ট্র মন্ত্রণালয় হইতে সংগ্রহ করিয়াছেন। **মিসেস রাইসা আজিজকে ৯/১/৮০ তারিখের স্মারকে মূল দলিল ইত্যাদি দাখিল করিতে বলা হইয়াছে।** কিন্তু ইহার কোন জবাব পাওয়া যায় নাই।দেখা যায় যে, **বাড়ীটি সম্পর্কে একটি মামলাও দায়ের করা আছে। মামলাটির বিস্তারিত বিবরণ নথিতে নাই। বাড়ীটি বর্তমানে কাহার দখলে আছে তাহারও কোন তথ্য নাই।**

এই অবস্থায় মামলা সম্পর্কে অবহিত করার জন্য আইন কোষকে অনুরোধ করা যাইতে পারে। বাড়ীটি সম্পর্কে সরেজমিনে তদন্ত করিয়া একটি রিপোর্ট দেওয়ার জন্য ও জয়েন্ট সার্ভে টিমকে লেখা যাইতে পারে।

স্বাঃ দুস্পাঠ্য

২৪/৭/৮০

১৯।প্রস্তাব মতে কাজ করুন।৯-১-৮০ তারিখের চিঠির তাগিদ দিন এবং মূল দলিল পত্র লইয়া তাঁহার ছবি ও নমুনা স্বাক্ষর সহ ০৭ দিনের মধ্যে মন্ত্রণালয়ে ব্যক্তিগতভাবে উপস্থিত হইতে বলুন। ছবি ও নমুনা স্বাক্ষর একজন প্রথম শ্রেণীর গেজেটেড অফিসার দ্বারা সত্যায়িত হইতে হইবে।

পূর্ব পৃষ্ঠায় ক চিহ্নিত সম্পর্কে অবহিত করার জন্য নথি আইন কোষে পাঠানো গেল।

স্বাঃদুস্পাঠ্য

২৮/৭/৮০

২০ ----------

২১----------

২২----------

২৩----------

২৪। মামলার পরিস্থিতি জানার জন্য নোট করিয়া নেওয়া হলো।

স্বাঃদুস্পাঠ্য

১১/৯/৮০

Application dt.23.09.81 from Raisa Aziz Begum

২৫। পুরানা পল্টনস্থ ১০ নং বাড়ীর উপর মালিকানা দাবী সম্পর্কিত রাইছা আজিজ বেগমের আবেদন ৯৬ পাতায় দেখা যাইতে পারে । তিনি ইতিপূর্বে আবেদন করিলে তাহার নিকট তাহার দাবীর স্বপক্ষে সংশ্লিষ্ট কাগজপত্র ও দলিলাদি মন্ত্রণালয়ে পেশ করার জন্য বলা হয় এবং আবেদনকারিনী পাকিস্ড়ানে যাওয়ার ইচ্ছা প্রকাশ করিয়াছিলেন কিনা এই মর্মে প্রতিবেদন দেওয়ার জন্য স্বরাষ্ট্র মন্ত্রণালয়কে অনুরোধ করা হয়। অত্র মন্ত্রণালয়ের বক্তব্যেও অনুসরণে জনাবা রইছা আজিজ তাহার দাবীর স্বপক্ষে যেসব দলিলপত্র ও কাগজাদি পেশ করেন তাহা ৬৩-৮৭ পাতায় দেখা যাইতে পারে। স্বরাষ্ট্র মন্ত্রণালয় কর্ত্তৃক প্রদত্ত সনদ হইতে দেখা যায় যে তিনি পাকিস্ড়ানে যাওয়ার ইচ্ছা প্রকাশ করেন নাই। জনাবা রাইছা আজিজ যে বরাবরই বাংলদেশী নাগরিক সে মর্মেও স্বরাষ্ট্র মন্ত্রণালয় সনদপত্র জারী করিয়াছেন। অবস্থা দৃষ্টে প্রতিয়মান হয় যে জনাবা রইছা আজিজ বেগমই উক্ত বাড়ীর প্রকৃত মালিক। **বর্ত্তমানে যাহারা উক্ত বাড়ীতে বসবাস করিতেছেন তাহাদেষ বক্তব্যেও রইছা আজিজকে মালিক বলিয়া উলে-খ করিয়াছে।** তবে ইতিপূর্বে বিষয়টি সম্পর্কে কোন সিদ্ধান্ড় নেওয়া হয় নাই। নথি খানা লিগেল সেলে ছিল।

২৬। **অনুচ্ছেদ ৭ হইতে প্রতিয়মান হয় উক্ত বাড়ী সংক্রান্ত আরো একটি ফাইল ছিল এবং টি,এস কেস নং-৪৯৩/৭৪ এর প্রেক্ষিতে ১৯৭৬ সালে সরকারী উকিলের নিকট প্রেরণ করা হয়। এ বিষয়ে আমি ব্যক্তিগতভাবে সরকারী উকিলের সহিত যোগাযোগ করিয়াছি কিন্তু ফাইল এবংউক্ত মামলা সম্পর্কে কোন পাত্তাই পাওয়া যায় নাই। ফাইলটি পাওয়া যাওয়ার পর কোনসম্ভাবনা আছে বলিয়াও মনে হয় না। এপ্রসঙ্গে নোটের ১২ এবং ১৩ অনুচ্ছেদেষ প্রতি সদয় দৃষ্টি আকর্ষণ করা হইল।**উক্ত মামলাটি কি সংক্রান্ত তাহা বুঝা যাইতেছে না। মামলার প্রকৃতি সম্পর্কে অন্তয়ধ হওয়ার পূর্বে মালিকানা দাবী সম্পর্কে কোন সিদ্ধান্ত গ্নণওয়া সমীচীন হইবে বলিয়া মনে হইতেছে না। **বাড়ীর উপর মালিকানা দাবীদারকে মামলা সংক্রান্ত কোন কাগজপত্র থাকিলে তাহা পেশ করার জন্য বলা যাইতে পারে।**

Yes

স্বাক্ষরঃ দুস্পাঠ্য স্বাক্ষরঃ দুস্পাঠ্য

২০/১১/৮১ উপসচিব ২৬/১১/৮১

২৭. ----------

28. Receipt at page 103/C along with its enclosures in response to our memo at page 97/C may kindly be seen. This relates to the claim of ownership on holding No.10, Purana Paltan by Raisa Aziz Begum. In this connection page 96/C and para 25/N & 26/N ante

may also kindly be seen. As for T.S. Case No.483 of 1974 as mentioned under para 26/N ante, this is a case for breach of specific performance of contract. It appears that the owner of the said holding allegedly entered into an agreement with one Mrs. Jamila Khatoon for selling the property in question on 20th January, 1972. **The applicant, Raisa Aziz Begum personally appeared before me and stated that the said case was engineered by said Mrs. Jamila Khatoon Begum to grab her property illegally.**As for this Ministry, we are not any way connected or concerned in the said suit for specific performance of contract as initiated by Mrs. Jamila Khatoon wife of Ashfaque Ahmed. It appears from page 102/C, that the rent of the property is being paid by Mrs. Raisa Aziz Begum as a owner of the property. It appears that rent is cleared up to date. Now the papers submitted by Mrs. Raisa Aziz in support of her ownership as previously indicated under para 25/N ante, we may strike off the property at **10, Purana Paltan from the abandoned list and release the same in favour of its owner, Mrs. Raisa Aziz Begum wife of late Sayed Azizur Rahman.**

S/d illegible

04.12.81

29. Notes above may be perused. **The owner Mrs. Raisa Aziz Begum is a Bangladeshi national (C.P>94)& comes of a respectable Muslim family as certified by the Chief Election Commissioner, vide C.P.95.** The house may be struck off from the list of A.P.

S/d illegible

04.12.81

30. According to the petitioner herself, **her prayer for release was rejected in 1976 (vide memo No.1-E-52/72/296 dt. 20-5-76).**Please put up that file for perusal.

S/d illegible

08.12.81

31. Minutes at para 30/N ante prepage bottom may kindly be seen. The original file as is already indicated under para 26/N ante was sent to the Court in connection with the suit (483/1974) for specific performance of contract. The alleged suit was brought by one Mrs. Jamila Khatoon for breach of contract by Mrs. Raisa Aziz Begum, the claimant of the property at 10, Purana Paltan. **As the original file is missing the memo No.1-E-52/72/296 dt. 20.5.76 is not available in the Ministry now.** It appears that the previous petition was rejected because of the above mentioned suit in which this Ministry is not involved anyway. Further this suit reveals that the applicant **Raisa Aziz Begum is the defecto owner of the property in question.** Being asked by this Ministry the papers submitted by Mrs. Raisa Aziz bear testimony that **she is the original owner of the property at 10, Purana Paltan, Dacca.** Now at this stage in pursuance of Article 16(2) of the P.O.16/72, the property at **10, Purana Paltan, Dacca may be dropped from AP list in favour of Mrs. Raisa Aziz Begum.**

S/d illegible

14.02.81

32. **Let us wait for the original file.**

33. S.O XVI to please put up in file.

34. Receipt at pages 104-109/C received from Raisa Aziz Begum regarding her claim on the property at 10, Purana Paltan may kindly be seen. In this connection preceding notes from 25/N ante detailing the issue may also kindly be perused. As to the observation under para 32/N ante prepage bottom, it is already indicated under paras 12/N and 13/N ante that the original file is neither available in Ministry nor in the office of the CJP. In the office of the CJP extensive search was made in my presence, but the file was not found and there is little possibility of its availability as it is missing since 1974. Now in consideration of the papers made available by Raisa Aziz Begum in support of her right

of claim on the property in question and the exposition made under para 31/N ante, the property at 10, Purana Paltan may be dropped from the AP list.
35. **Why had she delay in filing this papers?**
36. Issue the draft.
37. Minutes at para 35/N ante prepage bottom. In this connection page 110/C and the submission made by Raisa Aziz Begum may kindly be seen at page 112/C. It appears that Mrs. Raisa Aziz Begum has been claiming the title of ownership on the property at 10, Purana Paltan since 1972 and has been pursuing it continuously as it appears from the instant representation. Now in pursuance of the expectation made under para 34/N ante and the Article 16(2) of P.O.16/72, the property at 10, Purana Paltan may be dropped from the AP list.
38. Issue the draft.
S/d. illegible
12.01.82
39. **Please discuss and stay proceedings until we come to a decision**.
40. Pl put up in file immediately.
41. Slip at page 115/C along with the minutes of the HSM on it as transcribed under para 39/N ante may kindly be seen. This relates to the holding No.10, Purana Paltan, Dacca which is dropped from the list of AP in pursuance of Article 16(2) of the P.O. 16/72. In this connection para 37/N ante and preceding paras from 25/N ante may also kindly be seen for discussion of the issue with the Hon'ble State Minister.
42. H.S.M. is no more in office and as such there is no scope for discussion with him.
43. S.O. XII for n.a.

44. Notes from preceding para 41/N ante. It is for kind decision whether eviction as prayed for vide representation at page 121/C should be restored to. Submitted for kind orders.
S/d. illegible
31.03.82

45. What is the name of the occupant & what is his profession? Please give him a notice by name **to vacate the house on or before 5.4.1982 failing which he will be evicted,** with copy to the owner.
S/d. illegible
31.03.82

46. Pl issue the draft.
৪৭। বিবেচ্য পত্র ১২৪-১৫৬ পাতায় এবং ১৫৭-১৬০ পাতায় অনুগ্রহপূর্বক দেখা যাইতে পারে। বিষয়টি ১০ নং পুরানা পল্টনস্থ বাড়ীর দখল সম্পর্কিত। **বাড়ীটি বিগত ১২-১-৮২ তারিখে জনাবা রইসা আজিজের অনুকূলে খারিজ করা হইয়াছে। বাড়ী বসবাস কারীগণের মধ্যে শুধুমাত্র শান্তিনগর ক্লাব ব্যতীত বাকি ৬জন বসবাসকারী মালিককে দখল বুঝাইয়া দিয়াছে বলিয়া জনাবা রইসা আজিজ আবেদনে জানাইয়াছেন। (পত্রাংশ ১২৪ হইতে ১৫৬) শান্তিনগর ক্লাবের দখলীয় অংশ বুঝাইয়া দেওয়ার জন্য ২২-৫-৮২ তাং জনাবা রইসা আজিজ আবেদন করিলে উপদেষ্টা মহোদয় "Can't we help if she is stating the facts?" বলিয়া মন্তব্য করিয়াছেন।**
৪৮।শান্তিনগর ক্লাব, উপদেষ্টা মহোদয়ের নিকট অস্থায়ীভাবে থাকার অনুমতি প্রার্থনা করিলে সমস্ড় বিষয়টি লিখিতভাবে উপদেষ্টা মহোদয়ের দৃষ্টিগোচর করা হয় (পত্রাংশ ১৬০) **শান্তিনগর ক্লাবকে ২৭-২-৭৬ তারিখে ইষ্টেট অফিস হইতে তাহাদের দখলীয় অংশ বরাদ্দ করা হয়**। কিন্ত ভাড়া ধার্য্য কিংবা পরিশোধের কোন প্রমান নথিতে নাই। সরকারী বাসস্থান পরিদপ্তর হইতে কোন সময়ই তাহাদের নিকট হইতে ভাড়া আদায়ের কোন ব্যবস্থা গ্রহন করে নাই। এক্ষনে শান্তিনগর ক্লাবের দখলীয় অংশের ভাড়া নির্ধারণ করিয়া উহা আদায়পূর্বক বাড়ীর মালিককে দখল বুঝাইয়া দেওয়ার জন্য ব্যবস্থা গ্রহন করা যাইতে পারে।
S/d. illegible

১০.০৬.৮২
৪৯।৪৭-৪৮ অনুচ্ছেদ অফিস টোকা দ্রষ্টব্য। শান্ি ড়নগর ক্লাবকে ০৭ দিনের ভিতর দখল ছাড়িয়া দেওয়ার জন্য নোটিশ দেওয়া যাইতে পারে। এর ভিতর দখল না বুঝিয়ে দিলে উচ্ছেদ করা যাইতে পারে। অন্য কোথাও খালি জায়গা/বাড়ী থাকিলে শান্ি ড়নগর ক্লাবের অনুকূলে বরাদ্দ বিবেচনা করা যাইতে পারে।
স্বাঃ দুষ্পাঠ্য
২/১১/১৯৮২

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৫৬। আলোচ্য পত্রাংশ দয়া করিয়া পত্র পাতা ১৬২ দেখা যাইতে পারে । ক্রীড়া ও সংস্কৃতি বিভাগ শান্তিনগর ক্লাবের আবেদনে শান্তিনগর ক্লাবের অনুকুলে বর্তমান ঘরটি পুনঃ বরাদ্দ অথবা অন্য একটি ঘর বরাদ্দের জন্য আন্তঃ মন্ত্রনালয়কে অনুরোধ করিয়াছেন ।

এই প্রসংগে উল্লেখ্য যে ১০নং পুরানা পলটন বাড়ীটি বর্তমানে পরিত্যক্ত বাড়ী ঘর এর তালিকা হইতে ইহার মূল মালিক জনাবা রইসা আজিজ বেগমকে দখল বুঝাইয়া দেওয়া হইয়াছে, **শুধুমাত্র ঐতিহ্যবাহী শান্তিনগর ক্লাব তাহাদের দখল জনাবা রাইসা আজিজকে ছাড়িয়া দেন নাই ।** এমতাবস্থায় যখন ক্লাব বাড়ী ছাড়িতে প্রস্তুত, অতএব ক্লাবের জন্য ক্লাবকে তাহাদের নিজস্ব এলাকায় একটি পরিত্যক্ত বাড়ী খুঁজিয়া অত্র মন্ত্রনালয়কে জানাইতে বলা যাইতে পারে কেননা ক্লাব কি ধরনের বাড়ী চায় তাহাও তাহাদের জানান প্রয়োজন ।
স্বাঃ দুষ্পাঠ্য
২/১১/১৯৮২

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৬০। পরবর্তীতে দেখা যাইতেছে যে উক্ত সম্পত্তি জনৈক সৈয়দ বদিউর রহমান দলিল নং ৩৬৮৬ তাং- **৪/৯/৮৪ তারিখে জনাবা খাদিজা ইসলামের অনুকূলে বিক্রয় করেন (পৃঃ ১৬৬-১৭৭) এবং তদানুসারে**উক্ত খাদিজা ইসলামের নামে নামজারী পরচা ও খাজনা প্রদান করা হইতেছে (পঃ পৃ ১৬৪-১৬৫) । কিন্ত **ইহা অত্যন্ত সনেদহ প্রবণ যে উক্ত সম্পত্তি রইচা আজিজ বেগমের নিকট হইতে কিভাবে সৈয়দ বদিউর রহমানের নিকট হস্তান্তরিত হয়েছে তাহার কোন প্রমান নাই । এছাড়া ক তালিকাভূক্ত বাড়ীর ব্যাপারে সঠিক সিদধান্তের জন্য ইষয়ক্ষঢ় ষক্ষ জনঢ়ঢ়রনলনশঢ়এর নিকট প্রেরণ করা যাইতে পারে ।**
স্বাঃ দুষ্পাঠ্য
২৪/৮/৮৬
(Bold and underlined, emphasized)

41. From the aforesaid notes and the other materials of the abandoned property file the following facts are revealed:

a) The original file of abandoned property relating to the suit property is not traceable/missing for the period starting from 1972 up to part of 1977.

b) Raisa got possession of part of the suit property i.e. the shops on 25.04.1982 and 30.04.1982 respectively through renewing monthly rental agreements dated 25.04.1982 and 30.04.1982, vide rental agreement dated 25.04.1982 between Raisa and M/S. Globe Battery Works and rental agreements dated 30.04.1982 between Raisa and M/S. Jatiya Shahitya Prakashani, M/S. Elora, M/S. Hakim Electronics, M/S. Dacca Electric and Lift works, M/S. Kajal Enterprise after release of the suit property. So, she did not get possession in any part of the suit property till 25.04.1982/30.04.1982 after release of the suit property from the list of abandoned properties.

c) Raisa did not get possession of the rest part of the suit property i.e. the building from Shantinagar Club at least till 02.11.1982.

d) She filed several applications to the abandoned property authority initially for delivery of possession of the entire suit property and then for delivery of possession of the rest part of the suit property, which was in possession of Shantinagar Club.

e) The Sports and Cultural Division applied for re-allotment of the said building or any other house in favour of the Shantinagar Club.

f) Shantinagar Club did not hand over possession in favour of alleged Raisa, at least up to 02.11.1982.

g) Raisa, in none of her applications vide letters of Raisa from 1977 up to 22.05.1982 claimed that she had entered into an agreement to transfer the suit property to Badiur on 11.09.1969 or that she had transferred the suit property to Badiur at any time.

h) There was no evidence before Abandoned Property Authority as to how Badiur got the suit property vide Note No.60 dated 24.08.1986 of the abandoned property file.

42. In the plaint Khadiza claimed that Raisa firstly executed a bainapatra dated 11.09.1969 in favour of Badiur and then transferred the suit property in favour of Badiur on 15.01.1982 and handed over possession to him. But the Government Official record and statement of D.W.15-Md. Monsur Rahman clearly show that Raisa could not have transferred her leasehold right/any other right or handed over possession of the suit property to Badiur at the time of so called transfer on 15.01.1982 for the reasons that:

1) Raisa herself prayed for handing over possession of the entire suit property admitting that she was not in possession of the suit property before and after 15.01.1982 and till 25.04.1982.

2) She, in her application dated 22.02.1982 stated that since release of her property (12.01.1982) from the list of abandoned properties, one month has elapsed but no step was taken to deliver possession to her.

3) Raisa in her application dated 22.05.1982 stated that Shantinagar Club did not hand over possession to her although she got possession of the other shops .

4) Raisa never claimed to have executed any bainapatra on 11.09.1969 or at any time in favour of Badiur or that she transferred her leasehold or any other right to Badiur at any time, and rather she filed series of applications for delivery of possession in her favour even after her (Raisa) so-called transfer to Badiur on 15.01.1982.

5) D.W.15 Md. Monsur Rahman, Kanungo of Deputy Commissioners' Office in his cross-examination statedthat,

"খাদিজা ইসলামের নামে লীজ নবায়ন করিয়া দেই ৩/৭/৮৫ ইং তারিখ। আমরা ৩০ বৎসরের জন্য লীজ দিয়াছি । মেয়াদ ২০১৪ পর্যন্ত মেয়াদ বলবৎ আছে ।"

He further stated that,

"**রইসা আজিজ নালিশী সম্পত্তি transfer এর জন্য অনুমতি লয় নাই তবে সৈয়দ বদিউর রহমান বিএনীর অনুমতি লয় রাইসা আজিজের পক্ষে ১৯/৪/৮২ইং তারিখে । বদিউর রহমানের বরাবরে দলিল হয় ১৫/১/৮২ইং তারিখে অর্থাৎ সরকারের অনুমতি পাওয়ার পূর্বেই নালিশী সম্পত্তি বিএনী করিয়া দেয়** ।----------"

6) So, Raisa herself never obtained any permission from the Government Khas Mohal authority to transfer her leasehold right to Badiur at any time, and

7) Admittedly, permission from the Government was/is necessary for transfer of leasehold right to anyone in view of the provisions of Government Estate Manual, 1958.

43. It be mentioned that the original deed of alleged transfer of the suit property dated 15.01.1982 by Raisa to Badiur was neither produced before the abandoned property authority nor before any Government Office or before any Court.

44. Khadiza had tried to establish a new case by examining D.W.1 Awlad Hossain Chowdhury, a witness who deposed on her behalf. This witness stated that the original document of transfer by Raisa to Badiur is deposited with a bank at the time of marking a certified copy of the deed as exhibit M1(5) with objection. But this witness at the time of marking exhibit M1(5) did not mention the name of the bank. He also stated that Nirman took loan from the bank after 1984 without mentioning the date of taking loan.

45. Further, the Bank Officer, D.W.3 Kazi Md. Adam Ali stated that the loan was taken from the bank, the present name of which is Eastern Bank Ltd and earlier known as BCCI

Bank. From statement of this witness it also appears that he brought a certified copy and a photocopy was submitted before the Court and not the original one. D. W.3 the Bank Official did not say that the original deed was missing from the bank. Moreover, no other documentary evidence was/is placed before the Court to show that the original document was missing and that any action was taken by Khadiza over missing of this document by the bank or by any other means.

**46**. **At the time of hearing, this Court inquired about the whereabouts of this original document and Khadiza's learned Senior Advocate replied that theoriginal document is missing from the bank.**

47. Therefore, it appears that Khadiza allegedly mortgaged the suit property for the purpose of taking loan from a bank but neither the mortgaged deed nor the original document was ever produced before the court or the Government authorities. The new case about mortgage of suit property to the bank is beyond pleadings as no such case was mentioned in the plaint, even by way of amendment. It appears that Khadiza suppressed a vital information in the plaint and did not bring this new case in the plaint by way of amendment. Perhaps it is due to the fact that she did not obtain any permissionfrom the Government before mortgaging the suit property to the bank and that too by using a fictitious document. It is evident that Khadiza intentionally avoided toproduce original document so that Raisa's signature could not be compared.

48. In the above circumstances, it is crystal clear that even if we consider that Raisa was a genuine person and the suit property was lawfully released by abandoned property authority in her favour, in such case also plaintiff Khadiza failed to prove Raisa's transfer of the suit property to Badiur.

49. In consideration of the original file of abandoned property authority and non-production of the original deed of so-called transfer by Raisa to Badiur, we are fully convinced that Raisa never sold/transfer the suit property to Badiur for which the original document was not produced before the Government authorities or in any Court. Further, Khadiza claimed that her leasehold right was extended for 30 years but she prayed for declaration of her 16 annas title to the suit property again as a fraudulent device to grab the Government valuable property by practicing fraud upon the Court.

50. It be mentioned that all the contesting parties claimed that Raisa never transferred her right to the suit property to Badiur and the so-called deed of transfer is a forged document.

51. Since, Raisa's transfer of the suit property to Badiur is not proved, Khadiza has not acquired any legal/valid right to the suit property, leasehold or otherwise, through her purchase from Badiur as Badiur himself had no legal right to transfer it to anyone. Thus, it is evident that the so called deed of transfer by Raisa to Badiur is a fraudulent/ forged/ fictitious and collusive document created with the sole purpose to grab the valuable Government property.

52. It is evident that Khadiza in collusion with Badiur and some other persons obtained a deed of transfer in her favour from Badiur, who himself had no legal right or authority to transfer it. Khadiza managed to extend the leasehold right for 30 years in her favour by fraudulent means in active collaboration/collusion with the Government Officials.

53. It is very unfortunate to note that the suit property, a valuable property situated at the heart of the Capital of Bangladesh measuring at least twelve khatas vide statement of the witnesses was grabbed by Khadiza with the help of some dishonest Government officials, who were/are the protectors of the Government properties.

54. From the beginning till the end, the Government Officials, both abandoned property authority as well as the office of the Deputy Collector, Dhaka played a heinous role in this matter including filing of written statements in various suits changing Governments initial stand that the suit property is an abandoned property. Moreover, several civil litigations were going on but without waiting for the result of those litigations, the suit property was released from the list of abandoned property and lease extension was given to Khadiza-that too illegally without verifying if Raisa transferred the suit property to Badiur.

55. It be mentioned that the original file of abandoned property was/is not traceable/missing till date. The said file contained all notes and all records/documents from 1972 up to part of the year 1977. Thus, whether Raisa is a genuine person or not that could not be ascertained as all the documents containing her original signatures from 1972 up to part of 1977 are missing from the record. Therefore, the so called Raisa might be a fake person. Possibly, for that reason she was not examined as a witness in the court by Khadiza or any other parties in the suits.

56. It needs be mentioned that from the materials on record it appears that so called Raisa filed Misc. Case No. 34 of 1979 for setting aside the ex-parte decree obtained by Jamila Khatun previously against her. In the said case, in her deposition, she stated that,-

"এই ঘরের মধ্যে বোরখা ও ব্যাগ আমার। এই বাড়ির হোল্ডিং নম্বর আমি জানি না।..... আমি ১১/২৭ নং হোল্ডিং কায়েদে আজম রোডে থাকিতাম। তার আগে মিরপুর থাকিতাম। এখন এই বাড়িতে থাকি।..... আক্তার আলম আমার ভাই তিন বছর আগে পাকিস্তানে চলিয়া গিয়াছেন। আমার ছেলে মেয়েরা সকল করাচি নাছিরাবাদ আছে, তাদের সাথে ৪ বছর ধরে দেখা সাক্ষাৎ নাই। ..... এখানে আমি ১৫/২০ দিন যাবৎ আছি । এর আগে কায়েদে আজম রোডে থাকিতাম। আমার রান্না-বান্নার হাড়ি পাতিল আছে। ট্রাংক্ষ ছুটকেস আছে। আমার হাড়ি পাতিল ১১/২৭ নং কায়েদে আজম রোডে আছে। আমি এখানেই আছি। রেশন কার্ড নাই। এ ব্যাপারে আমার সাক্ষী নাই। ..... কমিশন আরম্ভ হওয়ার কিছুকাল আগে বোরখা ভানিটিব্যাগ সহ এখানে ঢুকিয়াছি।"

57. This so-called Raisa was examined in Misc. Case No. 34 of 1979 on commission and on question by the Advocate Commissioner-

"প্রশ্নঃ আপনার কোন সনাক্ত চিহ্ন আছে কিনা? আপত্তিমূলক। উঃ সাক্ষী উত্তর দেয় নাই।" Moreover, she herself admitted that,

"আমি এখানেই আছি। রেশন কার্ড নাই। এই ব্যাপারে আমার সাক্ষী নাই।"

58. It clearly indicates that the person deposed in the court in miscellaneous case may not be actual Raisa, as evidently she came to the place where the commission was held on the same day and she had no cookeries in the house where commission was held and she refused to disclose her identifying mark, which was very much vital. After her examination on Commission on 29.07.1979, Suit No.483 of 1974 (filed by Jamila) was restored to its file and number upon allowing the miscellaneous case. But Raisa never appeared before the trial court to contest the said suit. From Note No.28 of the abandoned property file, it appears that Raisa appeared, but how the concerned officer knew her or who identified her is not mentioned therein.Therefore, from the statement of so-called Raisa and abandoned property file, it appears that there is every likely hood that she may not be a genuine person.

59. Even if we presume that Khadiza was in possession of the suit property, her possession was illegal for the reasons discussed hereinbefore. Thus, the possession of Khadiza in the suit property, if there be any, was illegal possession in the Government property.

60. Moreover, D.W.2 Md. Selim in his examination-in-chief stated that,
"মালিক হবার দিনে দখল নিয়ে কোং এর সাইনবোর্ড টানাই ।"

61. D.W.1Md. Awlad Hossain in his examination-in-chief stated that,
"সৈয়দ বদিউর রহমান উহাতে ভোগ দখলকার থাকাবস্থায়৪/৯/১৯৮৪ ইং তারিখে একটি রেজিঃ সাফ-কবলা দলিলমূলে বিক্রী করে দখল খাদিজাআলমৎফকে বুঝাইয়া দেন।"

62. But at the time ofcross-examination D.W.1 stated that, "৪/৯/১৯৮৪ ইং তারিখে বাদিনীর নামে খরিদা রেজিঃ হয়। কত দিন পর বাদিনী খোদেজা ইসলাম নালিশী সম্পত্তির দখলে যায় তা স্মরণ নাই, তবে কিছু দিনের মধ্যে দখলে যায়।"

63. Therefore, there is also contradiction about the date on which Badiur handed over possession to Khadiza.

64. It appears that though the Government machineries are not willing to protect the suit property but the learned Additional Attorney General pointed out all the facts before us and made submissions that in these matters i.e.the appeals/CPLA the Court must exercise its power as provided in article 104 of the Constitution for doing complete justice, to protect a valuable Government property, a property of the People of Bangladesh.

65. Any property owned by the Government is the property of the People's of the Republic of Bangladesh and the citizens of this country are the actual owners of such property. Therefore, no one can dispose of valuable Government properties at his/their sweet will to anyone else unlawfully.

66. We have already seen that Khadiza failed to prove her vendor's title/leasehold right to the suit property and, as such, the extension of lease in her favour by certain unscrupulous Government officials is also collusive and fraudulent. However, Khadiza's illegal extended lease period for 30 years has also expiredmeanwhile.

67. On Khadiza's case, the trial court in consideration of deposition of Khadiza's witness Md. Awlad Hossain Chowdhery and evidence on record decided as under:
" অত্র সাক্ষী আরও উল্লেখ করে যে, নালিশী সম্পত্তি ১২/০১/৮২ ইং তারিখে রাইসা আজিজ বরাবরে Abandoned property এর তালিকা হইতে অবমুক্ত করা হয় ।তাহা হলে নালিশী সম্পত্তি Abandoned property এর তালিকাভূক্ত হওয়ার পর লীজ দলিলের টতরভধভঢ়ঁ আর থাকিতে পারে না। তাহা ছাড়া **সৈয়দ বদিউর রহমান এর নিকট সরকারের পূর্বানুমতি ছাড়া নালিশী সম্পত্তি বিক্রী করায় সৈয়দ বদিউর রহমানের নালিশী সম্পত্তিতে কোন প্রকার লীজের স্বত্বও সৃষ্টি হয় নাই। পরবর্তীতে খাদিজা ইসলাম ০৪/০৯/৮৪ ইং তারিখে নালিশী সম্পত্তি খরিদ করে। নালিশী সম্পত্তি খাদিজা ইসলাম খরিদ করিলেও উহাতে লীজের স্বত্ব সৃস্টি হইবে না কারণ বদিউর রহমান এর উপর লীজের স্বত্ব সৃস্টি হইয়াছিল না।**তাছাড়া খাদিজা ইসলাম আরও উল্লেখ করে যে, নালিশী সম্পত্তিতে তাহার স্বত্ব ও দখল আছে মর্মে ঘোষণা চাহিয়াছে। খাদিজা ইসলাম নালিশী সম্পত্তিতে বড়জোর লীজের স্বত্ব সৃস্টি হইয়াছে মর্মে দাবী করিতে পারে। **কিন্তু খাদিজা ইসলাম নালিশী সম্পত্তি সরকারের নিকট হইতে পুনরায় লীজ প্রাপ্ত হইয়াছে উহা দেওয়ানী ২২৪/৯৭ নং মামলার কোথাও উল্লেখ করে না। তাহা ছাড়া খাদিজা ইসলাম নালিশী সম্পত্তি হইতে বেদখল হইয়াছে মর্মে স্বীকার করায় খাদিজা ইসলামের বরাবরে নালিশী সম্পত্তি বাবদে স্থায়ী নিষেধাজ্ঞার ডিক্রী পাইতে পারে না। তাহা ছাড়া খাদিজা ইসলাম উক্ত মোকদ্দমায় সরকারের কাছ থেকে পুনরায় লীজ গ্রহণের বিষয় আরজিতে না আসায় খাদিজা ইসলামের বরাবরে লীজ স্বত্ব ঘোষণারও সুযোগ নাই। ফলে খাদিজা ইসলাম কর্তৃক দায়েরী দেওয়ানী ২২৪/৯৭ নং মোকদ্দমাটি আইনতঃ চলিতে পারে না । "**

(Bold and undelined by us)

68. In the facts and circumstances, as discussed hereinbefore, we are of the view that the trial court correctly dismissed the suit filed by Khadiza so far as it relates to declaration of her right, title to the suit property, khas possession and permanent injunction. However, the High Court Division erroneously held that Raisa with the permission of the Government transferred the suit property to Badiur although Government witness D.W.15 Md. Mousur Rahman in cross-examination clearly stated,

"রাইসা আজিজ নালিশা সম্পত্তি বিএনীর অনুমতি লয় নাই ।"

69. High Court Division without considering the evidence as discussed hereinbefore, erroneously allowed Khadiza's appeal as a whole, but curiously enough without declaring any title to or leasehold right of Khadiza in the suit property but simply directing Waziuddin to handover possession of the suit property to Khadiza within 6 months from the date of receiving copy of the judgment.

70. Now, let us turn our eyes to the fate of the appeals filed by the heirs of Noor Mohammad Khan, he being dead.

71. On the suit filed by Noor Mohammad Khan, the trial Court decided as under:

"দেওয়ানী ১১৩/৮৪ নং মোকদ্দমায় বাদী নুর মোহাম্মদ খাঁন উক্ত নালিশী সম্পত্তি বাবদ বায়না চুক্তি করে ২৩/৭/৬৯ ইং তারিখে । নুর মোহাম্মদ খাঁন উক্ত তারিখে ১নং বিবাদী রাইসা আজিজের সহিত বায়না চুক্তি করে । কিন্তু রাইসা আজিজ নালিশী সম্পত্তি সরকারের কাছে থেকে ১৯৫৯ ইং সালে লীজ গ্রহন করে । স্বীকৃত মতেই কোন সরকারী সম্পত্তি লীজ গ্রহন করিলে উক্ত সম্পত্তি লীজ গ্রহীতা সরকারের পুর্বানুমতি লইয়াই হস্তান্তর করিতে পারে। কিন্তু নালিশী সম্পত্তি নুর মোহাম্মদ খাঁনের সহিত বায়না চুক্তি করিবার পুর্বে সরকারের অনুমতি লইয়া দলিল রেজিস্ট্রি করিয়া দেয়ার কথা উল্লেখ আছে । উক্ত বায়না চুক্তির বক্তব্য অনুযায়ী সরকারের অনুমতি না লইয়াই নালিশী সম্পত্তি বাবদ বায়না চুক্তি করিয়াছিল । ফলে রাইসা আজিজ সরকারের অনুমতি না নেওয়ায় উক্ত বায়না চুক্তিটি লীজ দলিলের শর্ত লংঘন করিয়া সম্পাদন করায় উক্ত লীজ ডিড আদালতে উঃনদয়ঢ়তথরন হইতে পারে না ।"

72. Noor Mohammad filed Title Suit No.364 of 1982, renumbered as 113 of 1984, for Specific Performance of Contract against Raisa on the basis of a Bainapatra dated 23.07.1969 as well as a deed of novation dated 10.07.1972, renewing the previous agreement for sale. He also prayed for khas possession of the suit property. Khan's heirs examined several witnesses to substantiate their case.

73. Their first witness is Shakawat Hossain Chowdhury (D.W.9), who deposed in favour of heirs of Noor Mohammad Khan. This witness stated that Raisa is the owner of the suit property by virtue of a deed dated 11.12.1957 executed by Ashini. Raisa executed a Bainapatra in favour of Noor Mohammad on 23.07.1969 and he produced copy of the said Bainapatra (exhibit-B, with objection). He claimed himself to be present at the time of Bainapatra, but according to him he was only 12/13 years old in the year 1970.

74. During cross-examination this witness mentioned that,

"আমার জন্ম সন অনুমান ১৯৫৮ সনে। ১৯৭০ সালে স্বাধীনতা যুদ্ধ শুরু হয়। তখন আমার বয়স অনুমান ১২/১৩ বছর।"

He stated in his cross-examination that,

"আমার দাখিলকৃত একজিবিট ডকুমেনট এ রাইছা আজিজের দস্তখত কোনটা ইংরেজি ও কোনটা উর্দুতে আছে । **এই স্বাক্ষরগুলি রইছা আজিজের তা দেখানোর মতো কোন অথরাইজড দস্তখত দাখিল করি নাই** ।"

(Bold and undelined, emphasised)

75. Therefore, this witness was only a boy of 11 years on the date of first Bainapatra. So, his case that he was present at the time of Bainapatra is not believable.In his deposition he did not explain why Raisa put her signatures in Urdu at the time of executing the Bainapatra dated 23.04.1969, but put her signatures in English on the alleged deed of novation dated 21.01.1977. Further, it appears that he is not an witness of the bainapatra.

76. Their next witness is Bidhan Chandra Podder(D.W.10). Relevant part of his statements are as under:

"নূর মোহাম্মদ খান এর সাথে ১৯৬৯ সনে রাইসা আজিজের একটি বায়নাপত্র হয়। ১৫,০০০/- টাকা বায়না দেয়। তারিখ মনে নাই। এই বায়না পত্রে আমি সাক্ষী ছিলাম। প্রদঃ ১৩, তে আমি সাক্ষী হিসাবে ৪নং ক্রমিকে দস্তখত করিয়াছি। এই সেই স্বাক্ষর প্রদঃ ১৩/১ । আমার সাথে সাক্ষী হিসাবে মোহাম্মদ আলী ও জাকির ছিল। অন্য জনের নাম বলে নাই, রাইসা আজিজ উর্দুতে দস্তখত দিয়াছেন আমার সামনে। প্রদঃ ১৩ ইংরেজী টাইপ করা।"

77. During cross-examination he stated that,

"রাইসা আজিজ খানকে ১৯৬৯ সালে প্রথম দেখি। **প্রথম বায়নার তারিখের আগে রাইসা আজিজকে চিনিতাম না। প্রথম নায়না হয় ২৩/৭/১৯৬৯ তারিখে** ।এই বায়না হয় ১১২৭ আজম রোড মোহাম্মদপুর, ঢাকায়। ঐ ঠিকানায় রাইসা আজিজ খান বসবাস করত। বায়নাপত্র কে মুসাবিদা করে বলিতে পারি না। বায়নাপত্র ইংরেজীতে লেখা হয়। বায়নাপত্রে রইসা আজিজ উর্দুতে সই করে । ২/১ যাহার ইংরেজীতে ও সই করিয়াছে। **আমি উর্দ্দু পড়তে পারি না**। আমি মোট ৭টি দলিলে সাক্ষী হই। এই ৭ টা দলিলই বায়নাপত্র দলিল ও রশিদ। ----------

(Bold and underlined by us)

--প্রথম বায়নার সময় বেলা তিনটায় আজম রোডে যাই। ঐ দিন কিবার ছিল স্মরন নাই। নুর মোহাম্মদ খান আমাকে নিয়া যায়। রইসা আজিজের স্বামীর নাম বলিতে পারি না। তার স্বামীকে দেখি নাই।----------

বদিউর রহমান প্রথম বায়নায় সাক্ষী ছিল কিনা জানি না।প্রথম বায়নাপত্র সম্পাদনের সময় ৪/৫ জন সাক্ষী ছিল। কয়জন সাক্ষী সই করে বলিতে পারি না। নূর মোহাম্মদ খানের স্ত্রী আমার পিতাকে বাবা ডাকতেন।

**আমি উর্দু বা ইংরেজী পড়িতে পারি না**।---- আমি যে সকল দলিলে সাক্ষী আছি আমি উহার **কোনটাই আমি পড়িতে পারি না এবং উহার অর্থ জানি না**। আমার বাড়ী ঢাকায়। নুর মোহাম্মদের বাড়ী নোয়াখালী। আমি যে সকল document-এ সই করিয়াছি উহা কে টাইপ করে বা কবে কোথায় টাইপ করে বলিতে পারি না।

**রাইসা আজিজ পর্দানশীন মহিলা ছিল**। প্রথম বায়নাপত্রের সময় সাকাওয়াতের বয়স ১২/১৩ বছর ছিল । সব গুলো দলিলে আমি সাক্ষী হিসাবে পরে সই করিয়াছি ।"

(Bold and underlined by us)

78. This witness did not know Raisa and only seen her on the date of first bainapatra. Therefore, his evidence that Raisa executed the Bainapatra is of no value as he did not know Raisa.

79. Next witness of this suit is Md. Zakir Hossain (D.W.11). He stated that he had seen Raisa Aziz only one day and that Raisa Aziz put her signature in his presence.

80. During cross-examination he stated that, "২৩/৭/৬৯ তারিখে রাইসা আজিজের বয়স ৩৫/৪০ বছর ছিল । **আমি তার মুখ সম্পুর্ন দেখি নাই** । ঐ সময় রাইসা আজিজের স্বামী উপস্থিত ছিল কিনা বলিতে পারি না । রাইসা আজিজের কোন ভাই উপস্থিত ছিল কিনা বলিতে পারি না ।গুগু সত্য যে বায়নাপত্রে আমাদের কারো দস্তখতের নিচে কোন তারিখ উল্লেখ নাই ।"

(Bold and underlined, emphasised)

81. Thus, it appears that this witness has not seen Raisa on any other day except one day and on the date of execution of bainapatra dated 23.07.1969, he did not see her full face. So, evidence of this witness that Raisa Aziz herself executed the original Binapatra is of no value, as he did not know Raisa, who was a pardansin lady according to the previous witness Bidhan Chandra.

82. Moreover, in the original Bainapatra, signature of Raisa is in Urdu but in the deed of renewal of agreement all the signatures are in English. No reason was mentioned by the witnesses as to why the signatures in the deed of novation were in English. The money receipts could not also be proved in this suit.

83. In the above circumstances, it is crystal clear that the witnesses of this suit could not prove that the original Bainapatra was executed by Raisa herself for the reasons discussed earlier.

84. Thus, it is evident that Noor Mohammad's heirs failed to prove that it was Raisa who executed the original Bainapatra on 23.07.1969. Since, the case of execution of original Bainapatra by Raisa falls through, the case of novation as continuity of the original Bainapatra is of no value.

85. Considering the totality of the evidence on record, we are fully convinced that Raisa did not execute any Bainapatra or deed of novation in favour of Noor Mohammad at any time. So, his case was lawfully dismissed by the trial Court and the appeal was also lawfully dismissed. However, the judgments for dismissal are not with cogent reasons. Both the Courts below ought to have discussed the evidenceon record and on the basis of the evidence,oral and documentary ought to have dismissed the suit/appeal of Noor Mohammad's heirs.

86. In view of the above, we find no merit in the appeal of Noor Mohammad Khan's heirs so far as it relates to Civil Appeal No.31 of 2017. Thus, this appeal is liable to be dismissed.

87. Now let us examine the merit of the appeal filed by Jamila Khatun, which arose out of Transfer Appeal No.10 of 2014andthe said appeal arose out of Title Suit No.483 of 1974.

88. Jamila examined several witnesses in support of her case of execution of Bainapatra by Raisa on 20.01.1972. The trial Court dismissed the suit and High Court Division also dismissed/disallowed the appeal.

89. Jamila's witness P.W.1 Md. Ashfaq Ahmed is her husband and tadbirkarak of her suit. He proved the alleged Bainapatra in favour of Jamila dated 20.01.1972. He stated that,

"উক্ত বায়না পত্রে ১নং বিবাদীর সই (ছেড়া) ভাই সৈয়দ বদিউর রহমান, আজহার উদিদন আহমেদ, খোরশেদ আহমেদ, (ছেড়া) হোসেন ইত্যাদি সাক্ষী হিসাবে সই করেন। **বায়নাপত্রে পর ১নং বিবাদীনি নাঃ সম্পত্তি যাবতীয় দলিলাদি বাদীনির নিকট হস্তান্তর করে। গুগুগুগুগুগু১নং বিবাদিনী তাহার মুল টাইটেল ডিড আমাদেরকে প্রদান করে নাই। কেননা তখন উহা তদানিন্তন এস,ডি,ও, (সাউথ) এর কোর্টে দাখিল ছিল।**....."

(Bold and underlined by us)

90. This witness clearly stated that,

"বায়না সম্পাদনের দিন আমি, বাদিনীর স্বামী, রইসা আজিজ, তার ভাই সৈয়দ বদিয়ার রহমান, খোরশেদ, আজহার উদিদন আহমেদ, তোফাজেজল হোসেন উপস্থিত ছিলেন। বায়নার কথাবার্তার দিন রাইছা আজিজ, তার ভাই বদিয়ার রহমান উপস্থিত ছিলেন।"

91. P.W.2 Azhar Uddin Ahmed is the brother of Jamila's husband, who is a witness to the deed.This witness admits that other witnesses of the Bainapatra, named Khorshed Anwar is/was also his brother and Tofazzal Hossain was/is an employee in his brother's shop. He statedthat,

"৫নং বঙগবনদু এভিনিউর স্থানে যখন বায়নাপত্র হয় তখন আশেপাশের রুমে লোকজন ছিল । পার্শ্ববর্তী লোকজন বায়নার সময় উপস্থিত ছিলেন না ।"

92. P.W.3 Khorshed Ahmed is another brother of D.W.1. He statedthat,
"৫নং বঙগবনধু এভিনিউর অন্যান্য কক্ষে লোকজন থাকতে পারে । উক্ত কক্ষের লোকজনকে বায়নার সময় ডাকি নাই ।"

93. The last witness of Jamila relating to Bainapatra is P.W.4. P.W.4 Tofazzal Hossain stated that,"**রাইসাকে বায়না পত্রের দিন থেকেই চিনি** । আমি বায়না পত্রের দিন উপস্থিত ছিলাম । আমি বায়নাপত্রে স্বাক্ষর করিয়াছি । এই সেই দস্তখত (প্রদঃ ১/গ) । বাদিনী ও বিবাদীনি যখন বায়নাপত্রে দস্তখত করে তখন উপস্থিত ছিলাম ।"

94. At the time of cross-examination, hedeposed that,"**রাইছাকে বায়নার দিনই প্রথম দেখিয়াছি**। বায়নাপত্রের দিনে রাইসা আজিজের স্বামী জীবিত ছিল না । প্রথম সহি দেয় সৈয়দ বদিউর রহমান জমি কবে বেচা কেনার কথা হয় জানি না ।"

(Bold and underlined by us)

95. Thus, from the statements of P.Ws.1, 2 and 3 it appears that they are full brothers and P.W.1 is the husband of Jamila. So, they are all very close relativesof Jamila and are interested witnesses. P.W.4 the sole witness, who is not a relative of Jamila, is an employee of Jamila's husband. This witness clearly stated that he had seen Raisa firstly on the date of execution of Bainapatra. Thus, the solitary witness, who is not a relative of Jamila, did not know Raisa prior to execution of bainapatra. So, he had no personal knowledge whether the person who executed Bainapatra was infact Raisa or not.

96. In view of the evidence on record as discussed, it is evident that Jamila could not prove her case about execution of Bainapatra by Raisa herself by any independent witness so as to get a decree for Specific Performance of Contract relating to the suit property. Therefore, her suit for Specific Performance of Contract was correctly dismissed by the trial Court and affirmed by the appellate Court. However, both the Courts below did not consider the oral evidence of the witnesses in detail and dismissed the suit/the appeal for some other reasons as discussed.

97. In the above circumstances, we find no merit in Jamila's appeal being Civil Appeal No.30 of 2017. Therefore, this appeal is also liable to be dismissed.

98. Waziuddin has not preferred any appeal against the decree in favour of Khadiza. However, Noor Mohammad Khan's heirs have challenged the judgmentand decree passed in favour of Khadiza in Transfer Appeal No.08 of 2014 by filing a CPLA, which resulted in Civil Appeal No.32 of 2017.

99. On the other hand, Jamila Khatun filed Title Suit No.66 of 1990 for cancellation of sale deed as well as lease extension deed in favour of Khadiza. The said suit as well as the appeal being Transfer Appeal No.10 of 2014, were both dismissed by the trial Court and the appellate Court respectively. Wherefrom, Jamila filed CPLA No.4232 of 2018. The suits for Specific Performance of Contract filed by Noor Mohammad (being dead his heirs) and by Jamila were dismissed and the appeals against the said judgments and decrees were disallowed. We have also found no merit in Civil Appeal No.31 of 2017 and Civil Appeal No.30 of 2017.

100. Ordinarily, in such scenario, it is not necessary to consider the appeal of the heirs of Noor Mohammad Khan and the CPLA of Jamila but for the observations and decisions made

hereinbefore on Khadiza's case, we find that Khadiza miserably failed to prove her valid title to or leasehold right in the suit property. As Khadiza failed to prove her case and Waziuddin is not now in the picture, it is necessary to consider the merit of Civil Appeal No.32 of 2017 and CPLA No.4232 of 2018 in the unusualfacts of the matters.

101. We have already seen that Khadiza could not prove her case and, therefore, she was not entitled to have a decree in her favour and the trial Court correctly dismissed it, but her appeal was erroneously allowed by the High Court Division with decree of khas possession.Therefore, her suit for declaration of her 16 annas title to the suit property, recovery of possession and permanent injunction have to be dismissed due to the reasons as discussed. However, if Khadiza'ssuit is dismissed as a whole, in such case Waziuddin'sdecree for Specific Performance of Contract would come intooperation. Therefore, it is necessary to decide whether the decree in favour of Waziuddin is liable to be set aside for doing complete justice.

102. In the above backdrop, let us now study Waziuddin's case.

103. Md. Waziuddin has been examined as D.W.7 in the trial Court. He stated that,"মৌখিক বায়নাপত্র ৭/১/৭১ তাং। বায়না বাবদ ২৫,৫০০/- টাকা নেয়। তিনি তৎবাবদ একটি টাকার রশিদ দেয়। উহাতে এ কে এম শামীম, এইচ বি রহমান, কাজী মোঃ সাইদ, মনু গাজী। দাত্রী মানি রিসিটে স্বাক্ষর করেন। আমি মুল মানি রশিদ দাখিল করিতেছি। আপত্তি সহ। সাক্ষীদের ৩ জন মারা গেছে। অন্য জনের খবর আমি জানি না।"

104. Thus, it appears that out of 4 witnesses,3 witnesses of the money receipt are dead and he does not know the whereabouts of the other witness. About the oral agreement, the money receipt was the most important evidence, but Waziuddinfailed to prove it by any independent witness. So, it appears that Waziuddin as defendant-appellant failed to prove that Raisa had entered into an oral agreement with him to transfer the suit property in his favour. Therefore, his suit being Title Suit No.541 of 1982 was legally dismissed by the trial Court but the High Court Division in F.A. No.283 of 1984 erroneously decreed the suit against Raisa for Specific Performance of Contract. As a result, Waziuddin got possession of the suit property through Court.

105. In view of the above, the decree obtained by Waziuddin in F.A. No.23 of 1984 appears to be a fraudulent decree as claimed by the Government, Khadiza, Jamila and the heirs of Noor Mohammad Khan.Perhaps due to this fact Waziuddin did not file any CPLA against the decree obtained by Khadiza. Further, Md. Waziuddin obtained the decree for specific performance of contract against Raisa. But the Government is the actual owner of the suit property, a Khas Mohal property. Therefore, Waziuddin cannot retain his possession against the Government. Moreover, Waziuddin did not deposit the entire consideration price as per direction of the Court within 90 days. So, for that reason also Md. Waziuddin's decree in F.A. No.23 of 1984 is liable to be set-aside and the registered deed obtained by him through Court is liable to be cancelled.

106. We are well aware of the fact that generally appellate Court is the final fact finding Court. But herein, the trial Court and appellate Court did not consider oral evidence led by the parties and it escaped the notice of the appellate Court that D.W.15 for the Government stated during cross-examination that Raisa did not obtain permission from the Government to transfer her right to Badiur, but the High Court Division decidedthe appeal on the basis of examination in chief of this witness without perusing the cross-examination of the witness.Moreover, the abandoned property file was not also before the trial Court or the

Court of appeal i.e. the High Court Division so as to consider it. Therefore, we had to examine and assess the entire evidence on record, oral anddocumentary, to ascertain the actual merit of the cases.

107. In view of the discussions made hereinbefore, we are inclined to dispose of Civil Appeal No.32 of 2017 by setting aside the judgment and decree obtained by Md. Waziuddin in F.A. No.23 of 1984 and further disposing of CPLA No.4232 of 2018 filed by Jamila as Khadiza failed to prove her case.

108. Khadiza could not prove her case but the appellate Court without considering the merit of the case allowed the appeal and decreed the suit in favour of Khadiza erroneously relating to her prayer for recovery of khas possession without considering her legal right.

109. In fact the appeal was allowed by the High Court Division due to some unscrupulous Government Officials' illegal and collusive activities in favour of Khadiza.

110. From the materials on record, it appears that the suit property is a Government Khas Mohal property and all parties failed to prove their respective case and unlawful lease extension period of Khadiza already expired. Raisa's lease period expired long before and she is not before us with any claim on the suit property. Therefore, the suit property is now a Khas Mohal property of the Government as the Abandoned Property Authority excluded it from the list of abandoned properties unlawfully and collusively.

111. As the unlawful lease extension in favour of Khadiza expired meanwhile, we are of the view that Khadiza Islam is not entitled to get any further extension of her lease from the Government. She had no legal right for extension of Raisa's leasehold right at any time. We are further of the view that the Government must take over actual/physical possession of the suit property from Waziuddin/Khadiza/the persons/person, whoever be in possession thereof within 60 days from the date of receiving the copy of this judgment in its present condition.

112. It is a common knowledge that many Government Officials of various departments are situated on hired buildings. For this reason the Government has to bear huge expense for payment of rents. Therefore, it is our pious wish that the Government would retainthe valuable property i.e. the suit property, itself, which is situated at the heart of Dhaka by allotting the same to any Government Department or in the alternative the Government may construct a building for Government Departments/ Offices, so that this valuable property does not again fall into the hands of land/property grabbers with the help of some unscrupulous Government Officials.

113. It be noted that it is not necessary to discuss the decisions as referred to by the learned Senior Advocates/Advocates for the contending parties during their respective arguments, since we have dealt with the matters on the basis of evidence on record, oral and documentary as well as the abandoned property file independently and the parties failed to prove their respective case to get the suit property.

114. Before parting with the judgment, we would like to note that the power of this Court under article 104 of the Constitution is an extensive one though it is not used often or randomly. It is generally used for doing complete justice in any cause or matter pending before it in rare occasions in exceptional or extra-Ordinary cases for avoiding miscarriage of justice. To meet unwarranted and unpredicted exceptional situation this power is vested in

this Division for doing complete justice. Article 104 widens our hands so that this Division is not powerless in exceptional matters. The matters (appeals/CPLA) in our hands are matters requiring exercise of this power, to save a valuable property of the Government from the clutches of greedy land/property grabbers, that too with the active collaboration and help from the Government Officials. Therefore, we have no other option than to exercise our power under article 104 of the Constitution. In the instant matters, it is absolutely necessary to do so.

115. Moreover, if we do not exercise the power, given by our beloved Constitution under article 104 in these matters, it would give a wrong message to the unscrupulous land/property grabbers and in such case this judgment would be used as a tool/device to grab other Government properties with the seal of the Court. Therefore, under compelling circumstances, we have exercised our power under article 104 of the Constitution in dealing with the appeals and the CPLA for doing complete justice.

116. Finally, we appreciate Mr. Murad Raza, the learned Additional Attorney General, who with the leave of the Court, within a very short period has been able to assist the Court immensely by his elaborate arguments studying the abandoned property file meticulously. We also appreciate Mr. Nozrul Islam Chowdhury and Mr. A.M. Aminuddin, the learned Senior Advocates and Mr. Khair Azaz Maswood and Mr. Farooque Ahmed, the learned Advocates for the contending parties, who had tried their best for the interest of their respective clients and also to assist the Court. However, we do not find any merit in their submissions.

117. Accordingly,-

(1) Civil Appeal No.30 of 2017 and Civil Appeal No.31 of 2017 are dismissed.

(2) The impugned judgment and decree dated 24.08.2015 of the High Court Division in Transfer Appeal No.08 of 2014 allowing the appeal, decreeing T.S. No.224 of 1997 and directing Waziuddin to handover vacant possession of the suit property in favour of Khadiza Islam, appellant of T.A. No.08 of 2014 within 60 days from the receipt of the judgment by setting aside the judgment and decree dated 18.08.2009 of the 1st Court of Sub-ordinate Judge, Dhaka in T.S. No.224 of 1997 is set-aside and T.S. No.224 of 1997 is dismissed.

(3) The judgment and decree passed by the High Court Division in First Appeal No.23 of 1984 allowing the appeal and decreeing T.S. No.541 of 1982 of the Court of Sub-ordinate Judge, Dhaka by setting aside the judgment and decree of dismissal of T.S. No.541 of 1982 is hereby declared to be fraudulent, unlawful, and thus, set aside.

(4) The execution proceeding arising out of the said decree is also declared illegal. The registered deed of transfer of the suit property being Deed No.4722 dated 30.11.1992 in favour of Md. Waziuddin through Court is hereby cancelled.

(5) Khadiza Islam would not be entitled to get Khas possession from Md. Waziuddin and she would not be entitled to retain possession in the suit property, if there be any, by whatever means.

(6) Government Khas Mohal Authority shall takeover physical possession of the suit propertypresently measuring more or less 12 khatas of land with structures thereon of Holding No.10, Purana Paltan, Dhaka, Plot No.1184, Khatian No.217, present- Mouza-Ramna, Old Dag Nos.26, 27 and 28 vide statement of witnesses and plaint of Title Suit No.224 of 1997 (Khadiza Islam vs. Waziuddin and others), within 60 days from the date of receiving copy of this judgment from Md. Waziuddin/Khadiza Islam-Nirman Construction/ any person/ persons, in possession of the suit property in its present condition and retain its possession in accordance with law.

(7) Civil Appeal No.32 of 2017 and Civil Petition for Leave to Appeal No.4232 of 2018 are disposed of in the light of the observations made in the body of the judgment and the above decision/directions.

118. Send a copy of this judgment and order to the Inspector General of Registration and the concernedSub-Registrar for taking necessary steps relating to cancellation of Md. Waziuddin's deed being No.4722 dated 30.11.1992.

119. Also send a copy of this judgment to the Deputy Commissioner/Deputy Collector, Dhaka to take necessary action for taking over possession of the suit property,a Khas Mohal Property, as per our directions as above.

120. Further, sent copies of this judgment to the Secretary, Ministry of Land, Dhaka for information.

121. Send down the lower court records at once.

122. The Abandoned Property Record submitted on our instruction be also returned to the concerned authority through the person who submitted the same before this court on receiving appropriate acknowledgement receipt.

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**SPECIAL ORIGINAL JURISDICTION**

WRIT PETITION NO. 1774 OF 2017

**Grameenphone Limited, represented the Chief Executive Officer, GP House, Bashundhara, Baridhara, Dhaka- 1229.**
..... Petitioner
VERSUS
**Bangladesh Telecommunication Regulatory Commission (BTRC), represented by the Chairman, IEB Bhaban, Ramna, Dhaka-1000 and others**
..... Respondents

Mr. Junayed Ahmed Chowdhury, Adv. with
Ms. Sajeda Farisa Kabir, Advocate and
Mr. Tanvir Quader, Advocate
… For the Petitioner

Mr. Khandaker Reza-E-Raquib with
Mr. Khandaker Reza-E-Rabbi,
Mr. Sayed Mahsib Hossain,
Ms. Meherunnesa and
Ms. Nadeya Nazneen, Advocates
… For the Respondent No. 1

Heard on: 12.3.2019, 24.4.2019, 25.4.2019, 28.4.2019, 29.4.2019, 5.5.2019, 6.5.2019, 7.5.2019, 12.5.2019, 13.5.2019 and 14.5.2019.
Judgment on: 25.8.2019

**Present :**
**Mr. Justice Syed Refaat Ahmed**
**And**
**Mr. Justice Md. Iqbal Kabir**

**The Bangladesh Telecommunication Regulation Act Section 63 and 65;**
**It is our finding further that section 65 in its entirety is the corridor within the statutory scheme through which the sanctity of the section 63 penal sanction must be gauged. Consequentially, any failure to trigger section 65 or any of its components necessarily leads to a statutory infraction resulting in a more fundamental constitutional infraction. ... (Para 95)**

**If the section 65 provisions are to be obliterated or to be considered a dead letter of the law one is necessarily at a loss to find other statutory mechanisms that may be called upon for due implementation of section 63. Furthermore, it is our unqualified view that the power to charge an administrative fine to a maximum of Tk. 300 Crore must always have an in-built mechanism of fair play. Otherwise one is visited with a scenario of administrative anarchy resulting from an exercise of unfettered discretion. ... (Para 95)**

**JUDGMENT**

**SYED REFAAT AHMED, J:-**

1. Pursuant to this Application under Article 102 of the Constitution, a Rule Nisi was issued calling upon the Respondents to show cause as to why the (a) BTRC's show cause notice under Memo No. 14.32.0000.007.51.001. 15.974 dated 13.07.2016 (Annexure A); (b)

BTRC's Notice of Fine under Memo No. 14.32.0000.007.51.001.15.1373 dated 06.11.2016 (Annexure B) imposing a fine of BDT 30,00,00,000/- (Taka Thirty Crore) upon the Petitioner under section 65(5) of the Bangladesh Telecommunication Regulation Act 2001; (c) BTRC's letter of imposition of fine under reference No. 14.32.0000.007.51.001.15.1621 dated 29.11.2016 (Annexure C) rejecting the Petitioner's discharge application dated 16.11.2016 regarding the imposition of the said fine; and (d) BTRC's letter of imposition of fine under reference No. 14.32.0000.007.51.001.15.230 dated 30.01.2017 (Annexure D) rejecting the Petitioner's revision application dated 14.12.2016 regarding the imposition of the said fine shall not be declared as without lawful authority and are of no legal effect, and as to why the Respondent No. 1 (BTRC) shall not be directed to withdraw or rescind the impugned letter of imposition of fine under reference No. 14.32.0000.007.51. 001.15.230 dated 30.01.2017 (Annexure D) rejecting the revision application of the Petitioner and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The Petitioner is a company incorporated under the laws of Bangladesh and a duly licensed Cellular Mobile Phone Operator. The Petitioner is the largest telecommunication operator in Bangladesh in terms of revenue, coverage and subscriber base. Aggrieved and dissatisfied by the actions of Respondent No. 1 ("BTRC"), the Petitioner filed this writ petition ("the Application") challenging the following documents:

(a) BTRC's show cause notice under Memo No. 14.32.0000.007.51.001.15.974 dated 13.07.2016 ("the Impugned Show Cause Notice");

(b) BTRC's Notice of Fine under Memo No. 14.32.0000.007.51.001.15.1373 dated 06.11.2016 ("the Impugned Notice of Fine") imposing a fine of BDT 30,00,00,000/- (Taka Thirty crore) ("the Fine") upon the Petitioner under the Bangladesh Telecommunication Regulation Act 2001 ("the Act");

(c) BTRC's letter of imposition of fine under reference No. 14.32.0000.007.51.001.15.1621 dated 29.11.2016 ("the Impugned Letter 1") rejecting the Petitioner's discharge application dated 16.11.2016 regarding the imposition of the Fine; and

(d) BTRC's letter of imposition of fine under reference No. 14.32.0000.007.51.001.15.230 dated 30.01.2017 ("the Impugned Letter 2") rejecting the Petitioner's revision application dated 14.12.2016 regarding the imposition of the Fine;

3. on the grounds, *inter alia,* that the process, under which the Impugned Show Cause Notice, the Impugned Notice of Fine, the Impugned Letter 1 and the Impugned Letter 2 are issued and the Fine is imposed, is arbitrary, and the Fine is disproportionate and discriminatory.

4. Upon hearing the parties, this Court admitted the Application and by an Order dated 09.02.2017 ("the Court Order") directed the Petitioner to furnish a continuing Bank Guarantee covering the Fine made out in favour of BTRC within five working days of receipt of the Order and, thereafter, file an Affidavit-of-Compliance regarding issuance of such Bank Guarantee. This Court also directed BTRC to file an Affidavit-of-Compliance upon receipt of such continuing Bank Guarantee and place the said Bank Guarantee in the custody of this Court through the office of the Registrar, High Court Division, Supreme Court of Bangladesh.

5. In compliance with the Court Order, the Petitioner filed an Affidavit-of-Compliance on 19.02.2017 stating that the Petitioner has furnished a continuing Bank Guarantee dated 15.02.2017 covering the Fine made out in favour of BTRC.

6. Thereafter, in compliance with the Court Order, BTRC filed an Affidavit-of-Compliance on 26.02.2017 acknowledging the receipt of the continuing Bank Guarantee and that the said Bank Guarantee has been placed in the custody of this Court through the office of the Registrar, High Court Division, Supreme Court of Bangladesh.

7. BTRC filed an Affidavit-in-Opposition on 11.02.2018 ("the Affidavit-in-Opposition") seeking that the Application be rejected.

8. The Petitioner's case in the Application is as follows:
BTRC, under section 40 of the Bangladesh Telecommunication Regulation Act ("Act"), issued a permit dated 28.10.2007 with a validity period up to 10.11.2011 ("the Permit") to the Petitioner for *leasing or subleasing or sharing of, amongst others, the Petitioner's optical fiber and any other telecom installations subject to certain conditions.* These conditions included, amongst others, *sharing or leasing of any of its ...installations or system or any apparatus or facility* which included optical fiber without any discrimination (condition 7 of the Permit).

9. BTRC promulgated the Nationwide Telecommunication and Transmission Network Guidelines ("NTTNG") dated 30.11.2008 and the Infrastructure Sharing Guidelines ("ISG") dated 08.09.2008 (which was amended on 07.07.2011).

10. Subsequently, BTRC, by its letter dated 14.02.2011 ("the BTRC Permit Cancellation Letter") informed the Petitioner, amongst others that (i) validity of the Permit will not be extended beyond its expiration i.e., 10.11.2011; (ii) the Petitioner cannot make any further agreement with any party where there is Nationwide Telecommunication and Transmission Network ("NTTN"); (iii) the Petitioner cannot make any further agreement with any party for the period of non-existence of the Permit; and (iv) if any agreement is already executed and its duration exceeds the period of the Permit, that agreement shall have no legal effect on expiration of the Permit.

11. Upon receipt of the BTRC Permit Cancellation Letter, the Petitioner by its letter dated 03.11.2011 ("the GP Permit Extension Letter") wrote to BTRC about the ramification of the abrupt cancellation of the Permit and its consequential effect on the existing agreements between the Petitioner and various parties including banks, financial institutions, capital market such as DSE, CSE and CDBL, Bangladesh Navy, etc.

12. It so transpired moreover that the Petitioner by letter dated 10.11.2011 ("the Verbal Approval Confirmation Letter") (also being the date of expiration of the Permit), wrote to BTRC thanking for giving its *"verbal notification"* about the Petitioner being able to continue leasing or sharing its optical fiber network under the Permit pending BTRC's final notice.

13. BTRC never replied to the GP Permit Extension Letter or the Verbal Approval Confirmation Letter.

14. On or about 2012, the Petitioner, ADN (the proforma Respondent No. 3) and ASL (the proforma Respondent No. 4), in order to provide coordinated services to their customers, formulated a business model under the name and style of "GO Broadband" ("the coordinated service"), which they sought to present before BTRC. In this regard, ADN, by its letter dated

04.01.2012 under reference No. RA/ADN/Infrastructure/03 ("the ADN Letter") set out before BTRC the proposed business model.

15. ADN by its letter under reference No. RA/ADN/Infrastructure/04 dated 26.01.2012 sent to BTRC, the draft copy of the Business Alliance Agreement ("the Draft BAA") for coordinated services amongst the Petitioner, ADN and ASL.

16. ASL by its letter under reference No. অগ্নি/বিটিআরসি/ইএন্ডও/২০১২-০০১ dated 05.03.2012 ("the ASL Letter") wrote to BTRC about the rationale for coordinated services.

BTRC, in reply to the ADN letter dated 26.01.2012 and the ASL Letter, under its letter bearing reference No. BTRC/E&O/22-5/2012/Pt-1-556 dated 20.06.2012 ("BTRC Provisional Approval") gave provisional approval of the coordinated service as agreed by the Petitioner, ADN and ASL under the Draft BAA subject to the following, amongst others, terms and conditions:

(i) Passive infrastructure shall be shared in accordance with the Infrastructure Sharing Guidelines;

(ii) ADN and ASL can use the distribution channel of cellular mobile operators;

(iii)For providing the coordinated service, ADN and ASL shall be responsible for deploying their own network.

17. ADN and ASL subsequently sent another copy of the Draft BAA containing the name of the Petitioner as the third party to BTRC by their joint letter dated 02.09.2012.

18. BTRC, by its letter under reference No. BTRC/E&O/5-14/2012-1016 dated 12.09.2012, provisionally approved the Draft BAA between ADN, ASL and the Petitioner.

19. ADN and ASL, by their joint letter dated 07.10.2012 ("the Revenue Sharing Letter"), shared with BTRC the revenue sharing model for the coordinated service and requested BTRC to give its approval. BTRC, by its letter under reference BTRC/SS/Tariff/ISP-Part(2)/2011-13 dated 08.01.2013 ("the Approved Revenue Sharing Model"), approved the revenue sharing model.

20. On 22.01.2013, the Petitioner, ADN and ASL finalized, and executed the Business Alliance Agreement ("the BAA") in order to provide coordinated services.

21. BTRC further issued Interim Directive on Process flow for Amended Infrastructure Guideline under reference No. BTRC/E&O/22-5/2011/103 dated 31.01.2013 ("the Interim ISG Directive") under which it is stated, *inter alia*, that telecom operators must lease the primary fiber in long haul where NTTN already exists from NTTN operators and will be allowed to take the redundant/secondary backup from other telecom operators.

22. ADN and ASL, by their joint letter dated 03.02.2013 ("the BAA Execution Letter"), informed BTRC about the execution of the BAA upon following BTRC's instructions and guidelines. The BAA Execution Letter also annexed a copy of the BAA for BTRC's perusal. However, BTRC never replied to the BAA Execution Letter.

23. Furthermore, for the purpose of the coordinated service, ADN and ASL, by their letter dated 05.12.2012, sought tariff approval from BTRC, which was later modified by ADN and ASL upon BTRC's instructions and was duly notified to BTRC by their joint letter dated

27.01.2013. BTRC, by its letter under reference No. BTRC/SS/Tariff/ISP-Part(2)/2011-94 dated 17.02.2013 approved the tariff structure of the coordinated service, which was valid till 16.08.2013. This approval of BTRC was further applied for extension by the joint letter of ADN and ASL dated 05.08.2013 which was allowed by BTRC under reference No. BTRC/SS/Tariff/ISP-Part(2)/2011-518 dated 16.09.2013, which was due to expire on 16.03.2014.

24. ADN and ASL by their letter dated 11.02.2014 wrote to BTRC for extension of the tariff approval for another year ("the Tariff Extension Letter"). In this instance as well, BTRC never replied to the Tariff Extension Letter.

25. ADN and ASL, under another joint letter dated 23.03.2014, informed BTRC about continuation of the previously sanctioned tariff approval (which by then expired) until BTRC grants a new tariff approval ("the Tariff Continuation Letter"). Again, BTRC never replied to this Tariff Continuation Letter.

26. The Petitioner executed the Business Solutions Agreement ("BSA") on 03.12.2014 with Sonali Bank Limited ("SBL") pursuant to Petitioner's role under the BAA.

27. In the above context, BTRC issued the Impugned Show Cause Notice. In the Impugned Show Cause Notice, BTRC alleged that the Petitioner has violated the provisions of the Act, the NTTNG, the ISG, or its 2G or 3G licenses by (a) entering into an agreement with SBL; and (b) sharing its fiber optic network with ADN and ASL under the BAA. BTRC further instructed the Petitioner (i) to take corrective measures by immediately stopping the services provided to SBL and cancelling the BSA; and (ii) to show cause within thirty days from the date of receipt of the Impugned Show Cause Notice as to why an enforcement order should not be issued or necessary legal actions not be taken against the Petitioner in accordance with law.

28. The Petitioner replied to the Impugned Show Cause Notice on 11.08.2016, where the Petitioner stated that:

(i) It had migrated the transmission network to an NTTN operator as a corrective measure; and

(ii) There were some semantic errors in the BSA showing the Petitioner as the service provider, while in reality, ADN and ASL were the service providers and the Petitioner has sent an amended version of the BSA to SBL correcting the inadvertent mistakes on 04.08.2016.

29. On 06.11.2016, BTRC rejected the reply of the Petitioner to the Impugned Show Cause Notice, and through the Impugned Notice of Fine, alleged that the Petitioner has *failed to comply with the terms and conditions of the guidelines, license and the provisions of the Bangladesh Telecommunication Regulation Act 2001* and *also failed to justify such failure.* Hence, BTRC *after determining the nature of offence and the amount of loss, has taken the decision to* impose the Fine.

30. The Petitioner filed an application dated 16.11.2016 ("the Discharge Application") under section 65(3)(c) of the Act applying for discharge from the fine and denying the allegations levelled against it by BTRC as contained in the Impugned Notice of Fine. BTRC rejected the Discharge Application vide the Impugned Letter 1.

31 Thereafter, the Petitioner filed a revision application on 14.12.2016 ("the Revision Application") under section 65(5) of the Act on the ground that the Petitioner denies the allegations levelled against it by BTRC as contained in the Impugned Letter 1. The Revision Application of the Petitioner was rejected by BTRC by the Impugned Letter 2. BTRC also demanded that the Fine be paid by the Petitioner within 10 days of receipt of the Impugned Letter 2.

32. It is also important to note that along with the Petitioner, BTRC also imposed a fine of BDT 500,000/- (Taka five lac) on ADN by letter under reference No. 14.32.0000.007.51.001.15.1374 dated 06.11.2016 ("the ADN Notice of Fine") and a fine of BDT 500,000/- (Taka five lac) on ASL by letter under reference No. 14.32.0000.007.51.001.15.1375 dated 06.11.2016 ("the ASL Notice of Fine").

33. Under the coordinated services, ADN and ASL collectively earned Tk. 13,461,001/- and the Petitioner Tk. 147,682,324/-. However, BTRC only imposed a fine of Tk. 5 Lac each on ADN and ASL, whereas the Petitioner was imposed with a fine of Tk. 30 Crores.

34. The Petitioner points out furthermore, the Impugned Show Cause Notice, the Impugned Notice of Fine, the Impugned Letter 1 and the Impugned Letter 2 are all issued under section 65 of the Act despite the fact that the section was not mentioned in any of the documents. This is because in the Notice of the Fine, the Impugned Letter 1 and the Impugned Letter 2, BTRC states that the fine is imposed after determining the nature of the offence and amount of loss. It is stressed that section 65(2) of the Act empowers BTRC to fix penalty based on the nature of offence and the amount of loss.

35. BTRC's case in the Affidavit-in-Opposition is as follows:

BTRC notified the Petitioner that the term of the Permit will not be extended any further on the expiry of the Permit on 10.11.2011. Further, it is the case of BTRC that there is no scope for it as a government entity to give any verbal approval and as such it was not incumbent upon BTRC to respond to the letter dated 10.11.2011 written by the Petitioner to the BRTC.

36. It is also highlighted that upon vetting the Draft BAA between Petitioner, ADN and ASL, BTRC gave an approval subject to the fulfilment of specific conditions. It is contended that ADN and ASL never informed the BTRC about the execution of BAA. In that context BTRC's assertion is also that the BSA which was executed between the Petitioner and SBL was not in conformity with and pursuant to the role of the Petitioner under the BAA as approved by BTRC.

37. By a letter dated 30.03.2016, BTRC requested the Petitioner to explain the sort of internet service which GO Broadband provides and whether GO Broadband is a licensee of BTRC. According to BTRC it is apparent from the BSA that there was no reference therein to ADN and ASL and that the Petitioner, being a mobile phone operator, in providing to SBL Last Mile Connectivity violated different provisions of the Act. Predicated on such state of affairs, it was decided at the 200th Commission Meeting of BTRC held from 17 to 19 December to impose a fine of Tk. 30 Crore on the Petitioner for such violations.

38. Further, it is stated that BTRC did not impose the Fine under section 65(2) the Act. Since the Fine was not imposed under section 65 of the Act, there was no scope the Petitioner

to apply for discharge under 65(3)(c) of the Act. It is argued in a similar vein that since the Fine was not imposed upon the Petitioner under section 65 of the Act there was equally no scope for the Petitioner to apply for revision under section 65(5) of the Act. Therefore, a decision was taken during 20 to 26 December 2016 at the 201st Commission Meeting of BTRC rejecting the Revision Application and affirming its earlier decision that the Petitioner has to pay the Fine.

39. It is submitted, accordingly, that although the impugned notices & letters were sent within the purview of the Act, however, those were not sent under the authority given to BTRC under section 65 of the Act. Further asserted is the fact that the Fine was calculated on the basis of the loss which the exchequers has suffered by Last Mile Transmission which the Petitioner has provided to SBL since 03.12.2014.

40. Mr. Khandaker Reza-E-Raquib, BTRC's learned Advocate, submits that the Petitioner, even after expiry of the Permit, proceeded further with its *mala fide* intention to execute a fresh agreement and/or renew the existing agreement with other entities, despite being fully aware of the fact it has no lawful authority/ approval/ Permit to provide any sort of NTTN service and having also realized that such agreement shall have no legal effect beyond 10.11.2011. It is, accordingly, asserted that such actions on part of the Petitioner not only amount to violation of the Act, but also the terms and conditions of the Permit. He further submits that the Petitioner executed the BSA, an essentially bilateral agreement, with SBL in violation of the terms and conditions of the BAA to provide various business solution products and telecommunication services including Last Mile Connectivity and/or secure point to point data connectivity, when instead it were ADN and ASL who were responsible under the BAA to provide the coordinated service. He explains further that in any case under the purview of the Petitioner's existing 2G and 3G Cellular Mobile Phone Operator Licenses, the Petitioner being an Access Network Service (ANS) operator is not authorized to provide Last Mile Connectivity and/or secure point to point data connectivity service to SBL. Hence, in the absence of any appropriate license and/or approval, the Petitioner had no legal authority to enter into any such agreement with SBL and/or others.

41. In this context Mr. Reza-E-Raquib has stressed in reiteration that as per the BAA, both ADN and ASL, as opposed to the Petitioner, were responsible to provide the Last Mile Connectivity service i.e. the final leg of delivering connectivity to a customer. However, in the instant case, the Petitioner in violation of the terms and conditions of the BAA provided this service to SBL under the BSA. He submits that the Petitioner despite having actual knowledge and being fully aware of the fact that the Tariff approval as issued in favour of ADN and/or ASL for the coordinated service expired on 16.03.2014, went ahead and executed the BSA with SBL on 03.12.2014 to provide that very coordinated service in question. The BTRC's stance here is that since the approval was never renewed and/or extended any further by BTRC after its expiry on 16.03.2014, therefore, there remains no scope for the Petitioner and/or ADN and ASL to enter into any such BSA with any customers whatsoever including SBL.

42. Mr. Reza-E-Raquib submits that even if for the sake of argument it is considered that the BSA, although prima facie executed between the Petitioner and SBL bilaterally, somehow allows for ADN and ASL to be the actual service provider for the Last Mile Connectivity leaving the Petitioner to be only involved with Lead Sales (as has been the thrust of the arguments put forth at one point by the Petitioner's learned Advocate Mr. Junayed Ahmed Chowdhury), it can still be argued that the Petitioner with its *mala fide* intention knowingly

aided and abetted ADN and/or ASL to continue their operation despite the expiry of the Tariff approval in order to deprive BTRC and/or the government of revenues rightfully due it. Such action on part of the Petitioner, according to BTRC, amounts to a clear violation of section 73 of the Act along with other provisions of the relevant guidelines and licenses.

43. Furthermore, in generally assuming the position that each and every action of BTRC, i.e., from initiation of the Impugned Show Cause Notice till imposition of the Fine was done in accordance with the provision and/or power as conferred by section 63 of the Act, Mr. Reza-E-Raquib provides us with BTRC's perspective on where such authority exercised stands vis-à-vis the Petitioner under the said section in juxtaposition to the provisions and requirements of section 65. He accordingly submits that section 63 of the Act empowers BTRC with exclusive discretion to impose administrative fines upon the violator(s) for any amount up to BDT 300 Crore for violation of any provision of the Act, regulations and/or any terms and conditions of the license or Permit. He interprets section 65 as not containing any such threshold of administrative fine as may be imposed upon the violator for the aforesaid violations. According to Mr. Reza-E-Raquib, the provisions of section 65 are triggered and come into operation only when an administrative fine may be imposed upon the violator under any provisions including but not limited to section 63 of the Act. It follows, as per his submissions, that section 65 clearly deals with the process that is to be complied while executing the order of imposition of an administrative fine which may be imposed upon the violator under the relevant provisions of the Act and not at any point in time prior to such imposition.

44. Dwelling further on the specific grievance of the Petitioner on the matter of the Fine imposed, Mr. Reza-E-Raquib submits that the respective amounts of administrative fine imposed by BTRC upon the Petitioner, ADN and ASL were proportionate to the extent of their respective involvements with the offence and while determining the same BTRC duly considered all relevant factors including but not limited to the nature/gravity of the offence committed, roles assumed, responsibilities and liabilities of the respective violators, loss of revenue amount suffered by BTRC and/or the government, *mens rea* of the respective wrongdoers etc.

45. Summing up, therefore, BTRC's position, Mr. Reza-E-Raquib highlights thus the core points of BTRC's response:

(a) BTRC notified the Petitioner that the term of the Permit will not be extended any further on the expiry of the Permit. Further it is the case of BTRC that there is no scope for the BTRC being a government entity to give any verbal approval and as such it was not incumbent upon BTRC to respond to the letter dated 10.11.2011 (i.e., the Verbal Approval Confirmation Letter) written by the Petitioner to the BRTC upon the expiration of the Permit.

(b) Upon vetting the Draft BAA between the Petitioner, ADN and ASL, BTRC gave a conditional approval i.e., the BTRC Provisional Approval, and ADN and ASL never informed the BTRC about the execution of BAA. The BSA which was executed between the Petitioner and SBL was not pursuant to role of the Petitioner under the BAA which was approved by BTRC.

(c) By a letter dated 30.03.2016, BTRC requested the Petitioner to explain the sort of internet service which GO Broadband provides and whether GO Broadband is a licensee of BTRC. According to BTRC, it is apparent from the BSA there was no reference of ADN and ASL and that the Petitioner being a mobile phone operator has been providing SBL Last Mile

Connectivity, thereby, violating different provisions of the Act. During 17 to 19.10.2016, the 200th Commission Meeting of BTRC took place where it was decided that the Petitioner shall accordingly be liable for the Fine for violation committed.

(d) Further, BTRC did not impose the Fine under section 65(2) the Act. Since the Fine was not imposed under section 65 of the Act, there was no scope for the Petitioner to apply for discharge under 65(3)(c) of the Act. Moreover, it is BTRC′s case that since the Fine was not imposed upon the Petitioner under section 65 of the Act there was further no scope for the Petitioner to apply for revision either under section 65(5) of the Act. Therefore, during 20 to 26.12.2016 the 201st Commission Meeting of the BTRC took place where the BTRC rejected the Revision Application of the Petitioner and affirmed its earlier decision that the Petitioner is liable to pay the Fine.

(e) Although the Impugned Letters were sent within the purview of the Act, however those were not sent under the authority given to the BTRC under section 65 of the Act. Further, the Fine was calculated on the basis of the loss which the government has suffered by Last Mile Transmission which the Petitioner has provided to SBL since 03.12.2014.

46. In summation, BTRC contends that the grounds in this Writ Petition are vague, false, unfounded and replete with misconceptions and, therefore, the Rule Nisi issued is liable to be discharged.

47. In this context, the Petitioner advances the following submissions:

(a) The connectivity services provided by the Petitioner under GO Broadband to SBL as per the terms of the BSA did not violate the BTRC Provisional Approval, the Act, the NTTNG, the ISG or the Petitioner′s 2G or 3G licenses.

(b) The Petitioner did not violate the provisions of the Act, the NTTNG, the ISG, or the Interim ISG Directive by "sharing" its optical/wired transmission network with ADN and ASL for the coordinated service under the BAA rather than taking the lease of such optical/wired transmission network from NTTN licensee.

(c) Even if there is any violation by the Petitioner (which is denied), BTRC did not follow the due process when it issued the Impugned Notice of Fine, the Impugned Letter 1 and the Impugned Letter 2, since the process set out in section 65 of the Act was not followed.

(d) If section 65 of the Act does not apply (as argued by BTRC), then section 63 of the Act does not set out the way in which the Fine is to be calculated and therefore, BTRC had no basis for imposing the Fine.

(e) The Fine is discriminatory, since a regulatory authority like BTRC cannot, without any justification, adopt a different yardstick when determining the quantum of fines and penalties of the Petitioner, ADN and ASL.

(f) The Fine is wrong because BTRC did not take into account the corrective measures taken by the Petitioner.

48. This Court notes at the outset that the Petitioner's entire case is predicated on the validity of the Permit at all material times. That issue of validity constrains as first to look into section 40 of the Act as reads thus:

*"40. Restrictions on according commercial permission for use of telecommunication system.- (1) An operator shall not, without a permit issued by the Commission, accord permission to any other person or allow him, on commercial basis or in lieu of fees, price or*

*other consideration, to use his telecommunication system or any installation or apparatus or facility by which telecommunication services can be provided.*

*(2) Where an operator applies for a permit mentioned in sub-section (1), the Commission may allow the application and issue a permit if, after necessary inquiry, it is satisfied that the permit applied for will not adversely affect the telecommunication system or the providing of its services, and may also impose such conditions as it considers appropriate in any particular circumstances; the permit so issued shall remain valid for a period specified therein.*

*(3) Where a condition mentioned in the permit issued under subsection (2) is violated, the Commission may at any time cancel the permit."*

49. The Petitioner adopts the positions that its Permit was issued under section 40 of the Act allowing the *leasing or subleasing or sharing* of, amongst others, the Petitioner's *optical fiber and any other telecom installations subject to certain conditions.* It is the Petitioner's firm stance that there was no infraction on the part of the Petitioner which would entitle BTRC to cancel the Permit under section 40(3) of the Act. More significantly yet it is submitted further that at all material times, the Permit remained valid and subsisting because:

(a) BTRC never expressly denied that the Permit expired even when the Petitioner asked for its continuance by the GP Permit Extension Letter.

(b) BTRC never expressly denied that the Permit expired even when the Petitioner asked for its continuance by the Verbal Approval Confirmation Letter.

50. It is submitted by the Petitioner's learned Advocate, Mr. Junayed Ahmed Chowdhury that as a matter of law, there is a presumption of acceptance when there is non-reply to letters where, under the facts, there is an obligation to reply and disavow the claim if untrue *(Boerner v. United States 117 F 2d 387 (1941) at p. 391)*. From the facts, when the Petitioner, in the context of things and considering the gravity of the matter, under the Verbal Approval Confirmation Letter, asked of BTRC to confirm the continuance of the Permit and execution of new contracts thereunder as per verbal notification of BTRC, it was imperative, Mr. Chowdhury asserts, for BTRC to reply and deny that it had given any such verbal notification. He further highlights that in this case, after receipt of the BTRC Permit Cancellation Letter, the Petitioner sent two letters, namely – (a) the GP Permit Extension Letter and (b) the Verbal Approval Confirmation Letter. In these two letters, the Petitioner positively asserted its intention of continuing with the activities under the Permit and execution of new contracts thereunder. Especially, in the Verbal Approval Confirmation Letter, the Petitioner concluded by saying that "*We would now be conveying this notification to our customers so that they are assured of their service continuity*". This assertion of the Petitioner under the Verbal Approval Confirmation Letter (and also the GP Permit Extension Letter) Mr. Chowdhury argues to be crucial for the purpose of this case. He points out that none of these two letters evoked a contradiction or denial of BTRC and BTRC allowed the Petitioner's statements in the GP Permit Extension Letter and the Verbal Approval Confirmation Letter to remain unchallenged. It is submitted that if BTRC had any reservation about the Petitioner's claim that BTRC had given its *"verbal notification"*, it was incumbent upon BTRC, in the context of this case, under the principles enunciated in *Boggavarapu Subba Rao v. Telagamsetti Venkata Rao* reported in *2004 (4) ALD 426* and *Richardson v. Dunn* reported in *2 QB 218* to reply and dispel such assertion of the Petitioner. But in the

facts it so transpired that instead of replying to the GP Permit Extension Letter and the Verbal Approval Confirmation Letter, BTRC, for the first time, in its 200th meeting held from 17.10.2016 to 19.10.2016, while discussing the issue of the verbal approval, concluded that তাছাড়া কমিশন হতে যেকোন বিষয়ে মৌখিক অনুমোদনের কোন সুযোগ নেই। ("there is no scope for a verbal approval issuing from the Commission in any given matter") and reiterated the same position in its 201st meeting held from 20.12.2016 to 22.12.2016 and 26.12.2016. Mr. Junayed Ahmed Chowdhury stresses that under the laws governing oral information and subsequent confirmation, where action has to be taken on the basis of oral information, it is mandatory for the person giving such oral information to confirm the same in writing, and the person who has received such information, in turn, is required to seek confirmation of the oral information in writing as early as possible *(TSR Subramanian (India Supreme Court) Writ Petition (Civil) No. 234 of 2011).* Here, the Petitioner (that is the person receiving the verbal notification), upon receiving such information, informed BTRC by written confirmation under the Verbal Approval Confirmation Letter, to which BTRC never replied (either affirming or rejecting it).

51. Hence, the Petitioner contends that as a result of BTRC's failure to reply to these two Letters dispelling the Petitioner's position about the continuity of the Permit, the Permit remains valid and subsisting and was not cancelled under section 40(3) of the Act. Resultantly, it is submitted that the Petitioner was entitled under the Permit to go ahead with the sharing of, amongst others, its optical fiber with ADN and ASL under the BAA.

52. Having heard the submissions and considered the facts, pleadings and documentation on brought record in this case this Court is led to arrive at a finding at the outset that the nationwide NTTNG are of overriding effect with regard to the BAA and BSA. In this the application of the NTTNG has necessarily to be read with that of the ISG. The NTTNG are intended at all material times to provide an overview of the licensing and regulatory framework for applicants like the Petitioner to obtain license under the said guidelines. Consequentially, no person or entity can be allowed to develop, build, operate and maintain NTTN without a valid license issued by BTRC. Significantly further, the NTTNG had been prepared to create NTTNs with a view to separating Transmission Network Services and Access Network Services. The end result, therefore, must be that the law and the standards as the NTTNG must prevail over all contractual pathways that were sought variously by the Petitioner to operate in avoidance of the same. We also find the BTRC Permit Cancellation Letter (of 14.02.2011), considered on its own, to be an adequate advance notice to the Petitioner to get its act together before the expiration of the Permit on 10.11.2011 and avoid precisely the pitfalls anticipated therein and in which the Petitioner in the facts finds itself in. The Permit Cancellation Letter pertinently and presciently reads thus:

*"With reference to the subject mentioned above, I am directed to inform you that NTTN License has been issued to some entities for providing NTTN service by using the optical fiber network on commercial basis, which is the primary business of the NTTN Licensees. Hence, the term of the permit issued under section 40 of the Bangladesh Telecommunication Regulation Act, 2001, to Grameen Phone Limited will not, on its expiration, be extended for any further period. You are requested not to make any further agreement with any party where there is NTTN network. You are further requested not to make any agreement with any party for the period of non-existence of your permit. If any agreement is already executed and its duration exceeds the period of your permit, that agreement shall have no legal effect on expiration of the permit."*

53. Our primary reading is, therefore, that the Petitioner was negligent in not paying heed to the advance notice of 14.02.2011 and duly winding up its relevant operational activities in good time preparatory to the Permit expiration date of 10.11.2011 and beyond.

54. Predicated on that finding the GP Permit Extension Letter (of 03.11.2011) and Verbal Approval Certification Letter (of 10.11.2011) to BTRC appear to this Court to be the Petitioner's devices at avoidance of and suspending the inevitable consequences of the Permit's expiration. The facts, however, additionally indicate that the Petitioner was able to contrive such a situation in circumstances in which the BTRC itself was complicit. That conclusion also rings true of payments made and received by BTRC from the Petitioner in the post-November, 2011 period. It has been the Petitioner's contention that it chose to so act and operate on the basis of verbal assurance or *"verbal notification"* from BTRC itself, thereby, providing a leeway and license to the Petitioner to override the law.

55. In this context, Mr. Reza-E-Raquib has submitted candidly for the BTRC that the said regulatory authority was unaware of what the Petitioner was up to for a period of nearly five and a half years computed from the date of issuance of the BTRC Permit Cancellation Letter and leading into the issuance of the Impugned Show Cause Notice. It is submitted further it is only upon the BSA being executed that certain ISPs alerted the BTRC to the Petitioner's machinations. We are also given to believe by Mr. Reza-E-Raquib that the verbal assurance or *"verbal notification"* relied on by the Petitioner had at some point been possibly forthcoming from then incumbent Chairman, BTRC who incidentally passed away in 2012.

56. Indeed further, it can be agreed, and as done so by Mr. Junayed Ahmed Chowdhury an obligation attached to the BTRC to respond to the GP Permit Extension Letter and the Verbal Approval Confirmation Letter even given the adequacy and sufficiency of the BTRC Permit Cancellation Letter as found upon hereinabove. That said and BTRC being clearly remiss in not duly responding to the Petitioner's letters, in the facts such lapse is not found by this Court to be a fatal one and does not detract from the efficacy and adequacy of the BTRC Permit Cancellation Letter. By that reason this Court finds no reason to accept Mr. Chowdhury's assertions that BTRC's lapses contributed to the entrenched legal terms and conditions declaring the Permit's expiration on 10.11.2011 to be somehow, and inexplicably so, neutralized and placed in abeyance, thereby, permitting of the subsistence and continuity of the Permit beyond the expiry date. There is furthermore no ground found to attest to the view that section 40(3) of the Act had not been triggered off in the facts.

57. Mr. Khandaker Reza-E-Raquib has also contended, and not without merit, that the Petitioner resorted to *"subterfuge"* in *"making payments"* to BTRC under illegal FON Sharing Devices post - 2011. It is here that this Court is constrained to find on an abdication of regulatory responsibility on BTRC's part. We fail to understand how and why a regulatory authority as BTRC with its considerable statutory powers failed to detect and stop the Petitioner on its tracks for nearly five and half years after the expiration of the Permit on 10.11.2011. This is all the more baffling given that BTRC permitted the Petitioner to operate on an understanding, verbal or otherwise, failing to invoke its considerable penalizing powers under the Act. It would stand to reason that the charging and penalizing powers as found, for example, in sections 63 and 65, and considerable as they are, must be based on equally significant powers and duty to detect and prevent commission of offences under the Act. Such powers of detection and prevention ostensibly remained in abeyance for five and half years until issuance of the Impugned Show Cause Notice on 13.07.2016. It is our finding that BTRC does not at any material time and generally possess the luxury and privilege under the

statutory régime to assume readily ready compliance with the law by any entity as and including the Petitioner.

58. Given that finding above, we are concerned that in all likelihood the BTRC and the State exchequer have been ill-served by BTRC's inertia for an inordinate length of time and by the delayed regulatory response evident in the Impugned Show Cause Notice in lieu of prompt action demanded much earlier in the facts in 2011. Such prompt action was clearly anticipated otherwise following the BTRC Permit Cancellation Letter (of 14.02.2011). BTRC regrettably went into a deep slumber thereafter or chose to look the other way. That said, and predicated on our findings on the facts and issues focal to the issuance of the Impugned Show Cause Notice this Court holds that BTRC, albeit belatedly, grasped the gravity and nature of the offence committed by the Petitioner in its true legal context and accordingly no legal infirmity is found in the issuance of the Impugned Show Cause Notice. By that reason, the information on record indicates that the Petitioner had at material times been operating a system and/or providing service in violation of conditions of its license or Permit in a manner as constitute an offence under section 73(1)(a) of the Act as satisfactorily argued upon by the BTRC's learned Advocate, Mr. Reza-E-Raquib.

59. Yet another significant aspect of the Petitioner's grievance against BTRC is that due process has not been followed when issuing the Impugned Notice of Fine, the Impugned Letter 1 and the Impugned Letter 2:

The learned Advocate for the Petitioner, Mr. Junayed Ahmed Chowdhury emphasizes that even if it is accepted that the Petitioner violated the BTRC Provisional Approval, the Act, the NTTNG, the ISG or the Petitioner′s 2G or 3G licenses, even then, it is submitted that the Fine is imposed without following the due process of law. Mr. Chowdhury′s submissions in this regard has two parts – (a) whether section 65 of the Act applies or not; and (b) if section 65 of the Act applies, then whether its requirements were fulfilled or not.

60. As noted earlier, BTRC has relied on section 63 of the Act to impose the Fine and denies that section 65 of the Act applies to this case. As per the section 63(1) of the Act, if a licensee or a permit holder violates any provision of this Act or regulations or any condition of the licence or permit, in operating a system or in providing a service, then:

"...কমিশন একটি নোটিশের মাধ্যমে উক্ত ব্যক্তি বা লাইসেন্সধারীবা পারমিট বা সনদের ধারককে ৩০ দিনের মধ্যে এইমর্মে লিখিত কারণ দর্শানোর নির্দেশ দিতে পারিবে যে কেন তাহার বিরুদ্ধে একটি বাধ্যতামূলক বাস্তবায়ন আদেশ (enforcement order) ইস্যু বা উক্ত লাইসেন্স পারমিট বা সনদ বাতিল করা হইবেনা।"

61. Section 63(3) of the Act further states that:

"যদি উপ-ধারা (১) এর অধীনে ইস্যুকৃত নোটিশের কোন জবাব বা অভিযোগকৃত বিষয় সম্পর্কে কমিশনের নিকট সন্তোষজনক ব্যাখ্যা উপস্থাপন না করা হয় বা কমিশন কর্তৃক নির্দেশিত সময়ে উহার নির্দেশিত সংশোধন বা প্রতিকার না করা হয়, তাহা হইলে কমিশন লিখিতভাবে কারণ

উল্লেখপূর্বক একটি আদেশদ্বারা-

(ক) উক্ত লংঘনকারীর উপর অনধিক ৩০০ (তিনশত) কোটি টাকা প্রশাসনিক জরিমানা এবং উক্ত আদেশের পর যত দিন লংঘন চলিতে থাকে উহার প্রতি দিনের জন্য অনধিক অতিরিক্ত ০১ (এক) কোটি টাকা প্রশাসনিক জরিমানা আরোপ করিতে পারে।"

62. Section 63(1) and (3) of the Act clearly give BTRC the right to impose an administrative fine. However, Mr. Chowdhury submits that section 63 of the Act does not itself speak out about the procedure or the basis on which such fine be imposed. For those procedural niceties of mandatory application, Mr. Chowdhury stresses, we have to turn to section 65(1) of the Act which gives BRTC the right to make regulations for imposition of administrative fine in instances of violation of any section or provision of the Act. Moreover, section 65(2) of the Act states that:

"এই আইনে বা প্রবিধানের যে সকল বিধান লংঘনের ক্ষেত্রে প্রশাসনিক জরিমানা আরোপনীয় সেই সকল ক্ষেত্রে কমিশন অপরাধের ধরন ও ক্ষতির পরিমাণ নির্ণয় করিয়া] জরিমানা আরোপ করিবে লংঘনকারীকে এইমর্মে একটি নোটিশ দিবে যে, তিনি উক্ত নোটিশ প্রাপ্তির পর তাহার দোষ স্বীকার করিয়া নোটিশে নির্ধারিত প্রশাসনিক জরিমানা উহাতে নির্ধারিত সময়ের মধ্যে প্রদানের মাধ্যমে দায় মুক্ত হইতে পারেন এবং এই ব্যাপারে তাহার কোন বক্তব্য থাকিলে তাহাও উপস্থাপন করিবেন।"

63. It is validly explained that section 65(2) has several limbs, which are as follows-

(a) First Limb: If a violator contravenes any section/provision of the Act for which administrative fine can be imposed (এই আইনে বা প্রবিধানের যে সকল বিধান লংঘনের ক্ষেত্রে প্রশাসনিক জরিমানা আরোপনীয় সেই সকল ক্ষেত্রে), then (সেই সকল ক্ষেত্রে)

(b) Second Limb: BTRC, upon determining the nature of the offence and amount of loss (কমিশন অপরাধের ধরন ও ক্ষতির পরিমাণ নির্ণয় করিয়া), shall impose fine (জরিমানা আরোপ করিবে), and

(c) Third Limb: BTRC shall serve a notice on the violator to the effect that (লংঘনকারীকে এইমর্মে একটি নোটিশ দিবে যে) he may, after receipt of the notice, make the payment of the fine mentioned in the notice within the time stipulated therein and get himself discharged (তিনি উক্ত নোটিশ প্রাপ্তির পর তাহার দোষ স্বীকার করিয়া নোটিশে নির্ধারিত প্রশাসনিক জরিমানা উহাতে নির্ধারিত সময়ের মধ্যে প্রদানের মাধ্যমে দায় মুক্ত হইতে পারেন) and the violator may also present his position in this regard (এবং এই ব্যাপারে তাহার কোন বক্তব্য থাকিলে তাহাও উপস্থাপন করিবেন).

64. Therefore, and equally satisfactorily, it is submitted by Mr. Chowdhury that the interrelationship between sections 63 and 65 of the Act is as follows:

(a) To ascertain whether or not a violation under the Act has occurred, BTRC can issue a show cause notice under section 63(1) upon a suspected violator.

(b) If the suspected violator gives unsatisfactory reply to the show cause notice, then Section 63(3) allows BTRC to impose a fine within the prescribed limit.

(c) Once BTRC decides to impose a fine on the violator under section 63, BTRC then would *determine* the fine under section 65(2) by keeping অপরাধের ধরন ও ক্ষতির পরিমাণ (nature of offence and the amount of loss) in mind.

(d) BTRC would then issue a notice under section 65(2) to the violator stating the amount of the fine and would ask the violator to pay such fine within a prescribed time limit.

From the facts, the following points are highlighted as important by the Petitioner–

(a) The Impugned Show Cause Notice does not expressly say that it was issued under section 63 of the Act.

(b) But the Impugned Show Cause Notice ordered the Petitioner *to take corrective measures by immediately stopping the services* and *to show cause within 30 (thirty) days ... as to why enforcement order shall not be issued.* These are requirements of section 63(2) (উক্ত নোটিশে ... সংশোধন বা প্রতিকারের জন্য করনীয় সম্পর্কে সুনির্দিষ্ট বর্ণনা থাকিতে হইবে) and

63(3) of the Act (কমিশন একটি নোটিশের মাধ্যমে উক্ত... পারমিট... ধারককে ৩০ দিনের মধ্যে এই মর্মে লিখিত কারণ দর্শানোর নির্দেশ দিতে পারিবে যে কেন তাহার বিরুদ্ধে একটি বাধ্যতামূলক বাস্তবায়ন আদেশ (enforcement order) ইস্যু... করা হইবেনা).

(c) It has not been expressly stated in the Impugned Notice of Fine that the Fine was imposed under section 65 of the Act.

(d) The Impugned Notice of Fine imposed the Fine *after determining the nature of offence and the amount of loss* which is the Second Limb of section 65(2) of the Act (অপরাধের ধরন ও ক্ষতির পরিমাণ নির্ণয় করিয়া).

(e) BTRC, in its 201st meeting dated 20.12.2016 to 22.12.2016 and 26.12.2016, while calculating the Fine observed that উক্ত জরিমানা ধার্য করার ক্ষেত্রে Grameenphone Limited কর্তৃক সংঘটিত অপরাধের ধরন এবং সোনালী ব্যাংকের সাথে সম্পাদিত চুক্তিতে উল্লিখিত ফিস এন্ড চারজেস এর আলোকে সংঘটিত রাজস্ব ক্ষতি বিবেচনা করা হয়েছে।

(f) BTRC has stated that the Fine was imposed under section 63 of the Act and, therefore, the Petitioner does not have any scope under section 65(5) to apply for a revision.

(g) But, BTRC itself has stated that they have allowed the Petitioner fifteen days to apply for filing its revision application.

(h) Section 63 of the Act does not have any provision for filing and entertaining any revision application. Section 65(5) contains a provision for filing revision within fifteen days.

(i) BTRC did not reject the Revision Application on the ground that section 65 of the Act did not apply.

(j) In its 201st meeting dated 20.12.2016 to 22.12.2016 and 26.12.2016, while rejecting the Revision Application, BTRC observed that গ্রামীনফোন লিঃ এর রিভিশন আবেদনে প্রদত্ত বক্তব্য, যৌক্তিকতা ও আইনগত দিক গ্রহণযোগ্য না হওয়ায় কমিশন রিভিশন আবেদনটি নাকচ করে ৩০ ... কোটি টাকার জরিমানা আরোপের সিদ্ধান্ত বহাল রাখল।

(k) BTRC had full authority to reject the Revision Application outright on the ground that section 65 did not apply. But, BTRC dismissed the Revision Application on its merits (রিভিশন আবেদনে প্রদত্ত বক্তব্য, যৌক্তিকতা ও আইনগত দিক গ্রহণযোগ্য না হওয়ায়).

65. Therefore, it is submitted that the argument of BRTC that the Impugned Notice of Fine has been issued under section 63 of the Act cannot stand because:

(a) Section 63 does not contain provision on the form of notice. The form of the notice is specified in the Third Limb of section 65(2).

(b) Section 63 does not contain any provision about the factors which would be taken into account for calculating the Fine. The factors are stated in the Second Limb of section 65(2).

(c) BTRC entertained the Revision Application and rejected it on merits and not on the grounds that section 65 did not apply. The rejection of the Revision Application (which was filed under section 65(5)) on its merit is tantamount to BTRC′s tacit acknowledgement of the use of section 65 of the Act.

66. Moreover, it is submitted that section 65(5) of the Act cannot be taken in isolation and must be construed in light of the rest of the subsections of section 65 of the Act. Neither does section 63 of the Act have any provision for an application of revision, nor does it allow the parties to only use section 65(5) of the Act. It is submitted that BTRC cannot issue a notice under section 63 of the Act and entertain Revision Application under section 65(5) of the Act and leave out the mandatory procedure set out in section 65(2), (3) and (4) of the Act for their own benefit. Mr. Chowdhury relies here on the *ratio decidendi* of the judgment in *Sajida*

*Foundation v Post Office Savings Bank* reported in *31 BLD(HCD)2011 470* where this Court at para 18, held as follows:

*"... it is a cardinal principle of interpretation that a statutory provision is not to be construed in isolation and must be interpreted in its proper context (Abdus Samad Azad v Bangladesh 44 DLR 354 at para 12). The term 'context' means the situation or scenario without reference to which the statutory provision in question would become ambiguous. ... this Court finds that generally the context would be the preamble ... and each part of Rule 36 B and other provisions of the ... Rules shedding light on the other (Amin Jute Mills v Bangladesh 29 DLR (SC) 85)."*

67. Thus, in light of *Sajida Foundation,* it is submitted that if section 65(5) of the Act is taken in isolation of the rest of the subsections of section 65 of the Act, it becomes *"ambiguous"*. Section 63 has not made any provision that gives BTRC the right to jump to 65(5) of the Act, for an application of revision, without paying heed to the rest of the subsections of section 65.

68. The *ratio decidendi* in the *Sajida Foundation Case* has merited our due consideration and it is noted in this regard that in *Abdus Samad Azad v Bangladesh* reported in *44 DLR 354,* this Court at para 12, held as follows:

*"...it is a cardinal principle of interpretation of statute and also provisions of the constitution which is also a statute that it need be interpreted not in isolation but always by reference to the context in which the said expression appeared. It is also cardinal principle of interpretation of a statue that in interpreting of a statute that in interpreting the law the court will take the law as it would find the law and take every word found there in its ordinary meaning as expressly said in the act itself. Legislature meant what is said and had not meant what it had not said and thus nothing can be added to an expression even by implication, where the expression is unambiguous and clear, and no lacuna can be filled in on the basis on the so-called supposed intention of the legislature nor an interpretation be given to reach a law which the court may consider to be the law, keeping in mind the principle that any interpretation which would lead to repugnancy need to be avoided if it can be so avoided, without doing any injustice to other provisions of the Act."*

69. Upon a consideration of the above, this Court has arrived at the conclusion that pursuant to such firmly endorsed principle of interpretation, BTRC cannot, to borrow phraseology from the *Abdus Samad Azad Case,* add an *"expression"* to section 63 and imply that if a notice is sent under section 63, one can make an application of revision under section 65(5) of the Act. We hold that the legislature never intended section 65(5) of the Act to be read in isolation, without paying heed to the rest of the subsections of section 65 of the Act. BTRC cannot try to fill the *"lacuna"* on the basis of the *"supposed intention of the legislature"* but interpret the statute by what the legislature had actually said. If section 65(5) is read together with section 63, without rest of the subsections of 65, it will lead to *"repugnancy"*, which the court, in the *Abdus Samad Azad Case*, has asked to avoid.

70. Furthermore, in *Amin Jute Mills v Bangladesh* reported in *29 DLR (SC) 85,* the Appellate Division, at para 9, held as follows:

*"One of the basic rules of interpretation of statute is that to understand the meaning of a particular provision of an Act one if to read the Act as a whole each part shedding light on the other and the following observation of Lord Wright in the case of Jennings v Kelly,*

*decided by the House of Lords and reported in 1940 A.C. 206. Same case (1939) All. E.R. 464 maybe referred in this connection:*

*'the proper course is to apply the broad general rule of construction, which is that section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest'."*

71. Thus, pursuant to the *Amin Jute Mills Case*, it is accepted by this Court that a broad general rule of construction is required in this case and section 65 of the Act "*must be construed as a whole, each portion throwing light on the rest*". Consequently, it is this Court's finding in acceptance overall of the submissions by Mr. Chowdhury that the Impugned Notice of Fine on the Petitioner was issued under section 65(2) of the Act.

72. That finding consequentially leads us to ask if section 65 applies, then whether its requirements were fulfilled or not in the facts. Here, it is submitted that BTRC did not follow the due process elaborated in section 65 of the Act while imposing the Fine. The notice mentioned in section 65(2) of the Act, Mr. Junayed Ahmed Chowdhury argues, must follow the process stipulated in section 65(3) which states as follows:

"(৩) উপ-ধারা (২)-এ উল্লেখিত লংঘনের ব্যাপারে-

(ক) একজন পরিদর্শক প্রাসংগিক তথ্যাদি সহ নির্ধারিত নোটিশের ফরমপূরণ এবং দস্তখত করিয়া উক্ত নোটিশ-

(অ) অভিযুক্ত ব্যক্তির নিকট ব্যক্তিগতভাবে প্রদান করিবেন; অথবা

(আ) পরিদর্শকের জানামতে অভিযুক্ত ব্যক্তির সর্বশেষ বাসস্থান বা কর্মস্থলের ঠিকানায় প্রেরণ করিবেন; ...

(গ) অভিযুক্ত ব্যক্তি উক্ত লংঘন-

...

(ই) অস্বীকার এবং উহার সমর্থনে তাহার লিখিত বক্তব্যও প্রয়োজনীয় দলিল বা তথ্য পেশ করিয়া উক্ত জরিমানার দায় হইতে অব্যাহতির জন্য নোটিশে উল্লিখিত সময়ের মধ্যে কমিশন সমীপে আবেদন করিতে পারেন।"

73. Thus, pursuant to section 65(3)(a) of the Act, once a notice of administrative fine is issued by an inspector (পরিদর্শক) of BTRC upon an alleged violator, the accused may file a discharge application under section 65(3)(c)(iii) defending its position and asking for discharge from any administrative fine.

74. Section 65(4) of the Act sets out the process under which a discharge application of a violator (under section 65(3)(c)(iii)) would be decided. Section 65(4) of the Act states as follows:

"(৪) উপ-ধারা (৩)(গ) এর উপ-দফা (আ) বা (ই) এর অধীনে আবেদন করা হইলে কমিশন কর্তৃক এতদুদ্দেশ্যে নিযুক্ত একজন কর্মকর্তা সমগ্র বিষয়টি বিবেচনা ক্রমে লিখিত ভাবে সংশ্লিষ্ট কারণ উল্লেখ পূর্বক তাহার সিদ্ধান্ত প্রদান করিবেন এবং এইরূপ সিদ্ধান্তের ৩ (তিন) দিনের মধ্যে আবেদনকারীকে সিদ্ধান্তের অনুলিপি প্রদান করিবেন।"

75. Accordingly, once a discharge application of the violator under section 65(3)(c)(iii) of the Act is received, an appointed officer of BTRC (কমিশনকর্তৃক এতদুদ্দেশ্যে নিযুক্ত একজন কর্মকর্তা), under section 65(4) of the Act, shall consider the whole matter before him

and decide with reasons accordingly (সংশ্লিষ্ট কারণ উল্লেখপূর্বক তাহার সিদ্ধান্ত প্রদান করিবেন).

76. It is clear further from the construction of sections 65(3) and 65(4) that the inspector (পরিদর্শক) issuing show cause notice under section 65(3) must be a different person than the appointed officer of BTRC (কমিশন কর্তৃক এতদুদ্দেশ্যে নিযুক্ত একজন কর্মকর্তা) under section 65(4).

77. It has not escaped this Court's attention that in this case, however, the person signing the Impugned Show Cause Notice, the Impugned Notice of Fine, the Impugned Letter 1 and the Impugned Letter 2 is the same person (one Mr. S. M. Golam Sarwar, Senior Assistant Director of BTRC resulting in a clear violation of sections 65(3)(a) and 65(4) of the Act as the same person has acted as the inspector (পরিদর্শক) under section 65(3)(a) and the appointed officer of BTRC (কমিশন কর্তৃক এতদুদ্দেশ্যে নিযুক্ত একজন কর্মকর্তা) under section 65(4) of the Act.

78. Moreover, under section 65(5) of the Act, once BTRC receives a written application of revision from an alleged violator regarding the decision of the officer under section 65(4), it is required to afford an opportunity of hearing (**শুনানির** যুক্তিসঙ্গত সুযোগ দিয়া) to the alleged violator and the inspector (পরিদর্শক). However, evidently after the Revision Application was filed by the Petitioner, no such hearing was conducted by BTRC under section 65(5) of the Act and without any such hearing the Impugned Letter 2 was issued.

79. If it is accepted that section 65 of the Act does not apply (which is BTRC's case), the question then arises as to the basis on which the Fine was imposed by BTRC. The Petitioner's view is that section 63 of the Act has no basis of imposition of the Fine. In this context it is to be noted that section 63 of the Act specifies the upper limit of the administrative fine, but does not lay down the factors, based upon which BTRC can calculate the figure for a fine. Moreover, in the 201st meeting of BTRC, in আলোচ্যসূচি ১৩(গ), BTRC stated that:

"...এখানে উল্লেখ যে, উক্ত জরিমানা ধার্য্য করার ক্ষেত্রে Grameenphone Limited কতৃক সংঘটিত অপরাধের ধরন এবং সোনালী ব্যাংকের সাথে সম্পদিত চুক্তির উল্লেখিত ফি'স অ্যান্ড চারজেস এর আলোকে সংঘটিত রাজস ও ক্ষতি বিবেচনা করা হয়েছে।"

80. Thus, BTRC in making the statement অপরাধের ধরন এবং সোনালী ব্যাংকের সাথে সম্পদিত চুক্তির উল্লেখিত ফি'স অ্যান্ড চারজেস এর আলোকে has relied on section 65(2) of the Act which allows BTRC to determine the fine based on অপরাধের ধরন ও ক্ষতির পরিমাণ. It is to be noted that section 63 of the Act contains no such provision as *"the nature of offence and the amount of loss"* (অপরাধের ধরন ও ক্ষতির পরিমাণ) for imposing the Fine.

81. It is aptly submitted to this Court's satisfaction that BTRC cannot whimsically change its mind as to which section it would like to rely upon to pursue its case. On one hand, BTRC claims in its Affidavit-in-Opposition that section 65 of the Act does not apply but on the other, it has taken the benefits of section 65(2) of the Act to determine and impose the Fine on the Petitioner. The Petitioner emphatically highlights this as arbitrary which has made a mockery of the regulatory exercise of power under the Act. This Court finds that stance of the Petitioner legally tenable and sustainable to the exclusion of that by BTRC.

82. This Court is reminded here of the judgment in *D.N Ghosh vs. Additional Sessions Judge* reported in *AIR 1959 Cal. 208,* where the Calcutta High Court observed in para 12 as follows:

*"... The underlying principle is as follows: Prescribing an offence and its punishment is essentially a legislative act. But provided that this can be attributed to the legislative body, the actual working out of it can be delegated to a non-legislative body. The most simple example will be where the legislature itself prescribes the rules, makes its violation an offence, and lays down the penalty. Next, it may delegate the power to make rules to a non-legislative body but declare that violation of such rules when prescribed would be an offence and prescribe the penalty. ...The legislative body, instead of prescribing the precise penalty may also lay down the limit or standard, leaving it to the non-legislative body to prescribe the penalty within such limits or in accordance with the standard laid down.*

83. Furthermore, in *Commonwealth v. Walter W. Diaz* reported in *95 N.E 2d 666 (Mass. 1950),* the Massachusetts Supreme Judicial Court held as follows:

*"The fact that the statute empowered the commissioner, subject to the board's approval, to provide penalties for the violation of the regulations did not render it invalid. This is not a case where the statute authorized the commissioner to fix such penalties as he saw fit. Had the statute attempted to do that we have no doubt that it would have been an excessive delegation of power. See State vs. Curtis, 230 N.C. 169; People vs. Ryan, 267 N.Y. 133."*

84. Predicated on the above, this Court, therefore, arrives at the finding that the legislature through section 63 of the Act has laid down the limit of penalty for an administrative fine which is a permissible delegation of power to BTRC by the legislature. However, the actual working out of the penalty and the standard and factors to determine and calculate such penalty has been laid out in section 65 of the Act. Thus, this is not a case where the Act authorized BTRC to fix such penalties as it saw fit under section 63 of the Act (as stated in *Commonwealth v. Walter W. Diaz).* This is rather a case where BTRC has calculated the Fine based on the *standard laid down* in section 65(2) of the Act (as stated in *D.N Ghosh)*. But by denying the applicability of section 65 of the Act, BTRC has in effect made out a case that it has the power to fix the Fine under section 63 of the Act, which has absolutely no stipulation about the factors that would be considered by BTRC before arriving at a particular figure for the Fine. That proposition, in this Court's opinion, cannot be sustained in view of the provisions of section 63 read with section 65 of the Act and must be rejected. It is this Court's finding consequentially that BTRC did not follow the due process elaborated in section 65 of the Act while imposing the Fine. By that reason the Fine itself is found to be shorn of all legality and efficacy.

85. At this juncture, this Court has been asked by the Petitioner to ascertain further whether the Fine imposed is disproportionate and arbitrary:

This issue arises primarily in the context of ADN, ASL and the Petitioner contractually proceeding the coordinated service yet the Petitioner being fined BDT 30 Crore whereas the amount of fine imposed on ADN and ASL were BDT 5 Lac each.

86. Documents brought on record establish that BTRC has determined the amount of loss, i.e. by examining the fees and charges mentioned in the BSA, to decide on the amount of the Fine, at paragraph (ix) of the Impugned Letter 1 and Impugned Letter 2. Furthermore, BTRC, in its 200$^{th}$ meeting dated 17.10.2016 to 19.10.2016, while discussing the imposition of fine on the Petitioner, ADN and ASL, observed that:

"কমিশন সভার আলোচনাকালে ... কমিশনকে জানান যে, Grameenphone Ltd বর্ণিত শুধুমাত্র সোনালী ব্যাংক-কে GO Broadband সেবা প্রদানের মাধ্যমে বিগত দু-বছরে কমপক্ষে প্রায় ৩০ (ত্রিশ) কোটি টাকা আয় করেছে।"

87. However, Mr. Junayed Ahmed Chowdhury points out that the Petitioner's income from the coordinated service, since its inception, is not anywhere to BDT 30 Crore. He submits that from the facts, BTRC did not produce any document which would establish that the Petitioner earned BDT 30 Crore from the coordinated services. Rather, the facts clearly show that BTRC was guessing a figure for the Fine on the assumption that the Petitioner earned কমপক্ষে প্রায় BDT 30 Crore from the service provided to SBL. Mr. Chowdhury alerts this Court further to the fact that the documents produced by BTRC do not show any concrete basis on which BTRC determined:

(a) the Petitioner's income as কমপক্ষে প্রায় BDT 30 Crore from the service provided to SBL; and

(b) the fine of BDT 5 Lac each for ADN and ASL.

88. It is also submitted that the expression কমপক্ষে প্রায় ৩০ (ত্রিশ) কোটি টাকা does not have any legitimate basis and was a purely guesswork for BTRC to impose the Fine on the Petitioner.

89. At this juncture this Court is reminded of a cautionary note expressed by the Court in *Parasakthi Pictures Mart vs Collector Of Customs, 1995 (80) ELT 189 Tri Chennai, the Customs, Exercise and Gold Tribunal of Tamil Nadu* which reads as follows:

*"...I find it difficult to appreciate as to how there is such a substantial difference in the quantum of fine and penalty between the two ... persons similarly placed cannot be treated dissimilarly and this is the underlying spirit of Article 14 of the Constitution of India. The ... adjudicating authority cannot without any justification adopt a different yardstick in meting out the penal consequences by fixing the quantum of fine and penalty in one case which is far at variance with the one in another case. It is also well settled by the authoritative pronouncements of the Supreme Court that even in the matter of penalty in the nature of the breach and contravention between two persons in a similar or identical cannot be discriminated against the other in regard to the quantum of fine or penalty."*

90. BTRC may indeed argue that due to the Petitioner's financial position, the Fine is justified. But BTRC is reminded by this Court of the American case of *State Farm MUT. Automobile INS. Co. v Campbell* reported in *538 U.S. 408 (2003), ("Campbell")* where the Supreme Court of Utah in a similar vein tried to justify its decision of awarding a massive award to the State Farm by referring to its enormous wealth. But the U.S Supreme Court in declining to accept that stance stated in pages 426 and 427 of its judgment that:

*"The Utah Supreme Court sought to justify the massive award by pointing to ... State Farm's enormous wealth.*

*...*

*Here the argument that State Farm will be punished ... with reference to its assets...had little to do with the actual harm sustained by the Campbells. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."*

91. These cautionary notes have found favour with this Court. Thus, this Court holds that pursuant to the *Parasakthi Pictures Mart ratio,* BTRC cannot without any justification adopt

different and distinct yardsticks when determining the quantum of fines and penalties of the Petitioner, ADN and ASL especially when BTRC imposed the Fine on the Petitioner by arriving at the disputed figure on the basis of the expression কমপক্ষে প্রায়. Also, under *Campbell*, the wealth or financial position of the Petitioner cannot be a basis for imposing the disproportionate Fine when the basis of such imposition is unconstitutional, illegal and arbitrary.

92. It must not also be lost sight of that this second limb of the Petitioner's case concerns the construction to be accorded to sections 63 and 65 of the Act in determining the প্রশাসনিক জরিমানা or administrative fine payable by it in the facts. It is in that context that the Petitioner has impugned the BTRC's memos, letters of imposition and rejection orders comprising of the Impugned Notice of Fine of 6.11.2016, the Impugned Letter 1 of 29.11.2016 and the Impugned Letter 2 of 30.01.2017.

93. It is here that this Court has found merit in Mr. Junayed Ahmed Chowdhury's submissions that precisely because of BTRC's enormous responsibilities and powers it must operate within a regulatory boundary marked by the strictest application of the law. That has engaged this Court's attention in examining the necessary co-relationship between the provisions of section 63 and 65.

94. A proper reading of these two provisions with regard to both the determination and imposition of administrative fines leads us to discount BTRC's contention that section 63 is a stand-alone provision allowing for invocation independently of section 65(2) of the Act. Such contention notwithstanding, it is to be noted that in the orders issued by BTRC it has never adopted a position outright that certain provisions of section 65 shall not apply. Rather, the thrust of BTRC's actions as evident in the Impugned Notice of Fine and the Impugned Letters 1 and 2 has been of a liberty assumed to selectively apply the provisions of section 65 in preference to and exclusion of other equally applicable provisions. That *modus operandi*, as Mr. Chowdhury has satisfactorily submitted, runs counter not only to the scheme of the Act but to entrenched principles of statutory construction upheld by this very Court for example, in the *Sajida Foundation Case* reported in *31 BLD(HCD) 2011,470.* The *Sajida Foundation Case* ratio condemns and discourages an administrative authority's presumed power and discretion to pick and chose certain provisions of a governing statutory provision in isolation of its other interconnected provisions. Section 65 read on its own is found by this Court to be of a composite nature with each of its three pillars or limbs being organically woven into a rudimentary statutory textual fabric requiring invocation of each provision in the sequential order as clearly laid out in that section. In that light, BTRC's invocation solely of a section 65(5) process in preference to and exclusion of the other interconnected provisions and stages operates in denial of that composite thrust and objective of section 65 and is, hereby, found to be misconceived in law.

95. It is our finding further that section 65 in its entirety is the corridor within the statutory scheme through which the sanctity of the section 63 penal sanction must be gauged. Consequentially, any failure to trigger section 65 or any of its components necessarily leads to a statutory infraction resulting in a more fundamental constitutional infraction.

96. If the section 65 provisions are to be obliterated or to be considered a dead letter of the law one is necessarily at a loss to find other statutory mechanisms that may be called upon for due implementation of section 63. Furthermore, it is our unqualified view that the power to charge an administrative fine to a maximum of Tk. 300 Crore must always have an

in-built mechanism of fair play. Otherwise one is visited with a scenario of administrative anarchy resulting from an exercise of unfettered discretion. That mechanism of fair play is clearly devised in section 65 of the Act and can only be, therefore, ignored at the peril of not only the Petitioner but also BTRC. That appears to be the misstep taken by BTRC in its selective application of the law and in ignorance of this organic relationship between sections 63 and 65. By that reason, it is this Court's finding that the Impugned Notice of Fine and the Impugned Letters 1 and 2 are indeed the products of processes not sanctioned in law and from which presently no legal consequences can, accordingly, follow.

97. It is in that regard that the Impugned Notice of Fine and the two Impugned Letters are found to have been issued without lawful authority and of no legal effect and are consequentially, set aside with BTRC being, hereby, directed to embark afresh upon a process of imposition of an administrative fine as envisaged, in particular, in section 63(3)(ka) to be read in conjunction with the procedural provisions and protections granted under Section 65 in general and sections 65(2) (3) (4)(5)(6) and (7) as applicable in that sequence.

98. Significantly further, an intriguing aspect of this case has been revealed through the Petitioner's Supplementary Affidavit of 05.05.2019 in which it is stated that despite the expiry date of the Permit on 10.11.2011, the Petitioner continued to undertake activities of lease or sharing of fibre optic network purportedly on the basis of the Verbal Approval Confirmation Letter dated 10.11.2011 (Annexure-I). The Petitioner's continued activity under the Permit on the Verbal Approval Confirmation Letter is evidenced primarily by the fact that despite the Permit's expiry date of 10.11.2011 the Petitioner ostensibly kept on paying and BTRC kept on receiving revenue share from the Petitioner for the periods of October-December 2011, January-March 2012, April-June 2012, July-September 2012, October-December 2012, January-March 2013, April-June 2013, July-September 2013 and October-December 2013 for income arising out of fibre optic network. True copies of documents evidencing receipts of revenue share by BTRC from the Petitioner on account of fibre optic network during the periods of October-December 2011, January-March 2012, April-June 2012, July-September 2012, October-December 2012, January-March 2013, April-June 2013, July-September 2013 and October-December 2013 have been brought on record in the form of Annexures- AM, AM-1, AM-2, AM-3, AM-4, AM-5, AM-6, AM-7 and AM-8 to the said Supplementary Affidavit of 05.05.2019. The Petitioner has further provided a breakdown in Annexure AO of BTRC's earning of revenue shares on account of lease of sub-lease of the Petitioner's fibre optic network.

99. It is in this context that this Court deems it prudent to alert the office of the Comptroller and Auditor General of Bangladesh (Auditor General) to all financial dealings that transpired between the Petitioner and BTRC between 10.11.2011 till the issuance of the Impugned Show Cause Notice on 13.07.2016 in order that the Auditor General may consider undertaking an audit of BTRC's accounts for that period at least with a view to determining further the propriety or not of the financial transactions/ revenue sharing between the Petitioner and BTRC as above indicated.

100. It is to be noted that at the time of the issuance of the Rule on 09.02.2017 the Impugned Letter 2 rejecting the revision application of the Petitioner was stayed (with periodic extensions granted thereafter), subject to the Petitioner furnishing a continuing Bank Guarantee covering the administrative fine amount of Tk. 30 Crore made out in favour of BTRC. It is noted further from the Orders of 20.02.2017 and 27.02.2017 of this Court that

both the Petitioner and BTRC through Affidavits-in- Compliance individually filed have attested to the issuance and furnishing as well as receipt of such Bank Guarantee. As further contemplated in the Order of 09.02.2017 the said Bank Guarantee remains in custody of this Court as represented by the Office of the Registrar, High Court Division, Supreme Court of Bangladesh. In light of the findings and order above, the Registrar, High Court Division is, hereby, directed to hand over the said continuing Bank Guarantee to BTRC with receipt to be duly issued by BTRC and the said Bank Guarantee shall be retained by BTRC during the entire process of the determination and imposition of the administrative fine upon the Petitioner in accordance with law and as above directed by this Court.

101. Furthermore, from pleadings on record this Court is given to understand that a statutory forum for final determination on orders of administrative fine, and as envisaged in section 82(a) of the Act, is yet to be established notwithstanding that nine years have elapsed since introduction of section 82(a) into the law. Indeed, the Rule Nisi was issued on the understanding and specific pleading on behalf of the Petitioner that a judicial review of this matter was being sought in the absence of such appellate authority as contemplated in section 82(a). It is hoped that either in this very instance or future such instances of disputed determination and imposition of administrative fine an aggrieved party would have due recourse to such appellate authority duly constituted by the government.

102. Let a copy of this Judgment and Order be especially served upon the office of the Comptroller and Auditor General of Bangladesh for reference and future action, if any.

103. The Rule Nisi as issued on 09.02.2017 is, accordingly, disposed of with the findings, observations and directions as above.

104. BTRC shall strive to complete the process for determination and imposition as above directed within a period of 4 (four) months from the date of receipt of a certified copy of this Judgment and Order.

105. There is no Order as to costs.

106. Communicate this Order at once.

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**(SPECIAL ORIGINAL JURISDICTION)**

WRIT PETITION NO. 10519 of 2018
With
WRIT PETITION NO. 10520 of 2018

**Abdur Rahman and others**
..... Petitioners
(In writ petition No. 10519 of 2018)

-Versus-

**Judge (District Judge) Arpita Shampparrti Prattarpan Appellate Tribunal, Brahmanbaria and others**
..... Respondents
(In writ petition No. 10519 of 2018)

Farid Ahammed
..... Petitioner
(In writ petition No. 10520 of 2018)

-Versus-

Judge (District Judge) Arpita Shamppatti Prattarpan Appellate Tribunal, Brahmanbaria and others
..... Respondents
(In writ petition No. 10520 of 2018)

Dr. Kazi Akter Hamid, Senior Advocate with
Mr. A.Q.M Sohel Rana, Advocate(s)
……For the petitioners
(In both the writ petitions)

Mr. Md. Oziullah, with
Mr. Md. Kamal Hossain and
Mrs. Afroza Sultana, Advocate(s)
….. For the respondent No. 4 & 5
(In both the writ petitions)

Heard on 02.01.2019, 23.10.2019, 21.11.2019 & Judgment on 05.12.2019

**Present:**
**Mr. Justice Md. Ashfaqul Islam**
**And**
**Mr. Justice Mohammad Ali**

**Writ of Certionary: Maintainability;**
**It is well settled that in writ certiorari this Division would be loath to interfere with a decision of a Tribunal in specific, if the same is not a perverse one or a gross miscarriage of justice has been done.**

**A writ of certiorari is maintainable only in a case where erroneous decision within it jurisdiction. Even if there is mere error of law that will not confer any power on the High Court Division to issue a writ of certiorari except where there is an error apparent on the face of the record, that means, the error must be something more than a mere error. The High Court Division can issue writ of certiorari only if it can be shown that the judgment has been obtained by fraud, collusion or corruption or where the tribunal has acted contrary to the principles of natural justice or where there is an error apparent on the face of the record or where the tribunal's conclusion is based on no evidence whatsoever or where the decision is vitiated by malafide. ... (Para 34)**

**JUDGMENT**

***Md. Ashfaqul Islam, J:***

1. Both the writ petitions are taken up together and heard and disposed of by this single judgment as there involved a common question of fact and law.

2. The Petitioners in writ petition No. 10519 of 2018 Abdur Rahman and others as plaintiffs filed Arpita Shamppatti Prattarpan Suit No. 163 of 2012 before Arpita Shamppatti Prattarpan Tribunal, Brahmanbaria (hereinafter referred to as Tribunal), where writ respondent No. 5, Mihir Dutta contested as added defendant No. 4.

3. The Petitioner of writ petition No. 10520 of 2018 Farid Ahammed (who was plaintiff No. 4 in Suit No. 163 of 2012) featured as added defendant No. 3 in Suit No. 390 of 2012 filed by Mihir Dutta as plaintiff who is the added defendant No. 4 in Suit No. 163 of 2012.

4. Both the Suits were contested by the respective parties before the Tribunal wherein Arpita Case No. 163 of 2012 was decreed and Arpita Shamppatti Suit No. 390 of 2012 was dismissed by the Tribunal on 27.03.2017.

5. Three appeals were filed before the Arpita Shamppatti Appellate Tribunal, Brahmanbaria. Appeal No. 32 of 2017 was filed by Mihir Dutta against the Judgment and Decree passed in Arpita Shamppatti Suit No. 390 of 2012. Mihir Dutta filed another appeal No. 33 of 2017 as appellant as added opposite party against the decision of the Tribunal in Arpita Suit No. 163 of 2012 in which Suit was decreed. The Government also filed Appeal No. 34 of 2017 against the Judgment and Decree passed in Arpita Shamppatti Suit No. 163 of 2012.

6. The Appellate Tribunal after hearing the parties by the impugned Judgment and Decree dated 05.07.2018 allowed appeal No. 32 of 2017 and 33 of 2017 in favour of Mihir Dutta by setting aside the Judgment and Decree passed by the Tribunal in Arpita Shamppatti Suit No. 163 of 2012 and Suit No. 390 of 2012 respectively. Government Appeal No. 34 of 2017 was also dismissed and the Judgment and Decree of Arpita Shamppatti Suit No. 163 of 2012 was set aside.

7. For better understanding of the case the facts are detailed below in a nutshell:
Writ petitioners Abdur Rahman and others filed writ petition No. 10519 of 2018. Their case is that they filed the Suit before the Arpita Shamppatti Tribunal under অর্পিত সম্পত্তি প্রত্যর্পণ আইন, ২০০১ (hereinafter referred to as Ain) being Arptia suit no. 163 of 2012 (hereinafter referred to as Arpita case) before the Tribunal stating inter alia, that during preparation of revisional Khatian C.S Plot No. 131 was converted into S.A Plot No. 356. S.A Khatian No. 133 in respect of total 103 decimals of land including 46 decimals of land of Plot No. 356 was prepared in the name of Harendra Kishore Dutta, Norendra Kishore Dutta, son of Surendra Kishore Dutta and Surendra Kishore Dutta son of Prassanno Kishore Dutta. Harendra Kishore Dutta was enjoying the suit land on amicable settlement along with other tenants and died leaving behind Birendra Kishore Dutta as only legal heir. Birendra Kishore Dutta died leaving behind Samir Kishore Dutta as his only legal heir. Accordingly, Samir Kishore Dutta transferred the suit land to Malai Miah, son of late Siraj Miah vide an Ewaznama Deed being No. 5322 which was executed on 03.09.1982 and registered on 11.09.1982. Malai Miah was enjoying the suit land through tenants by erecting dwelling house and by digging pond therein.

8. The Government as plaintiff instituted a Title suit being No. 96 of 1985 for declaring the aforesaid Ewaznama deed as illegal and inoperative. The Suit was decreed in favour of the Government. Malai Miah preferred an appeal being No. 15 of 1993 before the District Judge, Brahmanbaria against the judgment and decree of the title suit No. 96 of 1985. On 09.10.2000 the aforesaid appeal was allowed and thereby set aside the judgment and decree dated 01.12.1992 and 02.01.1993 respectively passed in title suit No. 96 of 1985. Thereafter, the Government preferred a Civil Revision being No. 1225 of 2000 before this Division which was rejected for default vide order dated 24.03.2202. Malai Miah while in possession of the suit land transferred the same to the petitioners/their predecessors vide different sale deeds. The petitioners have been possessing and enjoying the suit land. The opposite parties have no right, title and possession over the suit land. After disposal of the Civil Revision case Additional Deputy Commissioner (Revenue), sought for legal opinion from the vested property lawyer and Government Pleader (GP) for correction of record of the suit land. On 11.03.2008 they rendered their legal opinion that Government has no right, title over the suit land of plot No. 356 and there is no legal bar to mutate the names of the petitioners in respect of the suit land. The suit land of plot No. 356 (41 decimals out of 46 decimals) was enlisted in the 'Ka' schedule as vested property vide Gazette notification dated 26.04.2012. Earlier the petitioners had no knowledge about the enlistment of the property in the 'Ka' schedule (Annexure-'B').

9. Added opposite party No. 4, Mihir Dutta who is respondent No. 5, in the instant writ petition contested the suit by filing a written statement wherein he denied the material allegations and stated inter alia, that S.A Khatian No. 133 corresponding to B.S Khatian No. 1576 in respect of C.S Plot No. 356, B.S Plot No. 1527, 1528 and 1529 measuring total land of 46 decimals was recorded in the name Harendra Kishore Dutta alias Harekrishna Dutta and Narendra Dutta, son of Surendra Kishore Dutta alias Prafulla Dutta. Harekrishna Dutta alias Harendra Dutta and Narendra Dutta were unmarried and died leaving behind their sister Moni Dutta. That is, Prafulla Dutta alias Surendra Dutta had 2(two) sons and 1(one) daughter. Moni Dutta was married to Sattandra Dutta of village Sultanpur. Mihir Dutta was born in the womb of Moni Dutta. Moni Dutta, when she was unmarried inherited her father's property since her two brothers were dead. Moni Dutta died leaving behind her only son Mihir Dutta who inherited the suit land. It is to be noted here that, after the death of first wife, Sattandra Dutta took his second wife Nibedita Dutta, daughter of Ashutosh Dhar of village Chittna under Nasirnagar Police Station (Annexure-'D').

10. Government contested the suit by filing a written statement and denied the material allegations made in the suit and further stated inter alia, that S.A Khatian No. 133 in respect of 1.03 acre land including 0.46 acre of plot No. 356 was prepared in the name Harendra Kishore Dutta, Narendra Kishore Dutta and Harendra Kishore Dutta who left the country for India forever during the war of 1965. Government enlisted the suit property as enemy property and subsequently as vested property. Thereafter, vide V.P case No. 37 of 1972-73 0.41 acre of land of plot No. 356 was leased out to Shahjahan Miah and others. The petitioners claimed the ownership of the suit land by creating forged documents. 0.41 acre of land of plot No. 356 was enlisted in 'Ka' schedule and 0.1 acre of land in the 'Kha' schedule (Annexure-'C').

11. Further, case of the Government as it appears from paragraph 7 of the additional written statement of the opposite party No. 1 in short, is, that S.A Khatian No. 133 was prepared in the name of Harendra Kishore Dutta and Narendra Kishore Dutta, son of Surendra Kishore Dutta and Surrendra Kumar Dutta, son of Prosanna Kumar Dutta in respect of 1.03 acres of land including 0.46 acre land of C.S plot No. 131, S.A plot No. 356 of 259

Paikpara Mouza, Harendra Kishore Dutta and other left the country for India before 1964 and the Evacuee property Management Committee took over the charge of the property on 01.09.1963 vide EPMC No. 1906 which was published in the Dacca Gazette on 24.10.1963. 0.41 acre of land of plot No. 356 was leased out to Abdul Malek, son of Saber Ali Hazi of Poirtola vide EPL case No. 1247 of 1963, dated 24.01.1964. 5 decimals of land of plot No. 356 was leased out to A.F.M Shahidullah, son of Dhon Miah of Paikpara vide EPL case No. 313 of 66-67, dated 11.05.1967. Thereafter, the aforesaid 5 decimals of land was leased out to Dhon Miah, son of late Hazi Abul Hossain of Paikpara vide EPL case No. 10/69-70 and on 12.10.1974 possession of the said land was handed over to him by the Government. After the death Abdul Malek lease of 0.41 acre of land was approved in the name of his four sons namely, Ismail Miah, Younus Miah, Idris Miah and Ibrahim Miah vide V.P Case 37/72-73, dated 06.07.1976. On 16.03.1978 lease of 0.41 acre of land of plot No. 356 was approved in the name of Dhon Miah, son of late Hazi Abul Hossain of Paikpara by obtaining 'No Objection' from Ismail Miah and others. Dhon Miah paid the lease money up to 1384 B.S and on 23.03.1978 possession of the land was handed over to him. Accordingly, possession and control of the whole land of disputed plot No. 356 was taken over by the Government. Later on, some people in collusion with lease holders claimed the ownership of the suit land by creating false and fabricated documents. Since the lease-record was lying in the Court the Government was not in a position to renew the lease agreement.

12. As it has already been stated that after hearing the parties the Arpita Shamppatti Suit No. 63 of 2012 was decreed and Suit No. 390 of 2012 was dismissed by the judgment and decree dated 27.03.2017 and 03.04.2017 respectively. Subsequently, the respective parties preferred three appeals of which Mihir Dutta preferred appeal No. 32 and 33 of 2017 and government preferred appeal No. 34 of 2017. Arpita Shampatti Appellate Tribunal as it has been already mentioned by the judgment and decree dated 02.07.2018 and 05.07.2018 respectively allowed the appeal No. 32 and 33 of 2017 and dismissed the government appeal 34 of 2017.

13. Challenging the said judgment of Arpita Shampatti Appellate Tribunal the plaintiff petitioners of suit No. 163 of 2012 Abdur Rahman and others filed writ petition No. 1091 of 2018 and added defendant No. 4 in Arpita Shampatti Prattarpan Case No. 390 of 2012 one Farid Ahmed filed writ petition No. 10520 of 2018.

14. Dr. Kazi Akhter Hamid, the learned Senior Advocate, appearing in both the writ petitions for the petitioners after placing the petition, impugned judgment and decree of the Tribunal and the Appellate Tribunal and other materials on record mainly advanced the following arguments:

Firstly, he argues that judgment of the Appellate Tribunal has been passed without assessing and evaluating the evidences on record and on misconception of law and facts and those are bad in law as well as in fact and hence the impugned judgment and decree is without lawful authority having no legal effect.

15. Substantiating his argument the learned Counsel further contends that the Tribunal rightly declared that the petitioners are the owner of the disputed land as per provision of 2 (ভ) of the Ain, Moreso, as per section 2 (ঞ)(অ) of the Ain the land in question does not come within the definition of vested property but the Appellate Tribunal failed to appreciate the same.

16. Next, he submits that the instant petitioners were able to prove their right, title and possession over the suit land and the learned Tribunal rightly decreed the suit in favour of the

petitioners. But the learned Appellate Tribunal on misreading and non-consideration of the material evidences on record allowed the appeal arbitrarily. Hence, an interference from this Hon'ble Court is imperative. As he submits that the impugned judgment and decree are contrary to law and amounts to an improper exercise of jurisdiction resulting in miscarriage of justice. In other words, the Appellate Tribunal had exceeded its jurisdiction in making an adverse view about the Ewaznama deed No. 5322 which was executed on 03.09.1982 and registered on 11.09.1982.

17. Next, he submits that Mihir Dutta (respondent No. 5) is not a legal heir of S.A tenant Harendra Dutta and Narendra Dutta. He has submitted forged succession certificate. Actually, Mihir Dutta is the son of Monidhar (daughter of Ashudhar) which is evident from the certificate issued by the Chairman, Gouniaok Union Parishad under Nasirnagar Police Station of Brahmanbaria (exihibit-27), Ashudhar had only two daughters, namely, Monidhar and Dolidhar. That is, Monidhar had not brother. She was married to Sattendra Dutta of Sultanpur under Brahmanbaria Sadar police station. It is to be noted here that since Hindu-marriage is not required to be registered, therefore, the question of maintaining register-book does not arise at all. But the learned Appellate Tribunal failed to appreciate these vital facts.

18. Lastly, he concludes that Mihir Dutta (respondent No. 5) fraudulently produced a succession certificate and a pratyanpattra on 25.09.2012 wherein it was stated that late Surendra Kishore Dutta alias Profulla Dutta was a resident of ward No. 04 who died leaving behind Harendra Kishore Dutta alias Hore Krishno Dutta, Narendra Kishore Dutta and Moni Dutta as his legal heirs. Moni Dutta was the legal heir of her aforesaid two brothers who died leaving behind her only son Mihir Dutta. From a careful reading of the aforesaid documents (exhibit-2/kha & 2/ga of Arpita case No. 390 of 2012) it is evident that those are subsequent embellishment and the probative value of those certificates are seriously doubtful and inadmissible evidence. But the learned Appellate Tribunal failed to consider these important facts of the suit.

19. Mr. Md. Oziulalh, the learned Advocate appearing for the respondents in both the writ petitions by filing affidavit-in-opposition dated 11.07.2019 opposes the Rule specifically on the grounds that in 1963 the land in question was declared as "Evacuee Property" and accordingly Government took it under its control, possession and management by publishing Gazette in 1963. Thereafter, the land in question was declared as "Enemy" Property in 1965 and accordingly Gazette was published in 1965 to that effect and as per law it vested in the Government as vested property. In this view of the matter, the "Enemy" Property/vested property cannot be transferred by registered deed to anybody else. As per provision of P.O 142 of 1972 no vested property/enemy property can be transferred by any registered instrument and if it is so done that will be void-ab-initio and as a whole null and void. Since the property in question stood as enemy/vested property till 1982 there was no scope to exchange the same by registered Ewajnama in favour of Malai Miah in 1982 as per said P.O 142 of 1972 and as such the exchange deed No. 5322 of 1982 does not create any legal interest in favour of said Malai Mia and it has no value in the eye of law.

20. He further submits that the claim of the petitioner of the disputed property has been emanating from the deed of exchange executed between Malai Mia and Shamir Kishore Dutta. He also submits that the Appellate Tribunal being last court of fact and law duly reversed the materials findings of the Tribunal after assessing and evaluating the evidences on record oral and documentary and duly reversed the materials findings of the Tribunal by giving cogent findings and reasoning. The appellate Tribunal found that the predecessors of the plaintiff Shamir Kishore Dutta, (who executed the Ewajnama with Mr. Malai Mia) were

not aware of S.A recorded tenant Harendra Kishore Dutta. The appellate Tribunal Found "সার্বিক পর্যালোচনায় অত্র আপীলেট ট্রাইব্যুনালের নিকট ইহা প্রতীয়মান হয় যে, মলয় মিয়ার ৫৩৩২/৮২ দলিলের দাতা সমীর কিশোর দত্তের পিতা বীরেন্দ্র কিশোর দত্ত এস,এ প্রজা হরেন্দ্র কিশোর দত্তের উত্তরাধিকার নহে" Therefore, as he submits that the judgment of Lower Appellate Tribunal being based on material evidence on record should be maintained.

21. He further submits that since the Appellate Tribunal by reversing the findings of the tribunal held that Somir Kishore Dutta, predecessor of the plaintiffs was not heir of S.A recorded tenant, he was never a মালিক (owner) of the land in question in terms of section 2 (ড) of the অর্পিত সম্পত্তি প্রত্যার্পন আইন, ২০০১। As he was not successor-in-interest of the S.A recorded tenant he was not the owner of the land in question. Claiming interest from him, the subsequent purchasers i.e the plaintiffs of Suit No. 163 of 2012 are not the owner of the land in question. Therefore, the findings of the Appellate Tribunal in respect of locus-standi of the plaintiffs, petitioners herein are legal and as such the Judgment of the lower Appellate Tribunal should be maintained.

22. He also submits that by giving findings, Appellate Tribunal found that the plaintiffs of Suit No. 163 of 2012 are illegal possessor of the land in question in as much as earlier as lessee, they got possession of the land in question and subsequently they are claiming that possession as their own possession. But the Tribunal totally ignored this vital and legal aspect of the matter while decreeing the suit.

23. Finally he submits that the lower Appellate Court being final court of fact, arrived at its findings on proper assessment of the evidence on record and appreciation of law involved in the instant case by finding that the plaintiff, Mihir Dutta of Suit No. 390 of 2012 is heir of S.A recorded tenants Horendra Kishore Dutta. While decreeing the suit, the Appellate Tribunal reversed the findings of the Tribunal in respect of locusstandi of said plaintiff Mihir Dutta and arrived at its decision by declaring that the plaintiff was মালিক (owner) of the Suit land and as such interference by this Court is not required.

24. We have heard the learned Counsels of both sides at length and considered their submissions carefully. We have also perused the impugned Judgment and decree of the Lower Appellate Tribunal and also the Judgment and decree of the Tribunal.

25. At the very outset it has to be seen what is the scheme of "অর্পিত সম্পত্তি প্রত্যর্পণ আইন, ২০০১ ও অর্পিত সম্পত্তি অবমুক্তি বিধিমালা, ২০১২" together with this let us first also visit what is the scope and limitation of application of Code of Civil Procedure in respect of this special law.

26. In the preamble of the Ain it is clearly mentioned:-

"অর্পিত সম্পত্তি হিসাবে তালিকাভুক্ত কতিপয় সম্পত্তি বাংলাদেশী মূল মালিক বা তাহার বাংলাদেশী উত্তরাধিকারী বা উক্ত মূল মালিক বা উত্তরাধিকারীর বাংলাদেশী স্বার্থাধিকারী (Successor-in-interest) এর নিকট প্রত্যর্পণ এবং আনুষংগিক বিষয়াদি সম্পর্কে বিধান প্রণয়নকল্পে প্রণীত আইন।"

27. Section 2 gives some definitions which are very important to note:

২। বিষয় বা প্রসঙ্গের পরিপন্থী কোন কিছু না থাকিলে, এই আইনে,-

(ক) ''অর্পিত সম্পত্তি'' অর্থ অর্পিত সম্পত্তি আইনের অধীনে সরকারে ন্যস্ত সম্পত্তি;

(খ) ''অর্পিত সম্পত্তি আইন'' অর্থ-

(অ) Defence of Pakistan Ordinance, 1965 (Ord. No. XXIII of 1965) (যাহা ১৬/০২/১৯৬৯ ইং তারিখ পর্যন্ত কার্যকর ছিল);

(আ) উক্ত Ordinance No. XXIII of 1965 এর অধীনে প্রণীত Defence of Pakistan Rules, 1965 এবং উক্ত Rules এর অধীন প্রদত্ত আদেশের যতটুকু দফা (উ) তে উল্লেখিত Act বলে হেফাজতকৃত;

(ই) Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 (Ord. No. I of 1969) (যাহা Act XLV of 1974 দ্বারা রহিত);
(ঈ) Bangladesh (Vesting of Property and Assets) Order, 1972 (P. O. No. 29 of 1972) এর যতটুকু উপ-দফা (অ), (আ) এবং (ই)- েত উল্লিখিত Ordinance এবং Rules এর ক্ষেত্রে প্রযোজ্য হয়;
(উ) Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974 (XLV of 1974); এবং
(ঊ) Vested and Non-resident Property (Administration) Act, 1974 (XLVI of 1974) (যাহা Ord. No. XCII of 1976 দ্বারা রহিত)এর যতটুকু উপ-দফা (অ),(আ)এবং (ই)-তে উল্লিখিত Ordinance এবং Rules এর ক্ষেত্রে প্রযোজ্য হয়;
……
(ঞ)"প্রত্যর্পণযোগ্য সম্পত্তি" অর্থ অর্পিত সম্পত্তি আইনের অধীনে তত্বাবধায়ক কর্তৃক অর্পিত সম্পত্তি হিসাবে তালিকাভুক্ত করা হইয়াছে এইরূপ সম্পত্তির মধ্যে-
(অ)যাহা এই আইন প্রবর্তনের অব্যবহিত পূর্বে সরকারের দখলে বা নিয়ন্ত্রণে ছিল; বা
(আ) যাহা "প্রত্যর্পণযোগ্য জনহিতকর সম্পত্তি" অর্থাত্ দেবোত্তর সম্পত্তি, মঠ, শ্মশান, সমাধিক্ষেত্র বা ধর্মীয় প্রতিষ্ঠানের বা দাতব্য প্রতিষ্ঠানের সম্পত্তি বা জনকল্যাণের উদ্দেশ্য ব্যক্তি উদ্যোগে সৃষ্ট ট্রাস্ট সম্পত্তি এবং যাহা এই আইন প্রবর্তনের অব্যবহিত পূর্বে সরকারের দখলে বা নিয়ন্ত্রণে ছিল;
ব্যাখ্যা।- ধারা ৬ এর দফা (ক) হইতে (চ) তে উল্লিখিত কোন সম্পত্তি উক্তরূপ প্রত্যর্পণযোগ্য সম্পত্তি বা প্রত্যর্পণযোগ্য জনহিতকর সম্পত্তি হিসাবে গণ্য হইবে না-তবে উক্ত ধারার দফা (চ) এর শর্তাংশে উল্লিখিত ক্ষতিপূরণের অর্থ প্রত্যর্পণযোগ্য সম্পত্তি বলিয়া গণ্য হইবে;
……
(ড) 'মালিক' অর্থ যে ব্যক্তির সম্পত্তি অর্পিত সম্পত্তি হিসাবে তালিকাভুক্ত হইয়াছে সেই মূল মালিক বা তাহার উত্তরাধিকারী, বা উক্ত মূল মালিক বা উত্তরাধিকারীর স্বার্থাধিকারী (Successor in interest), বা তাহাদের অনুপস্থিতিতে তাহাদের উত্তরাধিকার সূত্রে এমন সহ-অংশীদার যিনি বা যাহারা ইজারা গ্রহণ দ্বারা বা অন্য কোনভাবে সম্পত্তির দখলে রহিয়াছেন (Co-sharer in possession by lease or in any form)যদি উক্ত মূল মালিক বা উত্তরাধিকারী বা স্বার্থাধিকারী (Successor in interest)বা উত্তরাধিকারসূত্রে সহ-অংশীদার (Co-sharer in possession by lease or in any form) বাংলাদেশের নাগরিক ও স্থায়ী বাসিন্দা হন;]

28. Section 4 of the Ain enjoins the limited scope of application of Code of Civil Procedure in the manner:

৪। এই আইনের অধীন কোন কার্যধারায় দেওয়ানী কার্যবিধির নিম্নবর্ণিত বিধানাবলী ব্যতীত অন্য কোন বিধান প্রযোজ্য হইবে না, যথা:-
(ক) এই আইনে বা বিধিতে কোন বিষয়ে দেওয়ানী কার্যবিধির কোন বিধান যতটুকু প্রযোজ্য মর্মে বিধান করা হয় ততটুকু; এবং
(খ) উক্ত কার্যবিধির ১১ ধারা।

29. Now it can be said that any decision that has to be given under this special law should be given under the scheme and the provisions of this special law only. The law to this effect is very much clear and unambiguous but the fact remains that the application of Code of Civil Procedure though limited in terms of section 4 of the Ain but in any case the decision of the lower Appellate Court has to be given adverting to the real point upon which the decision of the Tribunal is based. Therefore, in our view, application of order 41 Rule 31 of the Code of Civil Procedure pertinently and relevantly comes into play.

30. Keeping all these things in the back of mind let us now evaluate the judgment of the Lower Appellate Tribunal. On our scrutiny we have found that by an elaborate and exhaustive judgment considering each and every evidence on record, oral and documentary, the Appellate Tribunal reversed the decision of the Tribunal. Clearly it held that in terms of section (2) as per definition part 2(kha) the appellate Tribunal found the property in question was first declared as evacuee property in the year 1963 and subsequently it was declared enemy property in the year 1965 and therefore, this property falls within the period of 1965 to 1969 and that being the admitted fact that the said property was declared enemy during this period, cannot be challenged before any court of law. This proposition of law has been well

settled and set at rest in the famous case of Dulichand vs. Omraolal 33 DLR AD 30. The Appellate Tribunal, as we have found rightly observed that the suit property admittedly was under the management and control as evacuee property and subsequently became enemy property cannot be transferred in any manner because of the P.O 142 of 1972. Therefore, by all emphasis it can be said that the exchange deed No. 5322 dated 11.09.1982 executed between Malai Mia and Shamir Kishore Dutta was void ab-initio and title cannot pass under the said Ewajnama to the subsequent transferee, that is to say, Abdur Rahman and others specifically. One Dhon Miah in whose favour 41 decimals of land was transferred subsequently. The said deed of Exchange was challenged by the government before Civil Court which was decreed in favour of the government but on an appeal preferred by Malai Mia that was reversed and the suit was dismissed against which government preferred Civil Revision which was rejected for default. In this aspect the appellate Tribunal has rightly brought section 44 of the evidence act which enjoins:

> "Fraud or collusion in obtaining judgment, or in-competency of Court, may be proved -Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

31. This provision of law has been well reflected, as observed by the appellate Tribunal in the decision of Md. Jahangir Alam vs. Shamsur Rahman and others VIII ADC (2011) 109 wherein our Hon'ble Appellate Division held:

> "When a judgment is given in evidence, the party against whom it is given in evidence may, in the proceeding in which it is given in evidence, show that the judgment was obtained by fraud or collusion , and a separate suit to have the said judgment set aside is not necessary. In view of the wide terms used in section 44 of the Evidence Act, it cannot be said that it is not open to a Court other than the Court from which the decree was passed, in cases fraud or collusion, to deal with the matter and decide whether the decree was obtained by fraud or collusion."

32. The fact that the property in question was evacuee property and then was listed as enemy property was not brought before the Appellate Court in Title Appeal No. 15 of 1993. Certainly had it been placed before the Appellate Court, the decision would have been otherwise. This thing has not escaped notice of the Appellate Tribunal while reversing the decision of the Tribunal.

33. As regard the property that belongs to the government the Court of Appeal came down in minute details as we have stated already when we narrated the facts of government case, by giving lease to several persons, the property assumes the status of a government property. This aspect has been clearly dealt with by the Appellate Tribunal and the chain of Title of Mihir Dutta has also been categorically dealt by the Court of Appeal. Factual aspect to this effect has been already stated above in clear terms. It held that Mihir Dutta is a S.A recorded tenant whose title emanates from Harendra Kishore Dutta and his mother Moni Dutta and also the fact that Prafulla Dutta three children, two sons and one daughter Moni Dutta, these are all admitted position which fully satisfy the scheme and laws of the Ain, 2001 outlined at the outset. The Appellate Tribunal properly adverted to the positive findings upon which the decision of the Tribunal is based which is absolutely in keeping with the scheme and relevant laws of the Ain, 2001.

34. Now the question comes how far sitting in writ certiorari we can deal with all these aspects though we have discussed everything in minute details. It is well settled that in writ

certiorari this Division would be loath to interfere with a decision of a Tribunal in specific, if the same is not a perverse one or a gross miscarriage of justice has been done. A lucid observations of the Hon'ble Appellate Division in the case of Shahidul Haque vs. Court of settlement 69 DLR AD 241 in this context has been quoted below: (Paragraph 44 and 45)

> "A writ of certiorari is maintainable only if it can be shown that the tribunal erroneously held that the property was illegally declared as abandoned property without admitting legal evidence or it has misconstructed the law. In other words, a writ of certiorari does not lie for an erroneous decision in respect of a matter which is within the jurisdiction of the inferior tribunal. Unless such erroneous decision relates to anything collateral, an erroneous decision upon which might affect jurisdiction and the statute does not confer upon the tribunal final jurisdiction to decide such question. A writ of certiorari is maintainable only in a case where erroneous decision within it jurisdiction. Even if there is mere error of law that will not confer any power on the High Court Division to issue a writ of certiorari except where there is an error apparent on the face of the record, that means, the error must be something more than a mere error. The High Court Division can issue writ of certiorari only if it can be shown that the judgment has been obtained by fraud, collusion or corruption or where the tribunal has acted contrary to the principles of natural justice or where there is an error apparent on the face of the record or where the tribunal's conclusion is based on no evidence whatsoever or where the decision is vitiated by malafide.

35. The crux of the matter is whether the disputed property is abandoned property within the meaning of Abandoned Property (Control, Management and Disposal) Order, 1972 and that the whereabouts of the owners were not in this country on 28th February, 1972. On both counts the Court of Settlement found in affirmative. The first groups of appellants are claiming the property by way of alienation after 28the February, 1972. In Government Vs. Orex Network Ltd.,10 ADC 1, the claimant claimed the property on the basis of oral gift followed by an affidavit acknowledging the gift on taking prior permission from the Ministry of Works for transfer, and the Ministry on accepting transfer fees muted the name of the claimant. Three of us (CJ, Md. Abdul Wahhab Mia and Syed Mahmud Hossain, JJ.) were members of the Bench in which it was held that "Admittedly the disputed property was published in the 'Kha' list of the abandoned buildings by Gazette Notification dated 23.09.1986. Therefore, all the permissions accorded by the Ministry or works and from 23.09.1986 allowing mutation and transfer were void and those orders were obtained by collusion and fraud'. So, in this case also all the deeds and transfers were collusively made after PO 16 of 1972 came into force and these transfers are hit by article 6 of PO 16 of 1972. Similarly, Abdus Sobhan failed to substantiate his clean title and possession. He being a citizen of this country ought to have given explanation why he was not in possession in 1972 has he been really inherited the same."

36. Unequivocally, we are in respectful agreement the said decision of the Appellate Division and hold that the judgment passed by the Lower Appellate Tribunal was a proper judgment which cannot be at all interfered under Article 102 of the Constitution that is to say under the writ certiorari. Therefore, in all fairness this Rule should be discharged.

37. In the result both the Writ Petitions are discharged, however, without any order as to cost. The orders of stay granted earlier by this Court is hereby recalled and vacated.

38. Send down the L.C.R at once.

39. Communicate at once

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**(SPECIAL ORIGINAL JURISDICTION)**

Writ Petition No. 7833 of 2016
**Dr. Nafia Farzana Chowdhury**
…… Petitioner

-Versus-

**Bangabandhu Sheikh Mujib Medical University (BSMMU), represented by its Vice Chancellor and others.**
……Respondents

Mr. Ramzan Ali Sikder, Advocate with
Mr. Zaman Akter, Advocate and
Mr. Mir Shafiqul Islam, Advocate
…. For the Petitioner

Mr. Tanjib-ul Alam, Advocate with
Mr. M. Saquibuzzaman, Advocate and
Mr. Kazi Ershadul Alam, Advocate
..... For Respondent Nos. 1-5

Mr. Imtiaz Moinul Islam, Advocate
..... For respondent No. 6

Date of Hearing : 27.06.2018, 16.07.2018, 17.07.2018, 22.10.2018, 23.10.2018, 24.10.2018 & 28.10.2018

Date of Judgment : 20.11.2018

**Present:**
**Mr. Justice Zubayer Rahman Chowdhury**
**And**
**Mr. Justice Sashanka Shekhar Sarkar**

**Equal protection of law in appointment;**
**If any particular case the selection committee abuse its power in violation of Article 31 of the Constitution, that may be a case for setting aside the result of a particular interview. ... (Para 51)**

**Unlawful Appointments not validated by rendering service;**
**If any appointment is given by the Authority in gross violation of the Rules, lapse of any period of time and rendering of service in the said post by the incumbent cannot clothe the said appointment with any legal validity. ... (Para 55)**

**JUDGMENT**

**Zubayer Rahman Chowdhury, J:**

1. By an application under Article 102(2)(a)(ii) of the Constitution of the Peoples Republic of Bangladesh, the petitioner has called in question the legality and propriety of the order dated 08.06.2016, issued by respondent no. 5, appointing respondent no. 6 as Assistant Professor in the Department of Psychiatry, Bangabandhu Sheikh Mujib Medical University, Dhaka.

2. The Rule is being opposed by respondent nos. 1-5 and respondent no. 6, by filing affidavits-in-opposition. It is interesting to note that pursuant to issuance of Rule, respondent nos. 1-5 and respondent no. 6 had not only executed the Vokalatnama jointly, but also filed a

common affidavit-in-opposition dated 21.08.2016. When this issue was pointed out by the Court, respondent no. 6 filed a fresh power on her own behalf along with a separate affidavit-in-opposition. Respondent nos. 1-5 did likewise

3. Relevant facts leading to the issuance of the Rule are that the petitioner obtained MBBS degree from Sylhet MAG Osmani Medical College in 1999. She was appointed on 02.03.2006 as a Medical Officer of Bangabandhu Sheikh Mujib Medical University (briefly, BSMMU). Subsequently, the petitioner obtained Doctor of Medicine (MD) degree from BSMMU in 2011 and she was awarded the Prime Minister's Gold Medal.

4. Vide Memo No. বিএসএমএমইউ/২০১৩/১১১৮৫ dated 19.09.2013, applications were invited for appointment in various posts under different Departments of BSMMU. The petitioner, having the requisite qualification, applied for appointment in the post of Assistant Professor in the Department of Psychiatry, BSMMU (hereinafter referred to as the said post). Although appointments were made in various positions in some of the other Departments, the Authorities did not proceed with the process of appointment in the said post.

5. After a period of nearly two years, respondent no. 5 once again published an advertisement on 09.11.2015 inviting applications for appointment in the said post. Accordingly, the petitioner, along with some other candidates including respondent no. 6, applied in response to the advertisement. Upon taking interview of the candidates, the impugned order dated 08.06.2016 was issued by respondent no. 5, appointing respondent no. 6 as Assistant Professor in the Department of Psychiatry, which has been challenged by the petitioner by filing the instant writ petition.

6. As noted earlier, the Rule is being opposed by respondent nos. 1-5 and respondent no. 6. The contesting respondents have opposed the Rule primarily on the ground that the petitioner has no locus standi to challenge the impugned order. It was also stated in the respective affidavits-in-opposition that respondent no. 6 was appointed in the said post as the Selection Board considered her to be the most suitable candidate amongst all the applicants. It was the further case of the contesting respondents that the petitioner, having participated in the selection process but having failed to obtain the appointment in the said post, cannot now challenge the very same process of selection to which she was a party. It was further stated that respondent no. 6 has long since joined in the said post and is discharging her duties at BSMMU.

7. Mr. Ramzan Ali Sikder, the learned Advocate appears along with Mr. Zaman Akter and Mr. Mir Shafiqul Islam, the learned Advocates on behalf of the petitioner, while Mr. Mr. Tanjib-ul Alam, the learned Advocate appears along with Mr. M. Saquibuzzaman and Mr. Kazi Ershadul Alam, the learned Advocates on behalf of respondent nos. 1-5. Mr. Imtiaz Moinul Islam, the learned Advocate appears on behalf of respondent no. 6.

8. Having placed the application and the supplementary affidavits filed on behalf of the petitioner together with the documents annexed thereto, Mr. Sikder submits that this is a case of malafide, pure and simple. Elaborating his submission, the learned Advocate submits that the Authority had earlier published an advertisement in 2013 inviting applications for appointment to the post of Assistant Professor in the Department of Psychiatry, pursuant to which four candidates including the petitioner applied. However, although appointments were made in several posts in the other Departments, for some unexplained and unknown reason, the Authority did not proceed with the process of appointment in the said post. He submits

that the Authority neither rejected the applications filed by the applicants nor provided any reason for withholding the process of appointment in respect of one particular post.

9. Mr. Sikder submits that the Authority once again published the advertisement in 2015 for giving appointment in the said post, following which the petitioner and some other candidates, including respondent no. 6, applied. Upon taking interview of the candidates, respondent no. 6 was selected by the Selection Board and appointed in the said post.

10. Mr. Sikder submits that all the other candidates including the petitioner had obtained the MD degree, which includes a mandatory 3 years academic study. On the other hand, respondent no. 6 obtained an FCPS (Fellow of the College of Physicians and Surgeons) degree, which is a four years training based degree requiring only a one year optional academic study. He acknowledges that although it was decided by the Government in 1998 that MD degree and FCPS degree would be deemed to be equivalent, yet, as the appointment in question relates to a teaching post in a Post-Graduate Research Medical Institute, it was imperative for the Authority to give due consideration to the academic qualifications of the respective candidates.

11. Referring to the appointment letter of respondent no. 6, Mr. Sikder contends that it is evident from the terms of the said appointment letter dated 22.01.011 that a person appointed as a Medical Officer in BSMMU cannot pursue any course or degree following the next two years of such appointment. He contends that in gross violation of the aforesaid term, respondent no. 6 pursued the FCPS course and completed the same in 2012 and the certificate was awarded in 2014. Making a pointed reference to the aforesaid two dates, i.e., the date on which respondent no. 6 completed her FCPS course and the date on which the certificate was awarded to her, the learned Advocate submits forcefully that respondent no. 6 was ineligible to apply as a candidate when the first advertisement was published in 2013, as the certificate of FCPS degree was not available until 2014. He argues forcefully that the concerned respondents, with a malafide motive, refrained from proceeding with the appointment in the said post in 2013, although several other highly qualified candidates had applied in response to the first advertisement. The learned Advocate submits that it is only after respondent no. 6 had obtained her FCPS degree in 2014 that the concerned respondents proceeded once again with the process of appointment in 2015. Therefore, the conduct of the respondents in not giving any appointment in 2013 in the said post despite receiving applications from competent and qualified candidates, but subsequently initiating the same process in 2015, once respondent no. 6 had obtained her FCPS degree, clearly demonstrates the bias and malafide on the part of the concerned respondents. The learned Advocate goes on to submit that it is now well settled through judicial pronouncements that malafide cuts at the very root of the case.

12. Mr. Sikder submits that as per provisions of the Ordinance of BSMMU (briefly, the Ordinance), if anyone intends to pursue a post-graduate degree or any other higher degree/course at BSMMU, he/she is required to obtain prior permission from the Authority. Referring to Annexure M of the affidavit-in-reply dated 07.08.2018, filed by the petitioner, Mr. Sikder submits that although the petitioner sought permission to pursue the second part of her MD course in Psychiatry, the Authority declined to grant such permission, as evident from the letter dated 30.07.2007. Referring to Annexure K (2) and L(2) of the supplementary affidavit dated 03.10.2018 filed on behalf of the petitioner, the learned Advocate submits that two other Doctors, working at BSMMU, were required to obtain permission for the FCPS second part and MD (Psychiatry) third part examination respectively. However, according to

Mr. Sikder, no such permission was obtained by respondent no. 6 nor has any document been produced before this Court by the contesting respondents to show that such permission was ever granted to respondent no. 6.

13. On the other hand, Mr. Tanjib-ul Alam, the learned Advocate appearing on behalf of respondent nos. 1-5 submits that as the appointment to the post of Assistant Professor in the Department of Psychiatry was made by the Syndicate following the recommendation made by the Selection Board, it cannot be said that the same was not in accordance with law and on that count, the Rule is liable to be discharged.

14. Mr. Alam contends that the allegation of malafide made by the petitioner will not invalidate the appointment of respondent no. 6. Referring to the decision of the Appellate Division, reported in 39 DLR (AD) (1987) 1, Mr. Alam submits forcefully that even if it is accepted, but not conceded, that there was malafide on the part of the Authority, that itself is a question of fact which cannot be decided under the writ jurisdiction and on that count also, the Rule is liable to be discharged. He further submits that merely alleging malafide is not enough, it has to be pleaded and proved by adducing documentary evidence. In support of his submission, Mr. Alam has also referred to the case of Professor Dr. Md. Younus Ali vs. The Chancellor of Rajshahi University, Rajshahi and others, reported in 18 BLD (1998) (AD) 291.

15. Replying to the contention advanced by Mr. Sikder, Mr. Alam submits that respondent no. 6 was not required to obtain any permission from the Authority as she was already pursuing the FCPS course prior to her appointment as a Medical Officer in BSMMU. According to Mr. Alam, prior permission from the Authority is required only when, after joining as a Medical Officer, a person intends to pursue a post-graduate course. However, Mr. Alam has not been able to refer to any law or rules in support of his contention.

16. Refuting the argument of Mr. Sikder with regard to the issue of bias on the part of the BSMMU Authority in appointing respondent no. 6 to the said post, Mr. Alam submits forcefully that mere assertion or apprehension of bias will not set aside an administrative action, there must be a real danger of bias. In support of his contention, Mr. Alam refers to the case of State of Punjab vs. V.K. Khanna and others, reported in AIR 2001 Supreme Court 343.

17. Referring to Annexure 7 series of the supplementary affidavit dated 11.10.2018, filed on behalf of respondent nos. 1-5, Mr. Alam submits that amongst the four candidates who were interviewed, respondent no. 6 secured the highest mark and accordingly, on the basis of the recommendation of the Selection Board, the Syndicate made the appointment in question and therefore, the petitioner has no reason to be aggrieved and consequently, the Rule is liable to be discharged.

18. Mr. Imtiaz Moinul Islam, the learned Advocate appearing on behalf of respondent no. 6, having adopted the submission advanced by Mr. Alam, further submits that respondent no. 6, being a more qualified and competent candidate amongst all the other candidates, was appointed as Assistant Professor. He contends that without challenging the first advertisement, the petitioner cannot now question the appointment of respondent no. 6 which was made pursuant to the second advertisement.

19. We have perused the application together with the various supplementary affidavits filed by the petitioner along with the documents annexed thereto. We have also perused the affidavits-in-opposition along with the supplementary affidavits-in-opposition filed on behalf

of the contesting respondents. We have also considered the submission advanced at the Bar together with the decisions cited by the contending sides, to which we shall advert, if necessary.

20. In the instant case, it is the positive assertion of the petitioner that the respondents acted in an arbitrary and malafide manner and demonstrated bias in favour of respondent no. 6 while appointing her in the post of Assistant Professor, Department of Psychiatry. This positive assertion has been vehemently denied by the contesting respondents. The assertion and denial by the contesting sides necessitates a careful examination of the issue before us.

21. The petitioner, having obtained her MBBS degree, joined BSMMU as a Medical Officer in 2006. She applied to the Authority for pursuing her MD course, who refused to grant permission on the ground that she had not completed two years of service as a Medical Officer in BSMMU.

22. On the other hand, respondent no. 6, having obtained her MBBS degree in 2006, was appointed as a Medical Officer on 22.01.2011. The appointment letter, bearing number BSMMU/2011/1006 dated 22.01.2011, as reproduced in paragraph 3 of the supplementary affidavit dated 27.06.2016, contains the following stipulations :

"৬। যোগদানের তারিখ থেকে ০২ (দুই) বছরের মধ্যে কোন কোর্সে যোগদান করতে পারবেন না।

৭। .....

৮। .....

৯। এই নিয়োগ ০১-০২-২০১১ ইং তারিখ থেকে কার্যকর হবে।"

23. As respondent no. 6 obtained her FCPS degree in 2014, it is apparent that at the time of her appointment as a Medical Officer at BSMMU in 2011, she was still pursuing the FCPS course. There is no document on record to indicate that it was either intimated to the Authority that she was already pursuing the FCPS course or that the Authority had granted her permission to continue with the said course during the first two years of service as a Medical Officer at BSMMU. However, we have noticed from Annexures K, L and M of the supplementary affidavit dated 03.10.2018 filed by the petitioner, that in similar situations, some other Doctors who were pursuing the FCPS and MD courses in BSMMU, were required to obtain permission from the Authority before enrolling in the respective courses.

24. Let us now examine the provisions relating to leave (ছুটি), as contained in the BSMMU Ordinance. Clause 15 and 16 of the Ordinance reads as under :

"১৫। শিক্ষা ছুটি ঃ

নিম্নলিখিত শর্তে শিক্ষক/চিকিৎসক/কর্মকর্তাগণকে শিক্ষা ছুটি মঞ্জুর করা যাইবে ঃ

ক) স্নাতকোত্তর ডিগ্রী কার্সে ভর্তির প্রমাণপত্রসহ শিক্ষা ছুটিকালীন সময়ে প্রয়োজনীয় আর্থিক সহায়তাপ্রাপ্তির (যাহা দ্বারা ক্ষিা কার্যএ্রম পরিচালনা ও অন্যান্য ব্যয় বহন করা সম্ভব হইবে) প্রমাণ জমাদান সাপেক্ষে শিক্ষা ছুটি মঞ্জুর করা যাইবে।

খ) ন্যূনপক্ষে ২ (দুই) বৎসর নিয়মিত পদে স্হায়ী হিসাবে সএ্রিয় চাকুরি করিবার পর সংশ্লিষ্ট শিক্ষক/কর্মকর্তাকে সবেতনে ছুটি মঞ্জুর করা যাইবে।

গ) .....

ঘ) শিক্ষা ছুটি মঞ্জুরির জন্য সংশ্লিষ্ট শিক্ষক/চিকিৎসক/কর্মকর্তাকে স্বপদে স্থায়ী হইতে হইবে। স্বপদে স্থায়ী না হইলে সংশ্লিষ্ট শিক্ষক/চিকিৎসরক/কর্মকর্তা যদি বর্তমান পদের পূর্ববর্তী পদে স্থায়ী হন তবে তিনি পূর্ববর্তী স্থায়ী পদে আহরিত সর্বশেষ বেতন পাইবেন। ছুটি শেষে কর্তব্যে যোগদান এবং বর্তমান পদে স্থায়ী হওয়া সাপেক্ষে অবশিষ্ট বেতন ভাতা পরিশোধ করা যাইবে।"

"১৬। শিক্ষা ছুটির জন্য বিশ্বদ্যিালয়ের সঙ্গে চুক্তি ঃ

শিক্ষা ছুটি মঞ্জুরকৃত শিক্ষক/চিকিৎসক/কর্মকর্তা/কর্মচারীকে বিশ্ববিদ্যালয়ের সিন্ডিকেট কর্তৃক অনুমোদিত চুক্তিপত্রে (পরিশিষ্ট-ক) স্বাক্ষর করিতে হইবে। উক্ত চুক্তি ভঙ্গকারী শিক্ষক/চিকিৎসক/কর্মকর্তা/কর্মচারী বিশ্ববিদ্যালয়ের দক্ষতা ও শৃঙ্গলা অধ্যাদেশের আওতায় অসদাচরণকারী হিসাবে গণ্য হইবেন।"

25. It appears that clause 15 and clause 16 of the Ordinance stipulates that a person can obtain study leave upon completion of at least two years of service in a regular post and he/she is also required to execute an agreement approved by the Syndicate. However, from the supplementary affidavit dated 17.07.2018, it appears that respondent no. 6 has attempted to explain the position in the following manner :

> "That, FCPS is a professional course of 2 parts and 4 years residency training in Psychiatry in the institutes recognized by the Bangladesh College of Physicians and Surgeons (BCPS) is a mandatory requirement for achieving FCPS degree; the respondent no. 6 completed her 1 year training in Dhaka Medical College Hospital (DMCH) from 01.01.2008 to 31.12.2008. Then the respondent no. 6 completed her 1.5 year training in National Institute of Mental Health (NIMH) from 01.01.2009 to 30.06.2010. Lastly, the respondent no. 6 completed her 1.5 year training in BSMMU from 01.02.2011 to 31.07.2012; thus completing 4 years for residency training as required for FCPS degree. The paid job in BSMMU as medical officer is not in conflict with FCPS course rather that paid job considered as "training" and was a part the FCPS degree of the respondent no. 6;

26. This is corroborated by the statement made by respondent nos. 1-5 in the supplementary affidavit dated 28.10.2018 in the following terms :

> "That the respondent No. 6 at the relevant time was undergoing a 4 (four) years clinical FCPS in Psychiatry which did not require her to be enrolled in any taught course and hence no permission from the BSMMU was required."

27. By the 4th supplementary affidavit dated 13.08.2018, respondent no. 6 stated that she had finished the 4 years training course "with the express consent of BSMMU and BSMMU administration gave a training certificate, only then BCPS allowed the respondent no. 6 to sit for the Final Exam of FCPS and these facts are evident from the application of the respondent no. 6 to BCPS seeking permission to sit for Final exam of Part 2". In support of this statement, respondent no. 6 has annexed a document, marked as Annexure 15. A perusal of the said document indicates that it is a receipt of the Enrolment fee issued by Bangladesh College of Physicians and Surgeons (briefly, BCPS). By no stretch of imagination can this document be taken to be the consent granted by BSMMU, as claimed by respondent no. 6.

28. In the affidavit-in-opposition dated 05.08.2018, respondent no. 6 stated at paragraph 11 as under :

> "The terms of employment are prerogatives of the BSMMU and its employees and if such terms are varied by BSMMU and any restriction is waived, then it cannot be challenged to be a violation of employment terms;"

29. It is, therefore, evident from the affidavits-in-opposition filed by the contesting respondents that whilst serving as a Medical Officer at BSMMU, respondent no. 6 also continued with her FCPS during the very same period. In other words, there was total non-compliance with the provisions of clauses 15 and 16 of the Ordinance by respondent no. 6. Therefore, in our view, there was a clear departure from the rules, not to mention the gross violation of the condition of employment on the part of respondent no. 6 in failing to obtain permission from the Authority before continuing with the FCPS course. However, despite the position as aforesaid, the Authority did not take any action against respondent no. 6, although there were required to do so as per the terms of the appointment letter dated 22.01.2011, which contains the following stipulation :

৮। কোন তথ্য গোপনের প্রমাণ পাওয়া গেলে তৎক্ষনিক চাকুরী থেকে অব্যাহতি দিয়ে বিভাগীয় ব্যবস্থা নেওয়া হবে।

30. In the affidavit-in-opposition dated 21.08.2016, jointly filed by respondent nos. 1, 2, 3, 4, 5 and 6, all the respondents have attempted to explain the reason for not proceeding with the process of appointment in the said post in 2013 in the following manner :

> "It is submitted that it was an administrative decision not to proceed any further with the said appointment process since none of the applicants met the criteria for such appointment at the relevant time. Therefore, the appointment process was cancelled in compliance with the applicable Rules and Regulations."

31. Once again, it is pertinent to note that although the issue concerns only respondent no. 1-5, yet, respondent no. 6, who had no role, far less any authority, in taking any "administrative decision", also endorsed the said statement. Nevertheless, in view of the explanation provided by all contesting respondents, and that too in one voice, that "none of the applicants met the criteria for such appointment at the relevant time", we are called upon to examine the qualifications of each of the four applicants who had applied in response to the first advertisement published in 2013.

32. From Annexure 5 series of the supplementary affidavit dated 05.08.2018 filed by respondent nos. 1-5, it appears that one of the applicants namely, Dr. Helal Uddin Ahmed had an MD degree in Psychiatry with as many as 43 (Forty three) publications to his credit, out of which he is the first author in 10 publications.

33. The next applicant Dr. Ashique Selim, in addition to his MBBS degree, also had an MRCPsych degree from the United Kingdom. He has three publications, being the first author in two of them, published in International Journals.

34. The third applicant Washima Rahman also had an MD in Psychiatry along with eight publications, out of which she is the first author in four publications.

35. The last applicant, the present petitioner, having an MD degree in Psychiatry, has ten publications to her credit, one of which was published in an Indexed International Journal from Kings College, London, UK.

36. It is, therefore, apparent that the explanation provided by the respondents is not only misleading, but grossly incorrect and untrue, being contrary to the documents on record. We fail to understand as to how such grossly misleading and incorrect statement could have been made before a Court of law, and that too on oath, by a statutory Authority like BSMMU. Needless to observe that the assertion of malafide and bias made by the petitioner gains ground in view of the conduct demonstrated by the respondents. We are not only surprised,

but also dismayed, to say the least, as to how the four candidates, who had applied in response to the first advertisement published in 2013, despite being highly qualified, were not even called for an interview.

37. When a Statutory Authority publishes an advertisement inviting applications from prospective candidates, for giving appointment in certain post(s), a duty is cast upon them either to call the candidates for an interview or to reject the applications on the ground that the applicants do not possess the requisite qualification for the advertised post(s). In any event, the Authority is under a legal duty/obligation to inform the applicants as to the fate of their applications. They cannot sit over the matter and remain silent. In our view, such inaction of the Authority infringes the Fundamental Rights of the applicants, as guaranteed by Article 29 of the Constitution which provides for "equality of opportunity for all citizens in respect of employment in the service of the Republic". In this context, we may profitably refer to the case of Shanbarsan Dash vs Union of India, reported in AIR 1991 Supreme Court 1612, where the Court observed as under:

> "Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the state has a license to act in an arbitrary manner. The decision not to fill up the vacancies has to be taken bonafide for appropriate reasons.

38. It is perhaps pertinent, at this juncture, to examine the very process of appointment to the post of Assistant Professor, Department of Psychiatry. In the supplementary affidavit dated 11.10.2018, respondent nos. 1-5 have stated as under:

> "The appointments in different Departments of Bangabandhu Sheikh Mujib Medical University (BSMMU) in the post of Assistant Professor, pursuant to the appointment Notification dated 19.09.2013 were made pursuant to 53rd and 54th Meeting of the Syndicate of BSMMU and the relevant excerpt of meetings are annexed hereto and marked as Annexure- "6" and "6-a".

39. A careful scrutiny of Annexure 6, which relates to the proceedings of the 54th Meeting of the Syndicate held on 29.06.2014 ("সিন্ডিকেটের ৫৪তম সভার কার্যবিবরণী") reveals that the deliberations of the Syndicate relate to the appointments made in the other posts under different Departments and not to the post of Assistant Professor, Department of Psychiatry. It is to be noted that despite being directed to do so, respondent nos. 1-5 were unable to produce the document relating to the deliberations of the Syndicate leading to the appointment of respondent no. 6.

40. In the aforesaid supplementary affidavit, it was also stated as under:

> "That the deliberation and the final recommendation dated 15.03.2016 of the Selection Board on the basis of which the Syndicate approved the appointment of respondent no. 6 in the post of Assistant Professor in the Department of Psychiatry, BSMMU is annexed thereto and marked as Annexure "7" series."

41. In view of the categorical statement of respondent nos. 1-5 that the deliberation and final recommendation was made by the Selection Board on 15.03.2016 and it is on the basis of such recommendation that the Syndicate approved the appointment of respondent no. 6 in the post of Assistant Professor, Department of Psychiatry, we are now called upon to examine the relevant annexures.

"The deliberation and the final recommendation" of the Selection Board is evidenced by Annexure 7 series, which reads as under :

''মনরোগ বিদ্যা বিভাগের সহকারী অধ্যপক শূন্য পদে নিয়োগদান এর নম্বরপত্র প্রসঙ্গে

| ১ | ২ | ৩ | | ৪ | ৫ | ৬ |
|---|---|---|---|---|---|---|
| ক্রমিক নং | নাম ও পদবী (ঠিকানাসহ) | শিক্ষাগত যোগ্যতা | | প্রকাশনা ও অভিজ্ঞতা (৩০) | মৌখিক (৫০) | মোট প্রাপ্ত নম্বর (১০০) |
| | | এসএসসি ও এইচএসসি(১০) | এমবিবিএস ও স্নাতকোত্তর (১০) | | | |
| ১. | ডাঃ সৈয়দ ফাহীম সামস্ ৩১৫/১, ধানমন্ডি, রো-১৫(পশ্চিম) ঢাকা(১২০৯ | ১০ | ১০ | ১৫ | ২০ | ৫৫ |
| ২. | ডাঃ ওয়াসিমা রহমান ১৭/৫, ইস্কাটন গার্ডেন রোডশ থানাঃ রমনা, ঢাকা-১০০০। | ১০ | ১০ | ১৮ | ২১ | ৫৯ |
| ৩. | ডাঃ সিফাত-ই-সাঈদ ফ্ল্যাট নং- এইচ-১শ বাড়ী নং- ১২, রোড নং-০৫, ধানমন্ডি, ঢাকা। | ১০ | ১০ | ২০ | ৩৫ | ৭৫ |
| ৪. | ডাঃ নাফিয়া ফারজানা চৌধুরী মেডিকেল অফিসার মনোরোগ বিদ্যা বিভাগ, বিএসএমএমইউ, ঢাকা। | ১০ | ১০ | ১৯ | ২০ | ৫৯ |

মন্তব্য/সুপারীশঃ **ডাঃ সিফাত-ই-সাঈদ কে সহকারী অধ্যাপক পদে নিয়োগ প্রদান করা হোল।**

| স্বাঃ (অস্পষ্ট) | স্বাঃ (অস্পষ্ট) | | স্বাঃ (অস্পষ্ট) | স্বাঃ (অস্পষ্ট) | স্বাঃ (অস্পষ্ট) | স্বাঃ (অস্পষ্ট) | স্বাঃ (অস্পষ্ট) | স্বাঃ (অস্পষ্ট) |
|---|---|---|---|---|---|---|---|---|
| অধ্যাপক ডাঃ কামরুল হাসান খান ভাইস-চ্যান্সেলর, সভাপতি | অধ্যাপক মোঃ রুহুল আমিন মিয়া, প্রো-ভাইস চ্যান্সেলর, শিক্ষা, বিএসএমএ মইউ, ঢাকা। | অধ্যাপক মোঃ শহীদুল্লাহ সিকদার, প্রো-ভাইস চ্যান্সেলর (গবেষণা ও উন্নয়ন), বিএসএম এমইউ, ঢাকা। | অধ্যাপক মোঃ শারফুদ্দিন আহমেদ, প্রো-ভাইস চ্যান্সেলর (প্রশাসন), বিএসএম এমইউ, ঢাকা। | অধ্যাপক ঝুনু শামসুন নাহার, চেয়ারম্যান, মনোরোগ বিদ্যা বিভাগ, বিএসএম এমইউ, ঢাকা। (মাননীয় ভাইস-চ্যান্সেলর কর্তৃক মনোনীত) | অধ্যাপক গোলাম রাব্বানী, ফ্লাট-বি-১২, স্কাইটাচ টাওয়ার, বাড়ী নং-২১, রোড নং-০৭, ধানমন্ডি আ/এ, ঢাকা-১২০৫। (সিন্ডিকেট কর্তৃক মনোনীত) | অধ্যাপক মোঃ আব্দুর রহিম, চেয়ারম্যান, মেডিসিন বিভাগ, বিএসএম এমইউ, ঢাকা। | অধ্যাপক এম এস আই মল্লিক, মনোরোগ বিদ্যা বিভাগ, বিএসএম এমইউ, ঢাকা (সিন্ডিকেট কর্তৃক মনোনীত) | অধ্যাপক মোঃ এবিএম আব্দুল হান্নান, রেজিস্ট্রার ও সচিব, সংশ্লিষ্ট নিয়োগ নির্বাচনী বোর্ড, বিএসএমএ মইউ, ঢাকা |

42. We have carefully examined this particular document. It appears that out of the four candidates, respondent no. 6 secured the highest marks. With regard to the allocation of marks, it is to be noted that all the candidates received 20 marks for their educational qualifications and decrees and 15-20 marks for their publications and experience out of the total 30 marks. However, in the oral examination comprising of 50 marks, although the other three candidates including the petitioner were awarded 20, 21, 20 marks respectively, respondent no. 6 secured 35 marks out of 50.

43. In the left-hand side column, the words "মন্তব্য/সুপারিশ" is written. The Selection Board was required to recommend or record a comment with regard to each of the candidates. Astonishingly, instead of doing so, what the Selection Board did was to give the appointment directly to respondent no. 6 in the following terms :

**"ডঃ সিফাত বিন সাইদকে সহকারী অধ্যাপক পদে নিয়োগ প্রদান করা হল।"**

44. It is, therefore, evident that the Selection Board, having taken the interview and having awarded the highest marks to respondent no. 6, did not stop there. Exceeding their authority, they proceeded to give the appointment to respondent no. 6 in the post of Assistant Professor, thereby usurping the role and function, not to mention the authority, of the Syndicate, which is clearly arbitrary and, no doubt, without lawful authority as well.

45. In this context, we may profitably refer to the case of Abdul Rouf –vs- Abdul Hakim, reported in 17 DLR (SC) (1965) 515, where the Supreme Court of Pakistan held:

"A malafide act is by its nature an act without jurisdiction."

46. The aforesaid decision was quoted, with approval, by the Appellate Division in the case of Nur Mohammad –vs- M. Ahmed, reported in 39 DLR (AD) (1987) 1.

47. The conduct of the Selection Board, particularly its members, leads us to conclude that the allegation made by the petitioner with regard to malafide and bias now manifests itself through this particular document, which has been issued by the concerned respondents themselves.

48. It has been persistently argued by Mr. Alam that the decision to appointment respondent no. 6 was taken by the Syndicate following the recommendation of the Selection Board. From the proceedings of the Syndicate, it appears that the deliberation of the Syndicate is summed up in two lines, as evident from Annexure 1(a) of the affidavit-in-opposition dated 21.08.2016, jointly filed by respondent nos. 1-5 and respondent no. 6 under the caption "২৮/০৫/২০১৬ তারিখ (শনিবার) সকাল ১১ঃ০০ ঘটিকায় অনুষ্ঠিত সিন্ডিকেট এর ৬০তম সভার আলোচ্যসূচী ঃ".

49. The relevant decision reads as under :

"মনরোগ বিদ্যা বিভাগ ঃ নিম্নলিখিত নিয়োগ নির্বাচনী বোর্ড সর্বসম্মতিক্রমে মনোরোগ বিদ্যা বিভাগের বিজ্ঞাপিত 'সহকারী অধ্যাপক' ডাঃ সিফাত-ই-সাঈদ কে নিয়োগ দেয়ার সুপারিশ করেছে। অনুমোদনের জন্য পেশকৃত।

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| ১. | অধ্যাপক ডাঃ কামরুল হাসান খান<br>ভাইস-চ্যান্সেলর, সভাপতি, বিএসএমএমইউ, ঢাকা। | সভাপতি |
| ২. | অধ্যাপক মোঃ রুহুল আমিন মিয়া<br>প্রো-ভাইস চ্যান্সেলর, (শিক্ষা), বিএসএমএমইউ, ঢাকা। | সদস্য |
| ৩. | অধ্যাপক মোঃ শহীদুল্লাহ সিকদার,<br>প্রো-ভাইস- চ্যান্সেলর (গবেষণা ও উন্নয়ন), বিএসএমএমইউ, ঢাকা। | সদস্য |
| ৪. | অধ্যাপক মোঃ শারফুদ্দিন আহমেদ, | সদস্য |

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| | প্রো-ভাইস চ্যান্সেলর (প্রশাসন), বিএসএমএমইউ, ঢাকা। | |
| ৫. | অধ্যাপক ঝুনু শামসুন নাহার,<br>চেয়ারম্যান, মনোরোগ বিদ্যা বিভাগ, বিএসএমএমইউ, ঢাকা।<br>(মাননীয় ভাইস-চ্যান্সেলর কর্তৃক মনোনীত) | সদস্য |
| ৬. | অধ্যাপক গোলাম রাব্বানী<br>ফ্লাট-বি-১২, স্কাইটাচ টাওয়ার, বাড়ী নং- ২১, রোড নং-০৭, ধানমন্ডি, ঢাকা-১২০৫।<br>(সিন্ডিকেট কর্তৃক মনোনীত) | সদস্য |
| ৭. | অধ্যাপক মোঃ আব্দুর রহিম,<br>চেয়ারম্যান, ইন্টারন্যাশনাল মেডিসিন বিভাগ, বিএসএমএমইউ, ঢাকা। | সদস্য |
| ৮. | অধ্যাপক এম এস আই মল্লিক,<br>মনোরোগ বিদ্যা বিভাগ, বিএসএমএমইউ, ঢাকা<br>(সিন্ডিকেট কর্তৃক মনোনীত) | সদস্য |
| ৯. | অধ্যাপক মোঃ এবিএম আব্দুল হান্নান,<br>রেজিস্ট্রার, বিএসএমএমইউ, ঢাকা | সচিব |

”

50. However, as noted earlier, there is nothing on record to substantiate the respondents contention that the Selection Board had made any “সুপারিশ” (recommendation). Rather, what we do find is that the Selection Board itself gave the appointment to respondent no. 6.

51. More than half a century ago, the Supreme Court of India dealt with a similar issue in the case of R. Chitralekha and another vs. The State of Mysore, reported in AIR 1964 Supreme Court 1823, where the Court held as under :

> “If any particular case the selection committee abuse its power in violation of Article 14 of the Constitution, that may be a case for setting aside the result of a particular interview.”

52. It is pertinent to note that Art 14 of the Constitution of India corresponds to Article 31 of our Constitution, which provides for equal protection of law.

53. It has also been argued on behalf of the contesting respondents that the petitioner having applied for appointment in the said post under the first advertisement published in 2013 and thereafter, having applied again for appointment in the said post in 2015, she had given a go bye to her right, if any, and was, therefore, estopped by waiver and acquiescence from challenging the process of selection. In our view, the argument is misconceived for the simple reason that it is not the subsequent “advertisement” that the petitioner has challenged by filing the instant writ petition. What she has challenged is the appointment of respondent no. 6 in the post of Assistant Professor in the Department of Psychiatry.

54. It has also been argued on behalf of the respondents that the petitioner had an alternative remedy under section 55 of the BSMMU Ordinance. However, without availing the said alternative remedy, she approached this Court and filed the writ petition and on that ground, the Rule is liable to be discharged. It has also been argued on behalf of the contesting respondents that by now, respondent no. 6 has already served in the said post for a period of two years and therefore, she has acquired a vested right and in that view of the matter, the present Rule has also become infructuous.

55. We are not convinced with the aforesaid argument, to say the least. If any appointment is given by the Authority in gross violation of the Rules, lapse of any period of time and rendering of service in the said post by the incumbent cannot clothe the said appointment with any legal validity. I am fortified in my view, yet again, by the decision of

the Supreme Court of India in the case of Krishna Yadav vs. State of Haryana, reported in AIR 1994 Supreme Court 2166, where the appointment of as many as 96 Tax Inspectors was set aside long four years after their appointment in the said posts on the ground of "fraud" and "arbitrariness" committed by the Authority in making the said appointments.

56. The duties and function of the Selection Board and the Syndicate are distinct and separate ; the former is entrusted with duty to take Interview/oral examination of the applicants and thereafter make the recommendation to the Syndicate who, in turn, will give approval and make the appointment. However, the process of giving approval and making the appointment is not an idle formality. The Syndicate, being the highest academic body, is not expected to simply endorse the recommendation of the Board, but is required to deliberate about the qualifications of the candidates so recommended by the Board, more so, when the appointment relates to an academic post in the most renowned and respected post-graduate medical research Institute of the country.

57. From the foregoing discussion, it can reasonably be inferred that the entire process of appointment in the post of Assistant Professor in the Department of Psychiatry, BSMMU, commencing from the very first publication of the advertisement in 2013 and culminating with the issuance of the appointment letter on 08.06.2016 in favour of respondent no. 6 is tainted with arbitrariness and malafide.

58. In the case of Mahesh Chandra v. Regional Manager, U.P. Financial Corporation, reported in AIR 1993 Supreme Court 937, the Court held as under:

> "That which is not fair and just in unreasonable. And what is unreasonable is arbitraty. An arbitrary action is ultra vires".

59. In the case of A.L. Kalra v. P & E Corporation of India Ltd., reported in AIR 1984 Supreme Court, 1361, the Court held :

> "Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art, 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

60. We agree with Mr. Tanjib-ul Alam's contention that malafide cannot simply be pleaded, it has to be proved through documentary evidence. This is precisely what has been done in the instant case, however, not by the petitioner, by the respondents themselves. From Annexures 6 and 7 series, being the deliberation of the Syndicate and the recommendation (appointment) issued by the Selection Board, it is palpably clear that the concerned respondents acted in a malafide and arbitrary manner, not to mention without any lawful authority, in giving appointment to respondent no. 6.

61. Mr. Tanjib-ul Alam has also attempted to argue that the endorsement made by the Selection Board by writing the word "appointment" in place of the word "recommendation" was a mere omission, which could not strike down the appointment of respondent no. 6.

62. In the 5$^{th}$ supplementary affidavit dated 04.11.2018 filed on behalf of respondent no. 6, it has been stated in paragraph 4 as under :

> "That, as it seems, the number sheet prepared by the BSMMU authority has 2 remarks being "comment" and "recommendation". It seems to be an innocent mistake in the said sheet as "decision" has not been included there. A simple mistake in the form cannot

terminate the appointment of the respondent no. 6 as she has acquired vested right and moreover she cannot be punished for the mistake of the appointing authority (54 DLR (2002) 318."

63. We are certainly not inclined to accept the argument. It is not a frivolous matter, which can be ignored or taken lightly. The Selection Board comprised of nine highly qualified and experienced individuals, holding responsible positions at BSMMU. Given their educational background and experience, they are not expected to act in such a negligent, callous and slip shod manner. Such conduct on the part of persons holding positions of responsibility, and that too in the most prestigious and renowned medical research Institute of the country is both unwarranted and unacceptable.

64. In this context, I may profitably refer to the case of V. Hundumal –vs- State of Modhya Prodesh, reported in AIR 1981 Supreme Court 1636, where the Supreme Court of India observed :

"When discrimination is glarying the State cannot take recourse to inadvertence in its action resulting in discrimination."

65. In that case, it was further observed :

"Equality before the law or equal protection of law within the meaning of Article 14 of the Constitution of India means absence of any arbitrary discrimination by the law or in their administration. No undue favour to one or hostile discrimination to another be shown."

(per D.A. Desai, J)

66. In recent times, the concept of administrative fairness has gained considerable significance and importance. It requires an administrative body to apply its mind while taking a decision on a matter which affects a person's right. The "duty to act fairly" is being increasingly endorsed and applied by the Courts all over the world in deciding issues involving executive actions. Noted authors A.W. Bradley and K.D. Ewing, in their text 'Administrative and Constitutional law (14th edition, at page 746) have commented as under :

"The rules of natural Justice has developed what is now in effect a universal rule that public authorities must act fairly in making decisions"

67. In the case of D.K. Yadav vs. J.M.A. Industries Ltd., reported in (1993) 3 Supreme Court Cases 259, it was held :

"Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice.

68. In our view, the impugned action of the respondents suffers from the vice of arbitrariness warranting interference of this Court. As has been so aptly stated, once again by the Supreme Court of India, in the case of Netai Bag vs State of West Bengal, reported in AIR 2000 Supreme Court 3313:

"The Courts are not concerned with the ultimate decision but only with the fairness of the decision making process."

69. Be that as it may, in view of the foregoing discussion and in due deference to the decisions referred to above, we are inclined to hold that the instant Rule merits positive consideration.

70. In the result, the Rule is made absolute.

71. The impugned order dated 08.06.2016, issued by respondent no. 5, appointing respondent no. 6 as Assistant Professor in the Department of Psychiatry, BSMMU, Dhaka is declared to have been issued without lawful authority and consequently, the same is set aside.

72. The respondents are directed to publish an advertisement, afresh, inviting applications for appointment to the post of Assistant Professor in the Department of Psychiatry, BSMMU.

73. The petitioner and respondent no. 6 shall both be eligible to apply for selection. However, should respondent no. 6 apply, she must first refund the monetary benefits that she has received while serving in the post of Assistant Professor in the Department of Pshchiatry, from the date of her appointment in that post till date. Respondent no. 6 must comply with Court's order first and make the aforesaid refund to BSMMU and thereafter apply for selection.

74. In the event of failure of respondent no. 6 to make the refund, as directed by this Court, the Authorities shall recover the same from her, in accordance with law.

75. Before parting with the matter, we wish to put on record own utter dissatisfaction regarding the conduct demonstrated by the BSMMU Authority. Each and every member of the Selection Board, who conducted the oral examination on 08.06.2016, is reminded that they are not rendering free, voluntary service and can act in any manner they like, as they have regrettably done in the instant case. They are warned to be more sincere, diligent and cautious in discharging their duties in future.

76. The learned Advocate appearing for respondent nos. 1-5 is directed to personally serve a copy of this judgment to each and every member of the Selection Board for their information.

77. Although the Court was inclined to award exemplary cost against all the respondents, we refrain from doing so.

78. The office is directed to communicate the order.

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

First Appeal No. 443 of 2012 with
Civil Rule No. 988(F) of 2012

**Feroza Begum and others**
……Plaintiff-Appellants
-Versus-

**Md. Nannu Mollah and others**
.....Defendant-Respondents.

Mr. Quamrul Haque Siddique, Advocate with
Mr. Ranjit K. Barmon, Advocate
.....For the plaintiff-appellants

Mr. Mostafa Niaz Mahmood, Advocate with
Mr. Md. Golam Noor, Advocate
…..For the defendant-respondents.

Heard on 11.12.2018, 13.12.2018, 17.12.2018, 03.01.2019, 09.01.2019, 10.01.2019, 17.01.2019, 30.01.2019, 13.02.2019, 17.02.2019, 20.02.2019 and Judgment on 12.03.2019.

**Present:**
**Mr. Justice A.K.M. Abdul Hakim**
**And**
**Justice Fatema Najib**

**Doctrine of past and closed transaction read with Sections 95 & 95A of the State Acquisition & Tenancy Act, 1950;**
**In the present case the Plaintiffs grandfather sold the suit property by registered saf-kabala deed dated 11.10.1963 and executed a deed of re-conveyance on that date with a condition of repurchase of the same within eight years period that is till 10.10.1971.The President's Order No.88 of 1972 came into effect on 03.08.1972 and following certain amendments therein by P.O No. 136 of 1972 and the condition giving right of repurchase having expired. The sale/transaction became past and closed transaction and the plaintiff was not entitled to get relief on the ground that the property was a mortgaged property. ... (Para 19)**

**JUDGMENT**

**A.K.M. Abdul Hakim: J.**

1. This appeal is directed against the judgment and decree dated 16.10.2012 passed by the learned Joint District Judge, Second Court, Chandpur in Title Suit No. 47 of 2012 dismissing the suit.

2. Appellants as plaintiffs instituted Title Suit No. 15 of 2011 in the Joint District Judge, First Court, Chandpur which was subsequently renumbered as Title Suit No. 47 of 2012 impleading respondent No.1 as principal defendant and respondent Nos. 1-3 as defendants nos. 1-3 praying for a declaration that the Sale Deed No. 1206 dated 09.02.2011 is false, fraudulent, collusive and not binding upon the plaintiff. During pendency of the appeal Plaintiff-appellant No. 2 Md. Habibur Rahman died leaving behind the appellant Nos. 2(a)-2(c) as his legal heirs and they were substituted by order of this court on 10.05.2018.

3. The case of the plaintiff, in short, are that one Asan Ali was exclusive owner of ˙24 Decimals of land in Petty (C.S.) Khatian No. 163, plot No. $\frac{290}{3620}$, S.A. Khatian 1427 and 1642, plot No. 1062 area ˙23 decimal and plot No. 1062 area ˙01 decimal were finally recorded in the name of Ason Ali and others in respect of 1.53 decimal including ˙24 decimal; that while Ason Ali had been owing and possessing ˙24 decimal land **of** plot No. $\frac{290}{3620}$ he took loan (Karja) of Tk. 800.00 from Yasin Matabbor mortgaging the said property and executed a Sale Deed No. 7534 dated 11.10.1963 and on the same day Yasin Matbor executed a registered agreement No. 7535; that is was stipulated in the agreement that Ason Ali will return Tk.800.00 within 8 years (within Magh 1370 BS- Poush 1378) in that case Yasin Matbor will execute reconveyance deed in favour of Ason Ali in respect of Suit 'KA' schedule; that thereafter Ason Ali transferred the said ˙24 decimal including other land to Rustom Ali, predecessors of the plaintiffs by registered Heba-bil-Ewaz Deed No. 668 dated 19.01.1965 but in the Heba Deed inadvertently Khatian No. 136 was recorded in place of Khatian No. 163, later on Ason Ali and Yasin Matbor died; that Yasin Matbor, before his death made Wasiatnama infavour of his First wife, Amirunnessa and son Fazal Haq declaring that if Rustom Ali son of Ason Ali return the loan money then they will return the mortgaged property; that plaintiff's predecessor requested the wife and son of Yasin Matbor to execute reconveyance deed accordingly upon receiving Tk. 800/- from Rustom Ali, Amirunnessa herself and on behalf of her minor sons and daughter and Fazal Haq executed registered Saf Kabala deed No. 381 dated 08.01.1969; that B.S. Khatian and D.P. Khatian No. 4736 prepared in the name of Rustom Ali; that there after Rustom Ali died leaving behind the plaintiff nos. 1-10 as wife, son and daughter, who inherited suit the 'KA' schedule land and the plaintiffs having been in possession and enjoyment of the property mutated their names by opening separate Khatian No. 104113 and by paying all kinds of Khajna; that although the defendant nos. 1-4 heirs of late Yasin Matbor, have no right, title and interest in the suit schedule land but the defendant nos. 1-4 as vendors executed registered Sale Deed No. 1206 dated 09.02.2011 infavour of Nannu Meah, defendant no. 1 in respect of land described in schedule 'KA' to the plaint; that defendant no. 1 threatened the plaintiffs on 10.02.2011 that he will dispossess the plaintiffs from the suit land; that the plaintiffs after obtaining certified of the said Sale Deed and being confirmed about the sale of the suit land, the plaintiff was constrained to filed the present suit for the reliefs stated above.

4. Defendant No.1, Md. Nannu Mollah only contested the suit by filing written statement contending, interalia, that the facts stated in the plaint are not correct. The defendant further stated that Ason Ali was the owner in possession of ˙24 decimal of land and through Deed of Agreement No. 7534-7535/63 both dated 11.10.1963 the land was Mortgaged to Yasin Matbor for a period of 8 year's which is admitted by the parties; that before completion of 8 year's period both vendor and vendee died and at the time of death Yasin Matabbor, had 2 wives, 3 sons and 3 daughters as legal heirs. Further case of the defendant is that Yasin Matbor died on 15.05.1964 and as per terms and conditions of the deed, Ason Ali did not take deed of reconveyance from Yasin Matbor, thus the land measuring ˙24 acres remains under ownership of Yasin Matbor and after his death his legal heirs inherited the property as per their shares; that Ason Ali died leaving behind 2 son's Rustam Ali, Momtaz Ghazi and five daughter's. Further case of the defendant no. 1 is that 2 son and 2 daughters of Yasin Matabbor got mutation in respect of ˙24 acres and on the strength of the mutation they transferred 0.1334 acres of land infavour of defendant no. 1 through registered deed No. 1206 dated 09.02.2011 and delivered possession; that Mafia Begum, daughter of Yasin Matbor by Second wife and Jamal Gazi son of Nuri Begum daughter of Yasin Matbor by First wife as

vendor sold way ˙0421 acres from B.S. plot No. 1051 by kabala No. 1367 dated 04.02.2011 infavour of defendant no. 1, who mutated his name in Miscellaneous Case No. 3079 of 2010-11; that defendant no. 1 while possessing (˙1334+˙0421) = ˙1755 acres, sold ˙0550 acres to Md. Humayun Kabir Chowdhury by kabala No. 3308 dated 11.04.2011 and further sold ˙500 acres to Md. Abdul Baset Sarker by kabala No. 3309 dated 12.04.2011; that he also sold ˙0202 acres to Md. Khurshid Alam Mollah by kabala No. 4569 dated 24.05.2011, ˙0250 acres to Harun-or Rashid and Md. Jahangir Alam Khan by kabala No. 4568 dated 24.05.2011, sold ˙0250 acres to Mahbub Alam and Soheli Sultana and after the aforesaid transfers, the defendant no. 1 had no lands. The purchasers erected pucca constructions and boundaries with the knowledge of the plaintiff; that Fazlul Haq and Amirunnessa never got title and possession in the suit land and they had no right to execute sale deed dated 08.01.1969.

5. During pendency of the appeal the appellants filed an application for amendment of the plaint on 07.05.2018 stating that the plaintiff ought to have prayed for a declaration of title in respect of the suit land and it will not be possible for the plaintiffs to get proper relief in the suit if they did not prayed for declaration of title. It was further stated that the plaintiffs are not aware about the law and they do not know how and what relief have to be seek before the court. It was also stated that if the plaintiff prayed for declaration of title in that case there was a chance to decreed the suit by the trial court. Since the plaintiff have been able to prove their case. The learned Advocate for the appellants submits that the amendment is very much essential and it will not change the nature and character of the suit. Accordingly, the application was allowed and only prayer portion of the plaint was amended by the order dated 28.06.2018.

6. In the suit plaintiff examined 4 (four) witnesses and on the other hand, defendant examined 3 (three) witnesses to prove their respective cases.

7. From the plaintiff's side good number of documents was filed and same was marked as Exhibits-1-9 and defendant documents was also marked as Exhibit-ka to ja(1) to ja(5).

8. Learned Joint District Judge after considering the evidence and materials on record dismissed the suit on the findings that the plaintiff's suit for simple declaration without establishing his title to the suit land is not maintainable. Trial court further found that the plaintiff failed to prove the redemption and reconveyance.

9. The plaintiff being aggrieved and dissatisfied with the Judgment and Decree dated 16.10.2012, preferred the present appeal before this court.

10. Mr. Quamrul Haque Siddique, learned Senior Advocate with Mr. Ranjit K. Barmon, the learned Advocate appearing on behalf of the plaintiff-appellant submits that the heirs of Yasin Matbor paid Taka 800/- and they by kabala dated 08.01.1969 (Exhibit-9) re- conveyed the land to Md. Rustom Ali, son of Ason Ali Gazi. He further submits that the present contract for sale time is not essence of the contract but in contract for re- conveyance time is the essence of contract. He next submits that the trial court erroneously found that the heirs of Yasin Matbor was minor but infact the heirs of Yasin Matbor after attaining majority sold the land to Nannu Mollah, defendant no. 1 by kabala dated 09.02.2011 (Exhibit-2). He also submits that the heirs of Yasin Matbor returned the original sale deed (Exhibit-3) dated 11.10.1963 to the heirs of Ason Ali at the time of re- conveyance dated 08.01.1969 and delivered possession. Subsequently, suit land was recorded in the D.P. Khatian (Exhibit-5) and during pendency of the suit B.S. Khatian was finally published in the name of Rustom

Ali and he paid rent regularly. He lastly submits that Ason Ali was alive in 1969 when the re-conveyance deed was executed by Yasin Matbor in favour of Rustom Ali. In support of his submission learned Advocate for the appellant cited a decision reported in *11 DLR 169*.

11. On the other hand, Mr. Mostafa Niaz Mohammad, Senior Advocate with Mr. Md. Golam Noor, the learned Advocate appearing for the principal-defendant-respondent No.1 submits that the plaintiff originally filed the suit for simple declaration to the effect that the appellants kabala is false, fraudulent and without establishing his title to the suit land, thus the present suit is not maintainable and accordingly the trial court upon relying the decision reported in *61 DLR (AD) 116* rightly dismissed the suit. In the appeal the plaintiff filed an application for amendment of the plaint and same was allowed, by the said amendment the plaintiff amended only the prayer portion of the plaint. In this respect learned Advocate for the appellant strenuously argued that without amending the averments of the plaint, the above lacuna still subsists and amendment does not help them to get benefit for declaration of title in the suit land as per law.

12. He further submits that the plaintiff filed the suit for cancellation of Sale Deed No. 1206 (Exhibit-8) in the name of defendant No.1 executed by defendant Nos. 2-4. But defendant No. 1 also purchased the land of the suit khatian from the heirs of Yasin Matbor by sale deed No. 1367 dated 14.02.2011(Exhibit Kha). But in the suit plaintiff only prayed for cancellation of deed No. 1206 (Exhibit-8). Thus the suit is not maintainable due to partial claim for cancellation of deed no.1206 only. Learned Advocate next submits that the defendant No.1 after purchase of the suit land transfer his entire purchased land by 5 (five) registered kabalas being Exhibit-Ja(1) to Ja(5) in favour of Md. Humayun Kabir Chowdhury, Md. Abdul Baset Sarker, Md. Khorshed Alam Mollah, Md. Harun-or-Rashid and Mohammad Jahangir Alam, Mahbub Alam and Soheli Sultana respectively and the aforesaid purchasers are in possession of the suit land but the plaintiff did not implead them as party in the present suit. So, for by non-impleading of the aforesaid necessary parties, the present suit is bad for defect of parties.

13. He also submits that the plaintiff's grandfather Ason Ali sold .24 decimal of land to Yasin Ali, the predecessor of defendant Nos. 2-4 by registered saf-kabala No. 7534 dated 11.10.1963 (Exhibit-3) and the recital of the said deed clearly evident that it was an out and out sale deed. Subsequently, plaintiff's grandfather Ason Ali executed Heba-bil-Ewaz deed No. 668 dated 19.01.1965 (Exhibit-4) in favour of his son Rustom Ali Gazi, father of the plaintiff and transferred the suit land by schedule two of the said deed but after execution of the earlier sale deed dated 11.10.1963 (Exhibit-3) in favour of the Yasin Matbor, the vendor Asan Ali had no right, title interest and possession over the suit land and the said Heba-bil-Ewaz deed itself is void and it has got no value in the eye of law. Learned Advocate by referring cross-examination of P.W.1, strongly submits that it is crystal clear from the deposition of P.W.1 Habibur Rahman son of Rustom Ali, Yeasin Matbor had 2(two) wives and at the time of his death he left two wives, 3 sons and 3 daughters as his legal heirs and Rustom Ali father of P.W.1 died in the year 2007 and his Grandfather, Ason Ali died after liberation leaving 2 sons and 5 daughters. The deed of re-conveyance No. 381 dated 08.01.1969 (Exhibit-9) executed by the First wife, Amirunnessa and son Fazal heirs of late Yeasin Matobbor in favour of Rustom Ali but the P.W.1 admitted that at the time of death Yasin Matbor left 2 wives, 3 sons and 3 daughters as his legal heirs. So, the aforesaid two legal heirs of Yasin Madbor had no right to execute the re-conveyance deed for entire property of their predecessor in favour of Rustom Ali, at best they can execute reconveyance their portion or share.

14. It was further evident from cross-examination of P.W.1, Ason Ali died after independence and at the time of execution of re-conveyance deed (Exhibit-9) vendor of the original sale deed was still alive and Rustom Ali had no right to take re-conveyance deed from two heirs of Yasin Matbor, thus total transaction is illegal and void. He further submits that in the deposition of P.W.1, he admitted that Yasin Matbor did not execute written wasiatnama and even plaintiffs failed to examine any witness to prove existence of Wasiatnama.

15. Learned Advocate finally submits that Agreement for re-conveyance Deed No.7535 dated 11.10.1963 (Exhibit-3 (Ka) for a period of 8 (eight) years from Magh 1370 B.S to Poush, 1378 B.S which expired on 10.10.1971 and after that the transaction has become past and closed. Thus the plaintiffs can not take advantage of President's Order No. 88 of 1972. Since the State Acquisition and Tenancy Act 1951 was amended and section 95 has been incorporated by inserting by the President's Order No. 136 of 1972 with effect from 03.08.1972. Since the transaction was not alive at the relevant time as such the plaintiff is not entitled to get relief. In this respect learned Advocate refers the decisions reported in *32 DLR (AD) 233 and 16 BLT (AD) 55*.

16. Heard the learned Advocate of both the sides, perused the exhibits and the relevant provision of law.

17. In the present case, firstly we are to consider after expiry of the period stipulated in the Agreement for re-conveyance on 11.10.1971 whether the transaction has become past and closed transaction or whether the transaction was alive at the time of execution of Deed of re-conveyance dated 08.01.1969(Exhibit-9) as per Section 95A of the State Acquisition and Tenancy Act, 1951.

18. Primarily Mr. Quamrul Haque, Siddique, the learned Advocate submits that the sale in the present case had become a complete usufructuary mortgage within the meaning of Section 95A of the State Acquisition and Tenancy Act but after submission advanced by the learned Advocate for the defendant-respondents, Mr. Siddique did not press this submission. In reply Mr. Niaz, learned Advocate for the respondents submits Ason Ali made Heba-bil-Ewaz dated 19.01.1965(Exhibit-4) to his son Rustom Ali Ghazi, father of the plaintiff in respect of the suit property. But it appears from Saf Kabala dated 11.10.1963 (Exhibit-3) that the said property was earlier sold by the Ason Ali, grandfather of the plaintiffs to Yasin Madbor. So, no interest was remained for Ason Ali to execute the Heba-bil-Ewaz deed favour of his son, Rustom Ali, father of the plaintiff.

19. In the case in hand, the plaintiffs grandfather sold the suit property by registered saf-kabala deed dated 11.10.1963 (Exhibit-3) and executed a deed of re-conveyance on that date with a condition of repurchase of the same within eight years period that is till 10.10.1971. The President's Order No. 88 of 1972 came into effect on 03.08.1972 and following certain amendments therein by P.O No. 136 of 1972 and the condition giving right of repurchase having expired, the sale/transaction became past and closed transaction and the plaintiff was not entitled to get relief on the ground that the property was a mortgaged property.

20. It further appears that in the present case when the Deed of re-conveyance was executed on 08.01.1969(Exhibit-9) transaction was not alive when the President's Order No.88 of 1972 came into effect on 03.08.1972 (P.O. 136 of 1972). The doctrine of past and

closed applies in the case of a transaction by way of out and out sale with an agreement to reconvey which has been treated as a mortgage under Section 95A of the State Acquisition and Tenancy Act, 1951 and also which was not alive on 03.08.1972, the date of coming into effect of the President's Order No. 88 of 1972.

21. In this respect we can rely on the decisions reported in *32 DLR (AD)233* which was subsequently followed in the decisions reported in *44 DLR (AD) 83*, *16 BLD (AD) 210* and *1 BLC (AD) 164.*

22. The learned Advocate for the appellant tried argue that in the case of a contract for the re-sale the time was an essence of the contract. In support of his submission he cited a decision reported in *11 DLR (1959)* 169 it has been held- Time, when essence of the contract-conveyance and re-conveyance, distinction between. We are totally at per with the decision cited by the learned Advocate for the appellants. But the cited decision has no manner of application in the facts and circumstances of the present case.

23. Having considering the submission of the learned Advocate of both the sides, we find that the trial court on consideration of the material and evidence on record and relying on the decision of our Apex Court reported in *61 DLR (AD) 116* rightly decreed the suit. It is evident from the re-conveyance deed (Exhibti-9) the transaction was not alive when the P.O 88 of 1972 subsequently by P.O. 136 of 1972 came into effect on 03.08.1972 was embodied in section 95A of the State Acquisition and Tenancy Act 1951. Since the present transaction become past and closed transaction, the plaintiffs is not entitled to get any relief on the ground that the property was a mortgaged property.

24. Accordingly, we find no merit in his appeal. In the result, the appeal is dismissed without any order as to costs and the connected rule being Civil Rule No. 988 (F) of 2012 is disposed of.

25. Send down the Lower Court Records at once and a copy of the judgment be sent to the concerned court expeditiously.

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**(CIVIL REVISIONAL JURISDICTION)**

Civil Revision No. 3179 of 2006
**Md. Akram Ali and others**
…..Petitioners
(Plaintiffs-Respondents)
-Versus-
**Khasru Miah and others**
….. Opposite parties
(Defendants-Appellants)

Mr. Tabarak Hossain with
Ms. Urmee Rahman, Advocates
For the Defendants-Appellants-Petitioners
Mr. Khalequzzaman with
Mr. Minal Hossain, Advocates
For the Plaintiffs-Respondents-Opposite parties

Judgment on : 01/06/2020

**Present:**
**Justice Muhammad Khurshid Alam Sarkar, J.**

**Partition Suit or Title Suit, Ubi Jus ibi remedium, Section 54, Order 20, Rule 18 and Order 26, Rule 13, Joint tenants;**
**Simply remanding back the suit for proper evaluation of the much-discussed documentary evidences, there shall not be an effective adjudication of the suit.**

**Since in a partition suit, a person approaches the Civil Court with a grievance of not being able to enjoy his/her property absolutely or independently or peacefully and, in responding to the plaintiff's case, if the defendant questions the very title of the plaintiff, in that scenario, it is incumbent upon the Court to assess and determine the plaintiff's title, right and interest in the suit land.**

**If the plaintiff does not make proper prayer in the plaint, the suit must not be dismissed on the said ground; rather it would be the duty of the Court to frame appropriate issue/s on the basis of the pleadings and submissions put forwarded by all the parties to the suit and proceed with the suits towards its effective disposal.**

**JUDGMENT**

**Muhammad Khurshid Alam Sarkar, J.**

1. An application under Section 115(1) of the Code of Civil Procedure, 1908 (CPC), at the instance of the plaintiffs-respondents-petitioners, engendered the instant Rule, which was issued on 20.08.2006 in the following terms:

> Let the record be called for and a Rule issue calling upon the opposite party No. 1 to show cause as to why the Judgment and Decree dated 10.04.2006 passed by the Second Joint District Court, Sylhet in Title Appeal No. 9 of 2002 allowing the appeal and sending back the suit on remand upon setting aside the Judgment and Decree dated 30.10.2001 passed by the Assistant Judge, Biswanath, Sylhet in Title Suit No. 61 of 2000 decreeing the suit in part, should not be set aside and or pass such other or further Order or Orders as to this Court may seem fit and proper.

Pending hearing of the Rule, let operation of the impugned Judgment and Decree dated 10.04.2006 passed in Title Appeal No. 9 of 2002 be stayed.

2. The background facts of issuance of this Rule are that the present petitioners and the opposite party No. 38, as plaintiffs, filed the Title Suit No. 61 of 2000 in the Court of Assistant Judge, Biswanath, Sylhet for partition of the suit land to get a saham (share in the land) of 0.1401 acres of land out of 0.41 acres of land described in the schedule to the plaint stating, *inter alia*, that the S.A. recorded owner of the suit plot No. 57 appertaining to Khatian No. 354 is Saifa Bibi, who died leaving behind 4 sons, namely, Abdul Mosobbir, Abdul Kaium, Abdul Mukit and 'Tular Bap' and 2 daughters, namely, Momina Bibi and Aymona Bibi (hereinafter referred to as "the Daughters"). Plaintiffs claim to have purchased the suit land from one of Saifa Bibi's son, named, Abdul Mosobbir and also from the heirs of Saifa Bibi's Daughters. The defendants Nos. 2-4 purchased their properties from Saifa Bibi's other 3 sons, namely, Abdul Kaium, Abdul Mukit and 'Tular Bap'. Defendant No. 1 got the land from the defendant Nos. 2-4 by executing an exchange deed dated 07.10.1999 and the defendant No. 1, after taking possession of the defendant Nos. 2-4's land, is now trying to grab more land than what he is entitled to. The plaintiffs on 10.07.2000 approached the defendant No. 1 to make partition of the land, but the defendant No. 1 and the other defendants did not pay heed to the same. Since the plaintiffs are entitled to a saham in respect of their share, they instituted this suit for partition.

3. Defendant No. 1 contested the suit by filing a written statement contending, *inter alia*, that S.A. recorded owner Saifa Bibi got the suit land against her dower money. She also inherited some other property as an heir of her husband late Idris Ali. All the properties left by Idris Ali and Saifa Bibi were divided among their heirs by way of mutual partition wherein the Daughters (Momina and Aymona) were not given any property from the suit land, but they were allocated their appropriate shares from other properties. Therefore, the heirs of the Daughters do not have any right to sell property from the suit Khatian to the plaintiffs. Moreover, two of the heirs of Momina and Aymona executed a *'Na-Dabi Patra'* (deed of waiver) in favour of the defendant No. 1 stating that they shall not claim any property from the suit plot. It was the further case of the defendants that by a registered deed of exchange, they got 0.31 acres of land and have been enjoying the same to the knowledge of all co-sharers, including the plaintiffs and no one ever raised any question on the ownership of the defendant No. 1 in the last more than one and half years.

4. During the course of trial, the plaintiff examined 5(five) witnesses (PWs) and the defendants examined 5 (five) witnesses (DWs) and while the plaintiffs produced documentary evidence by marking them as Exhibit 1-2 series and 3-4 series, the defendants produced documentary evidence upon marking them as Exhibit Ka, Kha, Ga series, Gha, Uma series and Cha series. The trial Court decreed the suit in part by granting saham of 0.1162 acres of land out of the claim of 0.1401 acres of land to the plaintiffs by the Judgment and Decree dated 30.10.2001 holding that although it was the case of the defendants that the heirs of Saifa Bibi divided the suit land by way of mutual partition where Saifa Bibi's Daughters were not allotted any saham from the suit land, however, the defendants failed to produce any documentary or oral evidence in support of such mutual partition and they could not prove which land was given to the Daughters (Momina and Aymona) and, as such, the mutual partition being not proved, the Daughters are entitled to get their shares from the suit land; that the plaintiffs claimed little more land than what they are entitled to get from the shares of 1(one) son and the Daughters of Saifa Bibi. Therefore, they are entitled to get a decree in part; defendant No. 1 would not get any more than the shares what the 3(three) sons were entitled to get.

5. Being aggrieved the opposite party No. 1, as the appellant, preferred Title Appeal No. 09 of 2002 in the Court of District Judge, Sylhet, which on transfer was heard by the Second Joint District Judge Court, Sylhet. The learned Judge of the Appellate Court by his Judgment dated 10.04.2006 allowed the appeal and, upon setting aside the Judgment and Decree passed by the trial Court, sent back the suit on remand with a direction for passing a fresh Judgment upon giving the parties an opportunity to get necessary steps in the light of the appellate Court's findings that the Daughters of Saifa Bibi got shares in other lands, not in the suit land; that there are some other joint properties which should be included in the plaint; that defendant No. 1 can claim a case of adverse possession regarding the excess land he is possessing in the light of the decision reported in 45 DLR 451; that the trial Court committed an error in deciding the partition suit violating the general principle of partition suit which requires incorporation of all the joint properties in a partition suit and giving decision basing on a cited decision of the Hon'ble Appellate Division given by way of an exception to the general rule for partition, which does not fit in the instant case.

6. Ms. Urmee Rahman, the learned Advocate appearing for the plaintiffs-petitioners, takes this Court through the Judgments passed by the trial Court and the appellate Court and submits that both the Courts below concurrently came to the findings that there is no common interest of the plaintiffs and defendant No. 1 in any other land except the suit plot, yet the appellate Court sent the case on remand to the trial Court which has resulted in an error in passing the impugned decision occasioning a failure of justice. She, then, refers to the case of Abdul Kader Khalifa Vs Suja Bibi and others 52 DLR (AD) 34 and the case of Mir Shariatullah Vs Abdur Rahman 8 DLR 645 and submits that it is the settled principle of law that where the parties to the suit have no common interest in a particular property, such property does not need to be included in the schedule of the partition suit. Her second count of submission is that the appellate Court made out a third case of adverse possession in favour of the defendant No. 1 which is beyond the pleadings as because the defendant No. 1 did not set up a case of adverse possession and as such the impugned Judgment is perverse in the eye of law. In support of the above count of submission, she refers to the cases of Noropoma Ritchel Vs Mohammad Abdul Jalil 41 DLR 467, Bijoy Kumar Sarabidya Vs Government of Bangladesh 5 ADC 44 and Lal Banu & others Vs Md. Yasin Abdul Aziz 42 DLR 335. By placing the facts of the case of Shah Alam and others Vs Masuma Khatun & other 45 DLR 541, she submits that though the appellate Court relied very much on the afore-cited decision in remanding the suit, but the case of 45 DLR has no manner of relevance in the instant case inasmuch as the facts are completely different from the facts of the present case. Her third count of submission is that the appellate Court sent the case on remand to the trial Court in a whimsical manner which is not in conformity with the provision of the law engraved in the CPC and hence the appellate Court's Judgment is liable to be set aside, because it is a settled principle of law that when the trial Court after framing the issues and giving parties an opportunity to adduce evidence disposes of the suit on merit, the appellate Court cannot remand the case back to trial Court for disposal on merit afresh. In support of her above count of submissions, she refers to the case of Hosne Ara Begum & others Vs Montaj Ali and others 55 DLR (AD) 20 and Madinullah Miah Vs Abdul Mannan 54 DLR 507. By referring to the case of Begum Syeda Marguba Khatoon Vs Dewan Shafiur Reza Chowdhury & another 30 DLR 179 and the case of Zehad Ali Vs Kharshed Ahamed and others 41 DLR 336, she submits that mere disagreement with the findings of the trial Court is no ground for the appellate Court to send the case back on remand when the evidence on record is sufficient to decide the matter finally. Lastly, she submits that the impugned decision is not a proper Judgment of reversal in the light of the provision of Order 41 Rule 23

of the CPC and, therefore, the same is liable to be set aside and, accordingly, she prays for making the Rule absolute towards upholding and maintaining the trial Court's decision.

7. Per contra, Mr. Minal Hossain, the learned Advocate appearing for the defendant-opposite party, contends that in view of the fact that Saifa Bibi had inherited some other lands on top of owning the suit land of 0.41 acres of land and after her death her 4 sons and 2 daughters inherited the same; that by amicable partition, while 4 sons got the suit land with a share of .1025 each, the Daughters were given their respective sahams from the other lands of Saifa Bibi; that the defendant Nos. 2-4 purchased some land of the suit property and exchanged 0.31 acres of land with defendant No. 1 which is in north portion of the suit land and defendant No. 1 was possessing the same within the knowledge of all, including the plaintiff, therefore, the trial Court committed an error in not considering the fact of partitioning the suit land among the four sons of Saifa Bibi and subsequent sale of their respective portions among themselves and exchange of 0.31 acres of land therefrom. He next submits that since all the successors of Saifa Bibi have every right, title and interest in her entire left-out land, therefore, one particular plot cannot be partitioned within some co-sharers without bringing every co-sharer in all the land, so that Saifa Bibi's entire properties are included in the suit. He forcefully submits that it is the general provision for a partition suit that the whole properties of the person from whom the contending parties are claiming their respective sahams must be brought in the hotchpotch and this general provision cannot be avoided and, which is why, the appellate Court rightly has sent the suit on remand with necessary instructions to pass a fresh Judgment. He lastly submits that since there is a dispute regarding title among the parties, the plaintiffs ought to have prayed for declaration of their title in the suit land and, as a consequential relief, could have prayed for dividing the suit land by metes and bounds; but they instituted 'Partition Suit', instead of filing a 'Title Suit'. In elaborating his above count of submission, he professes that partition suit is filed for partitioning of a joint estate or co-ownership or tenancy-in-common among the co-sharers or co-owners who do not raise any dispute with regard to any one's title but, here in this suit, the plaintiffs and the defendants are not joint tenants or co-owners, because the four sons of Saifa Bibi are no more owning or possessing any piece or part of the suit land as co-owners and, for the aforesaid reason, the plaintiffs ought to have instituted a Suit for Declaration of Title, instead of filing a Partition Suit. In support of above submissions, he refers to the cases of Mobinnessa Vs Khalilur Rahman 37 DLR (AD) 216, Md. Shahidul Alam Khan Vs Md. Gulzar Alam 36 DLR 290 and Shashi Kumar Vs Sreemati Kusum Kumari Debi 34 DLR 127.

8. After hearing the learned Advocates for both the sides, perusal of the Judgments of the Courts below in tandem with the papers and documents contained in the Lower Court Record (LCR) and upon examining the statutory provisions as well as the case-laws placed before this Court, it appears to me that for a fair and effective disposal of this Rule, the followings issues are needed to be adjudicated upon by this Court : (1) whether there is any legal requirement to name a suit as 'Partition Suit', 'Title Suit', 'Other Class Suit' etc, and whether due to wrong nomenclature of a 'Title Suit' as a 'Partition Suit' or vice-versa, a Civil Suit could be questioned to be not maintainable, (2) whether in any type of Civil Suit, if a relevant prayer is omitted or a wrong prayer is made, the suit is liable to be dismissed, (3) in a suit for partition, (a) whether it is a mandatory duty for the plaintiff to make a specific prayer for declaration of her/his title in the suit land or, in other words, what should be the ideal form of prayer/s in a suit for partition, (b) whether all the properties of the persons from whom the contending parties have inherited or purchased their claimed portion of land are to be brought in the hotchpotch, (c) whether the footing of a joint tenant, a co-owner and a co-tenant are the same; in other words, what are the core features to be looked into a suit for partition of

immovable property, (4) what are the principles governing the issue of 'sending a suit on remand' and (5) what are the laws regarding 'adverse possession'?

9. The instant suit was filed in the Court of Assistant Judge, Biswanath, Sylhet with a prayer for partition of the plaintiffs' claimed portion of 0.1401 acres of land. The suit was named by the learned Advocate for the plaintiffs as 'Partition Suit' and the Sheristadar (an administrative aid/officer of the Court) numbered the suit as T.S. No. 61 of 2000. No prayer was made by the plaintiffs for obtaining a declaration from the Court as to their title on the suit land. Let me now see whether because of naming the suit as 'Partition Suit', has there been any illegality warranting dismissal of the suit.

10. In order to know about the laws regarding 'institutions of suit', I find the provisions of Order IV of the CPC to be relevant, which provides that (i) a suit must be instituted through presenting a 'plaint' to the Court or its authorized officer and (ii) the particulars of the suit shall be recorded in the 'Register of Civil Suits'. Since Order VII of the CPC provides the details of a plaint, thus, in quest for names of suits, the same was also looked at by me. From a concurrent reading of the provisions of Orders IV and VII of the CPC, no one would get a clue about the nomenclature of a suit, except having a hint from Order VII, Rules 2 & 3 of the CPC that a particular type of suit should contain some specific averments, such as, *'in money suits: where the plaintiff seeks the recovery of money'* (Order VII, Rule 2) and *'where the subject-matter of the suit is immovable property'* (Order VII, Rule 3).

11. In an effort to trace out the legal back-up of characterization of the suits with different names, I went through the Civil Courts Act, 1887 together with the 'Manual of Practical Instructions for the Conduct of Civil Cases' issued by the High Court of Judicature at Fort William in Bengal in 1935, but neither the Act nor the Manual do contain any provision regarding naming of a civil suit. Then, I ventured to sort through the Civil Rules and Orders (popularly known as CRO) which are framed for the purpose of regulating the rules, procedures and working system of the subordinate Courts and I found a number of its provisions to be apposite for disposal of this case. Chapter 2 of the CRO deals with presentation and registration of plaint and I find rules 47 to 49 of the CRO to be relevant for the purpose of my on-going examination. And, from a minute perusal of the above provisions of the CRO, it appears that there are 'classifications of suits' (not - naming the suits), as shown in the specimen slip in rule 48, and for each class of suits there shall be separate volumes in addition to maintaining the General Register of suits and Filing Register of Suits, as stated in rule 49(2) and in the Note thereto. But no name or class of the suits is provided in the above-mentioned provision of the CRO. To this end, I felt that the 'Registers' might contain the names and classifications of the suits as spelt out in the preceding provisions and, accordingly, I looked at the relevant Chapter of the CRO which deals with the Registers. On carrying out further searching the CRO, I found out that Chapter 33 of the CRO contains the provisions regarding 'Registers' and rules 752 & 757, which are incorporated in this Chapter, appear to be apropos for adjudication of the present issue. After conducting a long searching hereinbefore, for the first time, rule 757(1) of the CRO while accouters two names of the suits, namely, (i) Title Suit and (ii) Others Suit, it also furnishes two classes of suits, which are (i) Suits for money and (ii) Suits for movables. Given that the 'Note' underneath the rule 752 states that the Registers are self-explanatory, I also looked at the two Forms mentioned in rule 757, namely, Register No. (R)1(i) and Register No. (R)1(ii), and it transpires that there are as many as 34 columns in both the Registers and while column No. 2 is allotted for 'Number of Suit', not a single column of the remaining columns speak about the naming or classification of suits.

12. In an expectation for obtaining further information on naming and classification of suits, I continued to go through the remaining provisions of the CRO and, out of them, only rule 769 appeared to me to be a bit beneficial for the purpose of the on-going scrutiny. Since the provisions of rule 769 require the subordinate Courts to file the 'Returns'/'Annual Statement', I was inquisitive to be familiar with their contents which are supposed to be contained in Form Nos. (S)11, as per the narrations made in rule 769(2). The aforesaid Forms mention about (i) Suit for money, (ii) Suit for movable property, (iii) Suit for recovery of rent under the Rent Law, (iv) Suit for enhancement of or abatement of rent under the Rent Law, (v) Suit for ejectment or recovery of possession under the Rent Law, (vi) Other Suits under the Rent Law, (vii) Suit for immovable property, (viii) Suit for specific relief, (ix) Mortgage Suits and (x) Other Suits not falling under any of the previous heads. The above-mentioned Forms do not supply the names of the suits except one (Mortgage Suit). However, at least, the information as to classification of many types of suits became surfaced from a codified-law. In fact, there is mentioning about the different nature of suits in Section 16 of the CPC, albeit the provisions of Section 16 of the CPC are not meant for providing the different class of the suits. Section 16 of the CPC seeks to show a suitor the appropriate Courts where a suit with regard to any immovable property should be filed. However, it apparently discloses the fact that there are many types of civil suits.

13. So, from the above marathon exercise (for apparently a trivial issue though) necessitating perusal of the overlong provisions of the CPC as well as that of the CRO and, side-by-side, upon glancing at the relevant Forms under the nomenclature of 'Filing Register of Suits', 'General Register of Suit', Return/Annual Statements prescribed by the CRO for the purpose of their mandatory use by the subordinate Courts, it appears that the law does not make any provision as to what would be the name of a suit for its particular nature. The plaintiff or the engaged Advocate of the plaintiff has simply been asked by the provisions of rule 48 of the CRO to write the 'classification of suit' in the 'slip of paper', which is required to be affixed to the top left-hand corner of the plaint's first-page. The purpose for obtaining the information as to classification of suits in the 'slip of paper' is to ease the administrative functions of the Court, so that the Court can record the said information in its 'Registers' and 'Annual Statements'. While the classification of suits, as reveals from the provisions of Section 16 of the CPC, rule 757(1) of the CRO and Form Nos. (S)11, & (S)12 appended to the Part 2 of the CRO, are amply useful for the aforesaid administrative purpose, naming the suits again by the litigants or Sheristadar as Title Suits, Money Suits, Mortgage Suits, Rent Suits, Eviction Suits, Other Class Suit etc appears to me to be pleonasm. Because since it is a well-established practice of drafting a plaint that at the very beginning of the averments of the plaint there should be a 'cause title'; meaning a brief statement about the reason for institution of the suit, that information should be sufficient for the Nazarat Section of the Court for classifying the suit as 'Suit for declaration of title', 'Suit for specific performance of contract', 'Suit for recovery of rent, etc. If there is really a need of naming the suit, the litigants, Advocates and Courts may use the simple expressions of 'Civil Suit' for all classes of substantive suits and 'Civil Miscellaneous Case' for all types of civil miscellaneous proceedings, such as, preemption case, application for restoration of the suit or any other miscellaneous application arising out of the substantive suit and, if the aforesaid practice is ushered/introduced, there would be no need to carry out further scrutiny by the Sheristadar or by the Court as to naming the suit appropriately, as happened in this case. In the case in hand, although the plaintiffs' Advocate had named the suit as 'Partition Suit', however, the Sheristadar recorded the suit as 'Title Suit'.

14. Be that as it may, if the plaintiff or the engaged Advocate fills in the line 'class of suit' engraved in the 'slip of paper' by taking into consideration the reason/purpose of institution

of the suit, which are outlined in Section 16 of the CPC, in other words, if the 'classification of suit' is written in the 'slip paper' on the basis of *'the facts constituting the cause of action'* and *'the relief which the plaintiff claims for',* as required by the law, namely, Order VII, Rule(1)(e) and Order VII, Rule(1)(g) respectively, to be set out in the plaint, then, the plaintiff's or the Advocate's obligation is deemed to be fulfilled. However, in compliance with the prevailing practice, when the plaintiff/Advocate names the suit as Partition Suit, Title Suit, Money Suit etc and, subsequently, upon carrying out scrutiny by the Sheristadar or by the Court if it appears to be mismatched with the class of the suit, usually, the Sheristadar of the Court or the learned Judge puts a befitting name relying on the plaint's averments plus prayer. It follows that when a suit is named by the plaintiff or Advocate as Partition Suit or Title Suit or Money Suit or Other Class Suit etc, s/he is required to do so by taking into consideration the averments regarding grievances for institutions of the suit in tandem with the prayers made therein. However, given that neither is there any coherent customary practice for designating a suit with a particular name, nor is there any mandatory legal provision requiring that a suit must be marked by a particular name, therefore, in my view, if a plaint is filed with a name mismatching with the plaint's averments and prayers i.e. with a wrong/unsuitable name, it cannot be a ground for non-maintainability of a suit.

15. With the above conclusion on the issue of naming of suits, I may take up the issue No. 2, namely, as to whether a suit is liable to be dismissed for making a wrong/inappropriate prayer or for not making prayer at all, since, evidently, in this suit no prayer was made by the plaintiffs for ascertainments of their title on the suit land. It is the requirement of the law, namely, Order VII, Rules 1 (e) & (g) of the CPC that the plaintiff must state his/her grievance in the plaint and, further, the plaintiff must seek the aspired relief. To this end, I find it pertinent to look at the provisions of Order VII, Rule 7 of the CPC. From the provisions of Order VII, Rule 7 of the CPC, it appears that the law binds a plaintiff and defendant to pray for relief in specific terms. In view of employment of the words *'……. the plaint <u>shall</u> contain ……'* in Order VII, Rule 1(g) and the words in Order VII, Rule 7 '……. *every plaint <u>shall</u> state specifically the relief which the plaintiff claims either simply or, in the alternative* ……..', the first presumption by this Court, without searching for and resorting to any case-laws, is that the above provisions are to be applied mandatorily. However, in the backdrop of not providing any consequence for failure to make specific prayer, it is incumbent upon this Court to find out whether the Court would be competent to grant a relief which has not been specifically asked for by the Court and what types of reliefs fall within the purview of 'general or other relief' as enshrined in Order VII, Rule 7 of the CPC.

16. In quest for an appropriate answer, upon skimming through a catena of case-laws of this subcontinent, which includes our jurisdiction, Privy Council and Indian jurisdiction, it appears to me that the principles laid down in the cases of Richard Ross Skinner Vs Kunwar Naunihal Singh (1913) LR 40 IA 105 (MANU/PR/0070/1913 – relevant para 17) and Kedar Lal Seal and another Vs Hari Lal Seal AIR 1952 SC 47- have consistently been followed by all the Apex Courts of this sub-continent till date.

17. In the case of Richard Ross Skinner Vs Kunwar Naunihal Singh (1913) LR 40 IA 105, it was opined by their Lordships of the Privy Council that although the plaintiff must ordinarily adhere to the claim as brought, the Court will depart from strict enforcement of this rule, where it is satisfied that justice will not be done between the parties if the suit was dismissed on a technical ground, with the prospect of further litigation for the determination of a controversy then substantially ripe for settlement.

18. In the case of Kedar Lal Seal and another Vs Hari Lal Seal AIR 1952 SC 47, the Indian Supreme Court held that:

> I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded. In any event, it is always open to a Court to give plaintiff such general or other relief as it deems just to the same extent as it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs.

19. So, when a grievance or complaint or dispute is placed before a Court, the Court's primary duty is to consider its substance, which may be derived from not only the averments and prayer, but also from the evidence led by the parties at the trial. Because, considerations of form cannot override the legitimate considerations of substance. From the averments and/or prayer (pleadings), if it transpires that a plea is not specifically made but it is covered by an issue by implication, and it appears to the Court that other side would not be prejudiced; in other words, it is within the knowledge of the other side that the said plea was involved in the trial, then, the mere fact that the plea was not expressly taken in the pleadings would, in my opinion, not necessarily debar a party from relying upon it if it is satisfactorily proved by evidence. No doubt, it is the general rule that any relief should be based on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the general rule as to expressly taking a particular matter in the pleadings should be considered by the Court to be purely formal and technical. Therefore, the substance of the question is that when the question relates to the title of both the parties and evidence has been led about it and both the parties are aware of the same, the mere technicality that the issue was not expressed in the averments and prayer i.e. in the pleadings - is of formal nature, and that technicality should not be allowed to preclude the Court from granting the relief. That is to say, the vital question for the Court should be in dealing with such a situation is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that shall directly violate the provisions of the CPC. Because, to allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would cause prejudice resulting in injustice to another. All that I wish to state here that the settled principle on this point is that the Court cannot grant relief to the plaintiff in a case for which there was no foundation in the pleadings and which the other side was not called upon or had no opportunity to meet.

20. In this suit, the plaintiffs have merely made a prayer for partition of the suit land along with a prayer for granting 'general and other relief' using the stereotyped expressions of 'as the Court thinks fit and just'. Now, I need to go through the averments made in the plaint and written statement, evidence led by the parties and the trial Court's Judgment to see whether the question of declaration of the plaintiffs' title are covered up by the principles laid down hereinbefore on the provisions of Order VII, Rule 7 of the CPC. In other words, whether by the averments made in the plaint and by the evidence led by the parties at the trial, any surprise was sprung by the plaintiff upon the defendant; meaning that whether it was within the knowledge of the defendants that the question of title of the parties are going to be adjudicated upon in this suit.

21. From a careful perusal and examination of the averments made in the plaint, it is apparent that the plaintiffs have categorically raised the issue of their title in the suit land and,

in response thereto, defendant No.1, who is the only contesting defendant in this suit, has dealt with the issue of title in his written statement. Accordingly, the trial Court also having framed a specific issue on the question of title declared that the plaintiffs have got title and interest of 0.1162337 acres of land in the suit plot (নালিশা দাগে .১১৬২৩৩৭ একর সম্পত্তিতে বাদীপক্ষের স্বত্ত ও স্বার্থ আছে মর্মে সিদ্ধান্ত স্থাপিত হলো). The above scenario, thus, leads me to hold that although the plaintiffs missed/omitted to make specific prayer as to obtaining a declaration of their title from the Court in the plaint, but the trial Court has made an appropriate declaration as to the title of the plaintiffs and the defendants on the basis of the pleadings and the evidence led by both the parties.

22. The above conclusion leads me to embark upon the examination of the issue No. 3, namely, (a) what should be the ideal form of prayer in a suit for partition i.e. in addition to making a prayer for partition of the suit land, what are the other prayers the plaintiff needs to make and, in particular, whether seeking declaration of title by the plaintiff is necessary, (b) whether all the properties of the persons from whom the contending parties have inherited or purchased their respective portions of land are to be brought in the hotchpotch and (c) whether the footings of a joint tenant, a co-owner and a co-tenant are the same; in other words, I need to know what are the nuclei of a suit for partition.

23. Since there is no separate/independent procedural or substantive law for exclusively dealing with a suit for partition, the present suit is an usual Civil Suit under Section 9 of the CPC, like any other suits of civil nature and, therefore, its features depend on the particulars contained, averments made and the relief sought in the plaint as well as in the written statements. The scheme of Section 9 of the CPC is that when a natural/juristic person would find a dispute in the way of her/his enjoyment of any right of a civil nature, s/he is entitled to institute a civil suit in a competent Civil Court unless its cognizance is either expressly or impliedly barred by a statute. Section 9 found its placement in our CPC in terms of the doctrine *Ubi Jus ibi remedium*.

24. In course of dealing with the suits for partition of movable/immovable properties involving/requiring interpretations of the numerous civil laws, such as, the CPC (in particular, Section 54, Order 20, Rule 18 & Order 26, Rule 14 of the CPC), the Partition Act, 1893, (particularly its Sections 2, 3, & 4), the Transfer of Property Act, 1882 (particularly its Sections 44 to 47), the Suits Valuation Act, 1886 (particularly its Section 3, 8, 9 & 11), the Court Fees Act, 1870 (particularly its Section 7 and Article 17 of Second Schedule), the Estates Partition Act, 1897 (repealed), the Specific Relief Act, 1877 (particularly its Section 39 to 44 & 52 to 57), the Registration Act, 1908 (in particular its Section 17), the Limitation Act, 1908 (particularly its Article 127 of First Schedule) and various provisions of the State Acquisition and Tenancy Act, 1950 (SAT Act), the common-law jurisdictions, over the period of time, have set out some principles on the topic of 'Partition Suit'.

25. In an expectation to garner the nitty-gritty of the suit for partition, I contrived to sequentially look at all the above laws. In pursuance thereof, at first, I went through the provisions of Section 54 of the CPC. [After a minute reading of the above law, my understanding is that the above law impliedly provides provisions for declaration of title in a suit for partition. Moreover, since the Court is required to pass a decree, there is apparently a mandate upon the Court to deal with the issue of title of the plaintiff on the suit land.

26. Then, I looked at the provisions of Order 20, Rule 18 of the CPC, which is extracted below:

> Order 20, Rule 18 of the CPC: Decree in suit for partition of property or separate possession of a share therein: Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then, -
> (1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;
> (2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties, interested in the property and giving such further directions as may be required. (underlined by me).

27. The above law apparently dictates the Court to declare the rights of the parties to a partition suit, although it does not furnish any guideline for the Court as to what would be the contents of the pleadings of the parties and how to determine the title of the parties to a partition suit. The above law also seeks to provide the provisions as to the duties of the Court after passing a decree in a suit for partition of property. My overall understanding about the provisions of Order 20, Rule 18 is that since it is obvious that the Court has to pass a decree, the assessment and determination of title of the plaintiff in the suit property is a must-to-do work for the Court.

28. Then, comes the provisions of Order 26, Rule 13 of the CPC, which is reproduced below:

> Order 26, Rule 13 of the CPC: Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

29. It is to be noticed from the above law that nothing has specifically been provided to ascertain the title of the parties to a suit for partition. It is a provision for the Court to appoint a Commissioner, usually an architect, engineer or draughtsman or Advocate, for effecting partition or separation, following passing a preliminary decree in a suit for partition. However, the Court, without stating about the right, title and interest of the parties of the suit, cannot seek assistance of the Commissioner towards execution of the final decree.

30. Then, I took up the Partition Act and from a minute reading of the relevant provisions of the Partition Act, namely, Sections 2, 3 & 4, it appears that Section 2 states about the power of the Court to order sale of the suit property, instead of dividing the same, at the instance of the fifty percent or more sharers of the property; Section 3 prescribes the procedures when the sharers undertake to buy the suit property and Section 4 sets out the provisions to deal with a situation when the suit property is a dwelling house and the transferee, being not a family member, files a partition suit before the Court. So, although there is no provision in the Partition Act stating what should be the salient features of a partition suit, but the Court is impliedly shouldered with a duty to ascertain the right, title and interest of the plaintiff/s and defendant/s.

31. Thereafter, I embarked upon examination of Section 44 of the TP Act. From a minute perusal of the provisions of Section 44 of the TP Act, my understanding is that a transferee of the undivided property is entitled to enjoy the right of joint possession or to enforce its partition which the transferor was enjoying, subject to the conditions delineated in the second

part of the same Section as well as in Section 4 of the Partition Act. So, here in this law, a duty is cast upon the Court to adjudicate upon the right of enjoyment upon the title and interest of the transferee when s/he approaches the Court for enforcement of partition of the property. Although this right to enjoy the property by the transferee is dependent on the provision of the second part of Section 44 of the TP Act, the resolution of the dilemma, however, is provided in Section 4 of the Partition Act. From a plain perusal of the other relevant provisions of the TP Act, namely, Sections 45, 46 and 47 of the TP Act (for the sake of brevity, extractions of Sections 44, 45, 46 and 47 of the TP Act are avoided), it appears to me that Section 45 is about joint purchase of property; if at the time of jointly purchasing the property, shares are not specified, then, the presumption is that all of them own equal shares in the property. Section 46 of the TP Act is about transfer of immovable property for consideration by persons having distinct interests and when there would be a dispute about whether the transferors were entitled to get the equal share or proportionately to the value of their respective shares, the Court would have to adjudicate upon the issue of title. And Section 47 states that when several co-owners transfer a share without specifying as to the portion of shares from each of the transferors, the transfer would take place as per the proportion of the shares the transferors hold in the property.

32. Then, from a concurrent reading of Sections 3, 8, 9 & 11 of the Suits Valuation Act together with the provisions of Section 7 & Article 17 of the Second Schedule of the Courts Fees Act, I find the solution of the problem as to whether in a suit for partition of joint property by a person, claiming to be in joint possession thereof, jurisdiction is determined by the value of the share of the plaintiff in the property or the value of the joint property as a whole.

33. Thereafter, comes the relevant provisions of the SR Act. Sections 39 to 41 of the SR Act empowers the Court to cancel entirely or partially any written instrument, Section 42 equips the Court with a discretionary power of declaration as to legal status or right of any person which is made binding upon the parties of a suit by the provisions of Section 43, Section 44 is regarding appointment of receivers and by the provisions of Sections 52 to 57 of the SR Act, the Courts have been bestowed with the arms of granting various types of injunctions.

34. Section 17(1)(f) of the Registration Act makes it compulsory to register the 'Instrument of Partition' of immovable property effected by persons upon inheritance according to their personal laws.

35. The provisions of Article 127 of the First Schedule of the Limitation Act provides that then a person is excluded from joint family property, s/he may approach the Court to enforce her/his right to share therein within twelve years from the time when the exclusion became known to the plaintiff.

36. Lastly the provisions of the SAT Act were looked into to see whether any substantive or procedural law are provided to deal with the 'Partition Suits'. Section 89(5) of the SAT Act imposes a duty upon the Registering Officer as to serving notice upon the co-shares; Section 116 and 117 of the SAT Act contain the words 'separation' and 'amalgamation' upon providing specific meanings and their implications. By these two provisions, the co-shares have been made competent to apply to the Revenue Officer for 'amalgamation' as well as for 'separation' and, pursuant to allowing the aforesaid application, the power of execution of a partition/division has been vested in the Revenue Officer by demarcating the portion of land by remaining physically present in the partitioned-land. By Section 143(B) of the SAT Act,

after the death of a person, an instrument of partition prepared amicably by the inheritors shall be effective if the same is signed by all the concerned and duly registered.

37. After wrapping up the examination of the above relevant provisions of the CPC, Partition Act, TP Act, Suits Valuation Act, Court Fees Act, SR Act, Registration Act, Limitation Act and SAT Act, the conclusion to be arrived at is that since in a partition suit, a person approaches the Civil Court with a grievance of not being able to enjoy his/her property absolutely or independently or peacefully and, in responding to the plaintiff's case, if the defendant questions the very title of the plaintiff, in that scenario, it is incumbent upon the Court to assess and determine the plaintiff's title, right and interest in the suit land. Even, if the plaintiff is not opposed/encountered by the defendant as to title on the suit land, it would be a prudent performance for a Court to examine the source/basis of the plaintiff's as well as defendant's ownerships in the suit land and thereby determine the title of the plaintiff and the defendant/s. Because, it would not only be useful and helpful for the Court-appointed Commissioner or the Collector to proceed further with the suit towards execution of the decree, but it would also help to curb multiplicity of suits. That is to say, in a suit for partition or separation of a share, irrespective the defendant's challenge as to the plaintiff's share in the suit land, the Court, at the first stage, would decide whether the plaintiff has a share in the suit property and whether s/he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as 'decree' under Order 20 Rule 18(1) of the CPC and termed as 'preliminary decree' under Order 20 Rule 18(2) of the CPC. The consequential division/separation by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Order 20, Rule 18(1) of the CPC and is the subject matter of the final decree under Order 20, Rule 18(2) of the CPC. A pivotal point to be noted from the wordings employed in Section 54, Order 20, Rule 18 and Order 26, Rule 13 that there is no provision in the law for filing an execution case in the suit for partition. Therefore, in a suit for partition, once the Court passes the preliminary decree (i.e. make a declaration as to saham of the plaintiff/s and defendant/s), it is incumbent upon the Court to proceed with the separation (i.e. the ministerial or administrative act) of the plaintiff's saham from other parties of the suit, without expecting/waiting for a formal application from the parties of the suit. It is to be noticed from the provisions of the CPC that the Legislature has used two different expressions, namely, 'partition' and 'separation' throughout the provisions of the CPC. Because, 'separation of share' is a species of 'partition'. When all joint tenants or co-owners or co-tenants get separated, it is a partition. Separation of share/s refers to a division where only one or only a few among several cotenants/co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother. Therefore, unless the other parties of the suit wish to be separated, only the plaintiff's properly would be separated by the Court's final decree.

38. So, the answer to the question, posed hereinbefore as to whether it is a mandatory requirement to pray for declaration of the plaintiff's title in a suit for partition is that - in a suit for partition, alongside making a prayer for declaration of plaintiff's title/share in the suit properties, there should also be a prayer for separation or division of the plaintiff's share by metes and bounds, and the Court shall frame, at least, three issues for disposing of a suit for partition. The said three issues are: (i) whether the person seeking division has got any title or

interest i.e. a share in the suit property/properties, (ii) whether s/he is entitled to the relief of division and separate possession and (iii) how and in what manner the property/properties should be divided by metes and bounds?

39. However, if the plaintiff does not make proper prayer in the plaint, the suit must not be dismissed on the said ground; rather it would be the duty of the Court to frame appropriate issue/s on the basis of the pleadings and submissions put forwarded by all the parties to the suit and proceed with the suits towards its effective disposal. Also, after perusing the pleadings of both the sides and hearing the contending parties at the stage of framing issues, if it surfaces that more Court fees are to be paid or excess Court fees have been paid, the Court shall pass necessary Order under Section 8B or under Section 11(2) of the Court-Fees Act, 1870. In any event, the Court shall not dismiss the suit on the ground of payment of insufficient Court-fees without first affording an opportunity to the plaintiff to correct it. However, in the event that because of the defendant's prayer to the Court in its written statement for her/his saham if the valuation of the suit increases and a question as to jurisdiction of the Court arises, the Court is obligated to examine its position as to whether the aggregate value of the shares/sahams (value of the plaintiff's claimed share plus value of the defendant's claimed share) of the plaintiff and the defendant is crossing the jurisdictional value of the Court. Also, a suit is not liable to be dismissed merely for non-mentioning the relevant provisions of law; for example, if the plaintiff ignores to state in its Cause-Title that 'this is a suit for partition of the suit land upon obtaining a declaration of title in the suit land and, pursuant thereto, for getting a separate saham in the suit land under Section 9 of the CPC read with Section 42 of the SR Act and Section 44 of the TP Act' and so on. In that scenario, the Court should not throw away the suit on the ground of lacking the aforesaid expressions.

40. Now, let me take up the issue No. (3)(b), namely, whether all the properties of the person/s from whom the parties of a partition suit have inherited or purchased their claimed portion of land should be brought in hotchpotch and issue No. 3(c), namely, whether the footings of a joint tenant, a co-owner and a co-tenant are the same; in other words, what are the core features to be looked into a suit for partition of immovable property. Because, I need to address the issue as to whether all the property of Saifa Bibi ought to have been brought in the hotchpotch. To deal with this issue, I find that it would be useful to know, at first, about the 'partition', 'partition suit', and when and how do they take place.

41. In the absence of a definition of the word 'partition' and 'partition suit' in any statute, it may be profitable to look at the Black's Law Dictionary. According to Black's Law Dictionary, "*The act of dividing; esp., the division of real property held jointly or in common by two or more persons into individually owned interests*." James W. Eaton, in his treatise *Handbook of Equity Jurisprudence* 571 (Archibald H. Throckmorton ed., 2d ed. 1923) describes 'partition' in the following words:

> Partition is the segregation of property owned in undivided shares, so as to vest in each co-owner exclusive title to a specific portion in lieu of his undivided interest in the whole. The term 'partition' is generally, but not exclusively, applied to real estate. All kinds of property may be partitioned by the voluntary acts of the owners. In the case of real estate, this is usually accomplished by a conveyance or release, to each co-tenant by the others, of the portion which he is entitled to hold in severalty. But, even when no actual conveyance is made, a voluntary written agreement for a partition will be enforced by conveyance. And a part partition may be made of lands owned by tenants in common, provided each party takes and retains exclusive possession of the portion allotted to him.

42. My understanding about the partition is that a partition is a division of a property held jointly or in common by several persons, so that each person gets a share and becomes the owner of a separate share to which each of the parties is entitled in law as applicable to them, in an expectation of acquiring a right of dealing with the property in any manner as s/he may so desire; meaning that s/he can retain, sell, transfer, exchange, or gift the property as its absolute owner. Given that each divided property gets a new title and each sharer gives up his interest in the property in favour of other sharers, thus, a partition is a combination of surrender and transfer of certain rights in the estate except those which are easement in nature.

43. Let me now deal with the question as to when/why and how a partition can be done. In order to get a clearer answer, one must know what is the meaning of the expressions 'tenant', 'tenancy', 'joint tenancy', 'co-owner', 'tenancy-in-common' and 'hotchpotch'.

44. In the State Acquisition and Tenancy Act, 1950, the definition of the word 'tenancy' has not been provided directly; but the word 'tenant' has been defined in Section 2(27) of the aforesaid Act describing the 'tenant' as the holder of the land paying rent to the Government. Black's Law Dictionary defines 'tenancy' as '(1) *The possession or occupancy of land under a lease; a leasehold interest in real estate,* (2) *The period of such possession or occupancy and* (3) *The possession of real or personal property by right or title, esp. under a conveying instrument such as a deed or will'*. Black's Law Dictionary also provides the meaning of joint tenancy, which is extracted below:

> Joint Tenancy: A tenancy with two or more co-owners who are not spouse on the date of acquisition and have identical interests in a property with the same right of possession. A joint tenancy differs from a tenancy in common because each joint tenant has a right of survivorship to the other's share (in some states, this right must be clearly expressed in the conveyance- otherwise, the tenancy will be presumed to be a tenancy in common).

45. A.C. Freeman, in his treatise *Cotenancy and Partition 71* (2d ed. 1886) describes joint tenancy in the following words:

> As joint-tenancy was a favorite of the common law, no special words or limitations were necessary to call it into being. On the other hand, words or circumstances of negation were indispensable to avoid it. Whenever it was shown that property had vested in two or more persons, by the same joint purchase, there arose at once, both in law and in equity, the presumption that it vested as an estate in joint-tenancy. This presumption is liable to be overthrown in equity by proof of circumstances from which the Court may infer that the parties intended a several rather than a joint estate.

46. Thomas F. Bergin & Paul G. Haskell, in his authoritative book *Preface to Estates in Land and Future Interests 55* (2d ed. 1984), states about the joint tenancy in the following language:

> The rules for creation of a joint tenancy are these: The joint tenants must get their interests at the same time. They must become entitled to possession at the same time. The interests must be physically undivided interest, and each undivided interest must be an equal fraction of the whole- e.g., a one-third undivided interest to each of three joint tenants. The joint tenants must get their interests by the same instrument- e.g., the same deed or will. The joint tenants must get the same kinds of estates- e.g., in fee simple, for life, and so on.

47. Black's Law Dictionary also provides the meaning of 'tenancy-in-common'. The meaning is given below:

> Tenancy-in-common: A tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship.

48. A. C. Freeman, in his book *Cotenancy and Partition* 67 (2d ed. 1886), states about the tenancy-in-common in the following language.

> If there be a doubt whether an estate was, at its creation, a joint-tenancy or a tenancy in common; or if, conceding the estate to have been a joint-tenancy at its creation, there be a doubt whether there has not been a subsequent severance of the jointure – in all such cases equity will resolve the doubt in favor of tenancy in common.

49. Thomas F. Bergin & Paul G. Haskell, in writing about tenancy-in-common in his treatise *Preface to Estates in Land and Future Interests* 54 (2d ed. 1984) makes the following opinion:

> The central characteristic of a tenancy in common is simply that each tenant is deemed to own by himself, with most of the attributes of independent ownership, a physically undivided part of the entire parcel.

50. Let me now be acquainted with the terminology 'hotchpotch'. When various properties are put together or blended for the purpose of achieving the portion of property to be distributed among the beneficiaries or legal heirs as per the laws of the concerned country; in other words, in order to divide the properties, which are presently enjoyed by the different individuals by virtue of inheriting or purchasing from a single person/source, 'hotchpotch' is the process of combining and assimilating of the said properties. Although the terminology may seem to be a jargon to the commoners, however, it is widely used in legal parlance in the suits for partition in all over the common-law jurisdiction.

51. After knowing about the meanings of the aforesaid terms of 'tenant', 'tenancy', 'joint tenancy', 'co-ownership', 'tenancy-in-common' and 'hotchpotch' as well as having been acquainted with the term 'partition', on which a brief discussion has been made hereinbefore, it has now become easier for this Court to state as to when/why and how a partition can be done.

52. A partition can be carried out amicably with the consent of all co-sharers or co-tenants. If the partition is done by mutual consent, the joint tenants or the co-owners or co-tenants shall execute the partition deed, which is required to be registered at the office of the Sub-registrar of the place where the property is situated. The deed should in particular mention the date from which the partition is effective, the names of the parties and their respective shares. Partition of movable property is usually done among the family members only. However, partition of immovable property can be done among the joint tenants as well as among the co-owners or tenants-in-common. When a partition deed for a property is executed to divide the property among the family members, it is called a partition among the co-owners. And when the bondage/relation of the parties is such that they do not belong to the same family; meaning that the parties have not inherited from the same predecessor, but the property's record of right is being maintained in the same Account (Khatian) by the concerned Government office/revenue office, and/or the parties are possessing the land contagious to each other, they are known as co-tenants.

53. When one or more joint tenants or co-owners want the property to be partitioned, but the other/s are not agreeable to partition of the said property, a suit for partition is required to be filed in the appropriate Court of law. Also, when a co-tenant wishes to enjoy the property by metes and bounds claiming exclusive ownership and possession of a particular portion/place/position, but the other co-tenant/s raises objection either with regard to quantum of land or with respect to the spot/location of the land, they would be compelled to seek relief from the Court. And, when a joint tenant or co-owner or co-tenant would approach the Court, a question germane to this scenario surfaces; whether s/he would be required to inscribe in the schedule/s of the plaint the entire lands of the person/s from whom the parties of the suit inherited or subscribed the claimed lands.

54. In an endeavour to dig up and ascertain the proper answer to the above question, I decided to read as many case-laws of our jurisdiction, Indian jurisdiction, Pakistani jurisdiction and of Privy Council concerning suits for partition of property as possible, including the decisions referred to by the learned Advocates of both the sides, and I find that it is a rule of equity that the entire properties held and possessed jointly or in-common in a suit for partition should be included in the schedules of the plaint, and the aforesaid rule can be loosened in a suit where the partition can be done without taking into consideration the other properties and, of course, without causing any prejudice to any party. The above rule of equity, as opposed to a rule of law, although has been emanated from the judicial pronouncements of the Apex Courts of the common-law jurisdiction in course of dealing with the partition of the properties among the family members of all the religions, including the Hindu, Muslim, Christian, Buddhist, however, its application to the maximum extent has been found, mainly, in the case-laws on the suit for partition among the Hindu family members. It is to be borne in mind that the principles of Hindu Law being different, the *ratio* laid down by the Courts of this sub-continent in dealing with the suits for partition among the Hindu family members shall not be applicable in a suit where the parties are Muslims. While a Hindu family member can be found as a party in a suit for partition in any of the following three categories; joint tenant, co-owner and co-tenant, however, a Muslim can be a party in a suit for partition either as a co-owner or as a co-tenant. Given that the Mahomedans are never joint in estate but only tenants-in-common whether they live together or not, they are not obliged to sue at a time for a partition of the entire properties in which they have interest. There is, thus, nothing to preclude one of the co-owners or co-tenants of several items of property from seeking a partition of one of such items of property. Under the Mahomedan Law, the estate of a deceased person devolves on his/her death on his/her heirs and each of the heirs becomes entitled to his/her definite fraction of every part of the estate. It is therefore futile to describe a suit, in which one heir claims to receive his/her share of the property of the deceased from another heir, as a suit for partial partition and to say that therefore the suit is not maintainable.

55. From my extensive research on the case-laws regarding suit for partition of our jurisdiction and that of the Privy Council, Indian jurisdiction and Pakistani jurisdiction, it appears to me that, on the issue of inclusion of the entire properties of the joint tenants or co-owners or co-tenants in a suit for partition, the followings are the well-settled principles: (1) there is no existence of joint tenancy in the Mohammedan Law/Muslim Law; only Hindu coparceners are joint in estate. Mohammedans are only co-owners or tenants-in-common; (2) there is substantially no difference in respect of the subject-matter of a suit for partition amongst Muslim co-owners or Hindu co-owners, where they hold property as tenants-in-common; (3) a suit for partition of even one item of such property is maintainable as Section 44 of the TP Act heralds that an undivided share in immovable property can be transferred,

provided that the partition can be effected without much inconvenience to the other co-owners or co-tenants. In other words, in the case of tenants-in-common, whether such tenants are Muslims or Hindus, one of them is not obliged to sue for the partition of all the items of the property in which they are interested, inasmuch as each of them is entitled to his definite share in every item of the property, unless the partition sought for results in inconvenience to the other tenants-in-common; (4) as per the provisions of the Mahomedan Law, although all the legal heirs of a Muslim deceased do not inherit the property of equal share, for example, deceased's each daughter gets half of the share of each son and so on, however, as the co-owners, each of them, having notionally held their respective portions under the Shariah Law till a division/partition is done by metes and bounds, are competent to sell their respective portion of definite share from each of the plot; (5) a co-owner is legally not barred to transfer his/her entire share from one plot or one item of the properties left by the deceased if the rest of the co-owners consent to such transfer, either by standing as witness/es of the transfer-deed or by executing a registered deed announcing and confirming their consents; (6) if one of the co-owners transfers a quantum of land from a plot without the consent/s of other co-owners and, subsequently, it is revealed that the transferred-land is more in quantum than what s/he is entitled to inherit in the said plot, then, a scenario of application of hotchpotch rule arises to find out (i) what was the total quantum of land of the deceased, (ii) the quantum of land inherited by each of the legal-heirs, (iii) whether any heir has already transferred more land in measurement than s/he is entitled to inherit, (iv) whether there was any verbal arrangement among the co-owners to waive his/her due share in a particular plot, either in lieu of another land in other plot/s or in exchange of monetary transaction or by taking any other type of benefit and (v) how to mitigate the scenario; (7) the rule that the suit for partition must cover the entire property held jointly by the parties is merely a rule of equity and convenience and (8) a suit for partition must embrace only the property/properties in which the parties have community of interest and unity of possession.

56. After delineating the principles on the issue under surgery/scrutiny, I now need to revert to the facts of this suit to find out (i) whether the contesting parties of this suit are joint tenants or co-owners or tenants-in-common, towards adjudication of the issue as to whether the present suit is maintainable with the single plot (i.e. the suit land) of the deceased Saifa Bibi, who has died leaving behind some other properties as well; if it is found that the suit is maintainable with this single plot and, also, the suit land is partitionable and separable without causing any inconvenience to others, then, (ii) the next question would be whether the facts of the present suit warrant application of the hotchpotch rule for resolution of the issues encapsulated in the principle No. 6 set out in the penultimate paragraph and, accordingly, whether the Court is under any obligation to track down the properties which have community of interest and unity of possession.

57. It is evident from the facts of the suit that the parties of this suit are not the members of Hindu family and, thus, the principle regarding joint tenancy is not applicable here in this suit. Also, the plaintiffs and the defendant No. 1 (the only contesting defendant in the suit) are not the descendants of Saifa Bibi and, hence, they cannot be seen as the direct co-owners. By virtue of being purchasers of land from the legal heirs of Saifa Bibi in the single plot i.e. in the same tenancy, the nature of relationship between the plaintiffs and the respondent No. 1 is of co-tenancy and, that is why, they are co-tenants/tenants-in-common. Also, since there is no issue as to separation/division of any property which is being used jointly (such as dwelling house, ponds, wall etc), this suit is not going to yield any botheration for other co-tenants. So, according to the principle laid down hereinbefore, the parties of the suit being co-

tenants they are very much competent to approach the Court for partition and separation of a single plot of Saifa Bibi and, on this count, it is held that this suit is very much maintainable.

58. The pertinent question that is to be adjudicated upon, at this juncture, thus, is that whether the partition and separation of this single plot can be carried out without referring and taking into consideration of other plots of late Saifa Bibi. In other words, whether the community of interest and unity of possession exist only in the suit land alone, or whether they do exist in some other specific lands left by Saifa Bibi or in the entire land left by Saifa Bibi.

59. It is an admitted fact in this suit that Saifa Bibi is the owner of this suit land of 0.41 acres and it is also evident from the exhibits submitted by the defendant No. 1 that there are some other lands (more or less 4 to 5 acres) owned by Saifa Bibi. Saifa Bibi died leaving behind 4 sons (Abdul Matin, Abdul Qaium, Abdul Mukit and Musabbir) and two daughters (Aymona Bibi and Momina Bibi) and, accordingly, in the suit land while each of the sons shall be entitled to $\frac{1}{5}$ (one fifth) being 0.0820 acres of land, the two daughters shall get $\frac{1}{10}$ (one tenth) each of a quantum of 0.0410 acres land. However, without following the aforesaid usual provisions of Sharia Law, all the four brothers, having claimed themselves to be the owner of $\frac{1}{4}$ (one fourth) sharers each in the suit land measuring a land of 0.1025 acres, have sold out the entire suit property of 0.41 acres. While three sons of Saifa Bibi (Abdul Matin, Abdul Qaium and Abdul Mukit) transferred 0.3075 acres of the suit land by two registered deeds being Nos. 3480 dated 27.07.1978 & 13317 dated 26.04.1979 in favour of the defendant No. 1's previous owners, the remaining one son of Saifa Bibi (named, Musobbir) sold 0.1025 acres from the suit land to the plaintiffs by the registered deed No. 4395 dated 29.09.1979.

60. To make the above-mentioned dealings and transactions of the descendants of Aymona Bibi and Momina Bibi a bit more descriptive, it may be exposed here that on 12.04.2000 two descendants of Saifa Bibi's daughter Aymona (i.e. *Aymona's two daughters named – Nuruna Bibi & Rabeya Bibi*) sold 0.0205 acres of land to the plaintiffs claiming themselves to be the half-owners in Aymona's share of 0.0410 acres of land, on 05/07/2000 one group of the descendants of Saifa Bibi's one daughter (i.e. *Aymona's grand children – Aymona had two sons, named - Gani & Mahmud, and two daughters, named, Nurun Bibi & Rabia Bibi; this group of seller is the children of Aymona's son – late Gani)* sold 0.0137 acres of land claiming themselves to be the $\frac{1}{3}$ (one third) sharer in Aymona's 0.0410 acres of land and on 10.09.2000 (during pendency of this suit) two of the descendants of Momina, Saifa Bibi's daughter, (*it is worthwhile to mention here that Momina had two daughters, named - Saleha & Moududa and, here, after Saleha's death, Saleha's sole minor daughter and her husband are the sellers*) sold 0.205 acres of land to the plaintiffs, (although the trial Court adjudged that Saleha is entitled to $\frac{1}{3}$ of her mother's - Momina's share of 0.0410 i.e. 0.0137 acres of land). On the other hand, one of the sons (named-Mahmud) of Aymona Bibi (i.e. *Saifa Bibi's daughter's son*) and one of the daughters of Momina Bibi (i.e. *Saifa Bibi's another daughter's daughter*) executed a registered deed of waiver No. 2169 dated 25.06.2000 confirming that their respective predecessors, namely, Aymona Bibi and Momina Bibi (who are the daughters of Saifa Bibi) have not taken any share from the suit land.

61. Now, the question comes up for consideration as to whether the four sons of the deceased Saifa Bibi were competent to transfer the land from a plot more in quantum than what the said four sons were entitled to inherit from that single plot. As per the principles laid down hereinbefore, the answer would be in the affirmative subject to the trial Court's findings to the effect that the two daughters of Saifa Bibi were allotted their respective due shares of the suit land from other properties left by Saifa Bibi. In other words, a duty is cast upon the trial Court to examine the title and shares of Saifa Bibi's two daughters (Aymona Bibi & Momina Bibi) in the suit land.

62. Let me now see what were the cases of the respective parties of this suit, and the manner and style adopted by the trial Court for examining and determining the title and shares of Saifa Bibi's two daughters and what were the trial Court's findings.

63. Out of 5 (five) PWs, PW-1 is the plaintiff No. 2 who through his cross examination made the following testimonies; "Defendant Nos. 2-4, having purchased the $\frac{3}{4}$ (three fourth) of the suit land from Abdul Mukit, Abdul Matin and Abdul Qaium, are in possession of the same". ("আঃ মুকিত, আঃ মতিন ও আঃ কাইয়ুম আমার ভূমির উত্তর সীমানা হতে চলে যাবার পর ঐ জায়গায় ২-৪ নং বিবাদী আসে এবং তারা অনুমান তিনপোয়া ভূমিতে ভোগ-দখলকার হন। ২-৪ নং বিবাদী তাদের খরিদা দলিলের সাকুল্য ভূমিতে দখলে আছে"।) With regard to possession in the suit land by Saifa Bibi's two daughters (Aymona Bibi and Momina Bibi), this PW1 stated that they used to enjoy their land through sharecropping and the name of the sharecropper is Nuruddin of village Makorgaon (সৈফা বিবির মেয়েরা বর্গাদার মাধ্যমে ভোগ-দখল করত। তাদের বর্গাদার ছিলেন মাকরগাঁয়ের নুরউদ্দিন). But the afore-stated sharecropper (Nuruddin) was not produced as a witness by the plaintiffs before the trial Court to substantiate the above statements as to possession of Saifa Bibi's two daughters in the suit land. Out of the remaining 4 (four) PWs, only PW-2 and PW-3 (who are apparently not acquainted with the estate of Saifa Bibi, albeit claimed themselves to be the neighbors to the suit land) made some scanty statements regarding Saifa Bibi's two daughters' possession in the suit land, but that too are inconsistent with that of PW-1.

64. It was the case of the defendant No. 1 that there was an amicable settlement among the 4 (four) brothers and 2 (two) sisters that all the brothers (four in number) will get the suit plot. In substantiating his claim, he himself deposed before the Court as DW-1 by exhibiting the sale-deeds executed by the sons of Saifa Bibi. Among the 5 (five) defense witnesses, the DW-2 is the grand son-in-law of Saifa Bibi. He is the one who, along with his two full brothers (defendant Nos. 2-4), bought 0.3075 acres of land 21 (twenty one) years ago from his father-in-law (Abdul Qaium) and two uncles-in-law (Abdul Mukit & Abdul Matin) and, thereafter, sold out the entire 0.3075 acres of land to the defendant No. 1. It is evident from the testimonies of this DW-2, contained in the LCR, that acquisition and possession of 0.3075 acres of land by the defendant No. 1 has categorically been corroborated by this DW-2, and by an independent witness, DW-3, without being shaken by the crosses conducted/fired by the plaintiffs' counsel.

65. Upon examination of the evidence, both oral and documentary, the trial Court ignored the fact of mentioning the quantum of 0.1025 acres of land in all the 4 (four) registered deeds and held that each of the sons is entitled to a quantum of 0.0820 acres of land and each of the daughters of Saifa Bibi has got her title and share in the suit land to the extent of 0.0410 acres in the suit land. With regard to possession of the suit land i.e. as to who possesses what quantum of land in the suit land, the trial Court failed to pronounce any statements specifically. Rather, the exiguous finding of the trial Court is apparently in favour of the

defendant No. 1 suggesting that he has been possessing the quantum of land which he has acquired from the three sons of Saifa Bibi i.e. 0.3075 acres of land (স্বীকৃতমতে বাদী পক্ষ ও ১নং বিবাদী নালিশ দাগের ভূমিতে খরিদাসুত্রে মালিক এবং ঐ দাগে উভয় পক্ষের দখল স্বীকৃত).

66. From the admitted documentary as well as oral evidence, it appears that the aforesaid four deeds were executed by the four sons of Saifa Bibi nearly 21 (twenty one) years ago containing the following recitals and declarations "….. upon a verbal agreement among other sharers, we have been enjoying our respective portions of land through amicable demarcation of the same…." (….. আমরা মৌরসী জোত স্বত্ব অপর শরীকানদের সহিত আপোষ চিহ্নিত মৌখিক বিল- য় মতে সরজমিনে চিহ্নিতভাবে মালিক ও দখলকার থাকিয়া.....), (*extracted from the exhibit "Cha", which is the registered sale deed No. 13317 dated 26.04.1979*) shows that there was a waiver of shares in the suit land by the two sisters in favour of four brothers. None of these 4 (four) registered deeds have ever been challenged by the two sisters or their descendants alleging that the 4 (four) brothers have sold land more in measurement than what they are entitled to inherit from Saifa Bibi. In other words, the two daughters of Saifa Bibi (Aymona Bibi and Momina Bibi) during their life-time and, after their death, their legal heirs never raised any question that although the 4 (four) sons of Saifa Bibi are entitled to 0.0820 acres of land each as the $\frac{1}{5}$ (one fifth) sharers, but they have sold 0.1025 acres of land portraying themselves as $\frac{1}{4}$ (one fourth) sharers of the suit land. In the light of the fact that all the four sale-deeds are duly registered deeds of 21 years old, a legal presumption as to the authenticity of their contents (including recitals as to verbal agreement among the brothers and sisters as well as mentioning of the quantum of the land to be 0.1025 acres) would be in favour of these deeds, particularly when it is evident that 21 years ago the plaintiffs themselves have accepted/recognized the vendors/sellers as the owners/sharers of $\frac{1}{4}$ (one fourth) of share in the suit land, which comes to a quantum of land of 0.1025 acres. Interestingly, the plaintiffs are getting only 0.1299 acres of land by institution of the instant suit by abandoning the quantum of land of 0.1025 acres which they were enjoying for last 21 years and, now, in summation they are succeeding to add merely 0.0205 acres of land by purchasing 0.479 acres of land (0.0205 + 0.0137 + 0.0137) to their share. From the above-mentioned scenario, a question would inevitably be ruminated in the mind of a sensible human being that whether persons like the present plaintiffs, whom cannot be regarded as simpletons by any stretch of imagination, would pay for around 5 (five) decimals (4.79 decimals) of land, knowing fully well that they would be able to enjoy only around 2 (two) decimals (2.05 decimals) of land.

67. Moreover, out of the descendants through the two daughters of Saifa Bibi, while three groups vide three deeds sold their claimed respective portions of their 0205 + 0137 + 0137 acres, aggregate of which becomes 0.0479 acres of land, to the plaintiffs within a span of a few months time in the year 2000, two of them (i.e. the descendants of Saifa Bibi's two daughters) executed a registered deed of waiver being No. 2169 dated 25.06.2000 stating that their predecessors, namely, Aymona Bibi and Momina Bibi (two daughters of Saifa Bibi) have never claimed shares from the suit land. Although the vendors/executants of this deed No. 2169 did not come forward to substantiate the document, but its scribe as DW-4, having exhibited the deed as exhibit-UMA, confirmed and corroborated that the deed was written as per the instructions of the parties from the aforesaid two descendants of Aymona Bibi and Momina Bibi. It is also evident that none from the three groups of descendants of Saifa Bibi's two daughters made them available before the trial Court to assert that Aymona Bibi and Momina Bibi, who are the grandmother (applicable for two groups) and mother (applicable

for one group) of these three groups of sellers, had never waived their due shares in the suit plot.

68. The discussions on these two pieces of evidence are aimed at showing that the likelihood of having some arrangement between the four sons and two daughters of Saifa Bibi agreeing verbally that the two daughters would waive their claim in the suit plot in exchange for getting larger shares in other plots and, at the same time, the unlikelihood of the claim of title/share by these three groups of descendants of the two daughters of Saifa Bibi in the suit land - should not have been found and held by the trial Court to be without evidential basis; for, since the two sisters themselves never claimed their shares in the suit land in the past 21 years, making claim by the second/third-degree down descendants at such a strikingly belated stage, and that too having been opposed by their own siblings, arouses serious doubt i.e. their claims' veracity eminently becomes shady. While the trial Court was competent to rely on the registered three sale-deeds (two of which were sealed and signed before a few months of institution of this suit and one was done during pendency of this suit) executed by three groups of the descendants of the Daughters of Saifa Bibi, it was also incumbent upon the trial Court to make appropriate findings with regard to the registered deed of waiver No. 2169 dated 25.06.2000 (exhibit-UMA) executed by two legal heirs of the two daughters of Saifa Bibi as well as on the fact of non-challenging four registered deeds of 21 years old by the three groups of descendants through the two daughters of Saifa Bibi. In the case of Jobeda Khatun Vs Hamid Ali 40 DLR (AD) 101, our Appellate Division remanded back the suit (suit for partition) to the trial Court for not taking into consideration a piece of evidence. His Lordship ATM Afjal, J (as he then was) propounded for the Court in the following language:

> It appears from the judgment of the High Court Division that the learned Judges found that the documents produced at the trial by the defendant-appellants (Ext. "Ka" to "Uma") were lawfully admitted into evidence after dispensing with their formal proof and the problem was not with regard to question as to the evidentiary value of those documents in the absence of any oral evidence supporting the defendants' case in the written statement. …….. . (Para – 9)

69. Should this Court now remand back the suit to the trial Court for recording its findings and observations on the above-discussed two documentary evidence? The answer definitely would be in the negative. Given the spurious dealings and transactions of the descendants of Saifa Bibi's daughters plus that of the four sons of Saifa Bibi, I am of the view that mere sifting of the above two items of documentary evidence may not be sufficient to help the trial/appellate Court in unearthing the true position of the three groups of the descendants of Saifa Bibi (through her two daughters) as to whether Saifa Bibi's two daughters had waived their shares in the suit land in lieu of taking shares in other plots or as to whether at the time of buying the property before 21 (twenty one) years, the vendees of the suit land were fallible to the impression insinuated by the four sons of Saifa Bibi that there is a verbal amicable settlement with their sisters.

70. Thus, from the above discussions, this Court is led to hold that there is community of interest and unity of possession in all the properties inherited by the four sons and two daughters from Saifa Bibi.

71. Then, what should be the right course of action for this Court? Since from the preponderance of evidence such as, (a) testimonies of PW-1, DW-2, DW-3, (b) documentary evidence of 4 registered sale-deeds of 21 years old and registered deed of waiver by the two descendants of Saifa Bibi's daughters, coupled with plaintiffs' failure to prove the possession

of the three groups of descendants through Saifa Bibi's daughters, this Court is led to hold that the title in the suit land of the aforesaid three groups of Saifa Bibi's descendants have not been proved on the balance of probabilities, let alone to have been conclusively established.

72. Now, given that the present plaintiffs and the defendant No. 1 would be in a position to claim themselves to be the co-tenants in this tenancy having stepped into the footings/shoes/status of the co-owners, only when the title and shares of Saifa Bibi's four sons/their legal heirs and the title and shares of Saifa Bibi's daughters would be adjudicated, and since the four sons of Saifa Bibi have sold 0.1025 acres of land each, which apparently is suggestive from the above-mentioned evidence that Saifa Bibi's two daughters might have been allotted a quantum of land in other lands, therefore, the said other lands are required to be tracked down in order to see whether Saifa Bibi's two daughters (Aymona Bibi & Momina Bibi) had received their due $\frac{1}{10}$ shares from the remaining other plots and, therefore, in order to be properly enabled to arrive at the sound and proper findings on the issue as to whether the descendants of the two daughters of Saifa Bibi have sold more land in quantum than what the two daughters of Saifa Bibi are entitled to inherit from Saifa Bibi, in other words, for the purpose of determining whether these three groups have their title and shares in the suit land, the entire properties of Saifa Bibi which have been inherited by her four sons and two daughters are needed to be presented before the trial Court/appellate Court.

73. Then, comes issue No. 4, namely, when/at what stage and on what ground a suit requires to be sent back to the trial Court. The appellate Court has been endowed with the power of remand by Section 107(1)(6) of the CPC and, then, Order 41, Rule 23 of the CPC manifests that if the trial Court decrees a suit on a preliminary point and the said decree is reversed in appeal, the appellate Court, upon pinpointing the issues or upon framing the issues under Order 41 Rule 25, may send back the suit to the trial Court. However, by now, the settled rule is that the power of remand may be exercised by the appellate Court exercising the Court's inherent power under Section 151 of the CPC in a fit case, when the facts and circumstances do not attract the stipulations of Rules 23 & 25 of Order 41 of the CPC. And, when the appellate Court fails to exercise the said power, the High Court Division being empowered by its revisional jurisdiction is competent to send back the suit either to the trial Court or to the appellate Court, whichever one appears to the High Court Division to be better equipped and more suitable considering the intricacies as to factual matrix as well as legal issues of a particular suit plus taking into consideration of the length of pendency of the suit.

74. In the light of the findings of this Court that unless and until the entire properties of the deceased Saifa Bibi are tracked down and, then, put on table for the consideration of the Court to see whether the daughters of Saifa Bibi took larger shares in other plots by abandoning their due shares in the suit land, there shall not be a fair adjudication of this suit, this Court is inclined to send this suit back on remand. To this end, a pertinent question clicks as to whether this suit should be sent back to the trial Court or to the appellate Court. Given that the present suit is a 20 (twenty) year-old one, this Court is of the view that if the suit is remanded to the appellate Court with some specific directions upon it, then, there shall be an effective and fair disposal of this Rule.

75. However, taking into consideration the prevalent phenomenon in most of the learned Judges of the lower appellate Courts to remand back the suits for partition on this or that plea by shrugging off their own responsibility of disposing of the suits on merit, this Court, as part of its constitutional duty under Article 109 of the Constitution in tandem with its revisional

jurisdiction under Section 115 of the CPC, proclaims that the appellate Court, in an appropriate suit if required, is not only empowered to take additional evidence, which would not amount to filling up lacuna caused due to the negligence/failure of any party to the suit, but also competent to call for necessary documents and persons by invoking the Court's power under Section 165 of the Evidence Act read with Sections 30, 31, 32 and Order 19 of the CPC. Under the above constitutional duty of superintendence in addition to being invested with the revisional power by the CPC, this Court notifies that when the learned Judges of the subordinate Courts perform their functions as the trial Court's Judge or the appellate Court's Judge, they should not hesitate to resort to the provisions of Section 165 of the Evidence Act, 1872, Sections 30, 31, 32 and Order 19 of the CPC in an appropriate case for the purpose of fair and effective adjudication of a suit. The trial Courts and appellate Courts, under the above provisions of laws, possess ample powers to summon and, if the situation warrants, then, to compel the appearance of any person in the Court and to produce the necessary relevant papers to the Court and take their deposition as Court Witness/es (CW/s), as has been held in the case of STS Educational Group Vs Bangladesh 18 BLC 806 (Para – 41 to 42). In this suit, the appellate Court's duty should be to collect the relevant papers regarding inheritance of Saifa Bibi's entire estate from all the known sources and, upon poring over and scanning through all the documents in connection with the entire property of Saifa Bibi with an aim to assess the ownership of the sellers/vendors of the land sold to the plaintiffs and the defendant No. 1, if the appellate Court considers that in the interest of a fair and final disposal of the suit, some relevant persons should clarify their respective position, the Court shall be competent to ask them to appear before the Court and depose as Court Witness/es (CW/s) and, thereafter, pass appropriate Judgment and Decree commensurate with the findings to be arrived at on the basis of examination of all the papers connected with Saifa Bibi's estate devolved upon her four sons and two daughters.

76. The last issue (as framed by this Court hereinbefore for disposal of this Rule) is about adverse possession. Adverse possession in the context of immovable property means; when a person continuously is in uninterrupted 12 (twelve) years of possession in any immovable property in which s/he does not have the documentary title, s/he is known as the owner of the said property on the basis of adverse possession. If a person intends to obtain a declaration from the Court about his/her title by dint of adverse possession, there must be specific averments in the plaint.

77. It is evident from the written statements that the defendant No. 1 did not make any specific averments as to claiming title in the suit land on the basis of adverse possession, nor is there an alternative prayer by the defendant No. 1 for obtaining a declaration of title based on adverse possession. Furthermore, the defendant No. 1 also did not ask the trial Court to frame an issue on the point of adverse possession and, more so, no evidence was led by the defense in an endeavour to make out a case of adverse possession and, thus, there is hardly any scope for the Court to take a view that although specific prayer is not made, but from the evidence, substance to that effect is present in the suit. Above all, there is always a legal presumption that the co-owners are in constructive possession of the property by virtue of inheriting from the same deceased person and, for that reason, in a suit for partition if adverse possession is claimed, it must be established by the claimant that the other party was totally ousted in assertion of the claimant's hostile title, but in the four corners of the written statements no such assertion was made by the defendant No. 1. Therefore, the findings of the appellate Court on the points of adverse possession are liable to be set aside.

78. In drawing up the conclusion, this Court pronounces that (i) since from the examination of the evidence, it appears that the claim made by the three groups of descendants of Saifa Bibi's two daughters in the suit land after around 21 (twenty one) years, as to having shares of their predecessors (Aymona Bibi and Momina Bibi), - has not been proved on a balance of probabilities, let alone conclusively; (ii) since by simply remanding back this suit for proper evaluation of the much-discussed two pieces of documentary evidence, there shall not be an effective adjudication of the suit; (iii) since the status of both the plaintiffs and the defendant No. 1 are tenants under the tenancy-in-common and their title and shares in the suit land are dependent on the title and shares of the four sons and the two daughters of Saifa Bibi, (iv) since the findings and observations made by the appellate Court on the issue of adverse possession are not compatible with the laws regulating that field, therefore, this suit is remanded back to the appellate Court, namely, Second Joint District Judge Court, Sylhet upon setting aside the appellate Court's Judgment and Decree dated 10.04.2006 passed in Title Appeal No. 9 of 2002, so far as it relates to the findings on the issue of adverse possession, and upon staying the operation of the trial Court's Judgment and Decree dated 30.10.2001 passed in TS No. 61 of 2000 decreeing the suit in part till the time of the disposal of the appeal by the appellate Court, with the following Orders and Directions:

(i) The appellate Court shall direct the plaintiffs, defendant No. 1, the four sons of Saifa Bibi (defendant Nos. 23, 24, 25 and legal heirs of the late son Abdul Qaium) and the descendents through Saifa Bibi's two daughters (Aymona Bibi and Momina Bibi) to submit all the papers and documents together with their descriptions of the entire properties left by Saifa Bibi at the time of her death.

(ii) After receiving all the schedules of the entire land of Saifa Bibi, the appellate Court shall heedfully scrutinize the papers.

(iii) If it appears to the appellate Court that further papers are required for the purpose of effective disposal of the suit, it shall not hesitate to issue summon upon the officials of the concerned land office, sub-register's office, settlement office or any other public office to furnish the requisite papers.

(iv) Upon receiving all the documents of Saifa Bibi's entire properties and, thereafter, by fastidiously carrying out necessary scrutiny of the same, if it appears to the appellate Court that any relevant person should explain his/her position with regard to identification and distribution of Saifa Bibi's properties among her four sons and two daughters, in that event, the appellate Court shall issue summons upon the said person to appear before the Court as Court Witness/es (CW/s).

(v) The appellate Court shall not deal with issue of adverse possession or any other issue, except concentrating on the issue as to whether the two daughters of Saifa Bibi (Aymona and Momina) were given any property from Saifa Bibi's other land in exchange for their due shares in the suit land.

(vi) If it is revealed that Saifa Bibi's two daughters were not given any extra land in other properties in lieu of their due shares in the suit land, in that event, the decree passed by the trial Court shall stand valid and, accordingly, the appellate Court, upon affirming the trial Court's decree, shall remit the LCR to the trial Court with a direction upon the trial Court to proceed with the accomplishment of the remaining tasks in the suit, without waiting for receiving any formal application for passing Final Decree, but by simply notifying both the parties in writing to that effect.

(vii) If it surfaces that Saifa Bibi's two daughters had received their due shares in other plots upon waiving their respective shares in the suit land, in that scenario, the appellate Court shall pass a fresh Judgment and Decree pronouncing the appropriate declaration of the title and shares of the plaintiffs and the defendant No. 1 with reference to the title and shares of their respective vendors.

(viii) It is to be borne in mind by the learned Judge of the appellate Court that only the suit land of 0.041 acres of land shall be partitioned and separated among the four sons and two daughters of Saifa Bibi. The other lands having not been asked for partition by the co-owners (Saifa Bibi's four sons/their legal heirs and two daughters/their descendants), there shall not be any Judgment and Decree for partition of the same. The other lands are being brought into scene simply for the purpose of assessing as to whether Safia Bibi's Daughters have been allotted larger shares therein in exchange for their due shares in the suit land.

79. Before parting with this Judgment, I consider it pertinent to observe here that in the context of prevailing incoherent practice in the sub-ordinate Courts in the different Districts of this country as to naming a 'suit for partition', that is to say, when in some Districts it is marked as a Partition Suit, in some Districts it is characterized as a Title Suit and in some Districts it is branded as a Other Class Suit, 'The Rules Committee of the Supreme Court of Bangladesh' should either recommend the Ministry of Law, Justice and Parliamentary Affairs to undertake a project for updating the CRO towards setting out appropriate rules therein or, in the alternative, the said committee should issue a 'Practice Direction' (PD) with a proper instructions upon the sub-ordinate Courts as to naming of the suits in different names or to use only 'Civil Suit' for all the types of civil suits and 'Civil Miscellaneous Case' for the various proceedings which are known as civil proceedings. Secondly, in course of dealing with suits for partition, I have noticed in a significant number of suits that the trial Courts oftentimes become fallible in arriving at an apparent correct decision due to not being familiar with the following terminologies; 'tenancy' 'joint tenants', 'co-owners', 'co-tenants' 'hotchpotch' and proper application of the afore-said terminologies in a given situation. Therefore, in my humble opinion, the judiciary would be benefitted if the Judicial Administration Training Institute (JATI) includes the relevant useful topics in their courses, so that the tasks of the learned Judges of the trial Courts and appellate Courts become painless and joyous to deal with the suits for partition.

80. With the above Observations, Orders and Directions, this Rule, having made absolute in part and, at the same time, having stayed the Judgment and Decree passed by the trial Court till disposal of the appeal by the appellate Court, is disposed of. However, there shall not be any Order as to costs.

81. The Office is directed to do the followings; (i) to send down the LCR at once to the Second Joint District Judge Court, Sylhet, (ii) to make available a copy of this Judgment for all the learned District Judges of the country, (iii) to place a copy of this Judgment to "Civil Rules & Orders Necessary Amendment Committee of the Supreme Court", (iv) to supply a copy of this Judgment to the Director General of Judicial Administration Training Institute and (v) to present a copy of this Judgment to The Hon'ble Minister of Ministry of Law, Justice and Parliamentary Affairs for his information and necessary action.

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**(SPECIAL STATUTORY APPELLATE JURISDICTION)**

TRADE MARK APPEAL NO. 01 OF 2014
With
TRADE MARK APPEAL NO. 02 OF 2014

**Md. Anwar Hossain, Proprietor of M/s. Pride Knit Wear Ltd.**
.... Appellants in both the appeals.
-Vs-
**Registrar, Patents, Designs and Trade Mark, Dhaka and another.**
....Respondents in both the appeals.

Mr. Gazi Md. Neamat Hossain, Advocate
...For the Appellants in both the appeals.

Mr. M. Hashmat Ullah Sheikh, Advocate
….For the Respondent No. 2 in both the appeals.

Heard On; 24.04.2019, 08.05.2019, 15.05.2019,
24.07.2019, 31.07.2019 & 21.08.2019.
AND
Judgment on: 28.08.2019.

**Present:**
**Mrs. Justice Farah Mahbub.**
**And**
**Mr. Justice S.M. Maniruzzaman**

**An appeal under section 100(2) of the Trade Marks Act, 2009;**

**Prior use of trade mark and prior application for registration in case of identical marks will go in favour of the prior user**

**JUDGMENT**

**S.M. Maniruzzaman, J:**

1. Since, similar question of law and facts are involved in both the appeals preferred by the respective contending parties as such, both have been taken up for hearing together and are being disposed of by this single judgment.

2. Both the appeals have been preferred challenging the order and decision dated 03.03.2013 passed by the respondent No. 1, Registrar, Patents, Designs and Trade Mark, Dhaka in Opposition Case Nos. 2727 of 2011 and 2845 of 2012 allowing Opposition Case No. 2727 of 2011 and thereby refused to register connected trade mark application bearing No. MP 101364 in Class-25 filed by the appellant and dismissed Opposition Case No. 2845 of 2012 and thereby allowing the connected trade mark application No. 91718 in Class-25 filed by the respondent No. 2.

3. Facts, relevant for disposal of both the appeals, in short, are that the appellant is a renowned business man and is engaged in the business of manufacturing and selling superior quality of socks under the name and style “Pride Knit Wear and M.B. Hosiery”. The appellant has adopted the word “HAZARD” along with special carrier, designs and getup as

his trade mark in respect of socks and has been marketing "HAZARD" branded socks all over the country through his dealers, whole sellers and retailers since 2005. It has been contended that the mark "HAZARD" is being continuously used by the appellant under the said trading style and Pride Knit Wear M.B. Hosiery without any objection from any quarter whatsoever including the respondent No. 2 due to the superior quality of socks being manufactured and sold by the appellant. The appellant's product i.e. socks with the trade mark "HAZARD" became popular amongst the customers and traders; hence, the appellant as applicant filed an application for registration of the said trade mark being application No. 101364 in Class-25 dated 27.09.2006 before the respondent No. 1, Registrar, Patents, Designs and Trade Mark, (in short, the Registrar) Dhaka claiming user of "HAZARD" trade mark since 2005. After preliminary examination of the application, the Registrar accepted the said application for advertisement in the Trade Mark Journal. Accordingly, it was published in the Trade Mark Journal No. 253 for the month of July- October, 2009 (at page 5307) and it was officially published on 27.01.2011. At this juncture, the respondent No. 2, Biplob Hossain Hawlader, proprietor M/s. Mack Knit Wear opposed the said publication by filing Opposition Case No. 2727 of 2011.

4. It has been stated further that the appellant has been manufacturing and selling "HAZARD" brand socks and that the respondent Biplob Hossain had been purchasing the said product (socks) from the appellant since 2006 to 2010. In the month of January, 2011 the appellant requested the respondent to liquidate all the previous outstanding dues in order to take further delivery of socks. Consequent thereto, the respondent upon paying off all previous outstanding had refused to take further delivery of "HAZARD" brand socks from the appellant.

5. On the other hand, the case of respondent No. 2, in short, is that the respondent No. 2 is the sole proprietor of M/s. Mack Knit Wear. He has been manufacturing and supplying hosiery and garments items i.e. underwear, vest, socks etc. in the local market of the country under the trade mark "HAZARD" with the device of combined alphabet 'H' with expanded sword like 'Z' and adopted the word mark "HAZARD" since 1999. Accordingly, he applied for registration before the respondent No. 1, Registrar being Trade Mark application No. 91718 in Class-25 dated 26.05.2005 claiming to have been using the said mark since 1999. The respondent No. 1, the Registrar after preliminary examination of the application accepted the same for publication in the Trade Mark Journal. Accordingly, it was published in the Trade Mark Journal No. 255 for the month of January- March, 2010 (at page No. 6366) and it was officially published on 30.11.2011. The appellant, however, opposed the said publication by filing Objection Case No. 2845 of 2012.

6. It has been stated further that in order to meet the market demands specially for the "HAZARD" branded socks, the respondent No. 2 contacted with the appellant and proposed him to produce and supply socks of specified quality labeling the brand "HAZARD". As per said verbal agreement, the appellant produced and supplied the socks to the respondent No. 2 for some times. In course of the said transaction the appellant came to learn about the popularity of the mark "HAZARD" in the local market and with a view to defraud the consumers and for his personal gain, the appellant upon imitating the respondent's trade mark "HAZARD" in toto applied to the Registrar for registration of the said mark vide trade mark application No. 1013664 in Class-25 dated 27.09.2006 claiming the same to have been used since 2005. Accordingly, it was published in the Trade Marks Journal in violation of rule 23 of the Trade Mark Rules, 2015.

7. The aforesaid 2(two) Opposition Cases being No. 2727 of 2011 filed by the respondent in the trade mark application No. 101364 in Class-25 and Opposition Case No. 2845 of 2012 filed by the appellant in the trade mark application No. 91718 in Class-25 were heard analogously by the respondent No. 1. Both the contending parties contested their respective opposition cases by filing counter statements (T.M.-6), evidences in support of their oppositions and evidence-in-reply against evidence-in-support of applications. The Registrar upon hearing the contending parties and considering the evidences on record and submissions advanced by both the parties allowed Opposition Case No. 2727 of 2011 filed by the opponent respondent No. 2 and rejected Opposition Case No. 2845 of 2012 filed by the appellant vide the impugned order and decision dated 03.03.2013.

8. Being aggrieved by the aforesaid order and decision dated 03.03.2013 passed in Opposition Case Nos. 2727 of 2011 and 2845 of 2012 the appellant preferred both the trade mark appeals before this Court.

9. Mr. Gazi Mohammad Neyamat Hossain, the learned Advocate appearing for the appellant of both the appeals submits that the respondent No. 2 in his notice of opposition (T.M-5) in para 12 raised objection under sections 8(ga), 10(1) and 16(Ka) of the Trade Mark Act, 2009 (in short, the Act, 2009), whereas objection under section 10(1) of the Act can only be raised by any person/owner whose trade mark has already been registered. In the present case, he submits the respondent opponent's trade mark was pending for registration before the respondent No. 1, Registrar. But, the Registrar without considering the said legal aspect accepted the objection of the respondent No. 2, who had no *locus standi* to raise objection under section 10(1) of the Act, 2009 and thereby arrived at a decision not warranted by law. He further submits that the opponent respondent was a regular customer of the appellant and had purchased finished socks with trade mark "HAZARD" from the appellant from the year 2006-2010 and that the appellant adduced evidences to that effect and as such, the respondent could not raise any objection against the registration of the appellant trade mark "HAZARD" Pride Knit Wear. But, the respondent No. 1 misinterpreted the provision of section 115 of the Evidence Act, 1872 and passed the impugned decision not mandated by law, facts and evidences. He further goes to submit that the Registrar erred in law in holding "যুগপৎ ব্যবহারের বিষয়টি বলে বিবেচ্য বিষয় হিসাবে গন্যকরা যেত যদি তারা একটা দেশের ভিন্ন ভিন্ন অঞ্চলে ব্যবসা পরিচালনা করতো যেহেতু তাদের উৎপাদিত ও ব্যবসা পরিচালনা বা বাজার একই সে কারনে এই বিষয়টি এক্ষেত্রে প্রযোজ্য হয় না।" Despite the fact that honest concurrent user has no limitation as regards place of business of the respective parties. He next goes to argue that the opponent respondent had/has no business of manufacturing socks prior to applicant appellant and that admittedly the opponent respondent had purchased "HAZARD" branded socks from the applicant appellant and sold the same on commission basis but, the respondent No. 1, Registrar calculated the period of user on the basis of garments products of the opponent respondent, not on the basis of socks. Lastly, he submits that the respondent, Registrar has decided the opposition case under section 10(2) of the Act, 2009 which is beyond the pleadings of the parties under litigation, the respondent Registrar has considered the two trade marks as "হুবহু" but, in fact the two trade marks are not exactly the same. The word Pride Knit Wear appears in the label in addition to trade mark "HAZARD" which the respondent Registrar has totally ignored. Moreover, the Registrar has considered the opponent respondent as prior user of the trade mark since 1999 but, the respondent opponent produced evidence in support of user trade mark "HAZARD" from 2006 and onwards which was concurrent user with the appellant. In this regard he submits that in case of honest concurrent user the question of confusion and deception in the course of trade under section 8(ga) does not arise at all.

10. *Per contra,* Mr. Hasmat Ullah, the learned Advocate appearing on behalf of the respondent No. 2 by placing the impugned order and decision submits that the respondent No. 1, Registrar after hearing the contending parties and on considering the evidences on record and existing law allowed the opponent respondent's Opposition Case No. 2727 of 2011 and dismissed the appellant's Opposition Case No. 2845 of 2012 and as such there is no illegality in the impugned order and decision so passed by the respondent No. 1, Registrar. He further submits that the appellant has been manufacturing and supplying Swan, Addidas and Super Dock branded socks; whereas, the respondent opponent has been manufacturing and supplying only "HAZARD" branded socks to meet the market demand but, the appellant with ill motive and for destroying the goodwill of the opponent respondent applied for registration trade mark "HAZARD" and that the Registrar considering the said fact passed the impugned order and decision. He next goes to argue that the present respondent did not allow the appellant to use trade mark "HAZARD" in his business and the appellant failed to produce any kind of agreement in support of allowing to use "HAZARD" brand trade mark by the respondent. As such, question of estoppel under section 115 of the Evidence Act, 1872 is not applicable at all in the appellant's case. He further goes to argue that the present respondent is the prior user of the trade mark "HAZARD" which was successfully proved by the respondent before the Registrar and that the Registrar, considering the said legal aspect passed the impugned order and decision. In view of the above contexts he submits that both the appeals are liable to be dismissed. In support, he has referred the decisions in the case of ***Nabisco Biscuit and Bread Food Products Limited, Dhaka*** -Vs- ***Baby Food Products Limited, Dhaka and another,*** reported in ***28 BLD 204***, in the case of ***S.M. Taufiq and others***-Vs- ***National Biscuit Co. Ltd.***, reported in ***PLD 1962 (W.P) Karachi 355, Abdul Motaleb and others*** -Vs- ***Haji Aftab Miah and others***, reported in ***16 BLT 138,*** in the case of ***MK. Electric limited, Shrubbery Road, Edmonton, London***-Vs-***Md. Mozammel Haque, Trading*** as ***MK Electronic Industry*** reported in ***27 BLD 445.***

11. We have heard the learned Advocate for the appellant and the learned Advocate appearing for the respondent No. 2 and have perused the impugned order and decision, memo of appeals and the relevant materials on record so appended thereto.

12. In both the appeals it is admitted by the contending parties that the appellant applied for registration of trade mark "HAZARD" being trade mark application No. 101364 in Class-25 dated 27.09.2006 claiming to use the said trade mark since 2005. On the other hand, the respondent No. 2 filed application for registration of the trade mark "HAZARD" being trade mark application No. 91718 in Class-25 dated 26.05.2005 for using the said mark since 1999. On perusal of both the applications for registration of trade mark word "HAZARD", it appears that the opponent respondent filed application prior to the application of the appellant; moreover, the said respondent is also prior user of trade mark "HAZARD". Considering the said context, the Registrar passed the impugned order and decision with the following findings;

> ***"সিদ্ধান্ত ও কারণঃ বিজ্ঞ আইনজীবিদের বক্তব্য এবং সাক্ষ্য হিসেবে উপস্থাপিত প্রমাণাদি হতে দেখা যায়- M/s. Mack Knit Wear "HAZARD" মার্কটি ব্যবহার ১৯৯৯ সাল থেকে এবং M/s. Pride Knit Wear এর Hazard মার্ক এর ব্যবহার ২০০৬ সাল থেকে এতে প্রমাণিত হয় M/s. Mack Knit Wear "HAZARD" মার্কটির prior user এবং Trademarks Act, 2009 এর ৮(গ) ধারা অনুযায়ী ট্রাইব্যুনালের নিকট প্রতীয়মান হয়েছে যে একই মার্ক একই ক্ষেত্রে দুইজনকে দেয়া হলে বাজারে বিভ্রান্তির সৃষ্টি হবে এবং জনসাধারণ প্রতারিত হবে Estoppels এবং Backward linkage ভিন্ন ভিন্ন বিষয়ে হওয়ার কারণে এবং বর্তমান মামলার ক্ষেত্রে Backward linkage গ্রহণ যোগ্য বিবেচিত হওয়ায় অধিকন্তু বাজারে বিভ্রান্তি রোধ এবং ১০(২) ধারা অনুযায়ী হুবহু মার্ক হওয়ার কারণে M/s. Mack Knit Wear দাখিলী আপত্তি মামলা নং-২৭২৭/২০১১ মঞ্জুর হবে।***

*আদেশঃ অতএব, আদেশ হচ্ছে যে অপোজিশন মামলা নং-২৭২৭/২০১১ বিনা খরচায় দোতরফা সূত্রে মঞ্জুর করা হইল তদানুযায়ী দরখাস্ত নং-১০১৩৬৪ শ্রেণী-২৫ খারিজ করা হলো এবং অপোজিশন মামলা নং-২৮৪৫/২০১২ বিনা খরচায় দোতরফা সূত্রে না-মঞ্জুর করা হলো এবং তদানুযায়ী দরখাস্ত নং-৯১৭১৮ শ্রেণী -২৫ নিবন্ধনের জন্য অগ্রসর হউক। আদেশের সারমর্ম সংশ্লিষ্ট সকলকে অবহিত করা হউক।"*

13. Countering the said findings the moot assertion of the appellant is that the Registrar without considering sections 8(ga), 10(1) and 16 (Ka) of the Act, 2009 rejected his Opposition Case No. 2845 of 2012. In order to appreciate of the arguments of the learned Advocate for the appellant, the relevant provisions of law are quoted below for ready reference;

*"ধারা-৮। নিবন্ধনের বিষয়ে কতিপয় নিষেধাজ্ঞা।- কোন মার্ক বা মার্কের অংশ ট্রেডমার্ক হিসাবে নিবন্ধিত হইবে না, যদি-*

*(ক) ----------*

*(খ) ----------*

*(গ) উহার ব্যবহার প্রতারণামূলক হইতে পারে বা বিভ্রান্তির সৃষ্টি করিতে পারে;*

*(ঘ) ----------*

*(ঙ) ----------*

*(চ) ----------*

*(ছ)) ----------*

*ধারা-১০। সাদৃশ্যপূর্ণ যা প্রতারণামূলকভাবে সাদৃশ্যপূর্ণ ট্রেডমার্ক নিবন্ধনে বাধা-নিষেধ।*

*(১) উপ-ধারা (২) এর বিধান সাপেক্ষে, ভিন্ন কোন স্বত্বাধিকারীর নামে কোন পণ্য বা সেবা অথবা, পণ্য বা সেবার বর্ণনা নিবন্ধিত থাকিলে, উক্তরূপ পণ্য বা সেবা অথবা পণ্য বা সেবার বর্ণনার অনুরূপ বা প্রতারণামূলকভাবে সাদৃশ্যপূর্ণ কোন মার্ক নিবন্ধন করা যাইবে না।*

*(২) সৎ উদ্দেশ্যে যুগপৎ ব্যবহার বা অন্য কোন বিশেষ কারণে একই পণ্য বা সেবা অথবা একই বর্ণনার পণ্য বা সেবা প্রায় সাদৃশ্যপূর্ণ হইলেও উক্ত বিষয়ে কোন ট্রেডমার্ক একাধিক স্বত্বাধিকারীর নামে নিবন্ধন করা প্রয়োজন বিবেচনায় নিবন্ধক, উপযুক্ত শর্ত ও সীমাবদ্ধতা সাপেক্ষে, একাধিক স্বত্বাধিকারীর নামে কোন ট্রেডমার্ক নিবন্ধনের অনুমতি দিতে পারিবেন।*

*ধারা-১৬। গৃহীত আবেদন প্রত্যাখ্যান।-কোন ট্রেডমার্ক নিবন্ধনের আবেদন গ্রহণের পর নিবন্ধক যদি এই মর্মে নিশ্চিত হন যে,-*

*(ক) আবেদনটি ভুলবশত গৃহীত হইয়াছে; বা*

*(খ) ----------"*

14. Section 8(ga) provides that the Registrar cannot accept any mark or part of mark for registration if the said mark can be registered which consists of or contents any scandalize design, or any matter use for fraud. Section 10 provides prohibition of registration of identical or similar trade mark. Sub-section (1) of section 10 provides that no trade mark shall be registered in respect of any goods or description of goods which is identical with a trade mark belonging to a different proprietors and either already on the register in respect of the same goods or description of goods or which so nearly resembles such trade mark as to be likely to deceive or cause confusion.

15. In the instance cases, the respondent No.2 is the sole user of the mark "HAZARD" and with the said trade mark he has been manufacturing hosiery and garments (including socks) items since 1999. In support of said contention he submitted challan/invoices (Annexure-C16) showing different dates from 06.06.2006-26.06.2006 for supplying "HAZARD" branded items in the local market and also submitted affidavits swearing by the some purchasers/distributors (Annexure-D series) confirming that the respondent M/s. Mack Knit Wear are using mark "HAZARD" since 1999. On the other hand the appellant submitted challan/invoices dated 11.12.2006-07.12.2009 (Annexure-B) in support of manufacturing and selling socks using the mark "HAZARD" since 2006.

16. Vide the said challan/invoices (Annexure-B) it appears that the appellant manufactured and supplied socks in the local market with trade marks Swan, Addidas and Super Dock. So, it is evidenced by the Annexure-B that excepting mark "HAZARD", the appellant has been manufacturing and supplying Swan, Addidas and Super Dock branded socks in the local market. On the other hand, the opponent respondent has been manufacturing and supplying garments and hosiery (including socks) under the trade mark "HAZARD". It also appears that the respondent's application for registration was prior to the application of the appellant. Moreso, the respondent has been manufacturing and supplying garments and hosiery (including socks) under the trade mark "HAZARD" since 1999; whereas, the appellant has been manufacturing and supplying socks with trade mark "HAZARD" since 2006. The Registrar, however, allowed the respondent objection holding, *inter alia*-

> ***"M/s. Mack Knit Wear "HAZARD" মার্কটি ব্যবহার ১৯৯৯ সাল থেকে এবং M/s. Pride Knit Wear এর Hazard মার্ক এর ব্যবহার ২০০৬ সাল থেকে এতে প্রমাণিত হয় M/s. Mack Knit Wear "HAZARD" মার্কটির prior user এবং Trademarks Act, 2009 এর ৮(গ) ধারা অনুযায়ী ট্রাইব্যুনালের নিকট প্রতীয়মান হয়েছে যে একই মার্ক একই ক্ষেত্রে দুইজনকে দেয়া হলে বাজারে বিভ্রান্তির সৃষ্টি হবে।"***

17. Another assertion of the appellant is that the respondent objection case is barred by the principle of estoppel. Conversely, the opponent respondent submits that as per his tender the appellant supplied "HAZARD" branded socks for the time being to fill up the backward linkage. In this regard, we have noticed from Annexure-B series that the appellant supplied "HAZARD" branded socks to the opponent respondent several times but, he included trade marks Swan, Addidas and Super Dock in his challan/invoices. However, he did not include mark "HAZARD" therein. As such, the appellant cannot claim that he has been manufacturing and supplying socks under the trade mark "HAZARD". In addition, the appellant could not place any agreement before the Registrar in support of allowing him to manufacture and supply "HAZARD" branded socks in the market by the present respondent. As such, the contention so has been raised to that effect falls through.

18. On perusal of the relevant provisions of law regarding registration of trade mark, it appears that when nearly resembled trade mark is claimed by different proprietors, the Registrar as per provision under section 10(2) of the Act, 2009 may give registration to different proprietors considering the trade mark being used concurrently and with honest purpose. In the instant appeals both the parties filed objection cases against each other. However, if the Registrar would allow registration of trade mark "HAZARD" for supplying and manufacturing socks to the appellant, he would not use mark "HAZARD" honest purpose since, the appellant is using other 3(three) trade marks for manufacturing socks. Besides, from the logo of the mark "HAZARD" in both the applications, we found that those are visually and phonetically identical i.e. "হুবহু" not nearly resemble. Hence, section 10(2) of the Act does not allow to give registration of identical trade mark to different proprietors, although the mark is to be used concurrently and with honest purpose.

19. The issue involves in the instant appeals has been discussed by the Apex Court in the several judgments of our jurisdiction as well as Indian jurisdiction.

20. In the case of ***Abdul Motaleb and others***-Versus- ***Haji Aftab Miah and others*** reported in ***16 BLT 138*****,** it has been held that-

> ***"The respondent No. 1 is using the Trade Mark "Bonoful" illegally and therefore the claim of use of the Trade Mark "Bonoful" for over 14 years by***

***the respondent hereof has no legal value and said period cannot be counted for the purpose of section 10(2) of the Trade Mark Act to get benefit as honest concurrent user and hence granting of registration of Trade Mark "Bonoful" in favour of Respondent No. 2 under section 10(2) of the Trade marks Act is illegal."***

21. In the case of ***Nabisco Biscuit and Bread Factory Limited, Dhaka, Appellant*** -Versus- ***Baby Food products Limited, Dhaka and another, Respondent*** reported in ***28 BLD 304*** it has been held that-

***"Section 8 of the Act prohibits, inter alia, registration of any trade mark which is likely to deceive or cause confusion or otherwise be disentitled to protection in a Court of justice. Section 10 of the Act further prohibits, inter alia, registration of any trade mark which is identical with a trade mark belonging to a different proprietor and either already on the register in respect of same goods or description of goods or which so nearly resemble such trade mark as to be likely to deceive or cause confusion."***

22. In the case of ***MK Electric Limited, Shrubbery Road, Edmonton, London N9 OPB (U.K), appellant,*** -Versus- ***Md. Mozammel Hoque, Trading as MK Electric Industries and others, Respondents*** reported in ***27 BLD 445*** it has been held that-

***"There is a legal prohibition for registration lf a trade mark which is phonetically identical with the previously registered trade mark. In such circumstances the Registrar has to record a finding of fact on the materials before him, if he comes to the conclusion that the matter falls within the prohibited category then he has no discretion but has to refuse Registration."***

23. In the case of ***Tosiba Appliances Company-Opponent***-Versus- ***Kabushiki Kaisha Toshiba-Applicant in 2002(24) PTC 654 (Reg.) (at page 655, 5th line from top)*** it has been held that-

***"The honest concurrent use is the main element to be considered by the Tribunal for allowing a trade mark to proceed for concurrent registration under section 12(3) of the Act. The honesty of the use of a trade mark has to be considered from the commercial point of view. The honesty or dishonesty of use of a trade mark relates back to its adoption. If a trade mark had been adopted honestly is subsequent use has to be honest. But to the contrary, if a trade mark had been dishonestly adopted its subsequent use of any length of time cannot launder the vice of dishonesty of adoption. If a person adopts a trade mark having knowledge of an earlier existing identical or deceptively similar trade mark, such adoption has to be dishonest adoption is tainted with mala fide intention of the person who adopts such trade mark."***

24. In the case of ***S.M. Taufiq and others- Appellants***-Versus- ***National Biscuit Co., New York-Respondents reported in PLD 1962 (W.P) Karachi 355(from 4th line of page No. 359)***, it has been held that-

***"The evidence produced by the respondents undoubtedly proves that after 1940, in the territories now comprising Pakistan, the trade mark "Nabisco" was neither used nor had any reputation till 1947, or after Partition upto the time they filed application for the registration of the said trade mark." Therefore, it is found that the appellants S.M. Taufiq and others being the prior user, the appeal was allowed and got registration for Trade Mark "Nabisco".***

25. Considering of the above context, it is discovered that section 8 of the Act, 2009 prohibits registration of any trade mark or part of the mark which is likely to deceive or cause confusion and or any matter use for fraud and or otherwise be disentitled in a Court of justice. Section 10 of Act, 2009 further prohibits registration of any trade mark which is identical with a trade mark belonging to a different proprietor and either already on the register in respect of same goods or description of goods or which so likely to deceive or cause confusion. In the instant appeals, both the contending parties filed applications for registration of trade mark "HAZARD" for supplying hosiery/garments/socks in the local market and both marks are phonetically and visually identical. However, sections 8 and 10(1) prohibit registration identical marks in respect of same goods or description of goods to different persons.

26. Moreover, the respondent is the prior user of trade mark "HAZARD" and his application was filed prior to the application of the appellant. The Registrar considering the said facts and the provisions of law granted registration of trade mark "HAZARD" in favour of the present respondent.

27. In view of the above facts and circumstances of the cases, findings and observations we find no legal infirmity in the impugned order and decision so passed by the Registrar refusing to register the trade mark "HAZARD" in favour of the appellant.

28. In the result, both the appeals are dismissed without any order as to costs.

29. The impugned order and decision dated 03.03.2013 passed by the respondent No. 1, Registrar, Patents, Designs and Trademarks, Dhaka in Opposition Case Nos. 2727 of 2011 and 2845 of 2012 allowing Opposition Case No. 2727 of 2011 and thereby refused to register connected trade mark application bearing No. MP 101364 in Class-25 filed by the appellant and dismissed Opposition Case No. 2845 of 2012 and thereby allowing the connected trade mark application No. 91718 in Class-25 filed by the respondent No. 2 is hereby upheld.

30. Communicate the judgment and order to the concerned respondents forthwith.

31. Send down the lower Court records at once.

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**(CIVIL APPELLATE JURISDICTION)**

F. A. No. 233 of 2006

**Md. Badaruddin being dead his heirs Most. Arjuda Khatun and others**
… Defendant-Appellants.

Mr. Md.Sanwar Ahad Chowdhury, Advocates
…for the appellants.

-VERSUS-

**Md. Shahidullah Miah**
… Plaintiff-Respondent.

Mr. Md. Imtiazur Rahman Farooqui (M.I. Farooqui), with
Ms. Razia Sultana, Advocates
…for the respondent

Hasan Sarwar Khan and others
… Defendant-Respondent.

Heard on: 20.11.2019, 21.11.2019, 05.12.2019 and 09.12.2019
Judgment on: 15.12.2019

Mr. Sasthi Sarker with

**Present:**
**Mr. Justice S.M. Emdadul Hoque**
**With**
**Mr. Justice Zafar Ahmed**

**Sale deeds, Article 113 of the Limitation Act, 1908, Baina dated, Time from which the period of limitation begins, Novation of contract, Performance of a contract;**

**Time consumed in the so called arbitration proceedings or waiting for subsequent refusal are of no assistance to the plaintiff.**

**Specific performance is a relief which the Court will not grant, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will admit. The rights of equity are rights which are given to litigants who are vigilant and not to those who sleep. ... (Para 26)**

**JUDGMENT**

**Zafar Ahmed, J:**

1. In this first appeal, the defendant Nos. 1-5 have challenged the judgment and decree dated 08.08.2006 (decree signed on 14.08.2006) passed by the Joint District Judge, 5th Court, Dhaka in Title Suit No. 255 of 2000 decreeing the suit.

2. During pendency of the appeal, the appellant No. 1 Md. Badaruddin died on 25.04.2007. His legal heirs were duly substituted in the appeal.

3. The respondent No. 1 as plaintiff filed the suit praying for *inter alia* declaration that four sale deeds ('C' schedule) executed by the defendant No. 1 in favour of his four daughters are collusive and not binding upon the plaintiff and for specific performance of contract (baina) dated 21.09.1979.

4. The case of the plaintiff, in short, is that the defendant No. 1 Badaruddin was the owner in possession through succession of .1151 acres of land in 9 annas share of the schedule 'A' property along with other properties left by his mother. After transferring portions of land to a 3rd party and to the plaintiff, the defendant No. 1 remained the owner in possession of land measuring 0.0738 acres ('B' schedule). Thereafter, the defendant No. 1 contracted to sell the same to the plaintiff for Tk. 1,40,000/- and entered into an unregistered written agreement (baina) with him on 21.09.1979 upon receipt of Tk. 10,000/- as advance. In the said baina, a period of three months from date was mentioned for payment of the balance consideration money and execution and registration of the required sale deed, but the defendant No. 1 delayed the same on the plea that he has four unmarried daughters and if he hands over the possession of the property to the plaintiff, he would face difficulty in giving the daughters in marriage. Subsequently, the defendant No. 1 received Tk. 30,000/- on different dates from the plaintiff till 1992. Thereafter, to meet the expenses of the marriage ceremony of the 2nd daughter (defendant No. 5) held on 17.06.1993, the defendant No. 1 received another sum of Tk. 20,000/- from the plaintiff in the first week of June, 1993 and then Tk. 20,000/- in the later part of April, 1997 to bear expenses of marriage ceremony of the third daughter (defendant No. 4) held on 30.04.1997. Thus, the defendant No. 1 received total sum of Tk. 80,000/- from the plaintiff as consideration money out of Tk. 1,40,000/-. The defendant No. 1 delivered possession of 1 katha land of schedule 'B' property to the plaintiff in June, 1993. The plaintiff constructed tin chapra consisting of four rooms on the said land and let out those to the tenants and has been realising rents from them.

5. The further case of the plaintiff is that on 15.05.1997, the plaintiff requested the defendant No. 1 to execute and register the sale deed upon receipt of the balance consideration money of 60,000/-, but the defendant No. 1 evaded the request on flimsy grounds. Thereafter, the plaintiff filed a petition against the defendant No. 1 before the Commissioner of the local Ward No. 58, Dhaka on 11.12.1997, whereupon, being summoned, the defendant No.1 appeared before the Ward Commissioner and contested the plaintiff's claim and though he admitted receipt of Tk. 80,000/- from the plaintiff, he refused to execute and register the required sale deed. The Ward Commissioner passed the award on 05.10.2000, whereby he directed the defendant No. 1 to execute and register the sale deed in respect of the suit property in favour of the plaintiff within 30 days from date upon receipt of balance consideration of money of Tk. 60,000/-, but the defendant No. 1 did not comply with the same.

6. The further case the plaintiff is that on inspection of the Tazdik records he came to know that behind his back and beyond his knowledge, the defendant No. 1 created 4 sale deeds in favour of his four daughters (defendant Nos. 2-5) in respect of a portion of the suit property (schedule 'C').

7. The suit was contested by the defendant Nos. 1-5 by filing a joint written statement and better statement. The case of the contesting defendants, in short, is that the defendant No. 1 did not enter into any written agreement on 21.04.1979 upon receipt of Tk. 10,000/- from the plaintiff by putting the alleged signature on the same. The story of receiving money from the plaintiff on different dates is false and concocted. The further case of the defendants is that after receiving consideration money, the defendant No. 1 transferred portions of the land in question to his four daughters (defendant Nos. 2-5) on 25.06.1998 and 30.06.1998 respectively, vide separate registered sale deeds and handed over possession thereof. The defendant Nos. 2-5 constructed semi pucca structure thereon and they have been paying rents

and taxes after mutating their names with knowledge of the plaintiff and others. The defendant No. 1 did not deliver possession of any portion of the suit land to the plaintiff.

8. In respect of the award dated 05.10.2000 passed by the Ward Commissioner, the defendants' case is that the said award is concocted and was passed beyond the knowledge of the defendant No. 1.

9. The trial Court framed the following issues:

1) Is the suit maintainable in it's present form.
2) Does the suit disclose a cause of action.
3) Is the suit barred by limitation.
4) Is the plaintiff entitled to get the relief as prayed for.
5) To what other reliefs except the relief prayed for, the plaintiff is entitled to.

10. The plaintiff examined 3 witnesses and produced documentary evidences which were marked as exhibits 1-6 series. The defendants examined 5 witnesses. Documentary evidences produced by them were marked as exhibits A-G series. The trial Court decreed the suit and hence, the first appeal at the instance of the defendant Nos. 1-5.

11. Mr. Sasthi Sarker, the learned Advocate appearing on behalf of the defendant-appellants made submissions on two points; firstly, the plaintiff failed to prove that the unregistered baina dated 21.09.1979 was executed at all and, secondly, even the execution of the said baina is proved, the suit is barred by limitation under the first part of Article 113 of the Limitation Act, 1908.

12. Mr. M.I. Farooqui, the learned Senior Counsel appearing along with Ms. Razia Sultana on behalf of the plaintiff-respondent No. 1, submits that the execution of the unregistered baina has been proved and that the suit is not barred by limitation inasmuch as the agreement for sale was novated which is evidenced by the subsequent conduct of the parties. The learned Advocate next submits that under the substituted agreement, no specific date was fixed for performance and therefore, the first part of Article 113 does not apply to the case. The learned Advocate finally submits that evidences on record prove that the second part of Article 113 shall apply to the case and the suit has been filed within the period of limitation. The learned Counsel submits that the trial Court has rightly decreed the suit.

13. We have heard the learned Advocates of both sides and perused the materials on record.

14. The points for determination in the instant appeal are:

(1) whether the deed of agreement dated 21.09.1979 (baina) was executed,
(2) whether the suit is barred by limitation,
(3) whether the plaintiff has proved the case, and
(4) whether the judgment and decree under challenge can be sustained.

15. The first question we need to address is whether the unregistered baina dated 21.09.1979 was executed by the defendant No. 1. PW1 (plaintiff) gave deposition supporting his claim that the baina was duly executed by the defendant No. 1. PW2 Hafej Md. Sirajuddin, who is an Imam of a mosque, deposed that the baina was executed in front of him and that he is an attesting witness. He further deposed that the defendant no. 1 put his signature in English in the baina in his presence. The defendant No. 1 deposed as DW2. In

examination-in-chief, he denied the execution of the baina by him. In cross-examination, DW2 stated that he cannot see the signatures contained in the sale deeds executed by him in favour of his daughters and the signature contained in the baina. He further stated, "উক্ত বায়না পত্রের সই আমার কিনা তা আমি বুঝিতেছি না". At the time of deposition, DW2 was about 87 years old. Having gone through the entire deposition of DW2, it appears to us that his memory was faded due to old age. The trial Court compared the signature of the defendant No. 1 contained in the baina with that contained in the sale deeds executed by him in favour of his daughters and came to the conclusion that it was the signature of the defendant No. 1. In view of the evidence given by the attesting witness (PW2) and the finding of the trial Court, we have no hesitation to hold that the baina was duly executed by the defendant No. 1.

16. Now, the second question is whether the suit is barred by limitation under Article 113 of the Limitation Act, 1908. Prior to the amendment, Article 113 provided a period of limitation of three years from the date fixed for performance or if no such date is fixed, when the plaintiff has notice that performance is refused. Article 113 was amended in 2004 which was given effect from 01.07.2005. Under the amended Article, the period of limitation is one year. In the instant case, the period of limitation of three years shall apply as the case was filed before the amendment.

17. In the Indian case of ***Ramazan vs. Hussaini***, AIR 1990 SC 529, it has been held that for the purpose of limitation and the date fixed for performance within the meaning of Article 54, mention in the deed of particular date from calendar is not necessary. It is sufficient if the basis of calculation which makes the date of performance certain is mentioned in the deed. Be it mentioned that Article 54 of the Indian Limitation Act and Article 113 of our Limitation Act contain identical provisions except that in India, period of limitation to file a suit for specific performance of contract is still three years.

18. Reverting back to the case in hand, in the baina dated 21.09.1979, a period of three months from the date of execution was mentioned for payment of the balance consideration money and execution and registration of the required sale deed. Accordingly, the last date for filing the suit was 20.12.1982. The suit was filed on 30.11.2000 beyond the prescribed period of limitation. This is precisely the argument advanced on behalf of the defendant-appellants that the suit is barred under the first part of Article 113 of the Limitation Act.

19. Mr. M.I. Farooqui, the learned Senior Counsel for the plaintiff, on the other hand, draws our attention to the plaint and to the deposition of the plaintiff (PW1). He refers to Section 62 of the Contract Act and submits that the original written agreement for sale (baina) has been novated by the subsequent oral agreement between the parties which is evidenced by the conduct of the parties and proved by oral evidence given by PW1 which is permissible under Explanation 3 of Section 91 and proviso 3 and 4 of Section 92 of the Evidence Act. Mr. Farooqui further submits that under the substituted oral agreement, no date was fixed for the performance. Therefore, the 2$^{nd}$ part of Article 113 shall apply to the case so far as limitation is concerned.

20. We note that it has been stated in the plaint that after execution of the baina dated 21.09.1979, the defendant No. 1 delayed the execution and registration of the sale deed till marriage of his four unmarried daughters. Evidences on record show that three daughters were given in marriage in 1983, 1993 and 1997 respectively. It has been further stated in the plaint that at the time of execution of the baina, the defendant No. 1 took Tk. 10,000/- from the plaintiff out of total consideration money of Tk. 1,40,000/-. Then he took Tk. 30,000/- on

different dates from the plaintiff till 1992, Tk. 20,000/- in the 1st week of June, 1993 and 10,000/- in the later of April, 1997. The plaintiff gave oral evidence supporting these portions of the plaint's case, but could not produce any documentary evidence. The defendant No. 1 denied the execution of baina as well as acceptance of any money. Mr. Farooqui submits that relationship between the parties and the surroundings circumstances must be taken into consideration to understand as to why the plaintiff did not feel it necessary to keep any record in respect of payment of money. Mr. Farooqui points out that the plaintiff is the next door neighbour of the defendant No. 1; that earlier the mother of the defendant No. 1 sold a piece of land to the plaintiff's mother in 1966; that the defendant No. 1 also sold a piece of land to the plaintiff in 1975; that PW2, who is an independent witness, deposed that 30 years back the defendant No. 1 used to work under the plaintiff in his ration shop. Mr. Farooqui submits that due to earlier transactions and relationship between the parties, the plaintiff, upon bonafide belief, did not care about keeping any record as to subsequent payment of money on different dates under the original baina and the substituted oral agreement. Mr. Farooqui further submits that cause of action consists of bundle of facts for the purpose of determining the relevant time from which the period of limitation begins to run and in the particular facts and attending circumstances of the case, a specific date should not be considered to count the period of limitation inasmuch as the original agreement was novated by a subsequent oral agreement which does not provide any specific date for performance, and that the defendant accepted payment of money of Tk. 80,000/- on different dates beyond the prescribed period provided under the original agreement, and that the plaintiff was always willing to perform part of his obligation. Now the defendant cannot use the Article 113 as a shield and take benefit of his own laches. In support of the argument, Mr. Farooqui refers to a passage from the text book "***The Specific Relief Act, 1877 with An Exhaustive Commentary***" by Sardar Muhammad Iqbal Khan Mokal, Law Publishing Company, Lahore, Pakistan (1978, 3rd edition, p.60). The relevant passage runs as follows:

> "The time at which the mutuality must exist, in order that it may produce these binding effects, is that of concluding the agreement between the parties. The contract should properly be mutual *ab initio.* Two questions may arise concerning the time: (1) Whether the quality of mutuality, originally existing, must continue to the time of bringing the suit or rendering the decree? (2) Whether, if the quality did not originally exist, the objection would be obviated by subsequent acts or events which render the obligation and remedy mutual. In respect of the first of these question, it is settled that if the agreement possesses the requisite element of mutuality, when it is concluded, so that the plaintiff can then maintain a suit for its specific execution, his right to such relief will not be subsequently defeated or diminished, because the defendant, through his delay or other acts or omissions, afterwards loses the right to enforce the contract against the plaintiff, which he originally had; a valid defence cannot thus arise from the defendant's own laches."

21. Mr. Farooqui argued strenuously on points of novation of contract, mutuality of parties under the substituted oral agreement and that the suit is not barred by limitation.

22. One of the essential requirements of 'novation' as contemplated by Section 62 of the Contract Act is that there should be complete substitution of a new contract in place of the old one. A substituted contract should rescind or alter or extinguish the previous contract (***Lata Construction vs. Dr. Rameshchandra Ramniklal Shah***, AIR 2000 SC 380). After execution of a new contract, the substituted contract gives rise to new cause of action and obligates the earlier one. If there is no intention to rescind the prior contract altogether, there is no substitution (***Renuza Begum and others vs. Md. Waziullah Mia and others***, 18 BLC

(AD) 201). In ***The Central Bank of India, Ltd. vs. Md. Islam Khan***, 14 DLR (SC) 86, it was held that by the mere extension of time for the performance of a contract, novation does not necessarily take place, but the promisee gets certain rights under Section 63 of the Contract Act.

23. In view of the above discussed judicial pronouncements, even we accept the arguments advanced by Mr. Farooqui, the original written agreement dated 21.09.1979 has not been novated simply because the subject matter and the consideration have remained the same except extension of time for performance which has been extended till marriage of the defendant No. 1's daughters. In that case, the 2nd part of Article 113 comes into the scenario since no date was fixed for performance.

24. It has been stated in the plaint that on 15.05.1997 and then on 07.11.2000, the defendant No. 1 refused to execute and register the sale deed. In the deposition, PW1 (plaintiff) mentioned the date 15.05.1997, but did not mention the date 07.11.2000. The plaintiff's case is that after 15.05.1997 the local Ward Commissioner held an arbitration in respect of the performance of the baina and gave a written award on 05.10.2000 directing the defendant No. 1 to execute and register the sale deed within 30 days upon receipt of balance consideration money of Tk.60,000/-. PW1 deposed that after the award, he requested the defendant No. 1 to execute and register the sale deed, but he refused. Be that as it may, Mr. Farooqui frankly concedes that the arbitration and the award have no sanction of law. We also find that the so-called arbitration is not a relevant fact and therefore, refrain from commenting on that.

25. In respect of 2nd part of Article 54 of the Indian Limitation Act (in Bangladesh the corresponding Article is the 2nd part of 113), it has been commented in "*Rustomji on Limitation Act*", 9th edition (2010) by S.P. Sen Gupta at p. 861 that, "Time … runs when the plaintiff *first* had notice that performance was refused. … time runs, not necessarily from date of refusal, but from plaintiff's *knowledge* of the refusal *Bathula Venkanna v Namuduri* ILR (1917) 41 Mad 18". Although Section 23 of the Limitation Act has not been argued by the plaintiff's learned Counsel, yet we have considered that. According to Section 23, in the case of a continuing breach of contract, a fresh period of limitation begins to run at every moment of the time during which the breach continues. A continuing contract is one to do a thing *toties quoties* (meaning 'as often as') as the the exigency of the case may require which is not the case here. On the other hand, a cause of action which is complete cannot be a recurring cause of action. In ***Panna Khan and others vs. Birendranath Halder***, 52 DLR 640, it has been held that for recurring refusal, the limitation in a suit for specific performance of contract cannot be extended and that the suit is to be filed within 3 years from the date of first refusal. The limitation will not be extended for subsequent refusal or recurring refusal or on the basis of causes of action as founded on the last date of refusal.

26. In the case in hand, even we accept the plaintiff's case that time for performance of the contract dated 21.09.1979 was extended, then according to the plaint and deposition of PW1, 15.05.1997 is the relevant date when the plaintiff first had notice / knowledge that performance was refused by the defendant No. 1. The plaintiff opted for arbitration which has no sanction of law. The so called award was given on 05.10.2000. The suit was filed on 30.11.2000. Meanwhile, more than 3 years have elapsed and the period of limitation has expired. Time consumed in the so called arbitration proceedings or waiting for subsequent refusal are of no assistance to the plaintiff. The case of the plaintiff, as narrated in the plaint and in the deposition of the plaintiff witnesses, clearly shows that in the entire transactions

there was utter negligence and laches on the part of the plaintiff. Specific performance is a relief which the Court will not grant, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will admit. The rights of equity are rights which are given to litigants who are vigilant and not to those who sleep. Since the plaintiff's case, considered in its entirety, is barred by limitation under Article 113 of the Limitation Act, we need not to dwell upon whether the plaintiff has proved his case. The trial Court overlooked the facts of the case in proper perspective and thus, wrongly held that the suit is not barred by limitation. Hence, the judgment and decree allowing the suit cannot be sustained.

27. In the result, the appeal is allowed. The impugned judgment and decree dated 08.08.2006 (decree signed on 14.08.2006) passed by the Joint District Judge, 5th Court, Dhaka in Title Suit No. 255 of 2000 decreeing the suit are set aside. The suit is dismissed. No order as to costs. Send down the L.C.R.

28. Communicate the judgment and order at once.

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**(Special Original Jurisdiction)**

**WRIT PETITION NO. 12977 OF 2015**

**Md. Giasuddin**
…..PETITIONER

-Versus-

**Govt. of Bangladesh, represented by the Secretary, Ministry of Primary and Mass Education, Bangladesh Secretariat, Ramna, Dhaka and others.**
...….RESPONDENTS

Mr. Abdullah Mahmood Hasan with
Mr. Md.Amir Hossain, Advocates
..... For the Petitioner

Mr. Amit Talukder, DAG
Mr. Titas Hillol Rema, AAG
Mr. Toufiq Sajawar partho, AAG
..... For the Respondents

Heard on: 16.10.2018, 22.10.2018, 13.01.2019
&17.02.2019
Judgment on:11.03.2019

**Present:**
**Ms. Justice Naima Haider**
**&**
**Mr. Justice Khizir Ahmed Choudhury**

**Rules 2(Ga) & 9(1) of the অধিগ্রহণকৃত বেসরকারি প্রাথমিক বিদ্যালয়ের শিক্ষক (চাকুরী শর্তাবলী নির্ধারণ) বিধিমালা, ২০১৩;**

The issue before the Honorable HCD is whether Rule 2(Ga) and Rule 9(1) of the 2013 Rules should be struck down.

Rule 2(Ga) define "কার্যকর চাকুরীকাল" which means that if a teacher renders, say 10 years of service prior to nationalization, his effective service period under the 2013 Rules shall be 50% thereof, i.e. 5 years. However, if the particular teacher's term of service is less than 4 years, then his previous service years shall not be counted after the nationalization. The provision is strange but not unreasonable. The nationalized teachers shall be entitled to different Government facilities including pension benefits. If Rule 2(Ga) was drafted differently to take account of the entire period of service prior to nationalization, then it would have had severe financial implications on the Government. Therefore, Rule 2(Ga) of the 2013 Rules is the mechanism used to reduce the financial exposure and at the same time, provide benefits to the teachers. It can be argued that the effect of Rule 2(Ga) is that the petitioners expectation to service benefits is affected; however, expectation is not synonymous to "rights and entitlements". Loss of expectation of the petitioners cannot be a ground to strike down Rule 2(Ga) of the 2013 Rules.

Rules 9(1) অধিগ্রহণকৃত বেসরকারি প্রাথমিক বিদ্যালয়ের শিক্ষক (চাকুরী শর্তাবলী নির্ধারণ) বিধিমালা, ২০১৩ provides that the seniority shall be counted by reference to কার্যকর চাকুরীকালের ভিত্তিতে. This provision also states that the direct appointee shall be senior to the teacher who has been nationalized under the 2013 Rules despite the fact that his tenure of service is less than the tenure of service of the nationalized teacher. This is manifestly absurd, particularly when the teacher directly recruited and nationalized teachers are treated at par. The previous tenure of service in the

private schools is recognized by the 2013 Rules. On the date when a nationalized teacher is appointed, he carries forward a deemed tenure of service. The deemed tenure of service recognized by first part of Rule 9(1) would cease to be recognized by second part of Rule 9(1). The second part of Rule 9(1) of the 2013 Rules renders the first part of the Rules 9(1) being 'শিক্ষকের নিয়োগ প্রদানের তারিখ হইতে কার্যকর চাকুরীকালের ভিত্তিতে শিক্ষক পদে তাহার জ্যেষ্ঠতা গণনা করা হইবে' redundant.

It appears that the teachers who are nationalized are affected because their seniority would not be properly recognized. This would affect their পদোন্নতি, সিলেকশন গ্রেড এবং প্রযোজ্য টাইম স্কেল because under Rule 9(3) of the 2013 Rules নিয়োগ বিধির শর্ত পূরণ সাপেক্ষে, উপ-বিধি (১) ও (২) এর অধীন জ্যেষ্ঠতার ভিত্তিতে শিক্ষকগণ পদোন্নতি, সিলেকশন গ্রেড এবং প্রযোজ্য টাইম স্কেল প্রাপ্য হবেন। The Court has concluded that Rule 9(1) of the 2013 Rules is manifestly unreasonable and self contradictory and therefore, is liable to be struck down.

**JUDGMENT**

***Naima Haider, J:***

1. In this application under Article 102 of the Constitution, Rule Nisi was issued in the following terms:

> *Let a Rule Nisi be issued calling upon the Respondents to show cause as to why the definition of* "কার্যকর চাকুরিকাল" *as laid down in Rule 2(Ga) of the* অধিগ্রহনকৃত বেসরকারি প্রাথমিক বিদ্যালয়ের শিক্ষক (চাকুরির শর্তাবলী নির্ধারণ) বিধিমালা, ২০১৩ *deducting 50% service tenure of the teachers of nationalized Non Government Primary School shall not be declared ultra vires to the Constitution and have been issued without any lawful authority and is of no legal effect and or pass such other or further order or orders as to this Court may seem fit and proper.*

2. An Application for issuance of Supplementary Rule was also filed by the petitioner. The said Application was allowed and Supplementary Rule was issued in the following terms:

> *Let a supplementary Rule Nisi be issued calling upon the respondents to show cause as to why Rule 9 of the* অধিগ্রহণকৃত বেসরকারি প্রাথমিক বিদ্যালয়ের শিক্ষক (চাকুরীশর্তাদি নির্ধারন) বিধিমালা, ২০১৩ *shall not be unlawful and unconstitutional and violative of the fundamental rights guaranteed under the Constitution and why the respondents should not be directed to treat the petitioners as Head Masters of their respective schools till their regular retirement age, unless otherwise disqualified and/or pass such other or further order or orders as to this Court may seem fit and proper*

3. The relevant facts, in brief, are set out as follows: the petitioner are law abiding citizens of Bangladesh and is the Head Master of Ranigoj Reg. Non Government Primary School (now nationalized).

4. The petitioner initially joined in 1989 as Assistant Teacher and subsequently he was promoted to the post of teacher. The petitioner obtained MPO in 1991. The petitioner is working as Head Master but he is not obtaining the selection grade for the post of Head Master.

5. This writ petition gives rise to identical question of law, as was raised in Writ Petition No. 14344 of 2017. The facts are also similar. The only mentionable difference between the

two petitions is the number of petitioners. As such Division heard the two writ petitions one immediately after another. Though in this writ petition the respondents did not contest the Rule, the contentions raised by the respondents in Writ Petition No. 14344 of 2017 are deemed applicable in the instant case. In Writ Petition No. 14344 of 2017, Affidavit in Opposition was filed by added respondents also. The Affidavit in Opposition filed by the added respondents is also deemed applicable in the present case. The submissions advanced by the learned Counsel for the respondents are also deemed applicable.

6. The instant writ petition gives rise to question of law i.e. the legality of Rule 2(Ga) and Rule 9(1) of the অধিগ্রহণকৃত বেসরকারি প্রাথমিক বিদ্যালয়ের শিক্ষক (চাকুরীশর্তাদি নির্ধারণ) বিধিমালা, ২০১৩ ("the 2013 Rules"). Since this Division has already decided on the legality of the aforesaid provisions, this Division considers it prudent to quote the relevant part of the judgment below instead of analyzing afresh:

**QUOTE (Judgment passed in Writ Petition No. 14344 of 2017)**

The Government decided to nationalize certain schools. All the schools in which the petitioners are Head Masters had been nationalized. The Government also framed the অধিগ্রহণকৃত বেসরকারি প্রাথমিক বিদ্যালয়ের শিক্ষক (চাকুরীশর্তাদি নির্ধারণ) বিধিমালা, ২০১৩ ("the 2013 Rules") which sets out the terms and conditions of the service of the nationalized teachers, including the petitioners. The 2013 Rules was framed by the Government without taking suggestions from the different stake holders, though such consultation process was required. When the 2013 Rules were available, it transpired that certain provisions cause extreme prejudice to the petitioners and takes away the vested rights. Being aggrieved, the petitioners moved this Division and obtained the Rule. Subsequently, the petitioners filed an Application for Issuance of Supplementary Rule and the said Application was allowed.

7. The petitioners filed two separate Supplementary Affidavits, annexing certain documents to show, among others, that the process of appointment and fixation of the salary of the petitioners had completed been through the respondents.

8. The Rule is opposed. The respondent No.4 filed an Affidavit in Opposition. With regard to the Rule issuing order, the respondent No.4 states that Rule 2(Ga) of the 2013 Rules is legal; the petitioners had voluntarily joined knowing that their service tenure would be reduced and therefore, the petitioners are estopped form raising this issue. Furthermore, since the 2013 Rules were framed in accordance with the procedure laid down under the Primary School (Taking Over) Act 1974, there is no scope for this Division to interfere. In the Affidavit in Opposition, it is stated that the promotion to the post of Head Master can be made if the person has the requisite qualification. Furthermore, to be eligible for promotion to the post of Head Master, the person must be working as Assistant Teacher for 7 years from the date of enlistment in the MPO. After nationalization, the Government issued an order which states that there is no scope to promote Assistant Teachers to Head Masters. Through the Affidavit, it is pointed out that the documents submitted by the petitioners are under challenge and questionable and therefore, this Division should not intervene. Through the Affidavit, the respondent No.4 also points out *"That the petitioners claim that they are discharging their duties and Headmaster is not true and hence denied"*. The respondent No.4 refers to the order passed by the Full Bench of the Hon'ble Appellate Division in Civil Petition for Leave to Appeal No. 4014 of 2018. The Full Bench of the Hon'ble Appellate Division confirmed the order of stay passed by the Hon'ble Judge in Chamber and directed disposal on merit. The learned Counsel, referring to his order of the Full Bench of the Hon'ble Appellate Division submits that the interim order passed by this Division had been

stayed by the Hon'ble Judge in Chamber and this indicates that there is no merit in the Rule. On these, among other counts, the learned Counsel submits that the Rule and the Supplementary Rule should be discharged.

9. The Rule is also opposed by the respondent Nos. 8-10. In the Affidavit in Opposition, it is stated that the 2013 Rule was framed in accordance with law and therefore, interference by this Division is not warranted. In the Affidavit in Opposition, it is stated that under the 2013 Rules, the direct appointees shall have preference over those who were nationalized and therefore, the direct appointees should be made Head Masters. It is also pointed out that on similar matters, the petitioners filed series of writ petition but there was no disclosure and therefore, the Rule and the Supplementary Rule should be discharged. Through the Affidavit in Opposition, the maintainability of the instant writ petition was also questioned.

10. The learned Counsel appearing for the petitioners at the outset takes us through the 2013 Rules. He submits that if the effective service period is reduced, as has been done by Rule 2(Ga) of the 2013 Rules, the petitioners' entitlement under the 2013 Rules would be detrimentally affected. The learned Counsel submits that delegated legislations are framed to further the objective of the parent legislation. The learned Counsel in support refers to certain decisions of the Supreme Court of India. Taking us through these decisions, the learned Counsel submits that Rule 2(Ga) of the 2013 Rules, reducing the "effective service period by half" does not have objective basis and therefore, should be struck down. The learned Counsel referring to Rule 9(1) of the 2013 Rules, submit that due to the operation of Rule 9(1), the seniority of the petitioners would be affected seriously; the petitioners would always remain junior to whoever is appointed directly. This, the learned Counsel submits, is manifestly arbitrary and absurd. Since after nationalization, there is only scope for direct recruitment, the interpretation of Rule 9(1) would be that the petitioners would never be senior to the junior most appointee. The petitioners, as Headmasters, serving for more than 20 years would remain junior to any teacher directly recruited. According to the learned Counsel, if under the 2013 Rules, the effective service is reduced to half, then the revised service period should be taken into account; if that is taken into account, Rule 9(1) of the 2013 Rules cannot stand because this has the effect of "continuous reduction of length of service". According to the learned Counsel, Rule 9(1) of the 2013 Rules is manifestly unreasonable, takes away the petitioners' vested rights and is vague; thus Rule 9(1) should be struck. The learned Counsel submits that for the reasons set out aforesaid, the Rule should be made absolute with appropriate direction upon the respondents.

11. We have heard the learned Counsels at length. We have also perused the pleading and the documents annexed therein.

12. Article 65 of the Constitution provides that the legislative powers shall be vested in the Parliament and notwithstanding the same, Parliament may delegate power to make orders, regulations and other instruments having legislative effect. This Division in exercise of powers under Article 102 of the Constitution can review the constitutionality of a primary legislation. If this can be done, the legality of a delegated legislation can always be subject to judicial scrutiny. This is the principle settled by the Hon'ble Appellate Division in series of cases. Delegated legislation can be struck down if: (a) the delegated legislation is void because the delegating statute is unconstitutional, (b) the delegated legislation offends the constitutional provisions, (c) the delegated legislation is ultra vires the delegating statute, or (d) the delegated legislation is arbitrary, unreasonable or contrary to any other statutory

provisions. A delegated legislation or any provision therein may also be struck down if it is so vague that a reasonable interpretation is not possible.

13. The purpose of subordinate legislation is to carry into effect the existing law and not to change it. Therefore, when Parliament delegates legislative functions to the administrative agencies to make rules or regulations, Parliament cannot be said to have permitted the delegate to make arbitrary and unreasonable rules; an unreasonable delegated legislation, in our view, does not carry into effect the parent law. While there are various tests which are applied in determining whether a delegated legislation is unreasonable, in our view, an appropriate test is *"whether the delegated legislation is so unreasonable that Parliament cannot be taken has having authorized it to be made under the Act in question"*.

14. The issue before this Division is whether Rule 2(Ga) and Rule 9(1) of the 2013 Rules should be struck down. The relevant provisions are set out below for ease of reference:

Rule 2(Ga) of the 2013 Rules

"কার্যকর চাকুরীকাল" অর্থ কোন শিক্ষক অধিগ্রহণের পূর্বে একাদিক্রমে যে মেয়াদে চাকুরী করিয়াছেন উহার ৫০%।

তবে শর্ত থাকে যে, কোন শিক্ষক অধিগ্রহণের অব্যবহিত পূর্বে একাদিক্রমে ৪ (চার) বৎসরের কম চাকুরী করিয়া থাকিলে উক্ত চাকুরীকাল হিসাবে গণ্য হইবে না;

Rule 9(1) of the 2013 Rules

৯। শিক্ষকদের জ্যেষ্ঠতা, পদোন্নতি, ইত্যাদি।- (১) বিধি ৪ এর অধীন কোন শিক্ষকের নিয়োগ প্রদানের তারিখ হইতে কার্যকরচাকুরী কালের ভিত্তিতে শিক্ষক পদে তাহার জ্যেষ্ঠতা গণনা করা হইবে এবং উক্ত তারিখের অব্যবহিত পূর্বে নিয়োগবিধির অধীন শিক্ষক পদে সরাসরি নিয়োগপ্রাপ্ত সর্বশেষ ব্যক্তির নিম্নে উক্ত শিক্ষকের অবস্থান নির্ধারিত হইবে।

(২) নিয়োগপ্রদানের পর শিক্ষকগণের পারস্পরিক জ্যেষ্ঠতা তাহাদের স্ব-স্ব কার্যকরচাকুরী কালের ভিত্তিতে নির্ধারণ করিতে হইবে এবং কার্যকরচাকুরীকাল একই বা সমান হইলে তাহাদের নূন্যতম শিক্ষাগত যোগ্যতা অর্জনের বৎসরের এবং উক্ত বৎসর একই হইলে বয়সের ভিত্তিতে জ্যেষ্ঠতা নির্ধারিত হইবে।

(৩) নিয়োগ বিধির শর্ত পূরণ সাপেক্ষে, উপ-বিধি (১) ও (২) এর অধীন জ্যেষ্ঠতার ভিত্তিতে শিক্ষকগণ পদোন্নতি, সিলেকশন গ্রেড এবং প্রযোজ্য টাইম স্কেল প্রাপ্য হইবেন।

15. The effect of Rule 2(Ga) is that if a teacher renders, say 10 years of service prior to nationalization, his effective service period under the 2013 shall be 50% thereof, i.e. 5 years. However, if the particular teacher's term of service is less than 4 years, then his previous service years shall not be counted after the nationalization. The issue is whether this provision, should be struck down.

16. This provision is strange but not unreasonable. The respondents did not offer any explanation on the rationale of Rule 2(Ga) of the 2013 Rules. Regardless, our understanding is as follows: the teachers who are nationalized, shall cease to be private employees and shall be treated as Government employees. They shall be entitled to different Government facilities, including but not limited to pension benefits. We are mindful of the fact that the Government has nationalized hundreds of schools and in the process, affirmed the status of the employees and teachers of those schools as Government employees entitled to pension benefits and other benefits. If Rule 2(Ga) is was drafted differently to take account of the entire period of service prior to nationalization, then it would have had severe financial implications on the Government. Rule 2(Ga) of the 2013 Rules is therefore, in our view, the mechanism used to reduce the financial exposure and at the same time, provide benefits to the teachers. The learned Counsel for the petitioners submits that as a result of Rule 2(Ga) of the 2013 Rules, the petitioners' "rights and entitlements" have been affected to their prejudice and therefore, Rule 2(Ga) should be struck down. Yes, it can be argued that the effect of Rule

2(Ga) is that the petitioners' expectation to service benefits is affected; however, expectation is not synonymous to "rights and entitlement". Loss of expectation of the petitioners cannot be a ground to strike down Rule 2(Ga) of the 2013 Rules.

17. Now, let us consider the legality of Rule 9 of the 2013 Rules. The 2013 Rules apply in respect of the teachers of the nationalized institutions. After nationalization in 2013, the teachers of the newly nationalized schools were absorbed into Government service. The "কার্যকর চাকুরীকাল" of the nationalized teachers would be অধিগ্রহণের পূর্বে একাদিক্রমে যে মেয়াদে চাকুরী করিয়াছেন উহার ৫০%. So, if a teacher was teaching for say, 10 years, in a the school which was nationalized, his "কার্যকর চাকুরীকাল" would be deemed to be 5 years. Rule 9(1) provides that the seniority shall be counted by reference to কার্যকরচাকুরী কালের ভিত্তিতে. We were informed by the learned Counsels for the respondents that after nationalization, appointments can be made directly only. The new direct recruit would not, immediately after his appointment, have চাকুরীকাল of 5 years; the direct appointee must serve as a teacher for 5 years for him to have tenure of service of 5 years. In the meantime, the teacher who was nationalized would be working for 5 more years, as nationalized teacher and his total tenure would be 10 years. However, under Rule 9(1) of the 2013 Rules, the direct appointee shall be senior to the teacher who has been nationalized under the 2013 Rules despite the fact that his tenure of service is less than the tenure of service of the nationalized teacher. This is manifestly absurd, particularly when the teachers directly recruited and nationalized teachers are treated at par. Furthermore, Rule 9(1) of the 2013 Rules provide সরাসরি নিয়োগপ্রাপ্ত সর্বশেষ ব্যক্তির নিম্নে উক্ত শিক্ষকের অবস্থান নির্ধারিত হইবে। We fail to understand the logic behind this. This means that the teacher who has been nationalized, irrespective of his service as nationalized teacher, would never be senior to the direct appointees, irrespective of the date of appointment. (emphasis added)

18. There is an alternative interpretation of Rule 9(1) of the 2013 Rules. The interpretation is that a nationalized teacher would not be junior to the direct appointee, irrespective of the date of appointment of the latter; the nationalized teacher would be junior to the direct appointee who was appointed immediately prior to the appointment of the nationalized teacher. On the face of it, this interpretation seems sound; he who is appointed first should be senior. The problem arises because previous tenure of service in the private schools is recognized by the 2013 Rules. On the date when a nationalized teacher is appointed, he carries forward a deemed tenure of service. Under this interpretation, the deemed tenure of service recognized by first part of Rule 9(1) would cease to be recognized by the second part of Rule 9(1). The problem is illustrated by the following example. Y is a nationalized teacher with work experience of 10 years prior to his appointment under the 2013 Rules in say, 2014. His deemed length of service in 2014 i.e. on the date of his appointment, would be 5 years. Z is a direct appointee. Z is appointed immediately before Y. Z's appointment is in 2013, exactly one year before Y's appointment. In 2014, on the date of Y's appointment, Z's tenure of service would be 1 year. However, because of Rule 9(1) of the 2013 Rules, Y will be deemed to have been in service for 5 years and yet, Y will be regarded as junior to Z because of the following "উক্ত তারিখের অব্যবহিত পূর্বে নিয়োগবিধির অধীন শিক্ষক পদে সরাসরি নিয়োগপ্রাপ্ত সর্বশেষ ব্যক্তির নিম্নে উক্ত শিক্ষকের অবস্থান নির্ধারিত হইবে। The quoted part of Rule 9(1) of the 2013 Rules, in our view, renders the first part of the Rule 9(1) being "শিক্ষকের নিয়োগ প্রদানের তারিখ হইতে কার্যকরচাকুরী কালের ভিত্তিতে শিক্ষক পদে তাহার জ্যেষ্ঠতা গণনা করা হইবে" , redundant.

19. It appears that the teachers who are nationalized are affected because their seniority would not be properly recognized. This is irrespective of how we interpret Rule 9(10 of the 2013 Rules. This in turn would affect their পদোন্নতি, সিলেকশন গ্রেড এবং প্রযোজ্য টাইম স্কেল because

under Rule 9(3) of the 2013 Rules নিয়োগ বিধির শর্ত পূরণ সাপেক্ষে, উপ-বিধি (১) ও (২) এর অধীন জ্যেষ্ঠতার ভিত্তিতে শিক্ষকগণ পদোন্নতি, সিলেকশন গ্রেড এবং প্রযোজ্য টাইম স্কেল প্রাপ্য হইবেন। (emphasis added)

20. We have carefully reviewed the Affidavit in Oppositions filed. Though the legality of Rule 9 was challenged, the respondents did not provide any cogent justification as to why we should not interfere. The respondents also did not set out the rationale behind Rule 9(1) of the 2013 Rules. Even when we pointed out that Rule 9(1) is manifestly absurd for the reasons we have set out aforesaid, the learned Counsels for the respondents could not provide any interpretation, alternative to our interpretations.

21. The learned Counsels pointed out that the 2013 Rules was duly framed under Primary Schools (Taking Over) Act 1974. This is neither here nor there. The executives were empowered by the Primary Schools (Taking Over) Act 1974 to frame Rules and in exercise of the powers so conferred, the respondents framed the 2013 Rules. In the instant case, we are not dealing with any issue relating to procedural irregularity/illegality committed at the time of framing of the 2013 Rules. We are dealing with the issue whether Rule 9(1) and Rule 2(Ga) of the 2013 Rules should be struck down as being unreasonable. We have concluded that Rule 9(1) of the 2013 Rules is manifestly unreasonable and self contradictory and therefore, is liable to be struck down.

22. Before we part with the judgment, we would wish to address three more issues. First, the learned Counsels for the respondents submit that the petitioners are not qualified. However, no documents are annexed in support of the contentions. Even assuming they are not qualified, the 2013 Rules permit the petitioners to gain the requisite qualifications. Rule 4 (1)(kha) reads as follows: কোন শিক্ষকের দফা (ক) তে উল্লিখিত অন্যান্য যোগ্যতা থাকা সত্ত্বেও কেবল প্রয়োজনীয় যোগ্যতা না থাকিলে, আইনের Section 3 এর Sub Section (1) এর অধীন অধিগ্রহণকৃত সংশ্লিষ্ট বিদ্যালয়ের অধিগ্রহণের তারিখ হইতে পরবর্তী ৩ (তিন) বৎসরের মধ্যে উক্ত যোগ্যতা অর্জনের শর্তে নিয়োগ প্রদান করিয়া প্রয়োজনীয় আদেশ জারি করিবে। In the context of Rule 4(1) (kha), প্রয়োজনীয় যোগ্যতা means educational qualification [ Rule 2 (cha)].

23. Secondly, the learned Counsels for the respondents submit that the petitioners preferred series of writ petitions on the same issue. We have reviewed the judgments passed in those writ petitions. The issues raised in those writ petitions are not the same as those raised in the instant writ petition.

24. Thirdly, the learned Counsels submit that the Rule is not maintainable since the petitioners, as Government employees, should have subjected themselves to the jurisdiction of Administrative Tribunal. This argument is devoid of any merit. The petitioners have, in the instant writ petition, challenged among others, the legality of Rule 2(Ga) and Rule 9 (1) of the 2013. This is not a matter for Administrative Tribunal.

25. In view of the above, we are inclined to hold that there is merit in the Rule. The Rule is made absolute in part.

26. It is declared that:

(i) Rule 2(Ga) of the 2013 Rule is not illegal; and

(ii) The following in Rule 9(1), being এবং উক্ত তারিখের অব্যবহিত পূর্বে নিয়োগবিধির অধীন শিক্ষক পদে সরাসরি নিয়োগপ্রাপ্ত সর্বশেষ ব্যক্তির নিম্নে উক্ত শিক্ষকের অবস্থান নির্ধারিত হইবে is illegal and without lawful authority.

27. In light of the above, the respondents directed to confer seniority to the petitioners and henceforth determine the seniority and benefits payable to them by reference to "কার্যকর চাকুরীকাল" as defined in Rule 2 (Ga) of the 2013 Rules. With respect to those petitioners who are Headmasters, the respondents are further directed to treat them and not the junior direct appointees as Headmasters and publish appropriate orders(s) if necessary.

**UNQUOTE (Judgment passed in Writ Petition No. 14344 of 2017)**

28. In line with the aforesaid judgment, the Rule is made absolute in part with similar direction.

29. It is declared that:

(i) Rule 2(Ga) of the 2013 Rule is not illegal; and

(ii) The following in Rule 9(1), being এবং উক্ত তারিখের অব্যবহিত পূর্বে নিয়োগবিধির অধীন শিক্ষক পদে সরাসরি নিয়োগপ্রাপ্ত সর্বশেষ ব্যক্তির নিম্নে উক্ত শিক্ষকের অবস্থান নির্ধারিত হইবে is illegal and without lawful authority.

30. In light of the above, the respondents directed to confer seniority to the petitioner and henceforth determine the seniority and benefits payable to him by reference to "কার্যকর চাকুরীকাল" as defined in Rule 2 (Ga) of the 2013 Rules. The respondents are further directed to treat the petitioner and not the junior direct appointee as Headmaster and publish appropriate orders(s) if necessary, through official gazette.

31. Communicate the Judgment and Order at once for immediate compliance.

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**(SPECIAL ORIGINAL JURISDICTION)**

WRIT PETITION NO. 11826 OF 2018
WITH
WRIT PETITION NO. 11827 OF 2018
AND
WRIT PETITION NO. 11828 OF 2018

**Md. Golam Morshed**
.....Petitioner

(In all the Writ Petitions)

-Versus-

**Court of the Executive Magistrate and General Certificate Officer, Dhaka, Deputy Commissioner's Office Building, Dhaka and another**
..... Respondents

Mr. Taposh Kumar Dutta, Advocate
....For the respondent no. 2 in all the Writ Petition Nos. 11826 of 2018, 11827 of 2018 and 11828 of 2018

Heard on 31.10.2019 and 06.11.2019.
Judgment on 13.11.2019.

**Present:**
**Mr. Justice Moyeenul Islam Chowdhury**
**-And-**
**Mr. Justice Khandaker Diliruzzaman**

**Sentence of Fine: whether it is a Public Demand;**
**Unquestionably the sentence of fine passed by any Criminal Court is not a "public demand" within the meaning of the Public Demands Recovery Act, 1913. As it is not a "public demand" within the meaning of the Public Demands Recovery Act, the question of realization of the fine amounts through initiation of the Certificate Case is out of the question. Such Certificate cases are an abuse of the process of law. ... (Para 14)**

**The realization of any fine amount under any sentence of fine of any Criminal Court cannot be effected by resorting to the provisions of the Public Demands Recovery Act, 1913. ... (Para 15)**

**JUDGMENT**

**MOYEENUL ISLAM CHOWDHURY, J:**

1. As the facts and circumstances of all the 3(three) Writ Petition Nos. 11826 of 2018, 11827 of 2018 and 11828 of 2018 are virtually one and the same, they have been heard together and are disposed of by this consolidated judgment.

2. In all the 3(three) Writ Petition Nos. 11826 of 2018, 11827 of 2018 and 11828 of 2018, Rules Nisi were issued calling upon the respondents to show cause as to why the initiation and continuation of the proceedings of the Certificate Case Nos. 427 (Fine) of 2015, 428 (Fine) of 2015 and 429 (Fine) of 2015, now pending before the Executive Magistrate and the

General Certificate Officer, Dhaka should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

3. Facts relevant to the disposal of all the 3(three) Rules Nisi may be, briefly, stated as follows:

The respondent no. 2 Md. Anowarul Kabir initiated C. R. Case Nos. 1228 of 2011, 1196 of 2011 and 1197 of 2011 against the petitioner under section 138 of the Negotiable Instruments Act, 1881 which were subsequently registered as Dhaka Metropolitan Sessions Case Nos. 3795 of 2012, 3797 of 2012 and 3798 of 2012 respectively. During the trial of all the 3(three) Metropolitan Sessions Cases, the petitioner was present and he cross-examined the prosecution witnesses; but at the time of pronouncement of judgments by the Metropolitan Joint Sessions Judge, 1st Court, Dhaka, the petitioner was absent. However, all the cases having been proved to the hilt, the Metropolitan Joint Sessions Judge, 1st Court, Dhaka by her judgments dated 27.08.2015 convicted the accused-petitioner under section 138 of the Negotiable Instruments Act and sentenced him thereunder to suffer simple imprisonment for 1(one) year and to pay fines of different amounts of money in each case. As the judgments of the Metropolitan Sessions Cases were pronounced in absentia, the convict-petitioner could not be sent to jail by the convicting Court along with warrants of commitment. Anyway, subsequently the convict-petitioner was hunted down by the police on 18.02.2016. From that date (18.02.2016), he started undergoing the sentences imposed upon him till he was granted bail by an order dated 14.08.2018 passed by the High Court Division in Writ Petition No. 10876 of 2018. Thereafter the legality of the order dated 14.08.2018 was challenged by the respondent no. 2 before the Appellate Division in Civil Petition For Leave To Appeal No. 4711 of 2018. The Appellate Division, by its order dated 24.01.2019, directed the petitioner Md. Golam Morshed to surrender before the 1st Court of Metropolitan Joint Sessions Judge, Dhaka within 2(two) weeks, failing which, the said Court could take appropriate steps to bring him in jail custody. In response to the direction dated 24.01.2019 given by the Appellate Division in Civil Petition For Leave To Appeal No. 4711 of 2018, the convict-petitioner did not surrender before the trial Court within 2(two) weeks; rather he is still on the run as a convict.

4. As admittedly the convict-petitioner is a fugitive from law till date, we cannot hear the learned Advocate Mr. M. Atikur Rahman engaged on his behalf.

5. Since the convict-petitioner flouted the order of the Appellate Division to surrender before the 1st Court of Metropolitan Joint Sessions Judge, Dhaka within 2(two) weeks as rendered in Civil Petition For Leave To Appeal No. 4711 of 2018, he cannot prosecute the Rules Nisi issued in all the 3(three) Writ Petitions, that is to say, Writ Petition Nos. 11826 of 2018, 11827 of 2018 and 11828 of 2018.

6. Be that as it may, since an important question of law has arisen in all the 3(three) Writ Petitions with regard to realization of fine in accordance with section 386 of the Code of Criminal Procedure, 1898, we are inclined to dispose of all the Rules on merit.

7. Indisputably the petitioner was convicted under section 138 of the Negotiable Instruments Act, 1881 and sentenced thereunder to suffer simple imprisonment for 1(one) year and to pay a fine of Tk. 2,00,00,000/- (two crore) in Metropolitan Sessions Case No.

3798 of 2012 by the 1st Court of Metropolitan Joint Sessions Judge, Dhaka on 27.08.2015. The petitioner was also convicted under section 138 of the Negotiable Instruments Act and sentenced thereunder to suffer simple imprisonment for 1(one) year and to pay a fine of Tk. 30,50,00,000/ (thirty crore fifty lac) in Metropolitan Sessions Case No. 3797 of 2012 by the same Court on the self-same date (27.08.2015). Besides, the petitioner was further convicted under section 138 of the Negotiable Instruments Act and sentenced thereunder to suffer simple imprisonment for 1(one) year and to pay a fine of Tk. 31,01,62,000/- (thirty-one crore one lac and sixty-two thousand) in Metropolitan Sessions Case No. 3795 of 2012 by the same Court on that very date (27.08.2015). Undeniably the judgments of the Metropolitan Joint Sessions Judge, 1st Court, Dhaka were pronounced in absentia. Anyway, the convict-petitioner was tracked down by the police on 18.02.2016 and produced before the convicting Court and the convicting Court sent him to jail in order to serve out the sentences imposed upon him in all the 3(three) Metropolitan Sessions Cases.

8. Mr. Taposh Kumar Dutta, learned Advocate appearing on behalf of the respondent no. 2-complainant, submits that for the purpose of realization of fine amounts from the convict-petitioner, the provisions of section 386(1)(b) and (3) of the Code of Criminal Procedure, 1898 are definitely attracted; but he candidly concedes that as the amounts of fine can be realized by execution according to the civil process against the moveable or immovable property, or both of the convict-petitioner, the impugned proceedings, that is to say, Certificate Case Nos. 427 (Fine) of 2015, 428 (Fine) of 2015 and 429 (Fine) of 2015 are *coram non judice* and as those Certificate Cases are 'de hors' the law, those are void and liable to be quashed.

9. We have heard the learned Advocate Mr. Taposh Kumar Dutta and perused the Writ Petitions, Supplementary Affidavits, Affidavits-in-Opposition and relevant Annexures annexed thereto. We have gone through the provisions of section 386 of the Code of Criminal Procedure with a fine tooth-comb.

10. It will be profitable for us if we quote the relevant provisions of section 386 (1)(b) and (3) of the Code of Criminal Procedure verbatim:

> "386. (1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may–
>
> (a) **...**
>
> (b) issue a warrant to the Collector of the District authorizing him to realize the amount by execution according to civil process against the movable or immovable property, or both of the defaulter.
>
> (2) **...**
>
> (3) Where the Court issues a warrant to the Collector under sub-section(1), clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decree shall apply accordingly:
>
> Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

11. Moreover, Rule 201(4) of the Criminal Rules and Orders (Practice and Procedure of Subordinate Courts), 2009 provides that a warrant issued under clause (b), sub-section (1) of

section 386 of the Code of Criminal Procedure for the levy of a fine shall be directed to the Collector of the concerned district authorizing him to realize the amount by execution according to the civil process as provided by the Code of Civil Procedure, 1908.

12. Hence it leaves no room for doubt that when an offender has been sentenced to pay a fine, the Court passing the sentence may take action for recovery of the fine in either of the ways as stipulated in clause (a) or clause (b) of sub-section (1) of section 386. As the convicting Court issued warrants to the Collector of Dhaka authorizing him to realize the fine amounts by execution according to the civil process against the properties of the convict-petitioner, the warrants so issued, as per section 386(3) of the Code of Criminal Procedure, shall be deemed to be decrees and the Collector to be the decree-holder within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly.

13. From the analysis as above, it is crystal clear that the warrants issued to the Collector of Dhaka by the convicting Court are deemed to be decrees and the nearest Civil Court of that District shall execute the decrees according to the provisions of the Code of Civil Procedure as to execution of decrees. But in order to realize the fine amounts from the offender, that is to say, the convict-petitioner, the Collector of the District (in this case, Dhaka) may not be in a position to know the particulars of his movable and immovable properties for execution of the decrees in accordance with the provisions of the Code of Civil Procedure. In order to obviate this difficulty, the respondent no. 2-complainant shall be at liberty to furnish the particulars of the movable and immovable properties of the convict-petitioner to the Collector of Dhaka District for proper and effectual execution of the decrees according to the civil process.

14. The Public Demands Recovery Act, 1913 (Act No. III of 1913) was enacted in order to consolidate and amend the law relating to the recovery of public demands in Bangladesh. The term "public demand" has been defined in sub-section (6) of section 3 of the Public Demands Recovery Act, 1913. As per that sub-section (6) of section 3, "public demand" means any arrear or money mentioned or referred to in Schedule I, and includes any interest which may, by law, be chargeable thereon up to the date on which a certificate is signed under part II. Unquestionably the sentence of fine passed by any Criminal Court is not a "public demand" within the meaning of the Public Demands Recovery Act, 1913. As it is not a "public demand" within the meaning of the Public Demands Recovery Act, the question of realization of the fine amounts through initiation of the Certificate Case Nos. 427(Fine) of 2015, 428(Fine) of 2015 and 429(Fine) of 2015 is out of the question. So those Certificate Cases, now pending before the General Certificate Officer, Dhaka, are an abuse of the process of law. The General Certificate Officer should have been aware of the relevant provisions of section 386 of the Code of Criminal Procedure and accordingly he should have sent the warrants back to the Collector of Dhaka for realization of the fine amounts in accordance therewith.

15. What we are driving at boils down to this: the realization of any fine amount under any sentence of fine of any Criminal Court cannot be effected by resorting to the provisions of the Public Demands Recovery Act, 1913. As the Certificate Case Nos. 427(Fine) of 2015, 428(Fine) of 2015 and 429(Fine) of 2015 are *coram non judice* and an abuse of the process of law, they need to be quashed forthwith. Therefore all the Certificate Cases being Nos.

427(Fine) of 2015, 428(Fine) of 2015 and 429(Fine) of 2015, now pending before the General Certificate Officer, Dhaka, are hereby quashed. The Collector of Dhaka is directed to realize the amounts of fine from the convict-petitioner in accordance with the provisions of section 386(1)(b) and (3) of the Code of Criminal Procedure, 1898 as discussed in the body of this judgment.

16. With the above observations and findings, all the Rules are disposed of with costs of Tk. 1,00,000/- (one lac) to be realized from the convict-petitioner according to law for giving a damn to the order of surrender dated 24.01.2019 passed by the Appellate Division in the Civil Petition For Leave To Appeal No. 4711 of 2018.

17. Let a copy of this judgment be immediately transmitted to the Collector of Dhaka and the General Certificate Officer, Dhaka (respondent no. 1) for information and necessary action.

18. Let a copy of this judgment be also immediately transmitted to all the District Collectors of Bangladesh for information and necessary guidance.

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**(CRIMINAL APPELLATE JURISDICTION)**

Criminal Appeal No. 6513 of 2019

**Md. Ibrahim**
----- Accused-appellant

Mr. Md. Hasibur Rahman, Advocate
---------for the appellant

-Versus-

Mr. Md. Mozibur Rahman, A.A.G.
.....For the State

**The State**
------- Respondent

Heard on: 23.07.2019,16.10.2019 and Judgment on: 23.10.2019

**Present:**
**Mr. Justice Md. Habibul Gani**
**And**
**Mr. Justice Md. Badruzzaman.**

**Under section 9(4)(Kha) of Nari-O-Shishu Nirjatan Daman Ain 2000 (as amended in 2003);**
**FIR, Misuse of the privilege of bail, Ad-interim bail, Non-extension of bail, Section 498 of the Cr. P.C;**
**It is settled principle that bail is a very valuable right granted to an accused by the Court and once it is granted, it should not and ought not to be interfered with lightly except upon valid grounds and cogent reasons. ... (Para 10)**

**When an accused is enjoying the privilege of bail granted by the High Court Division for a limited period in a pending *rule* under section 498 of the Cr.P.C or in an appeal under special law, as the case may be, and he is regularly appearing before the Court below his bail cannot be cancelled and cannot be taken him into jail custody by the Court below only on the ground of non-extension of the period of bail by the High Court Division. If such situation arises, the Court below must wait for the result of the *rule* or the appeal, as the case may be, in which the accused was granted ad-interim bail.**
**... (Para 12)**

**JUDGMENT**

**Md. Badruzzaman, J**:

1. This appeal has been directed against order dated 19.06.2019 passed by the learned Judge of Nari-O-Shishu Nirjatan Daman Tribunal No.5, Chattogram in Nari-O-Shishu Case No. 79 of 2019 arising out of Chandgaon Police Station Case No. 23 dated 16.05.2018 corresponding to G.R. No. 135 of 2018 under section 9(4)(Kha) of Nari-O-Shishu Nirjatan Daman Ain, 2000 ( as amended in 2003), now pending in the said Tribunal.

2. Relevant facts for the purpose of disposal of this appeal are that one Md. Abu Bakkar Chowdhury as informant lodged FIR with Chandgaon Police Station, Chattogram against the accused appellant on the allegation of outraging modesty of his minor son namely Md. Ratul Sabur Chowdhury (aged about 08 years) and the allegation was registered with the said police station as Chandgaon Police Station Case No. 23 dated 16.05.2018 under section

9(4)(Kha) of Nari-O-Shishu Nirjatan Daman Ain, 2000. On the same date of lodging FIR on 16.05.2018, this accused-appellant was arrested by the police and was taken into custody. Thereafter, the accused appellant filed Criminal Miscellaneous Case No. 41360 of 2018 before this Court under section 498 of the Code of Criminal Procedure praying bail and after hearing, this Court vide order dated 07.09.2018 issued *rule* and enlarged the accused appellant on ad-interim bail for a period of 6(six) months.

3. Upon getting bail, the accused appellant was released from the custody and he was appearing before the Court below. In the meantime, the police, after investigation, submitted charge sheet under the aforementioned section of law against the accused-appellant and the case was transferred for trial to Nari-O-Shishu Nirjatan Daman Tribunal No.5, Chattogram. Then the accused-appellant voluntarily surrendered before the Tribunal on 19.06.2019 and prayed for bail and the Tribunal, upon hearing, vide order dated 19.06.2019 refused to accept his surrender, cancelled his bail and took him into jail custody with a finding that the bail which was granted in Criminal Miscellaneous Case No. 41360 of 2018 for a period of 6(six) months, in the meantime, has expired and as such, the accused-appellant is not entitled to continue with the bail granted by the High Court Division. Challenging the legality of the said order dated 19.06.2019 the accused-appellant has preferred this appeal and prayed for bail and this appeal was duly appeared in the list and after hearing, this Bench vide order dated 26.06.2019 admitted the appeal and enlarged the accused-appellant on ad-interim bail for a period of 3(three) months which is still continuing.

4. At the time of admission of this appeal, this Court found that though the accused-appellant was present before the Tribunal after obtaining bail from this Court but the Tribunal cancelled his bail and took him into jail custody on the plea that he could not produce bail extension order from this Division though there was no allegation of misuse of the privilege of bail against the accused appellant. In that view of the matter, this Court vide order dated 26.6.2019 directed the concerned learned Judge of the Tribunal to appear before this Court personally on 14.07.2019 and to explain his position in respect of his order of cancellation of bail of the accused-appellant which was granted by the High Court Division while there was no allegation of misuse of the privilege of bail against the accused-appellant as well as he, on surrender, was present before him. After receiving the order, the learned presiding Judge of the said Tribunal duly appeared before us and submitted his written explanation stating that he could not understand the spirit of law regarding bail granted by this Division and sought unconditional apology and after hearing the learned Judge in-person and by taking the matter leniently and accepting his unconditional apology we have exonerated him vide order dated 21.07.2019 and fixed this matter for hearing on merit.

5. Mr. Md. Hasibur Rahman, learned Advocate appearing for the accused-appellant submits that the Tribunal committed illegality in cancelling the bail of the accused-appellant without allegation of misuse of the privilege of bail granted by the High Court Division. Learned Advocate further submits that due to non-extension of bail by the concern Advocate of the High Court Division, the accused-appellant should not have suffered and the learned Judge of the Tribunal should have allowed the accused-appellant to continue with his bail because of the fact that he was very much present before the Tribunal and as such, the impugned order is illegal and liable to be set aside.

6. Mr. Md. Mozibur Rahman, learned A.A.G. appearing on behalf of the State found it difficult to refute the submission of the learned Advocate for the accused-appellant.

7. We have heard the learned Advocates and perused the materials available on record.

8. Considering the submissions of the learned Advocates and the materials on record a question arises whether, after granting bail by the High Court Division for a limited period, the Courts below have got any authority to cancel the bail on the ground of non-extension of bail by the learned Advocate of the High Court Division or whether, an ad-interim bail granted by the High Court Division to an accused for a limited period, can be cancelled, on its expiry, by the Courts below without any allegation of misuse of the privilege of the bail by the accused.

9. In the recent years, we have been noticing that a common practice has been developed among the learned Judges of the Courts below to the effect that in exercising criminal jurisdiction, they have been frequently cancelling the ad-interim bail of accused persons granted by the High Court Division and taking the accused persons into jail custody despite that accused persons have been regularly appearing before the Court below and very much present therein without any allegation of misuse. It appears that learned Judges are usually cancelling the bail on the ground that the accused persons had not extended the period of bail from the High Court Division. Due to such cancellation miscellaneous cases and appeals, as the case may be, are increasing day by day in the High Court Division and litigant public are also suffering a lot both financially and physically.

10. It is settled principle that bail is a very valuable right granted to an accused by the Court and once it is granted, it should not and ought not to be interfered with lightly except upon valid grounds and cogent reasons. In this regards we may refer the case of Hasina Akhter vs Md. Raihan reported in 66 DLR 298 where a Division Bench of this Court held that bail of an accused may be cancelled and committed him to jail for five reasons : i) where the person on bail during the period of bail commits the very same offence for which he is being tried or has been convicted; ii) if he hampers the investigation iii) if he tempers with the evidence iv) if he runs away to a foreign country or goes underground or beyond the control of his sureties and v) if he commits acts of violence or revenge.

11. In that view of the matter, we are of the view that when an accused on bail is present before a Court on surrender or otherwise and there is no allegation of misuse of the privilege of bail, the concern Court is competent enough to allow the accused to continue with the bail granted by the higher Court. Mere non-extension of bail by the learned engaged Advocate of the higher Court cannot be a ground for cancelling his bail granted by this Court because a litigant cannot be suffered for the fault of his lawyer.

12. At trial stage of a criminal case, if any accused is enlarged on ad-interim bail by the High Court Division for a limited period and the rule or appeal remains pending before the High Court Division and the accused is regularly appearing before the Court below without any allegation of misuse of the privilege of bail, his bail cannot be cancelled by the Court below only on the ground of expiry of the period of bail or on the ground that the accused could not submit extension order from the High Court Division. In other words, when an accused is enjoying the privilege of bail granted by the High Court Division for a limited period in a pending *rule* under section 498 of the Cr.P.C or in an appeal under special law, as the case may be, and he is regularly appearing before the Court below his bail cannot be cancelled and cannot be taken him into jail custody by the Court below only on the ground of non-extension of the period of bail by the High Court Division. If such situation arises, the Court below must wait for the result of the *rule* or the appeal, as the case may be, in which the accused was granted ad-interim bail. We are of the view that there should be a proper

guideline in this regards from the Registrar General of Bangladesh Supreme Court to be followed by the inferior Courts of the country having exercising criminal jurisdiction.

13. Now we are going to giving our decision regarding the case in hand. Admittedly, the accused appellant obtained bail from this Court for a period of 6(six) months in a pending *rule* under section 498 of the Cr.P.C vide order dated 7.9.2018 and during pendency of the *rule* he had been appearing before the concern Magistrate regularly without any allegation of misuse and after submission of police report, the case has been transferred to Nari-O-Shishu Nirjatan Daman Tribunal and immediate after transfer, the accused appellant voluntarily surrendered before the Tribunal on 19.6.2019 with a prayer for continuation of his bail but the Tribunal cancelled his bail and took him into jail custody on the ground that the period of his bail was expired. We have carefully gone through the impugned order and other relevant papers. It appears that there was neither any allegation of misuse of the privilege of bail by the accused appellant granted by this Division nor any other ground for which his bail could be cancelled. Moreover, the *rule* in which the accused appellant was enlarged on bail was, at the relevant time, pending for disposal. The learned Judge of the Tribunal without appreciating the settled principle of law on this point cancelled the bail of the accused appellant on the ground which does not fall within the category for which a bail of an accused can be cancelled. Accordingly, we are of the view that the cancellation of bail by the learned Judge of the Tribunal was illegal and the same cannot be sustained.

14. Accordingly, we find merit in this appeal.

15. In the result, the appeal is allowed. The accused-appellant will continue with his bail till conclusion of the trial of the case.

16. However, the Court below would be at liberty to cancel the bail of the accused appellant if he misuses the privilege of bail in any manner.

17. The Registrar General of Bangladesh Supreme Court is hereby directed to issue a "General Circular" to all the Judges/ Magistrates having exercising criminal jurisdiction containing the following directions:

1. The Court below shall not cancel the bail of an accused granted by the High Court Division without any allegation of proven misuse of the privilege of bail by the accused.
2. When an accused is enjoying the privilege of ad-interim bail granted by the High Court Division for a limited period in a pending *rule* under section 498 of the Cr.P.C or in an appeal against under special law and he/she is regularly appearing before the Court below, his/her bail shall not be cancelled and cannot be taken him/her into jail custody by the Court below only on the ground that he/she could not submit bail extension order from the High Court Division.
3. In the event of unavailability of such extension order, the Courts below must wait for the result of the *rule* or the appeal, as the case may be, in which the accused was granted ad-interim bail.
4. Learned Judges of the Courts below shall not cancel bail of an accused granted by the High Court Division in pending rule or appeal until and unless the rule is discharged or the appeal is dismissed or in any way the accused violates any condition of bail, if any, imposed by the High Court Division at the time of granting bail"

18. Office is hereby directed to communicate a copy of this judgment to the Registrar General of the Supreme Court at once.

১৪ স্কব [২০২০] হাইকোর্ট বিভাগ

ফৌজদারী রিভিশন মামলা নং-১৫৭২/২০১৯
সঙ্গে
ফৌজদারী রিভিশন মামলা নং-১৮৯৮(স্যুয়-মটো)/২০১৯

**মোঃ নাজমুল হুদা ওরফে নাজমুর হুদা**
.....সংবাদদাতা-দরখাস্তকারী।
বনাম

**রাষ্ট্র এবং অন্য**
.....প্রতিপক্ষগণ।

জনাব মোহাম্মদ হোসেন, অ্যাডভোকেট
.....দরখাস্তকারীর পক্ষে।

জনাব মোঃ সারওয়ার হোসেন, ডেপুটি অ্যাটর্নি জেনারেল

মিস মৌদুদা বেগম, অ্যাসিস্টেন্ট অ্যাটর্নি জেনারেল
মিস হাসিনা মমতাজ, অ্যাসিস্টেন্ট অ্যাটর্নি জেনারেল
মিস শাহানা পারভীন, অ্যাসিস্টেন্ট অ্যাটর্নি জেনারেল
.....প্রতিপক্ষ নং-১ এর পক্ষে।

জনাব এ.এম. আমিন উদ্দিন, অ্যাডভোকেট সঙ্গে
জনাব মোঃ রবিউল আলম (বুদু), অ্যাডভোকেট
.....প্রতিপক্ষ নং-২ এর পক্ষে।

শুনানীর তারিখঃ ২১/০৮/২০১৯; ০৬ শ্রাবণ ১৪২৬ বঙ্গাব্দ
রায়ের তারিখ ঃ ২৯/০৮/২০১৯; ১৪ শ্রাবণ ১৪২৬ বঙ্গাব্দ

**উপস্থিতঃ**
**বিচারপতি জনাব এম. ইনায়েতুর রহিম**
**এবং**
**বিচারপতি জনাব মোঃ মোস্তাফিজুর রহমান**

**দ্য কোড অব ক্রিমিনাল প্রসিডিউর, ১৮৯৮ এর ধারা ২৬৫সি;**

আদালত দ্য কোড অব ক্রিমিনাল প্রসিডিউর, ১৮৯৮ এর ধারা ২৬৫সি এর বিধান অনুযায়ী তখনই একজন আসামীকে মামলা হতে অব্যাহতি দিতে পারবেন যদি নথি (রেকর্ড) এবং তৎসঙ্গে দাখিলকৃত কাগজাদি (documents submitted therewith) হতে প্রাথমিক দৃষ্টিতেই যদি দেখা যায় যে, ঐ আসামীর বিরুদ্ধে মামলার কার্যক্রম পরিচালনা করার জন্য পর্যাপ্ত কোন উপাদান (Sufficient ground for proceeding) নেই। আসামী পক্ষ শুধুমাত্র মামলার নথি এবং তৎসঙ্গে দাখিলকৃত কাগজাদির উপর তাঁর বক্তব্য উপস্থাপনের অধিকারী। এ পর্যায়ে আসামীর দাখিলকৃত আত্মপক্ষ সমর্থনে কৈফিয়তের কাগজাদি বা বক্তব্য কিংবা আসামীর পেশা, পদবি বা অবস্থা (status) বিবেচনা করার সুযোগ নেই।

কোন আসামীর বিরুদ্ধে অভিযোগের প্রাথমিক/আপাত যথার্থতা থাকলে ( prima facie case) অভিযোগ গঠন পর্যায়ে তাঁকে অব্যাহতি দেয়ার কোন সুযোগ নেই। অভিযোগ গঠন পর্যায়ে আসামীর বিরুদ্ধে আনীত আপাতদৃষ্ট অভিযোগটি সত্য কিংবা মিথ্যা তা নির্ধারণ করার সুযোগ নেই; সেটি নির্ধারণ হবে বিচার প্রক্রিয়ার শেষে উপস্থাপিত সাক্ষ্য প্রমাণের ভিত্তিতে।

**রায়**

**বিচারপতি এম. ইনায়েতুর রহিম**

১. সংবাদদাতা-দরখাস্তকারী কর্তৃক দাখিলকৃত ফৌজদারী কার্যবিধির ধারা ৪৩৯ এবং ৪৩৫ মতে দরখাস্তের প্রেক্ষিতে ফৌজদারী রিভিশন নং-১৫৭২/২০১৯ মামলার রুলটি প্রতিপক্ষগণের উপর জারি করে এই মর্মে কারণ দর্শাতে বলা হয় যে, কেন নড়াইলের বিজ্ঞ দায়রা জজ কর্তৃক দায়রা মামলা নং-৯৩/২০১৮-এ প্রদত্ত ১০/০৬/২০১৯ইং তারিখের আদেশ, যার দ্বারা ফৌজাদরী কার্যবিধির ধারা ২৬৫সি অনুসারে আনীত দরখাস্ত মঞ্জুরক্রমে প্রতিপক্ষ নং-২ কে মামলা হতে অব্যাহতি দেয়া হয়েছে, রহিত/বাতিল করা হবে না বা অত্র আদালতের বিবেচনায় যথাযথ প্রচারযোগ্য এতদ্‌সংশ্লিষ্ট অন্যবিধ আদেশ বা অধিকতর আদেশ বা আদেশ সমূহ প্রচারিত হবে না।

২. রুলটি ইস্যুর সময়ে প্রতিপক্ষ নং-২ কে ২(দুই) সপ্তাহের মধ্যে নিম্ন আদালতে আত্মসমর্পনের নির্দেশ দেয়া হয়।

৩. অত্র আদালতের নির্দেশনা অনুযায়ী প্রতিপক্ষ নং-২ ০৭/০৭/২০১৯ইং তারিখে নড়াইলের বিজ্ঞ দায়রা জজ আদালতে আত্মসমর্পণ করলে বিজ্ঞ দায়রা জজ (ভারপ্রাপ্ত) তাঁকে জামিন প্রদান করেন। সে প্রেক্ষিতে অত্র আদালত ৩০/০৭/২০১৯ইং তারিখে স্বেচ্ছা প্রনোদিত হয়ে স্যুয়-মটো রুল এই মর্মে জারী করে যে, প্রতিপক্ষ নং-২ কে প্রদত্ত জামিন কেন বাতিল করা হবে না

বা অত্র আদালতের বিবেচনায় যথাযথ প্রচারযোগ্য এতদ্‌সংশ্লিষ্ট অন্যবিধ আদেশ বা অধিকতর আদেশ বা আদেশ সমূহ প্রচারিত হবে না।

৪. ফৌজদারী রুলটি জারীর সময়ে অত্র আদালত প্রাথমিকভাবে অভিমত ব্যক্ত করে যে,

"তর্কিত আদেশ পর্যালোচনায় প্রাথমিক ভাবে প্রতীয়মান হয়েছে যে, বিজ্ঞ দায়রা জজ, নড়াইল এজাহার ও অভিযোগপত্রে আসামীর বিরুদ্ধে সুনির্দিষ্ট অভিযোগ থাকা সত্ত্বেও, যা ময়না তদন্ত প্রতিবেদন দ্বারা সমর্থিত, আসামী কর্তৃক দাখিলকৃত আত্মপক্ষ সমর্থনে কৈফিয়তের কাগজাদি/বক্তব্য (defence materials/plea) বিবেচনায় নিয়ে আসামীকে অভিযোগ গঠন পর্যায়ে মামলা হতে অব্যাহতি দিয়েছেন। আসামীর আত্মপক্ষ সমর্থনে কৈফিয়তের কাগজাদি বিবেচনায় নিয়ে অভিযোগ গঠন পর্যায়ে আসামীকে মামলা হতে অব্যাহতি প্রদান কোন ভাবেই আইন সংগত নয় এবং প্রচলিত আইন এবং সুপ্রতিষ্ঠিত আইনি নীতির (Legal Proposition) সুস্পষ্ট লংঘন। একজন দায়রা জজের নিকট এ ধরনের আদেশ প্রত্যাশিত নয়।"

৫. উপরোক্ত অভিমত বিবেচনায় নিয়ে অত্র আদালত নড়াইল-এর বিজ্ঞ দায়রা জজ জনাব শেখ আব্দুল আহাদ-কে 'প্রতিপক্ষ নং-২ কে আইন বহির্ভূত ভাবে মামলা হতে অব্যাহতি প্রদান করায় কেন তাঁর বিচারিক ক্ষমতা প্রত্যাহার করা হবে না'- তা অত্র আদালতকে লিখিতভাবে ব্যাখ্যা প্রদানের জন্য নির্দেশ প্রদান করা হয়।

৬. ন্যায় বিচারের স্বার্থে উভয় রুল একত্রে শুনানীর জন্য গ্রহণ করা হয় এবং একই রায়ের মাধ্যমে রুল দুটি নিষ্পত্তি করা হলো।

৭. রুল দু'টি নিষ্পত্তির স্বার্থে নিম্নোক্ত প্রাসঙ্গিক তথ্য সমূহ বিবৃত করা আবশ্যকঃ

বর্তমান দরখাস্তকারী সংবাদদাতা হিসেবে ১১/০২/২০১৫ইং তারিখ তাঁর ভাই এনামুল শেখের হত্যার বিষয়ে প্রতিপক্ষ নং-২ সহ সর্বমোট ৬৮ জনের নাম উল্লেখে নড়াইল জেলার কালিয়া থানায় একটি এজাহার দায়ের করেন, যা কালিয়া থানার মামলা নং-০৫ তাং-১১/০২/২০১৫ইং; দন্ডবিধির ধারা ১৪৩/৩২৩/৩২৪/৩২৫/৩২৬/৩০৭ /৩০২/৩৪/১১৪ হিসেবে নিবন্ধিত হয়।

৮. এজাহারে উল্লেখ করা হয় যে, ১০/০২/২০১৫ইং তারিখ সকাল আনুমানিক ৮.০০ ঘটিকার সময় এজাহার নামীয় সকল আসামীগণ বন্ধুক, শর্টগান, পাইপ গান, রিভলবার, ছ্যান দা, ভেলা, সড়কী, চাইনিজ কুড়াল, চাপাতি লোহার রড, বাঁশের লাঠি ইত্যাদি মারনাস্ত্রে সজ্জিত হয়ে বে-আইনীভাবে সংগঠিত হয়ে বড় নাল বাজারের পশ্চিম উত্তর পার্শ্বে চন্ডিনগর সরকারি প্রাথমিক বিদ্যালয়ের রাস্তায় সংবাদদাতা ও তাঁর ছোট দুই ভাই সহ তাঁর পক্ষের লোকজনের উপর আক্রমণ করে। আসামী খায়রুল শেখ এক নালা বন্ধুক দিয়ে গুলি করে সংবাদদাতার ছোট ভাই এনামুলের বুকের বাম পার্শ্বে, বাম কাধে ও বাম বাহুর গোড়ায় গুরুত্বর রক্তাক্ত জখম করে। ভিকটিম এনামুল মাটিতে পড়ে গেলে আসামী মনিরুল ইসলাম রিভলবার দিয়ে এনামুলের বাম কানের গোড়ায় গুলি করে, যা বাম কানে সোজা প্রবেশ করে ডান কানের গোড়া দিয়ে বেরিয়ে যায়। আসামী মাঝহারুল ইসলাম মাঝা (বর্তমান প্রতিপক্ষ নং-২) পাইপ গান দিয়ে ভিকটিম এনামুলের বুকের বাম পার্শ্বে এবং বাম স্তনের উপরে গুলি করে রক্তাক্ত জখম করে এনামুলের মৃত্যু নিশ্চিত করে। ভিকটিম এনামুল বি.এল. কলেজে মাস্টার্সের ফাইন বর্ষের ছাত্র ছিল। অন্যান্য আসামীরা বিভিন্ন অস্ত্র দ্বারা সংবাদদাতার পক্ষের অন্যান্য লোকজনকে আক্রমণ করে বিভিন্ন ধরনের গুরুতর রক্তাক্ত জখম করে।

৯. পুলিশ মামলার তদন্ত শেষে বিগত ৩০/০১/২০১৭ইং তারিখে প্রাথমিক সাক্ষ্য প্রমানের ভিত্তিতে বর্তমান প্রতিপক্ষ নং-২ সহ সর্বমোট ৬৮ জনের বিরুদ্ধে দন্ডবিধির ধারা ১৪৩/৩২৩/৩২৪/৩২৫/৩২৬/৩০৭/৩০২/৩৪/১১৪ অনুসারে অভিযোগপত্র দাখিল করে। মামলাটি বিচারের জন্য প্রস্তুত হলে মামলার বিচারিক কার্যক্রম শুরু করার জন্য মামলার নথি (record) নড়াইলের বিজ্ঞ দায়রা জজ আদালতে প্রেরণ করা হয়, যা দায়রা মামলা নং-৯৩/২০১৮ হিসেবে নিবন্ধিত হয়।

১০. বর্তমান প্রতিপক্ষ নং-২ আসামী মল্লিক ইসলাম মাঝহারুল ওরফে মাঝা ২৯/১১/২০১৮ইং তারিখে বিজ্ঞ জেলা ও দায়রা জজ, নড়াইল আদালতে স্বেচ্ছায় হাজির হয়ে জামিন আবেদন করলে বিজ্ঞ দায়রা জজ ঐ তারিখেই তাঁর জামিন মঞ্জুর করেন।

১১. আদালত কর্তৃক চার্জ গঠনের দিন ধার্য্য হলে বর্তমান প্রতিপক্ষ নং-২ ফৌজদারী কার্যবিধির ২৬৫সি ধারা অনুসারে মামলা হতে অব্যাহতির জন্য আবেদন করেন। বিজ্ঞ দায়রা জজ, নড়াইল ১০/০৬/২০১৯ইং তারিখের তর্কিত আদেশে উক্ত অব্যাহতির দরখাস্তটি মঞ্জুরক্রমে বর্তমান প্রতিপক্ষ নং-২ কে মামলা হতে অব্যাহতি প্রদান করেন। বিজ্ঞ দায়রা জজ আদেশে উল্লেখ করেনঃ-

"শুনানীকালে জানা যায়- আসামী মল্লিক মাঝহারুল ইসলাম @ মাঝা ইং ০৯.০২.১৫ তারিখ হতে ইং ১২.০২.১৫ তারিখ পর্যন্ত ২৫০ শয্যা বিশিষ্ট হাসপাতাল, গোপালগঞ্জে সড়ক দুর্ঘটনায় আহত হয়ে চিকিৎসাধীন ছিল এবং সে এন.এস.আই-র একজন কর্মকর্তাও বটে।

১২. মামলার ঘটনা ইং ১০.০২.১৫ তারিখ সকাল ৮.০০ ঘটিকায়। কিন্তু এফ.আই.আর রুজু করা হয়েছে ইং ১১.০২.১৫ তারিখ ১১.১৫ ঘটিকায় যা ২৭ ঘন্টা ১৫ মিনিট পরে। অথচ কম্পিউটারে কম্পোজকৃত ০৫ পৃষ্ঠার লিখিত এজাহারে উক্ত বিলম্বের গ্রহনযোগ্য ও আইন সম্মত কারণ উল্লেখ নেই।

ঘটনার সময় এবং তার পরেও আসামি মাঝা হাসপাতালে চিকিৎসাধীন ছিল এবং সে বাংলাদেশ সরকারের একজন কর্মকর্তাও বটে। তাকে আসামী শ্রেনীভুক্ত করা হয়েছে মাত্র। প্রকৃতপক্ষে আধিপত্য বিস্তারকে কেন্দ্র করে এই আসামি, শ্রেনীভুক্ত করা হয়েছে অনৈতিক ও অবৈধ উপায়ে।

উপযুক্ত পর্যালোচনায় আসামি মল্লিক মাঝহারুল ইসলাম @ মাঝার বিরুদ্ধে অভিযোগ গঠনের মত সুস্পষ্ট অভিযোগ না থাকায় তাকে মামলার দায় থেকে অব্যাহতি প্রদান করা যৌক্তিক ও আইন সম্মত মর্মে বিবেচিত হয়।"

১৩. রুলটির সমর্থনে সংবাদদাতা-দরখাস্তকারীর বিজ্ঞ আইনজীবী জনাব মোহাম্মদ হোসেন নিবেদন করেন যে, এজাহার ও চার্জশীটে বর্তমান প্রতিপক্ষ নং-২ এর বিরুদ্ধে সুনির্দিষ্ট অভিযোগ থাকা সত্বেও, যা ময়না তদন্ত ও সুরতহাল প্রতিবেদন দ্বারা সমর্থিত, বিজ্ঞ দায়রা জজ তাঁকে মামলা হতে অব্যাহতি দিয়ে মারাত্মক ভুল করেছেন, যা ন্যায় বিচারের পরিপন্থী এবং বেআইনী।

১৪. অপরদিকে প্রতিপক্ষ নং-২ এর পক্ষের বিজ্ঞ আইনজীবী জনাব এ.এম. আমিন উদ্দিন এবং জনাব রবিউল আলম (বুদু) তর্কিত আদেশটি সমর্থন করে নিবেদন করেন যে, বিজ্ঞ দায়রা জজ মামলার নথিপত্র পর্যালোচনা করে এবং সংশ্লিষ্ট পক্ষগণকে শ্রবনান্তে সঠিকভাবে তর্কিত আদেশটি প্রদান করেছেন; এক্ষেত্রে আইনের কোন ব্যত্যয় ঘটেনি এবং আদেশটি আইন সংগত।

১৫. আদালত, প্রতিপক্ষ নং-২ এর বিজ্ঞ আইনজীবী এবং রাষ্ট্রপক্ষে বিজ্ঞ ডেপুটি অ্যাটর্নি জেনারেল মোঃ সারওয়ার হোসেন এর নিকট জানতে চান যে,

**এক.** চার্জ গঠন পর্যায়ে আসামী কর্তৃক দাখিলকৃত আত্মপক্ষ সমর্থনে কৈফিয়তের কাগজাদি বা বক্তব্য এবং

**দুই.** আসামীর পদমর্যাদা/পেশা অর্থাৎ সরকারি কর্মকর্তা বা আইন শৃঙ্খলা রক্ষাকারী বাহিনীর কর্মকর্তা/সদস্য বিবেচনায় নিয়ে আসামীকে অব্যাহতি দেয়ার আইনগত কোন সুযোগ আছে কি না এবং এ সংক্রান্তে বাংলাদেশ সুপ্রীমকোর্ট বা উপমহাদেশের অন্যকোন উচ্চতর আদালতের কোন সিদ্ধান্ত আছে কি না।

উপরোক্ত বিষয়ে রাষ্ট্র পক্ষের বিজ্ঞ ডেপুটি অ্যাটর্নি জেনারেল এবং প্রতিপক্ষ নং-২ এর বিজ্ঞ আইনজীবীগণের নিকট হতে যথাযথ কোন বক্তব্য পাওয়া যায়নি বরং তাঁরা নিশ্চুপ ছিলেন।

উভয় পক্ষের বিজ্ঞ আইনজীবীগণের বক্তব্য, এজাহার, অভিযোগপত্র, তর্কিত আদেশসহ আদালতে উপস্থাপিত অন্যান্য কাগজাদি পর্যালোচনা করা হলো।

১৬. আমরা তর্কিত আদেশটি এবং ফৌজদারী কার্যবিধির ধারা ২৬৫সি এর বিধান নিবিড়ভাবে পর্যালোচনা করেছি। তর্কিত আদেশটি সাধারন পাঠেই এটা সুস্পষ্টভাবে প্রতীয়মান হয় যে, বিজ্ঞ দায়রা জজ প্রতিপক্ষ নং-২ কর্তৃক দাখিলকৃত ফৌজদারী কার্যবিধির ধারা ২৬৫সি এর অব্যাহতি প্রদানের দরখাস্তটি মঞ্জুর করে তাঁকে মামলা হতে অব্যাহতি দিয়েছেন মূলত আত্মপক্ষ সমর্থনের কৈফিয়তের কাগজাদি/বক্তব্য (defence materials/plea) বিবেচনায় নিয়ে; যথাঃ

**এক.** সড়ক দুর্ঘটনায় আহত হওয়ার কারনে ঘটনার দিন ও সময়ে প্রতিপক্ষ নং-২ গোপালগঞ্জ হাসপাতালে চিকিৎসাধীন ছিল;

**দুই.** এজাহার দায়েরে ২৭ ঘন্টা ১৫ মিনিট বিলম্ব হয়েছিল; এবং

**তিন.** প্রতিপক্ষ নং-২ একজন সরকারী কর্মকর্তা।

১৭. ফৌজদারী কার্যবিধির ধারা ২৬৫সি নিম্নরুপ:

> "265C. Discharge.-If, upon `consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Court considers that there is no sufficient grounds for proceeding against the accused, it shall discharge the accused and record the reasons for so doing."

১৮. আইনের উপরোক্ত বিধানটি নিখুঁতভাবে (meticulously) পর্যালোচনা করলে এটা সুস্পষ্টভাবে প্রতীয়মান হয় যে, অভিযোগপত্র (চার্জ শীট) দাখিল হলেও আদালত ফৌজদারী কার্যবিধির ২৬৫সি এর বিধান অনুযায়ী তখনই একজন আসামীকে মামলা হতে অব্যাহতি দিতে পারবেন যদি মামলার নথি (রেকর্ড) এবং তৎসঙ্গে দাখিলকৃত কাগজাদি (documents submitted therewith) হতে প্রাথমিক দৃষ্টিতেই যদি দেখা যায় যে, ঐ আসামীর বিরুদ্ধে

মামলার কার্যক্রম পরিচালনা করার জন্য পর্যাপ্ত কোন উপাদান (sufficient grounds for proceeding) নেই। আসামী পক্ষ শুধুমাত্র মামলার নথি এবং তৎসঙ্গে দাখিলকৃত কাগজাদির উপর তাঁর বক্তব্য উপস্থাপনে অধিকারী। এ পর্যায়ে আসামীর দাখিলকৃত আত্মপক্ষ সমর্থনে কৈফিয়তের কাগজাদি বা বক্তব্য কিংবা আসামীর পেশা, পদবী বা অবস্থা (status) বিবেচনা করার কোন সুযোগ নেই।

১৯. মামলার এজাহারে সুনির্দিষ্টভাবে উল্লেখ করা হয়েছে যে, প্রতিপক্ষ নং-২ মাঝহারুল ইসলাম ওরফে মাঝা পাইপ গান দিয়ে খুন করার জন্য এনামুল এর বুকের বাম পার্শ্বের বাম স্তনের বাম পার্শ্বে দুইটা ও বাম স্তনের উপরে একটি গুলি করে রক্তাক্ত জখম করে এনামুলের মৃত্যু নিশ্চিত করে।

২০. অভিযোগপত্রে উল্লেখ করা হয়েছে যে, আসামী বুলু মল্লিকের হুকুমে আসামী খায়রুল, মনিরুল, মাঝহারুল ইসলাম মাঝা (বর্তমান প্রতিপক্ষ নং-২), অরিজ মল্লিক বাদীর ভাই এনামুলকে লক্ষ্য করে গুলি করে, উক্ত গুলিতে ঘটনাস্থলেই এনামুল মারা যায়।

২১. সুরতহাল প্রতিবেদনে বর্ননা করা হয়েছে যে, 'বাম হাতের উপরে গুলির চিহ্ন, বাম বুকের দুধের উপর ০১টি গুলির চিহ্ন। বাম বুকের দুধের নিচে ০১টি গুলির চিহ্ন, ডান হাতে গুলি, ডান বুকে ০১টি গুলির চিহ্ন, বাম ঘাড়ে ০১টি গুলি দেখা যায়।

ময়না তদন্ত প্রতিবেদনে উল্লেখিত জখমসমূহের প্রাথমিক সমর্থন পাওয়া যায়।

এছাড়াও উল্লেখযোগ্য সংখ্যক সাক্ষী ফৌজদারি কার্যবিধির ধারা ১৬১ অনুযায়ী প্রদত্ত জবানবন্দীতেও প্রতিপক্ষ নং-২ মাঝহারুল ইসলাম মাঝা-এর হাতে অস্ত্র থাকা এবং ভিকটিম এনামুলকে গুলি করার বিষয়ে বর্ননা করেছেন।

২২. আমাদের আপীল বিভাগ মোঃ লোকমান ওরফে লোকমান বনাম রাষ্ট্র, ৬৩ ডিএলআর, পৃষ্ঠা ১৫৬; বাংলাদেশ বনাম প্রান চন্দ্র বারই, ১৯৮৬ বিসিআর, পৃষ্ঠা ২২৫; তাহের হোসেন রুশদি বনাম রাষ্ট্র ৭, এমএলআর পৃষ্ঠা-৭; রাষ্ট্র বনাম খন্দকার মোঃ মনিরুজ্জামান, ১৭ বিএলডি, পৃষ্ঠা ৫৪; লতিফা আখতার গং বনাম রাষ্ট্র; ১৯ বিএলডি, পৃষ্ঠা-২০, মামলা সমূহে ফৌজদারী কার্যবিধির ধারা ২৬৫সি এর অন্তর্নিহিত ভাবার্থ বা সারমর্ম (purport) এবং সুযোগ বা পরিধি (scope) সম্পর্কে বিস্তারিত আলোচনা ও অভিমত প্রদান করেছে। উপরোক্ত নজিরসমূহ নিবিড় ভাবে পর্যালোচনা করলে এটাই প্রতীয়মান হয় যে, এজাহার বা অভিযোগপত্রে আসামীর নাম উল্লেখ থাকলেই যেমন যান্ত্রিকভাবে অভিযোগ গঠন করা সমীচীন নয়, তেমনি কোন আসামীর বিরুদ্ধে অভিযোগের প্রাথমিক/আপাত যথার্থতা থাকলে (prima facie case) অভিযোগ গঠন পর্যায়ে তাঁকে অব্যাহতি দেয়ারও কোন সুযোগ নেই। অভিযোগ গঠন পর্যায়ে আসামীর বিরুদ্ধে আনিত আপাতদৃষ্ট অভিযোগটি সত্য কিংবা মিথ্যা তা নির্ধারণ করার সুযোগ নেই; সেটি নির্ধারণ হবে বিচার প্রক্রিয়ার শেষে উপস্থাপিত সাক্ষ্য প্রমানের ভিত্তিতে।

২৩. লোকমান বনাম রাষ্ট্র মামলায় আপীল বিভাগ অভিমত ব্যক্ত করেছে যে, 'the accused has no scope to have any shelter under section 265C of the code since a prima facie case has already been disclosed against him.'

২৪. প্রাসঙ্গিকভাবে এখানে আরো উল্লেখ করা সংগত হবে যে, একজন অভিযুক্ত তাঁর আত্মপক্ষ সমর্থনে বক্তব্য বা কাগজাদি দাখিল করার আইনগতভাবে অধিকারী ফৌজদারী কার্যবিধির ধারা ৩৪২ অনুযায়ী তাঁকে পরীক্ষার সময়ে, তার পূর্বে নয়। সাক্ষ্য আইনের ধারা ১০৬ অনুযায়ী আসামী যদি অপরাধের অভিযোগ হতে রেহাই বা দায়মুক্তি পেতে অপরাধ সংঘটিত হওয়ার সময় তিনি ঘটনাস্থলে উপস্থিত ছিলেন না বা অন্য কোন বিশেষ অজুহাতে রেহাই পাওয়ার দাবী (alibi) বা তাঁর জ্ঞাত বিশেষ কোন তথ্য (any fact is especially within the knowledge) আদালতে উপস্থাপন করেন বা করাতে চান, তা হলে ঐ বিশেষ বিষয়টি প্রমানের দায়িত্ব তাঁর উপরেই বর্তাবে।

'ঘটনার দিন ও সময়ে প্রতিপক্ষ নং-২ সড়ক দূর্ঘটনায় আহত হয়ে গোপালগঞ্জ হাসপাতালে চিকিৎসাধীন ছিলেন'-তাঁর এই 'অজুহাত' বা 'দাবী' আইন অনুযায়ী তাঁকেই প্রমান করতে হবে। এই 'অজুহাত' বা 'দাবী' অভিযোগ গঠন পর্যায়ে বিবেচনায় নিয়ে কোন অভিযুক্তকে মামলা হতে অব্যাহতি দেয়ার বিন্দুমাত্র সুযোগ নেই।

উপরোক্ত আলোচনার প্রেক্ষিতে আমাদের সুচিন্তিত ও দ্বিধাহীন অভিমত এই যে, বিজ্ঞ দায়রা জজ প্রতিপক্ষ নং-২-আসামীর আত্মপক্ষ সমর্থনে কাগজাদি/বক্তব্য এবং পেশাগত অবস্থান বিবেচনায় নিয়ে চার্জ গঠন পর্যায়ে মামলা হতে অব্যাহতি দিয়ে মারাত্মক ভুল করেছেন, যা বে-আইনী এবং ন্যায় বিচারের পরিপন্থী।

২৫. বিজ্ঞ দায়রা জজ, নড়াইল ফৌজদারী কার্যবিধির ২৬৫সি ধারার দরখাস্তটি নিষ্পত্তির সময়ে মামলার এজাহার, অভিযোগপত্র, সাক্ষীদের ফৌজদারী কার্যবিধির ধারা ১৬১ অনুসারে প্রদত্ত জবানবন্দীসমূহ, সুরতহাল ও ময়না তদন্ত প্রতিবেদন অর্থ্যাৎ মামলার নথি ও তদ্সঙ্গে দাখিলকৃত কাগজাদি আদৌ বিবেচনায় না নিয়ে শুধুমাত্র আসামী পক্ষের আত্মসমর্থনের কাগজাদি/বক্তব্য এবং পেশাগত অবস্থান বিবেচনায় নিয়ে প্রতিপক্ষ নং-২ কে মামলা হতে অব্যাহতি দেয়ার বিষয়টি আমাদের

কাছে শুধু বিস্ময়করই মনে হয়নি বরং বিজ্ঞ দায়রা জজের দায়রা মামলা পরিচালনার যোগ্যতা এবং ফৌজদারী আইন সম্পর্কে তাঁর জ্ঞান ও ধারনা সম্পর্কে যুক্তিসংগত সন্দেহের (reasonable suspicion) সৃষ্টি করেছে।

২৬. এ বিষয়টি মেনে নেয়া খুবই কষ্টকর ও দুর্ভাগ্যজনক হবে যে, একজন দায়রা জজ-এর ফৌজদারী আইন বিশেষত: ফৌজদারী কার্যবিধির ধারা ২৬৫সি এর অন্তর্নিহিত সারমর্ম বা উদ্দেশ্য (purport/sprit) এবং পরিধি বা সুযোগ (scope) সম্পর্কে প্রাথমিক ধারনা নেই। আর বিজ্ঞ বিচারক আইন জেনে বুঝে যদি তর্কিত আদেশটি দিয়ে থাকেন তা হলে আমাদের ধরে নিতে হবে যে, তিনি 'অন্য কোন কারনে' উক্ত আদেশ প্রচার করেছেন, যার ব্যাখ্যা শুধু তিনিই দিতে পারবেন।

২৭. বিষয়টি যাই হোক না কেন, ধারনার বশবর্তি হয়ে এ পর্যায়ে এ বিষয়ে চূড়ান্ত কোন মন্তব্য বা সিদ্ধান্ত প্রদান সংগত হবে না বিধায় কোন ধরনের চুড়ান্ত মন্তব্য প্রদানে বিরত থাকা হলো।

২৮. তবে আমাদের সুচিন্তিত অভিমত এই যে, সাময়িক ভাবে হলেও নড়াইলের বিজ্ঞ দায়রা জজ জনাব শেখ আব্দুল আহাদের দায়রা মামলা সংক্রান্ত বিচারিক ক্ষমতা প্রয়োগ স্থগিত করা প্রয়োজন।

২৯. এখানে প্রসঙ্গক্রমে উল্লেখ করা অপ্রাসঙ্গিক হবে না যে, বর্তমান মামলার এজাহার ১১/০২/২০১৫ইং তারিখে প্রতিপক্ষ নং-২ সহ ৬৮ জনের নাম উল্লেখে দায়ের করা হয়। অভিযোগপত্র দাখিল হয় ৩০/০১/২০১৭ইং তারিখে। প্রতিপক্ষ নং-২ সহ অন্যান্য পলাতক আসামীগণকে হাজির হওয়ার জন্য পত্রিকায় বিজ্ঞপন দেয়া সহ মামলাটি বিচারের জন্য প্রস্তুত পূর্বক নড়াইল দায়রা জজ আদালতে মামলার নথি পাঠানো হলে বিজ্ঞ জেলা জজ ২২/০২/২০১৮ইং তারিখে অভিযোগ আমলে গ্রহণ করেন। প্রতিপক্ষ নং-২ দীর্ঘ দিন পর ২৯/১১/২০১৮ইং তারিখে অর্থাৎ এজাহার দাখিলের প্রায় ০৩ বৎসর ০৯ মাস পর নড়াইলের বিজ্ঞ দায়রা জজ আদালতে স্বেচ্ছায় আত্মসমর্পণ করে ঐ দিনেই জামিন লাভে সক্ষম হন। একজন দায়িত্বশীল সরকারি কর্মকর্তা হয়েও পত্রিকায় হাজির হওয়ার বিজ্ঞপ্তি প্রকাশের পরেও আইনের প্রতি শ্রদ্ধাশীল না হয়ে দীর্ঘ দিন পলাতক, কিন্তু চাকুরীতে কর্মরত থাকার পর জেলা ও দায়রা জজ আদালত হতে প্রতিপক্ষ নং-২ এর আত্মসমর্পণের পর তাৎক্ষনিকভাবে জামিন লাভের বিষয়টিও আমাদের কাছে অস্বাভাবিক (unusual) মনে হয়েছে, যাতে সংগত কারনেই অনেক প্রশ্নেরও জন্ম দিয়েছে।

৩০. অত্র আদালত কর্তৃক কারণ দর্শানোর প্রেক্ষিতে নড়াইলের বিজ্ঞ দায়রা জজ জনাব শেখ আবদুল আহাদ লিখিত ভাবে একটি জবাব প্রদান করেন, যা নিম্নোরুপ:

"তৎমর্মে বিনীতভাবে জানাচ্ছি যে, উক্ত মামলায় ইং ১০/০৬/২০১৯ তারিখ উভয় পক্ষের শুনানী ও নথি পর্যালোচনায় ১৭নং আদেশ প্রদান করা হয়।

উক্ত আদেশটি সঠিকভাবে প্রচারিত হয়নি এবং তা আইন সংগতও নয় এবং আইনি নীতির সুস্পষ্ট লংঘন মর্মে মাননীয় হাইকোর্ট বিভাগ সদয় হয়ে আদেশ দিয়েছেন।

উক্ত ভুলের জন্য নিম্নস্বাক্ষরকারী নিঃশর্তভাবে ক্ষমা প্রার্থী। ভবিষ্যতে এরূপ ভুল না করার জন্য সতর্ক থাকবো।"

উপরোক্ত জবাবটির সাধারন পাঠে আমাদের কাছে মনে হয়েছে যে, যেহেতু হাইকোর্ট বিভাগ তর্কিত আদেশটি সঠিকভাবে প্রচারিত হয়নি এবং তা আইন সংগত নয় মর্মে প্রাথমিকভাবে অভিমত দিয়েছে, সেহেতু বিজ্ঞ দায়রা জজ জনাব শেখ আবদুল আহাদ ভুল স্বীকার ও ক্ষমা প্রার্থনা করেছেন।

৩১. . আমাদের কাছে আরো মনে হয়েছে যে, বিজ্ঞ বিচারক অনিচ্ছাকৃতভাবে আইনগত ভুল করেছেন এ ধরনের কোন আত্ম-উপলব্ধি বা অনুশোচনার অবস্থান থেকে ক্ষমা চাননি; বরং মনে হচ্ছে যে, যেহেতু হাইকোর্ট বিভাগ ভুল ধরেছে কেবলমাত্র সে কারনেই তিনি ভুল স্বীকার ও ক্ষমা প্রার্থনা করেছেন।

৩২. সুতরাং, সার্বিক অবস্থা বিবেচনায় আমাদের সুচিন্তিত অভিমত এই যে, নড়াইলের বর্তমান বিজ্ঞ জেলা ও দায়রা জজ জনাব শেখ আব্দুল আহাদকে আগামী ১(এক) বৎসরের জন্য দায়রা মামলা পরিচালনা থেকে বিরত রাখা প্রয়োজন; যাতে করে এ সময়ের মধ্যে বিজ্ঞ বিচারক দায়রা মামলা পরিচালনার জন্য নিজেকে প্রস্তুত করতে পারেন।

৩৩. আমাদের এ অভিমত সম্পর্কে পরবর্তী কার্যক্রম গ্রহণের জন্য বিষয়টি সুপ্রীম কোর্টের নিকট উত্থাপনের জন্য ১। সচিব, আইন ও বিচার বিভাগ, আইন বিচার ও সংসদ বিষয়ক মন্ত্রণালয় এবং ২। রেজিস্ট্রার জেনারেল, বাংলাদেশ সুপ্রীম কোর্ট-কে নির্দেশ প্রদান করা হলো।

উপরোক্ত পর্যবেক্ষণ ও অভিমত সহ ফৌজদারী রিভিশন মামলা নং-১৫৭২/২০১৯-এ প্রদত্ত রুলটি নিরঙ্কুশ (Absolute) করা হলো।

৩৪. নড়াইলের বিজ্ঞ দায়রা জজ কর্তৃক প্রদত্ত ১০/০৬/২০১৯ইং তারিখের আদেশ, যার দ্বারা প্রতিপক্ষ নং-২ কে ফৌজদারি কার্যবিধির ধারা ২৬৫-সি অনুযায়ী আনিত দরখাস্তটি মঞ্জুরক্রমে মামলা হতে অব্যাহতি দেয়া হয়েছিল, তা বাতিল করা হলো।

৩৫. রায়ে প্রদত্ত পর্যবেক্ষণ ও অভিমতের আলোকে বিজ্ঞ দায়রা জজ, নড়াইল-কে আইন অনুযায়ী পরবর্তী পদক্ষেপ গ্রহণের নির্দেশ দেয়া হলো।

৩৬. এতদ্‌সংগে স্বেচ্ছা প্রনোদিত (Suo-Moto) রুলটি নিম্নোক্ত পর্যবেক্ষণ সহ নিষ্পত্তি করা হলো-

নিম্ন আদালত কর্তৃক প্রদত্ত প্রতিপক্ষ নং-২ এর জামিন বহাল থাকবে, তবে জামিনের অপব্যবহার প্রমানিত হলে সংশ্লিষ্ট আদালত যে কোন পর্যায়ে জামিন বাতিল করতে পারবে। এছাড়াও প্রতিপক্ষ নং-২ নিম্ন আদালতে যে কোন পর্যায়ে অযৌক্তিক কারণে সময় প্রার্থনা করলে, তাঁর জামিন সরাসরি বাতিল (stand cancelled) বলে গণ্য হবে।

৩৭. এই রায় ও আদেশের কপি প্রয়োজনীয় অবগতি ও ব্যবস্থা গ্রহণের জন্য সংশ্লিষ্ট আদালত-সহ ১। সচিব, আইন ও বিচার বিভাগ, আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়, এবং ২। রেজিস্ট্রার জেনারেল, বাংলাদেশ সুপ্রীম কোর্ট-এর নিকট অবিলম্বে প্রেরণ করা হোক।

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**(Criminal Appellate Jurisdiction)**

Criminal Appeal No. 9143 of 2015

**National Warehouse**
... Appellant
-Versus-
**Anti-Corruption Commission and others**
... Respondents

Mr. Moudud Ahmed, Senior Advocate with Mr. Mustafa Jamal Pasha and Syed Tazrul Hossain, Advocates
... for the appellant

Mr. Md. Khurshid Alam Khan, Advocate
... for respondent 1

Mr. Syed Hasan Zobair, Advocate
... for respondent 3

Mr. M Amir-Ul Islam, Senior Advocate
Mr. Abdur Razaque Khan, Senior Advocate
Mr. M I Farooqui, Senior Advocate
...Amicus Curiae

Judgment on 06.06.2016

**Bench:**
**Mr. Justice Md. Ruhul Quddus**
**And**
**Mr. Justice Mahmudul Hoque**

**Section 14 of the Money Laundering Protirodh Ain 2012 and Principles of Natural Justice in Criminal Justice System:**
**The principle of natural justice by way of service of prior show cause notice are to be complied with, where any legal or vested rights of a citizen or entity are going to be taken away by an administrative order. Non service of prior show cause notice can be a very strong ground against such administrative/quasi judicial order that generates different type of writ petitions amongst others. However, natural justice in the sense of prior show cause notice is not available in criminal justice system. The criminal law, however, provides procedural fairness in enquiry/investigation, ensures the right to defence of an accused and fair trial. .... (Para-32)**

**For the purpose of freezing/attachment of property under section 14 of the Act V of 2012, no prior show cause notice is necessary. It may alert the offender, prompt him to transfer or take the property beyond his possession immediately after receipt of the notice thus defeat the purpose of law. ... (Para-35)**

**The ACC can proceed with an application for freezing even before completion of the investigation, if there are any credible documents/probative materials or information, which are gathered during investigation, subject to fulfillment of the conditions as provided in section 14 (2) of the Act V of 2012. It will depend on the facts and circumstances of a particular case. Even in rare cases, an order of freezing/attachment of one's property can be passed when such documents/materials or information are available to the prosecuting/enquiring agency at the time of receiving the initial complaint or at the initial stage of pre-FIR enquiry, but this must not be a general practice. ... (Para-36)**

**Where despite a prolonged inquiry, no FIR is lodged and the ACC fails to produce any primary evidence regarding one's involvement in any offence of money laundering or any predicate offence, his right to maintain and operate bank account cannot be infringed at the whim of Anti-Corruption Commission. .. (Para-38)**

**Section 16 of the Money Laundering Protirodh Ain 2012:**
**A person aggrieved by an order passed under section 14 of the Money laundering Protirodh Ain (Act V of 2012), can prefer an appeal directly to the High Court Division under section 16 without approaching the Court below under section 15 of the Act.**
**... (Para-31)**

**JUDGMENT**

**Md. Ruhul Quddus, J:**

1. This appeal under section 16 of the Money Laundering Protirodh Ain, 2012 (Act V of 2012) at the instance of a partnership firm is directed against order dated 01.11.2015 passed by the Senior Metropolitan Special Judge, Dhaka in Permission Petition No. 91 of 2015 freezing its bank account under section 14 of the Act.

2. Facts placed in the petition of appeal in brief are that the appellant-firm is engaged in business of running a Diplomatic Bonded Warehouse catering the foreign nationals and privileged individuals with imported/local liquor, beverage, tobacco etc. The appellant is a regular vat and tax payer and has been running the business for more than 30 years with goodwill and reputation.

3. In course of an enquiry into a complaint made by the Financial Intelligence Unit of Bangladesh Bank, the Anti-Corruption Commission (in brief ACC) through one of its Deputy Director Sheikh Md. Fanafilla filed an application before the Metropolitan Sessions Judge (it would be the Senior Metropolitan Special Judge), Dhaka stating that some individuals and business entities were suspected to be engaged in money laundering through Habib Bank, Gulshan and Uttara Branches and the Standered Chattered Bank. He thus prayed for an order of freezing some bank accounts maintained with those banks including the appellant's one.

4. The learned Judge without hearing the appellant or giving it any notice, passed the impugned order dated 01.11.2015 freezing the accounts as prayed for. Being aggrieved with the said order, so far it relates to the appellant's account, the appellant moved in this Court with the instant criminal appeal.

5. In view of the grounds taken in the petition of appeal and strenuous arguments made by Mr. Moudud Ahmed, learned Senior Advocate for the appellant while he was moving an application for stay that an order of freezing one's bank account without serving him a prior show cause notice violates the principles of natural justice as well as his right to property guaranteed under the Constitution and that section 14 of the Act V of 2012 does not contemplate to pass any such order, we felt it prudent to hear some of the learned Senior Advocates on the points and with their prior consents requested Mr. M Amir-Ul Islam, Mr. Abdur Razaque Khan, Mr. M I Farooqui, all Senior Advocates and also the learned Attorney General Mr. Mahbubey Alam to appear and make their valuable submissions on the points. Mr. Mahbubey Alam, learned Attorney General does not feel any necessity to appear.

However, Mr. M Amir-Ul Islam, Mr. Abdur Razaque Khan and Mr. M I Farooqui appear as Amicus Curiae and assist this court by making their thoughtful submissions.

6. Mr. Moudud Ahmed, learned Senior Advocate for the appellant agitates all the grounds taken in the petition of appeal and submits that the appellant's right to hold and enjoy property as guaranteed under the Constitution has been infringed by freezing its bank account without serving it any prior notice. The impugned order is apparently illegal due to non-compliance with the principles of natural justice. Mr. Ahmed then submits that the frozen account is the only dollar account maintained by the appellant-firm and due to its freezing the appellant is not being able to run its 30 years old business. Its goodwill is being damaged and its right to trade equally guaranteed under the Constitution is also infringed. In support of his submission on prior notice, Mr. Ahmed refers to the cases of Obaidul Kader (Md) Vs. State, 63 DLR 425, Jamuna Oil Company Ltd and another Vs. S K Dey and another 44 DLR (AD) 104 and Abu Hanifa (Md) Vs. Md Shafiul Bashar and others 65 DLR (AD) 243.

7. Mr. Ahmed further submits that section 14 of the Act V of 2012 gives authority upon a Special Judge to freeze or attach any property subject to fulfillment of some pre-conditions provided therein. But in the present case none of those preconditions is fulfilled. The appellant is not yet made accused in any criminal case, further there is no allegation of money laundering or commission of any other predicate offence against it. Still the learned Senior Special Judge froze the account by a non speaking order without assigning any reasons whatsoever. The impugned order is, therefore, out and out illegal and liable to be set aside.

8. Mr. Khurshid Alam Khan, learned Advocate for the ACC (respondent 1 herein) at the very outset raises objection to the maintainability of the appeal inasmuch the appellant without filing an application for release of the frozen account under section 15 of the Act V of 2012 in the court below, has directly approached this Division.

9. Mr. Khan further submits that it cannot be a ground for appeal that the impugned order is a non speaking one unless there is a gross illegality or miscarriage of justice. The principles of natural justice by a prior show cause notice are not applicable in a case of financial crime especially in our country. Service of prior notice as argued by the learned Advocate for the appellant would frustrate the very purpose of the law.

10. Mr. Khan lastly submits that the account in question was frozen in the course of an enquiry initiated on a complaint made by the Financial Intelligence Unit of Bangladesh Bank. In such a case, the account should not be released before the enquiry is completed. Any order of release may also frustrate the purpose of enquiry.

11. Mr. Ahmed, in reply thereto, submits that it clearly appears from the language of section 16 that any person aggrieved by an order of freezing/attachment passed under section 14 of the Act can prefer an appeal before the High Court Division within 30 days of passing the order. The provision of section 16 is independent of section 15 of the Act. Admittedly the appellant-firm owns the frozen account and there is no bar to approach the High Court Division with an appeal directly under section 16 of the Act.

12. Syed Hasan Zobair, learned Advocate appearing for Bangladesh Bank (respondent 3 herein) supports the impugned order and makes his submission in the same line of Mr. Khan, learned Advocate for the ACC.

13. Mr. M Amir-Ul Islam, learned Senior Advocate and Amicus Curiae submits that the question whether the requirements of natural justice should be met would depend on the facts

and circumstances of a particular case, the constitution of the Tribunal and the rules under which it functions. Whenever a complaint is made before a Court that some principles of natural justice have been contravened, the court has to decide whether observance of those principles are necessary for a just decision under the given facts. The rules of natural justice are to secure justice and prevent its miscarriage. These rules can operate only in the areas not covered by any law. In other words they do not supplant the law but supplement it. It is true that if a statutory provision can be read consistently with the principles of natural justice, the Court should do so because it must be presumed that the legislatures and statutory authorities intend to act in accordance with the principles of natural justice. But if on the other hand a statutory provision either specifically or by necessary implication exclude the application of any or all the principles, then the Court cannot ignore the mandate of the legislature. Mr. Islam makes the above submissions relying on the cases of *Suresh Koshy George Vs The University of Kerala and others* [1969] 1 SCR 317, *A K Kraipak and others Vs Union of India and others* [1970] 1 SCR 457 and *Union of India Vs Col J N Sinha and another* [1971] 1 SCR 791 and some other cases of similar nature from English jurisdiction.

14. Mr. Islam then refers to the different provisions of the Act V of 2012 and submits that the principles of natural justice are substituted by the Act itself. According to section 14, the enquiry/investigation authority has to make an application to the concerned Special Judge on fulfillment of the three preconditions as laid down in section 14 (2) of the Act. The Court only after being satisfied that the conditions are appropriately met, would pass an order of freezing/attachment of property. The order under section 14 of the Act is a judicial order. Thus it must not be mechanical one and contain sufficient reasons. Sections 15 and 16 thereof have provided a forum to seek remedy by the person aggrieved with the order. Mr. Islam concludes with the words that equity for both the State and individuals need to be ensured.

15. Mr. Abdur Razaque Khan, learned Senior Advocate and Amicus Curiae submits that the offences under Act V of 2012 are scheduled to the Durneeti Daman Commission Ain, 2004 (Act V of 2004) and triable by the Special Judge appointed under the Criminal Law Amendment Act, 1958. Sub-section (1) of section 9 of the Act V of 2012 provides investigation of the offence under Act V of 2004, while sub-section (3) empowers the ACC to act for investigation and identification of the property of an accused and also to exercise the powers under any other law. Rule 2 (a) of the Anti-Corruption Commission Rules, 2007 (in brief the Rules, 2007) spells out the scope of enquiry and enables the ACC to act with a view to ascertain the prima-facie truth of a complaint upon receipt thereof or being aware of an offence specified in the schedule of the Act, before acceptance and recording the same for investigation.

16. On the above premises, Mr. Khan submits that at the stage of enquiry one need not be an accused. An order of freezing/attachment of property can be passed by a Special Judge even in enquiry stage, but subject to fulfillment of the conditions laid down in section 14 of the Act. In absence of those conditions no order of freezing/attachment can be passed. In other words, the ACC cannot approach the Court for freezing/attachment on mere whims and caprices, or on any vague and unspecific allegation. The power exercisable thereunder is, therefore, not discretionary.

17. Mr. Khan further submits that the law does not bar the affected persons or entity from filing an appeal before the High Court Division directly under section 16, without exhausting the forum under section 15 of the Act. The instant appeal is therefore maintainable.

18. Mr. M I Farooqui, learned Senior Advocate and an Amicus Curiae submits that freezing or attachment of property affects the fundamental right of a citizen to hold, transfer

or otherwise dispose of her/his property guaranteed under article 42 of the Constitution. A subordinate legislation is to be strictly construed as it takes away the right guaranteed under the Constitution. The person/entity would be affected by the order of freezing or attachment must be served with a notice to show cause as the procedural fairness demands for considering the contrary view points, even if there is any 'primary evidence' on the record.

19. Mr. Farooqui further submits that the Act V of 2012 is a special law having overriding effect over all other laws on the subject. Section 9 of the Act provides investigation and trial of an offence thereunder and an approval of the ACC is made inevitable under section 12 for taking cognizance of the offence. There is no proceeding against the appellant-firm or any of its owners and as such they are not accused. Section 14 (2) (b) prescribes 'grounds and primary evidence' in support of freezing/attachment of a property due to its involvement in money laundering or in any predicate offence. Section 14 is not an independent provision and has a nexus with section 9 of the Act. Section 14 can only be invoked on the basis of primary evidence gathered on an investigation under section 9 of the Act. So, an order of freezing/attachment cannot be passed without primary evidence based on logically probative materials, otherwise it would result in 'no evidence' rule. The power must be exercised on sound judicial principles. On the face of record, the impugned order is passed on no primary evidence and without assigning any reasons as such this court is competent to interfere with the same on that count as well.

20. Mr. Farooqui lastly submits that the forum of appeal under section 16 of the Act is provided to any person or entity affected by an order under section 14, who has rightful claim over the frozen/attached property. But section 15 is available to any person or entity other than the accused. In both the sections 15 and 16, limitations of 30 days are prescribed for filing an application for return of the attached property and preferring an appeal respectively from the date of passing the order under section 14 of the Act. There is no interrelation between the two sections 15 and 16 and these are independent of each other.

21. Mr. Farooqui refers to the cases of *Ashbridge Investments Ltd Vs Minister of Housing and Local Government* [1965] 3 All ER 371, *Coleen Properties Ltd Vs Minister of Housing and Local Government* [1971] 1 All ER 1048 and *Regina Vs Deputy Industrial Injuries Commissioner*, [1965] 1 QB 456 to substantiate his submission on passing an order basing primary evidence or probative materials and also refers the case of *The University of Dacca Vs. Zakir Ahmed* 16 DLR (SC) 722 on passing of an order on sound judicial principles as well as on compliance with the principles of natural justice.

22. We have gone through the decisions cited. In the case of Obaidul Kader (Md) as cited by Mr. Ahmed, the petitioner being a former Minister was charged under section 161 of the Penal Code read with section 5 (2) of the Prevention of Corruption Act, 1947 (Act II of 1947) allegedly for taking bribe. The High Court Division on an application under section 561A of the Code of Criminal Procedure quashed the proceedings with observations amongst others that during enquiry/investigation, the ACC did not ask him (accused Obaidul Kader) to furnish any statements under rules 8 and 11 of the Rules, 2007.

23. The said observation in the case of Obaidul Kader was made without considering the legal proposition that non compliance with any procedural rule before lodgment of FIR cannot be brought for judicial inquiry, which was settled earlier in the case of *Habibur Rahman Mollah Vs. The Anti-Corruption Commission* 61 DLR 1. Subsequently the said decision in Habibur Rahman Mollah's case was upheld by the Appellate Division in 62 DLR (AD) 233. However, in the present case, the question of serving notice during the enquiry is still there as the enquiry is not yet concluded and since no FIR has yet been lodged, question

of service of notice during investigation does not yet arise. Moreover, use of the words "যদি মনে করে" and "সুযোগ প্রদান করিতে পারিবে" in rules 8 and 11 of the Rules, 2007 makes it clear that service of notice upon a suspect/accused for hearing him about the allegation is not mandatory in each and every case. The case cited is clearly distinguishable from the present one.

24. In the case of *Abu Hanifa (Md) Vs. Md. Shafiul Bashar and others* 65 DLR (AD) 243, the Government in the Ministry of Law revoked a license of Nikah Registrar, which was issued earlier in favour of respondent 1, Md. Shafiul Bashar without giving him any opportunity of being heard, and approved appointment of the petitioner, Abu Hanifa (writ respondent 4) for the same area. The incumbent Nikah Registrar Md. Shafiul Bashar challenged the order by moving an application under article 102 of the Constitution, obtained Rule from this Division and ultimately succeeded. Challenging the said judgment of the High Court Division, writ respondent 4, Abu Hanifa moved in the Appellate Division with a Civil Petition for Leave to Appeal and the same was dismissed summarily. The laws involved therein were article 102 of the Constitution, Muslim Marriage and provisions of the Divorce (Registration) Act, 1974 and rules 5(1) and 8 (2) of the Muslim Marriage and Divorce (Registration) Rules, 1975.

25. In the case of *Jamuna Oil Company Ltd. and another Vs. S K Dey and another* 44 DLR (AD) 104, the respondent 1 S K Dey, an employee of Jamuna Oil Company Ltd., an abandoned company placed under the control and management of Bangladesh Petroleum Corporation, instituted a suit for declaration against his dismissal order. A competent civil Court on admitted facts of non service of second show cause notice declared the dismissal order to be illegal and so did the lower appellate court. The High Court Division also summarily rejected the revisional application brought by the employer company i.e., Jamuna Oil Company Ltd. The matter was taken up to the Appellate Division, which set aside all the judgments and dismissed the suit on the ground that no second show notice was required to be served. In the said case, article 135 of the Constitution; provisions of the Bangladesh Industrial Enterprises (Nationalisation) Order, 1972 read with Bangladesh Industrial Enterprises (Nationalisation) (Second Amendment) Act, 1974; Bangladesh Petroleum Act, 1974 and the principles of natural justice were discussed and considered. We fail to understand as to how this case would help the appellant in the present case.

26. In the well known case of *The University of Dacca Vs. Zakir Ahmed* 16 DLR (SC) 722 as referred to by Mr. Farooqui, respondent 1 Zakir Ahmed, a student of Dacca University and an elected Member of its Central Students Union was expelled therefrom without any opportunity of being heard. He moved in the High Court Division with a writ of certiorari. A Special Bench of five Judges heard the petition and declared the order of expulsion void and of no legal effect. Challenging that judgment the University moved in the Supreme Court with a certificated appeal, which was also dismissed. The Constitution of Pakistan (1962), General Clauses Act, 1899 and the principles of natural justice were discussed and considered in that case.

27. It thus appears that none of the above cases except that of Obaidul Kader was of criminal nature. The offences related to money laundering or any other penal provisions were also not involved therein. The facts, circumstances and laws involved in those cases are therefore, distinguishable from the case in hand.

28. The case of *Ashbridge Investments Ltd Vs Minister of Housing and Local Government* [1965] 3 All ER 371, *Coleen Properties Ltd Vs Minister of Housing and Local Government* [1971] 1 All ER 1048 and *Regina Vs Deputy Industrial Injuries Commissioner* [1969] 1 QB

456 as referred to by Mr. Farooqui are also not of criminal nature. However, these can be referred to for limited purpose only to lend support to his contention that an order of subordinate Tribunal which affects one's existing right/interest must be passed on primary evidence based on 'probative materials' and on objective satisfaction of the Tribunal. We shall discuss later whether the present case is lacking primary evidence and objective satisfaction on the part of the Special Judge.

29. In Suresh Koshy George Vs University of Kerala and others [1969] 1 SCR 317, the Vice-Chancellor of Kerala University debarred the appellant, Suresh Koshy George, a student of an Engineering College affiliated therewith from appearing for any examination up to a certain period. Before that an internal inquiry was held, the student was served with a show cause notice and submitted explanation in response thereto. The student successfully challenged the order before a Single Judge of Kerala High Court, but the decision of the Single Judge was reversed on appeal by a Division Bench of the High Court. The matter was taken up to the Supreme Court on the grounds amongst other that no copy of the inquiry report was made available to the appellant before he was called upon to submit his explanation. The appeal by special leave was ultimately dismissed. In so doing, K S Hedge, J observed:

> "*No rule either statutory or otherwise was brought to our notice which required the Vice Chancellor to make available to the appellant a copy of the report submitted by the Inquiry officer. It is not the case of the appellant that he asked for a copy of that report and that was denied to him. The rules of natural justice are not embodied rules. The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions.* "

30. In the cases of *A K Kraipak and others Vs Union of India and others* [1970] 1 SCR 457 and *Union of India Vs Col J N Sinha and another* [1971] 1 SCR 791, K S Hedge, J held similar view. The cases cited by Mr. Islam are administrative and service matters unlike the present one. Still the requirement of natural justice has been dealt in a very critical way on the facts and circumstances of the particular cases, nature of inquiry, the rules under which the Tribunals has acted, the subject matter that has been dealt with and so forth.

31. Let us examine first whether this appeal is competent or not because of not approaching the Court below for release of the account under section 15 of the Act. In both the sections 15 and 16, the limitation of 30 days is prescribed for filing an application for release and preferring an appeal respectively against the order of freezing/attachment under section 14 of the Act. If it is mandatory to file an application for release/return under section 15 before preferring an appeal under section 16, the limitation would run from the date of passing the order under section 15. The Act V of 2012 is a special law having overriding effect on all other laws on the selfsame subject. Section 14 (1) of the Act gives authority upon a Special Judge to freeze/attach any property subject to fulfillment of the pre-conditions as provided in section 14 (2) and publication of notice of the said order in official gazette as well as in two well circulated national dailies, one Bengali and the other English under section 14 (3) thereof. On perusal of the impugned order, we do not find any satisfaction within section 14 (2) of the Act and publication of notice as provided in section 14 (3). Section 15 of the Act provides a forum of filing application for return of the property before the concerned Court within 30 days from publication of the notice meaning publication in news papers under section 14 (3), while section 16 provides a forum of appeal before the High Court Division within 30 days from passing the impugned order under section 14.

Section 22 of the Act provides another forum of appeal against any other interlocutory order or final judgment within 30 days from passing of the same. Since no gazette notification and paper publications have been made in the present case, the question of filing any application under section 15 is yet to arise. We thus find substance in the submission of Mr. Farooqui on this point. It cannot be said that the appellant could have approached the Court, which passed the impugned order of freezing the account. It is, therefore, not correct to say that the instant appeal is not competent due to not availing the forum under section 15 of the Act.

32. The principle of natural justice by way of service of prior show cause notice are to be complied with, where any legal or vested rights of a citizen or entity are going to be taken away by an administrative order. Non service of prior show cause notice can be a very strong ground against such administrative/quasi judicial order that generates different type of writ petitions amongst others. However, natural justice in the sense of prior show cause notice is not available in criminal justice system. The criminal law, however, provides procedural fairness in enquiry/investigation, ensures the right to defence of an accused and fair trial. To be more particular, procedural fairness is maintained by an impartial and proper enquiry/investigation guided by law, satisfaction of the trial Court in taking cognizance of offence and thereafter in framing of charge upon consideration of prosecution materials as to whether there are sufficient grounds to presume an accused to be the offender. Holding of trial in public by an independent, impartial and competent court, giving the accused full opportunity of taking defence and providing him a forum of appeal are the most important indicators of a fair trial. The right to defence of an accused is ensured by service of summons/issuance of process/warrant to make his appearance in trial, and by publication of warrant in newspapers and sometime in official gazette where the accused is absconding. Where the accused is facing trial, reading over the charge to him with all material particulars, giving right to cross-examine the prosecution witnesses during trial and bringing into his notice all the incriminating evidence after closing the prosecution evidence, so that he can explain any circumstance appears in the evidence and can establish the defence case by examining defence witnesses, are the guarantees of his right to defence.

33. In a criminal case relating to cognizable offence, the police even a private individual can arrest the offender without warrant even before lodgment of FIR curtailing his right to free movement. But in such a case the question of violation of one's fundamental right guaranteed under article 36 of the Constitution does not arise. This arrest is secured to bring the offender to book without delay, prevent him from committing any other offences and raise confidence and a sense of security in people's mind. The offence of money laundering is made cognizable under section 11 of the Act V of 2012. It is such an offence, which threatens the financial system and institutions both domestic and international. It hits the lifeline of a nation i.e. economy of the Country. Therefore, where there is sufficient materials to meet the tests of primary evidence and objective satisfaction, the ACC can/should proceed for freezing/attachment of the tainted property for the purpose of preventing the criminals from legitimating their ill-gotten money, and also to prevent them from committing any other predicate offence with the money/property and finally to bring it into public exchequer for greater public interest. There is no scope to adopt delatory procedures, which are not specifically provided by law, in dealing with such offences.

34. Any person/entity aggrieved with an order of freezing/attachment of property under section 14 of the Act, has right to move under sections 15 and 16 thereof for return of the property and setting aside the order. By this way he gets full opportunity of presenting his case, which is one of the essentials of the principles of natural justice. Mr. Islam rightly

submitted that in the present case natural justice is substituted by the provisions of the Act V of 2012 itself.

35. In the above premises, we can safely conclude that for the purpose of freezing/attachment of property under section 14 of the Act V of 2012, no prior show cause notice is necessary. It may alert the offender, prompt him to transfer or take the property beyond possession immediately after receipt of the notice thus defeat the purpose of law.

36. If an application is filed on fulfillment of all the conditions as laid in section 14(2) of the Act, namely, (i) full description of the property proposed to be frozen/attached, (ii) grounds and primary evidence in support of its involvement in the offence, and (iii) apprehension of transfer of the property before disposal of the complaint; and the concerned Special Judge is fully satisfied with all the tests, he would pass an order of freezing/attachment of the property to prevent such transfer or dispossession. The ACC can also proceed with such application even before completion of the investigation, if there are any credible documents/probative materials or information, which are gathered during investigation, subject to fulfillment of the above conditions. It will depend on the facts and circumstances of a particular case. Even in rare cases, an order of freezing/attachment of one's property can be passed when such documents/materials or information are available to the prosecuting/enquiring agency at the time of receiving the initial complaint or at the initial stage of pre-FIR enquiry, but this must not be a general practice. The submissions of Mr. Abdur Razaque Khan, Amicus Curiae lend support to this view.

37. In the present case the application filed by ACC for freezing the appellant's bank account does not fulfill any single condition mentioned in section 14 of the Act. It contains only the names of some other suspected persons and business entities, who were allegedly engaged in money laundering, but no allegation whatsoever was made against the appellant-firm except mentioning its name at the bottom of a list given therein. The impugned order also appears to be a non speaking and mechanical one. In the meantime more than six months have elapsed, but no formal FIR has yet been lodged. It is also not clear whether the enquiry in the meantime has been concluded. The ACC has also failed to produce any primary evidence regarding the appellant's involvement in any offence of money laundering or any predicate offence, even before this Division.

38. Under the circumstances, the appellant's right to maintain and operate its account cannot be infringed because of an order apparently passed without application of mind and at the whim of the Inquiry Officer of the ACC. We are, therefore, unable to accept the contention of Mr. Khurshid Alam Khan that the account should not be released till conclusion of the enquiry. The appeal, therefore, merits consideration.

39. Accordingly, the appeal is allowed. The impugned order dated 01.11.2015 passed by the Senior Metropolitan Special Judge, Dhaka in Permission Petition No. 91 of 2015 so far it relates to freezing of the bank account of the appellant firm is set aside.

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**(STATUTORY ORIGINAL JURISDICTION)**

COMPANY MATTER NO. 163 OF 2017.

**Pankaj Roy**
..... Petitioner
-Versus-
**Alliance Securities & Management Limited and others.**
..... Respondents.

Mr. Akther Imam, senior Advocate
Mr. Mahbuby Alam, senior Advocate with
Mr. Reshad Imam, Advocate.
..... For the petitioner.

Mr. Mejbahur Rahman, Advocate
.....For the respondent nos. 2& 3

Mr. Tanjib-Ul-Alam, senior Advocate
.....For the respondent no. 4.

Heard on 10-07-2019, 11-07-2019, 14-07-2019
and judgment on 14-07-2019.

**Present:**
**Mr. Justice Md. Mozibur Rahman Miah**

**Company matter, Article 45 of the Articles of association; Interim order, Board of directors, Modify the judgement, Administration of Justice;**

**Invariably, under no circumstances, this court can interfere with its own judgment which was even affirmed by the Honb'le Appellate Division. ... (Para 35)**

**JUDGMENT**

**Md. Mozibur Rahman Miah, J:**

1. This matter has been referred by the Honb'le Chief Justice of Bangladesh vide his order dated 03-03-2019 on the heels of feeling embarrassed by another bench of this division in the event of filing applications by Respondent nos. 4 and Respondents nos. 2-3 after an order was passed on 13-12-2019 modifying the judgement passed by another bench on 05.2.2018 basing on a compromise petition filed by the petitioner and Respondent nos. 2 to 3.

2. This company matter stemmed from an application filed by the petitioner, Pankaj Ray under section 233 of the companies Act, where he amongst others made 2 principal prayers:

*"Order the respondent no. 2-4 to jointly or severally purchase the shares of the petitioner at a fair valuation*

***or***

*in the alternative, order respondent nos.2-4 jointly or severally sell their share to the petitioner at a fair valuation.*

3. To contest the said application, the respondent, no. 2,3 and 4 entered their appearance and initially this court on 22-05-2017 admitted the application and passed an interim order in the following manner :

*"Accordingly, the respondent no. 2 and 3 are hereby directed to comply at once with the provision of Article 45 of the Articles of association of the company and to consult*

*with the petitioner in discharging in performing his function as the Managing Director and also in the operation of the bank accounts".*
*The respondent no. 2 and 3 having exclusive control in the board and in the managing affairs of the company and apparently acting as a group against the petitioner therefore, respondent nos. 1,2 and 3 are hereby further directed to make arrangement with the banks of the company for signing of all cheques and for operation of the bank account, jointly under signature of 2(two) directors, one to be the petitioner himself and another to be any one from the respondent nos. 2 or respondent no. 3.*

4. Against that interim order an appeal was preferred being civil petition for leave to appeal no. 545 of 2017 before the Hon'ble Appellate Division and the said interim order was upheld.(As found in the "Order" portion of the Judgement dated 05.02.2018).

5. Eventually, the company matter was heard and disposed of by the company bench on 05-02-2018 and in the operative portion of the judgment following directions were given:

*I. "The respondent nos. 2 and 3 are directed to purchase the share of the petitioner within 30th June,2018 for Tk.151177431-490400/= Tk. 150,68,703/= and shall submit an affidavit of compliance with in one month thereafter"*
*The interim direction dated 22-05-2017, upheld in Civil Petition for Leave to Appeal no. 545 of 2017 shall continue until filing of the affidavit of compliance.*
*II. The respondent no. 4 can sell his share in the manner prescribed herein above.*

6. Long after passing the judgment, the petitioner on 10-05-2018 filed an application for correction of the judgment passed on 05-02-2018 and on that very date, the company bench took up the said application and allowed the same.

7. Record depicts, on 13-12-2018 a judgment was passed by another company beach of this Division on the basis of an application jointly filed by the petitioner and respondent no.2 and 3. In the judgment dated 13-12-2018 the learned company bench upon considering the joint application ultimately held the following :

" having been agreed with some terms and conditions, this court is of the view that, there is no need to comply with the direction passed by this court in the judgment dated 05-02-2018. Instead, the parties are directed to comply with the following direction".

*(i) The petitioner and Respondent nos. 2 & 3 are directed to implement /execute/comply with all the terms of their joint agreement, which are incorporated hereinbefore in this judgment under-paragraph nos. (a) to(j)*
*(ii) Respondent nos. 5 & 6 (the banking institutions) are hereby directed to change/modify the signatory requirements of Alliance Securities & Management Limited (company) in relation to all the bank accounts of the Company, including Fixed deposit receipt (FDR) accounts, in accordance with the terms and condition of the instant joint application with 24 (twenty four) hours of receipt of this Order.*
*(iii) The petitioner and respondent Nos. 2 &3 are directed to execute/implement the terms and conditions of their mutual agreement, which are paragraphed hereinbefore as paragraph nos. (a) to (j) within 30(thirty) days and, thereafter, submit an affidavit-in-compliance within 10 (ten) days of the expiry of the aforesaid thirty days.*

8. In view of the said directions, the terms and conditions which had been incorporated in the joint application filed by the petitioner and respondent no. 2 and 3 dated 13-12-2018 was asked to comply with instead of the judgment passed on 05-02-2018. In pursuance of the said

order dated 13-12-2018, a meeting of the board of directors comprising the petitioner and respondent nos. 2-3 was held on 19-12-2018 where the petitioner was given absolute authority to operate day to day affairs of the company and to operate all banking transaction by the petitioner as sole signatory. However, the dispute evolves in implementing the said order dated 13.12.2018 when respondent no. 4 and respondent no. 2 and 3 filed several applications chiefly thus filed for restraining the petitioner from implementing the said order and to re-call the same. In such a situation, the company bench then vide its order dated 06-02-2019 felt embarrass and referred the matter to the Honb'le Chief Justice of Bangladesh and then the Honb'le chief Justice sent the matter before this court as stated hereinabove.

9. Mr. Tanjib-Ul-Alam, the learned senior counsel appearing for the Respondent no.4 by placing the application dated 04.02.2019 at the very out set submits that, a gigantic fraud has been committed in obtaining the order dated 13.12.2018 by the petitioner and respondent no. 2 and 3 in the name of modifying the judgement dated 05.02.2018 upon filing a joint application for compromise which was passed behind the back of the knowledge of the respondent no. 4.

10. By referring to Article 45 of the Articles of association, the learned counsel contends that, that very articles clearly stipulates that all the transaction of the company is to be held with the joint signature of two directors and in line with the said provision an interim order was also passed by this court on 22-05-2017 which was also upheld by the Honb'le Appellate Division in Civil petition for leave to appeal no.545 of 2017 and it was ultimately confirmed in the judgement dated 05.02.2018 but by the aforesaid compromise and modified order dated 13.12.2018 the said article has grossly been violated.

11. By referring to Article no. 15 of the Articles of Association, the learned counsel further contends that, this respondent reserves preemption right to have the proportionate share held by respondent no. 2 and 3 in the company but that very condition provided in Article of Association has also been infringed in arriving at alleged compromise by the petitioner and respondent no. 2 and 3.

12. So far as it relates to the propriety of the order of modification dated 13.12.2018, held on the basis of compromise after passing the judgment by another bench dated 05-02-2018, the learned counsel further avers that, under no circumstances can earlier judgement be modified after the same is disposed of on contest among the parties and in that regard the learned counsel has placed his reliance on the decision so have been reported in 64 DLR (AD)- 100 as well as 7 BLT (HC) 18. With such submission, the learned counsel finally prays for allowing the application and recall the order of this court dated 13-12-2018.

13. In contrast, Mr. Mejbahur Rahman, the learned counsel appearing for the respondent nos. 2 and 3 upon placing the application dated 06.02.2019 filed for recalling the order dated 13-12-2018 just contends that, in view of exerting coercion and threat and also under duress the respondent nos. 2 and 3 had been compelled to file joint application with the petitioner on 13-12-2018 and also sat in a meeting of board of directors dated 19-12-2018 where some resolutions was passed giving absolute authority to the petitioner in running the company and to operate Banking transaction for the company and therefore the said compromise cannot be sustained in the eye of law and thus the order passed dated 13.12.2018 in liable to be recalled.

14. On the other hand, Mr. Rashed Imam, the learned counsel appearing for the petitioner upon placing the joint applications dated 13-12-2018 and the Affidavit-in opposition so filed

against the applications of Respondent no.4 and Respondent no. 2-3 and on taking me to the judgment passed dated 05-02-2018 and order dated 13-12-2018, as well as other materials on records at the very onset submits that, respondent no. 4 has got no *locustandi* to file any application for recalling the order dated 13-12-2018 as in the judgement dated 05-02-2018 no direction has ever been made either to of the petitioner or to respondent no. 2 and 3 to purchase share of respondent no. 4 so there appears no scope to recall the said order.

15. The learned counsel further contends that, the respondent no. 2 and 3 are bound by the terms and conditions so embodied in the joint application they filed with the petitioner because upon conceding with all the terms and conditions thereof, the respondent nos. 2 and 3 as well as their learned counsel put their respective signature in it so there has been no scope to deviate from the joint application dated 13-12-2018 and order passed thereof.

16. The learned counsel goes on to submit that, for non-compliance with the judgment passed by this court dated 05-02-2019, the petitioner was compelled to file a contempt petition being contempt petition no.13 of 2018 before a contempt bench of this Hon'ble court which is still pending where both the petitioner and respondent no. 2 and 3 filed a joint application apprising it that they are going to compromise the dispute among themselves having no occasion to go beyond the order dated 13-12-2018.

17. The learned counsel also contends that, there is basic and vital distinction between order no. 1 and order no.2 of the judgement dated 05-02-2018 as by that order this petitioner has got no obligation to purchase share of respondent no.4 so respondent no. 4 is not entitled to any direction from this court asking the petitioner to purchase his share or to recall the order dated 13-12-2018.

18. The learned counsel by drawing my attention to the applications filed by respondent no. 4 dated 02-01-2019 and 24-01-2019 also contends that, by filing those application the respondent no. 4 rather made his stand totally dubious because in one hand, he intended to purchase the share of the petitioner and in the next breath, he wanted to sell his share to the petitioner and upon failing to materialise all his ill intention, he has now come to recall the order which cannot be sustained rather his such stand is barred by principle of approbate and reprobate.

19. So far as it relates to my query pose to the learned counsel as to whether after passing the judgment by this Division on 05-02-2018 and upheld by the Hon'ble Appellate Division on 16-07-2018, whether the petitioner and respondent no. 2-3 can arrive at any compromise and the said judgement dated 05-02-2018 can be modified by subsequent order dated 13.12.2018. In reply to that, the learned counsel readily contends that, since the parties reached an amicable arrangement in the event of not implementing earlier judgment dated 05-02-2018 so in compliance with the direction no. 1 made in the said judgement, there has been no legal bar to settle the matter through compromise with respondent no. 2 and 3 as none of the parties is likely to be prejudiced with the modification ordr dated 13.12.2018.

20. At this, Mr. Mahbubey Alam, the learned senior counsel starts arguing for the petitioner and submits that, had there appear any mistake on the face of the order dated 13.12.2018 in that case, the judgment would have been recalled but from the order since there having no such mistake, so the modified judgment passed on compromise cannot be recalled.

21. The learned counsel further contends that, if the parties to any dispute reachs any compromise and an order is passed on that basis such order cannot be recalled.

22. The learned counsel goes on to submit that, since the compromise was held on the basis of earlier judgment dated 05-02-2018 in particular, as per direction no. 1 thereof, so there cannot be any reason to recall the order dated 13-12-2018 which was passed on the basis of compromise among the parties.

23. The learned counsel also contends that, there has been no forgery ever committed by the petitioner or the respondent nos. 2 and 3 in arriving at compromise and therefore, this court may not interfere with the order dated 13-12-2018.

24. So far as it relates to my query with regard to the authority of a subsequent bench to modify the judgement of earlier bench dated 05-02-2018 when the same was tested in the appeal and was upheld by the Hon'ble Appellate Division, the learned senior counsel submits that, since the petitioner and respondent nos. 2-3 ultimately agreed to compromise the dispute among themsleves so there is no bar to modify earlier judgement that based on compromise as no violation of earlier judgement is made.

25. After wrapping up his such submission, Mr. Akter Imam, the learned senior counsel then by referring to the provision of sub rule (3) of order 23 of the Code of Civil Procedure and that of rule (6) of the companies rules, 2009 very candidly submits that, the parties can arrive compromise at any point of time even after passing the judgment. To buttress the said contention, the learned counsel has also placed his reliance on the decisions reported in AIR 1915 Cal 454, AIR 1966 J & K 13 and AIR 1963, AII 296 but without supplying copy of those decisions. Apart from those decisions, the learned counsel has also placed the provision of section 96 (3) of the Code of Civil Procedure where it has been provided that, if any judgment is passed on compromise that judgment cannot be challenged in appeal. The learned counsel then by referring to the provision of section 233(3) of the Companies Act, 1994 also submit that, the provision has given ample power to this bench to pass any order, direction which it deems fit and proper and therefore the order dated 13-12-2018 modifying earlier judgement on the basis compromise is very much sustainable in law in exercising the authority given under the given section. With such submission, the learned senior counsel finally prays for setting aside the application so filed by the respondent nos. 2, 3 and 4 for recalling the order dated 13-12-2018.

26. Anyway, I have heard the learned senior counsels for the petitioner and that of the learned counsels for the respondent nos. 2, 3 and 4 at length. It is worthwhile to mention here that, after pronouncement of the judgment dated 05-02-2018, the petitioner at first filed an application on 26-11-2018 for clarification of the said judgment and order which remains unresolved. Then, petitioner and respondent no. 2 and 3 filed a "joint application" on 13-12-2018 seeking three different remedies. After that, respondent no. 4 on 02-01-2019 filed an application for modification of the order dated 13-12-2018 passed in company matter no.163 of 2017 where he sought a direction upon petitioner to purchase his share he held in respondent no. 1 company. Subsequently, Respondent no. 4 filed another application on 24-01-2019 seeking direction upon petitioner to sell his share to him (respondent no. 4). Thereafter, the respondent no. 4 filed another application on 04-02-2019 praying for injunction restraining the petitioner from diverting fund of the company and restore all the funds so diverted and lastly to recall the order dated 13-12-2018. Finally, respondent no. 2

and 3 filed an application on 06-02-2019 praying for recalling the order dated 13-12-2018 and allow them to purchase shares of the petitioner as per the judgment dated 05-02-2018.

27. Against these applications so filed by respondent no. 4 and respondent no. 2 and 3 ostensibly for re-calling the order of this court dated 13-12-2018, the petitioner also filed two sets of affidavit-of-opposition on 10-07-2019 and 11-07-2019 denying all the material allegations so made in those petitions of the Respondents.

28. In view of the above material facts, I have given my anxious through to the submission so placed by the learned senior counsels for the petitioner and that of the learned senior counsel for the respondent no. 4, the learned counsel for respondent no. 2 and 3. There has been no gainsaying of facts that, this petitioner originally filed an application under section 233 of the Companies Act literally seeking two alternative prayers. On going through the judgment passed by this court dated 05-02-2018, I find that, by that judgment the court allowed prayer no. 1 of the petitioner through which the petitioner sought direction upon the respondent nos. 2-4 to purchase his share and by judgment dated 05-02-2018, the respondent no. 2 and 3 were directed to purchase share of the petitioner at a value which has been evaluated by audit report dated 20.11.2017 and in the said judgement, option was also given to respondent no. 2 and 3 to purchase the share of respondent no. 4 or by their nominee in the manner as has been stipulated in paragraph no.22 of the judgement.

29. In the operative portion of the judgment dated 05-02-2018 an interim order who also passed at in line with the order while of admitting the matter on 22.05.2017 and was ordered to continue the same until filing of the Affidavit-of-compliance.

30. Record shows, after passing the said judgment an application was filed on 10.5.2018 by the petitioner for correction of the judgment dated 05-02-18 and it was allowed. After the order dated 10.5.2018, I only find the order passed on 13-12-2018 in the order book of this company matter through which the joint application filed by the petitioner and respondent no. 2 and 3 was allowed. And in between those two orders, I don't find any order whatsoever as regard to filing any application either by the petitioner or by respondent no. 2- 3 and 4. Now question remains, whether after pronouncement of the judgment by this court dated 05-02-2018 and upheld by the Honb'le Appellate Division, the petitioner and respondent nos. 2-3 reserve any right to file joint application for modifying that judgement and this court assumes any jurisdiction to act beyond the said judgment making it any modification.

31. It is admitted that, challenging the judgment and order passed by this court dated 05-02-2018, two sets of appeal were preferred before the Honb'le Appellate Division one, by respondent no. 2 and 3 being civil petition for leave to appeal no. 1960 of 2018 and another by respondent no. 4 being Civil Petition for Leave to Appeal no. 2099 of 2018 and both the appeals were dismissed finding those barred by limitation. So there has been no denying that, the judgment dated 05-02-2018 was upheld by the Honb'le Appellate Division. Moreover, on going through the judgment dated 05-02-2018 I also find that, in its ordering portion it was held that, the direction dated 22-05-2017 and upheld in Civil Petition for Leave Appeal no. 545 of 2017 shall continue until filing of affidavit-of-compliance. So by judgment dated 05.02.2018 in fact the order of the Honb'le Appellate Division has been made enforceable by the parties. From the trend of argument it appears to me that, the chief contention, of the learned counsel for the petitioner is that, since the petitioner has complied with the direction no. 1 of the judgment dated 05-02-2018 by arriving at a compromise with Respondent no. 2-3 so there has been occurred no violation of the said judgment. To counter the said contention

the learned counsel for respondent no. 4 very robustly contends that, the direction given in judgment dated 05.02.2018 has got no existence in the following order dated 13-12-2018 because in earlier judgment the respondent no. 2 and 3 were directed to purchase the share of petitioner but in the subsequent modified order dated 13-12-2018 rather the petitioner was ordered to purchase share of the respondent no. 2 and 3 upon performing several absurd terms and conditions and accordingly order was passed on 13-12-2018 into to in accordance with the joint application so that very direction no. 1 has never been upheld in subsequent modified order and there cannot be any scope to say that as per order no. 1 of judgement dated 05.02.2018 subsequent compromise was held and modified order was passed.

32. In view of such submission I have also very meticulously gone through the operative portion of the judgment dated 05-02-2018 and that of the modified order passed subsequently dated 13-12-2018. On going through the operative portion of the order dated 13-12-2018 I find that this court by order dated 13.12.2018 passed directions exactly in line with the terms and condition incorporated in the joint application for compromise filed by the petitioner and respondent no. 2 and 3.

33. On the contrary, in the original judgment dated 05-02-2018, there are only 3 directions, given to respondent no. 2, 3 and respondent no. 4 including a direction to comply with an interim order passed at the time of admitting the company matter. So on plain reading of both the judgement and order, I find that, vide order dated 13-12-2018 the judgement dated 05-02-2018 has been totally reversed.

34. Now question evolves, whether after closing a matter in other words, after passing a judgment on merit and on contest by a bench that very judgment can be modified or reversed or altered by another bench by subsequent order when such contesting judgment was upheld by the Hon'ble Appellate Division. In such a panaroma, the learned senior counsel for the petitioner very candidly submits that, under the provision of order 23 rule 3 of the Code of Civil Procedure, and that of rule (6) of the companies rules, 2009, the High Court Division can modify the judgement at any point of time on the basis of compromise. But on going through the provision so have been enunciated in those two different statutes. I find that, nothing denotes therein specifying that after adjudication of any dispute on contest and on merit a compromise can be made so those provision has got no application here.

35. Further, in the interim portion of the judgment dated 05-02-2018 there has been also an order giving authority to petitioner and any of the respondent nos. 2 and 3 to make all sorts of transaction in running the company as well as its bank and that very order was upheld by the Honb'le Appellate Division as well. But by giving subsequent order dated 13-12-2018 amongst others absolutely a diverse decision was passed giving sole authority to the petitioner which clearly runs counter to the direction given in the judgement dated 05.02.2018 including interim order thereof. Invariably, under no circumstances, this court can interfere with its own judgment which was even affirmed by the Honb'le Appellate Division.

36. It is the contention of the learned counsel for the respondent no. 4 that, while filing joint application for compromise by the petitioner and respondent no. 2 and 3 no copy of the same was served upon him. On the contrary, the learned counsel for the petitioner vehemently opposes the said contention saying that, since a copy of the application he filed for clarification of judgment dated 26-11-2018 had been served on him so the learned counsel for the respondent no. 4 essentially had knowledge about the compromise. But on going through the entire order sheet lying with the order book of the company matter, I find

that after passing the order of correction of the judgment dated 10-05-2018 there has been no other order in the entire record, reflecting entry of any application filed either by the petitioner or by respondent no. 2,3 or respondent and 4. However, it is admitted that, the copy of the joint application dated 13-12-2018 has not been served upon the respondent no. 4 though by that very compromise and order passed thereby dated 13.12.2018 the judgment passed on 05-02-2018 is found to have totally reversed so the respondent no. 4 who admittedly holds 25% share in the company was very much entitled to have a copy of the said application.

37. Be that as it may, in view of the above discussion and observation now I conclude the paramount question as to whether a bench of this division can interfere with any judgment passed by another bench which was up held by the Honb'le Appellate Division. In view of the forgiving discussion, It is of my considered view that, under no circumstances, this court can pass any order whatever manner it be, that makes a judgement passed earlier redundant one. Because, if such trends is allowed to entertain then there would have no chain of command in the administration of justice-here, the highest seat of judiciary.

38. Regard being had to the above deliberations and observation, the applications so filed by respondent no. 4 and 2 to 3 is hereby allowed and the order dated 13-12-2018 passed by this court is recalled.

39. All steps, actions taken and made by the petitioner and respondent nos. 2-3 in pursuance of the order dated 13-12-2018 is thus declared illegal consequent to the judgement passed by this court dated 05-02-2018 is thus put in its place.

40. The petitioner and respondent no. 2 and 3 are hereby directed to revert to the position of the company and all its Banking status at it remained at the time of passing the judgment dated 05-02-2018.

41. The petitioner and respondent no. 2, 3 and 4 are further directed to comply with their respective obligation in implementing the judgement dated 05-02-2018 within 30th September, 2019 without any fail and file affidavit-of-compliance within 31st October, 2019.*

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**(Civil Revisional Jurisdiction)**

Civil Revision No. 1511 of 2017
**Pruesiau Aug Marma and another**
.....petitioners

-Versus-
**Aungmra Shang Marma and another**
------- Opposite parties.

Mr. Mohammad Idrisur Rahman with
Mr. Md. Harun-Al-Kaioum with
Mr. Mosammat Morsheda Pervin, Advocates
------ For the petitioners

Mr. Abdus Salam Mamun with
Mr. Mohammad Abdul Mannan with
Mr. Md. Asraf Uddin Chowdhury, Advocates
------- For the Opposite Parties.

Heard on: 20.06.2019, 26.06.2019, 02.07.2019, 03.07.2019, 07.07.2019, 09.07.2019 and
Judgment on: 14.07. 2019.

**Present**
**Madam Justice Kashefa Hussain**

**Temporary injunction, Mutation Case, Special statutory rules and regulations, Cittagong Hill Tracts Refgulation 1900, Customary laws of the Chittagong Hill Tracts, Article 152 of the Constitution of Bangladesh, Existing laws; Private parties regarding declaration of a deed, Registration of the deed, Competence any of party;**

**Mandatory issuance of notice upon the statutory authorities before filing of any suit in accordance with the relevant laws and also taking into consideration the existing customary laws of the Chittagong Hill Tracts which contemplate mandatory service of notice to the concerned authorities prior to filing any suit. ... (Para-17)**

**Customary laws and usages of the Chittagong Hill Tracts are all within the ambits of law and as such they can not be violated. ... (Para 18)**

**JUDGMENT**

**Kashefa Hussain, J.**

1. Rule was issued in the instant Civil Revisional application calling upon the opposite parties to show cause as to why the judgment and order dated 30.03.2017 passed by the learned Additional District Judge, Bandarban Hill District, in Miscellaneous Appeal No. 5 of 2016 dismissing the appeal and affirming the judgment and order dated 24.03.2016 passed by the learned Joint District Judge, Bandarban Hill District, in Other Class Suit No. 263 of 2012 rejecting an application filed under Order 7 Rule 11 of the Code Civil Procedure should not be set aside and or pass such other order or further order or orders as to this court may seem fit and proper.

2. The opposite party as plaintiff instituted Other Class Suit No. 263 of 2012 in the court of Joint District Judge, Bandarban Hill District, praying for declaration of Registered Bainapatra (contract for sale) being No. 632 of 2010 registered dated 02.08.2010 as illegal, void and inoperative, not binding upon the plaintiff impleading the instant petitioners as defendant in the suit. During pendency of the suit the plaintiff filed an application for temporary injunction under Order 39 Rule 1 and 2 read with section 151 of the Code of Civil Procedure praying for stay of all further proceedings of the Mutation Case No. 252(DO-/2012 by an order of temporary injunction. The defendants filed written objection and simultaneously the defendants in the suit also filed an application under Order 7 Rule 11 of the Code of Civil Procedure praying for rejection of plaint. After hearing the parties the court of Joint District Judge, Bandarban Hill District allowed the plaintiff's application under Order 39 Rule 1 and 2 read with section 151 of the Code of Civil Procedure and thereby stayed all further proceedings of the Mutation Case No. 252 (DO-/2012 by an order of temporary injunction. On the other hand the defendants filed an application for rejection of plaint under Order 7 Rule 11 of the Code of Civil Procedure and thereby the court of Joint District Judge rejected the plaint by Order No. 21 dated 24.03.2016. Being aggrieved by the Judgment and Order of the court of Joint District Judge, Bandarban Hill District dated 24.03.2016 allowing the plaintiff's application for temporary injunction and simultaneously rejecting the defenda0nt application for rejection of plaint under Order 7 Rule 11 of the Code of Civil Procedure, the defendant in the suit filed Miscellaneous Appeal No. 5 of 2016 before the court of District Judge. However upon hearing both sides the Court of District Judge dismissed the Miscellaneous Appeal with some modification by its judgment and order dated 30.03.2017. Being aggrieved by the judgment and order of the District Judge court dated 23.03.2017 dismissing the Miscellaneous Appeal, the defendants in the Other Class Suit No. 263 of 2012 being appellants in the Miscellaneous Appeal No. 5 of 2016 filed a civil revisional application which is instantly before this court for disposal.

3. Learned Advocates Mr. Mohammad Idrisur Rahman with Mr. Md. Harun-Al-Kaioum along with Mr. Mosammat Morsheda Pervin appeared for the petitioners while learned Advocates Mr. Abdus Salam Mamun with Mr. Mohammad Abdul Mannan along with Mr. Md. Asraf Uddin Chowdhury appeared for the opposite parties.

4. Learned Advocate for the petitioner submits that the orders of the courts below were incorrectly given without applying their judicious mind and upon non-consideration of the relevant special statutory rules and regulations enacted specially for the Chittagong Hill Tracts and therefore the order of the courts below are not sustainable and those ought to be set aside respectively. Upon elaborating his contention the Learned Advocate for the petitioner submits that the Chitttagong Hill Tracts Regulation 1900 hereinafter called Regulation 1900 was amended as late as in the year 2003 and by which amendment two courts were constituted in each districts of CHT being the Districts of Bandarban, Khagrachory and Rangamaty. He continues that these two courts in each district constituted one court with the Joint District Judge and another court was constituted with the District Judge. In this context he takes me to the Regulation 8 of the Chittagong Hill Tracts Regulation, 1900 which regulation provides for 3(three) separate districts with a Civil Court with a concerned joint district judge and a concerned District Judge. He further continues that according to the provisions of Rule 8 (4) of the Chittagong Hill Tracts Regulation, 1900 the court of Joint District Judge shall be a court of original jurisdiction which shall try all civil cases in accordance with the existing laws, customs and usages of the districts concerned except the cases arising out of the family laws and other customary laws of the tribes of the respective districts and the exception arising out of the family laws cases shall be triable by

the Mauza Headman and Circle Chiefs or Tribal Chiefs whatsoever. He further submits that the District Judges Court shall be the appellate court where appeal may be preferred against any order, judgment and decree of the court of Joint District Judge in accordance with Regulation 8(5) of the CHT Regulation, 1900. He submits that prior to amendment in 2003 which only came to effect as late as 2008 the administration of justice in the Chittagong Hill Tracts District was administered and conducted by the district administration being the Deputy commissioner and the Divisional Commissioner respectively in those districts. He next submits that by the amendment of the CHT Regulation 1900 in the year 2003 although the administration of justice was transferred from the executive authorities to the judiciary by way of constituting a civil court but nevertheless the Code of Civil Procedure did not come to be wholly applicable regarding cases arising out of any disputes in those districts. He submits that the applicability of the Code of Civil Procedure however was confined and limited up to a certain point given that the amendment of CHT regulation in the year 2003 however did not interfere into the existing laws and customary laws of the Chittagong Hill Tracts. In this context he takes me to Rule 20 of the "Rules for Administration of the Chittagong Hill Tracts" in the CHT Regulation 1900. He points out that according to the provisions of Rule 20 for the purpose of any registration in the CHT region registration of a document by way of a deed or similar legal instruments is significantly different from the laws of registration in other parts of the country. He submits that Rule 20 of the Rules for Administration of CHT in the Regulation of 1900 provides that the functions of the registering officer shall be performed by the Deputy Commissioner or Sub-Divisional officer or by such other officer as the local government may appoint for the purpose. He distinguishes this particular Rule from the rules of the rest of the country and contends that significantly enough contrary to the provisions for the rest of the country however in the Chittagong Hill Tracts District there are no provisions for any sub-registrar's office for registering any instrument or document. He next submits that Article 152 of the Constitution of Bangladesh provides the definition of existing laws. He submits that 'existing law' has been defined by our constitution as being any law in force in or in any part of the territory of Bangladesh immediately before the commencement of the constitution whether or not it has been brought into operation. He continues that Article 152 has also defined the meaning of 'law' and submits that the term 'law' has been defined by the Article as any Act, Ordinance, Rule, Regulation, bye- law, notification or any other custom or usages etc having the force of law in Bangladesh. The learned Advocate for the petitioner submits that these definitions of the term 'law' and 'existing law' definitely assist in arriving at a proper appreciation as to the limits to the authority of the civil courts in applying the concerned laws to conduct a case and are express guidelines as to the manner in which cases in the Hill Tracts are to be conducted. It is asserted by the learned advocate for the petitioner that "existing law" for the purpose of this case therefore means and includes all the existing laws that was in force in the Chittagong Hill Tracts Regulations, 1900 and in the absence of amendment or repeal of any such laws by any statutory enactment all law that were in force before immediately the constitution was promulgated shall continue to be in force. He also contends that the definition of law as contemplated in the constitution of the land also categorically includes any customs and usages having the force of law in the country at the time. He asserts that therefore for the purpose of deciding the issue in this case it is imperative to be reminded that the customs and usages in the Chittagong Hill Tracts district includes the indigenous tribal customs and usages which shall have the same force as any other law in Bangladesh. He now comes to the facts of in the instant case and submits that in the instant case the courts below committed a grave error of law in not comprehending that the existing laws and Rules and Regulation of the Chittagong Hill Tracts are distinguishable from the laws and regulations in the rest of the country and therefore applicability of the Code of Civil Procedure is also limited and

confined thereto. He submits that the courts below allowed the application for temporary injunction of the plaintiff by staying the proceedings of the mutation case and also rejected the application of the defendant under Order 7 Rule 11 for rejection of plaint on the issue of maintainability as being barred by law upon total misapplication of mind and nonconsideration of the statutory Rules and regulations concerning cases and matters arising out of any dispute in the Chittagong Hill Tracts. He submits that the courts below totally bypassed the statutory enactments of the Chittagong Hill Tracts Regulation, 1900 and also failed to consider the customary laws that must be adhered to in accordance with the intention of the constitution of the land. He agitates that in this case the courts below totally overlooked the fact that before filing of the suit the plaintiff did not issue any notice neither to the concerned Zila Parishad of the Bandarban Hill Tracts district nor was any notice served upon the office of the Deputy Commissioner. Upon a query from the bench as to whether a notice is necessary to the concerned Zila Parishad since the matter arises out of a dispute between two private parties regarding declaration of a deed as void etc, the learned Advocate for the petitioner replies that the Rules and Regulation of Chittagong Hill Tracts are distinguishable from the Rules and Regulation in the other parts of the country by special enactment under the Chittagong Hill Tracts Regulation, 1900. Regarding the issue of failure of issue of notice by the plaintiff to the Zila Parishad, he takes me to section 64 of the "বান্দরবন পার্বত্য জেলা পরিষদ আইন, ১৯৮৯". He draws attention of this court to section 64 and submits that section 64 begins with a non-obstante laws in its preamble providing:

"আপাততঃ বলবৎ অন্য কোন আইনে যাহা কিছু থাকুক না কেন-

He continues that this non –obstance clause section 64 (ক) (খ) expressly means notwithstanding any other law which may be in force in the time being in the country.

5. He now takes me to the provision and reads from section 64 (1) (ক) (খ) of the Ain of 1989 which is provides:

(ক) বান্দরবন পার্বত্য জেলার এলাকাধীন বন্দোবস্তযোগ্য খাস জমিসহ যে কোন জায়গা জমি, পরিষদের পূর্বানুমোদন ব্যতিরেকে, ইজারা প্রদান, বন্দোবস্ত, ক্রয়-বিক্রয় বা অন্যবিধভাবে হস্তান্তর করা যাইবে না।

তবে শর্ত থাকে যে, সংরক্ষিত (Reserved) বনাঞ্চল, কাপ্তাই জলবিদ্যুৎ প্রকল্প এলাকা, বেতবুনিয়া ভূ-উপগ্রহ এলাকা, রাষ্ট্রীয় মালিকানাধীন শিল্পকারখানা ও সরকার বা স্থানীয় কর্তৃপক্ষের নামে রেকর্ডকৃ জমির ক্ষেত্রে এই বিধান প্রযোজ্য হইবে না।

(খ) পরিষদের নিয়ন্ত্রণ ও আওতাধীন কোন প্রকারের জমি, পাহাড় ও বনাঞ্চল পরিষদের সহিত আলোচনা ও উহার সম্মতি ব্যতিরেকে সরকার কর্তৃক অধিগ্রহণ ও হস্তান্তর করা যাইবে না।

6. He points out that this section categorically provides that for transfer of any property in the Chittagong Hill Tracts area by way of sale, lease whatsoever no such sale or transfer can be done without the prior approval of the concerned Zila Parishad of any of the 3 Chittagong Hill Tracts District. He next takes me to section 71 of the Ain of 1989 and submits that it is expressly provided in section 71 of the Ain that any case involving the Zila Parishad or involving its employees in any matter, such case cannot be filed by an party without issuing prior notice to the concerned Zilla Parishad. He further points out that sub-section 2 of section 71 provides that before 30 days of sending the notice no suit can be filed against the Parishad by any person whatsoever in the CHT district. He contends that these 2 sections section 64(1) and section 71(1) are inter related and ought to be read together particularly in addressing an issue in this case presently being dealt with here. To vindicate his assertion he takes me to the exhibit- 5 series of the supplementary affidavit filed by the petitioner. In this context he takes me to the "আদেশ প্রত্র নতুন নামজারি মোকদ্দমা নং ২৩/সদর/২০১১" and points out that this is an order of the concerned ADC Revenue and further points out that from this order it is revealed that before transfer of the land by way of sale the concerned Zila Parishad represented by its chairman had given prior approval to transfer the same and which is on record. He next submits that from this document it is clear that prior to registration of the

deed by way of sale, prior approval of the Zila Parishad was taken as per provisions of section 64 (1) of the Bandarban Zila Parishad Ain, 1989. He next submits that although the impugned deed of sale in this case challenging which the suit was filed was executed between 2 private parties nevertheless the said property which is the subject matter of the deed was transferred by way of sale whatsoever without the prior approval of the Zila Parishad. He agitated that in accordance with section 64(1) of the Ain of 1989 read along with section 71 of the Ain it is obvious that in any dispute arising out of a deed of the type in this case, the Zila Parishad is a proper and necessary party and therefore a notice is to be mandatorily served in accordance with the provisions sub-section 1 of section 71 of the Ain. He argued that in this case however the parties prior to filing of the suit did not comply with the statutory provisions of section 71 sub-section 1 read along section 71 of sub section 2 of the Ain and therefore such a suit is not maintainable since the proper parties were not notified priorly in accordance with the provisions of the Ain. On the contention on failure of the plaintiff in issuing prior notice to the Deputy Commissioner, the learned Advocate for the petitioner urges that the plaintiff also failed to issue notice to the Deputy commissioner given that it is evident from the records and from the customary existing laws of Chittagong Hill Tracts that the Deputy Commissioner is a necessary party upon whom notice must be served before filing of any suit in the Chittagong Hill Tracts. He elaborates this contention upon taking me to Annexure-5 series of the 'আদেশ পত্র' by which he shows that it is evident from the documents marked as Annexure- 5 series that the Deputy Commissioner is a necessary party and without issuance of notice to the Deputy Commissioner, the suit is also not maintainable from defect of parties as being barred by law. He next submits that under Rule 20 of the CHT Regulation 1900 the functions of the registering officer shall be performed by the Deputy Commissioner or sub-divisional officer or by such other officer as the local government may appoint for the purpose. Relying upon Rule 20 he urges that it is evident that the function of registration in the CHT region is not conferred upon any sub registrar's office, rather the office of the Deputy Commissioner is the direct authority to do the same. He stresses that in the Chittagong Hill Tracts region such function being designated to the office of the Deputy Commissioner is distinguishable from the rules in the rest of the country and significantly shows that the Deputy Commissioner is a necessary party in matters of property upon whom a notice must be served before filing of any civil Suit. He takes me to Annexure-D series to an application filed by the plaintiff in this suit and contends that the application arose out of the Mutation Case N. ২৩/সদর/২০১১. He next contends that it is clear from this application that the plaintiff himself filed this application before the Deputy Commissioner through the Assistant Commissioner Land of the Bandarban Shadar Upazila for mutation of the said land. He next takes me to an enquiry report under the signature of the Mouza Headman in the নামজারি মোকদ্দমা নং ২৩/সদর/২০১১. He continues that this report is also addressed to the Deputy Commissioner of the District. He next takes me to the কানুনগো/ সার্ভেয়ারস enquiry report which is addressed to the Assistant Commissioner of Land. Upon drawing attention to these documents produced as Annexures in the supplementary affidavit, he contends that from these documents it is clear that the Deputy Commissioner's office is directly involved in the transfer of any land in the CHT as per existing laws and customs of the CHT read along with Rule 20 of the CHT Regulations 1900. He assails that therefore it is clear that the suit is not maintainable in the absence of any notice to the concerned authority that is the Deputy Commissioner's office and the Zila Parishad and therefore the suit suffers from maintainability. In support of his submission that the existing laws and customs of the Chittagong Hill Tracts were not repealed after the amendment of 2003 and also that the existing laws and customs has constitutional support he cites a few decisions of this court and our Apex Court inter alia in the case of Wagachara Tea Estate Vs. Md. Abu Taher reported in 69 DLR (AD) (2017) page-381 and another in the case of Bangladesh Vs Rangamati Food

Products reported in 69 DLR (AD) (2017) page- 432. He pursuaded that these Apex Court decisions which are binding upon us categorically holds that in deciding civil suits the customary and existing laws and usages of the Hill Tracts region must be retained. He next submits that the provision of prior notice to statutory authority is also provided for in other existing laws in this country wherefrom analogy may be drawn in the instant case. He submits that section 91 of the Local Government Ordinance (XC of 1976) provide for non maintainability of suit in case of non service of notice to the concerned authority. He continues that section 91 of the Local Government Ordinance (XC of 1976) received interpretation from our Apex Court in the case of District Council Vs Feni Alia Madrasha reported in 69 DLR (AD) (2017) page- 46 wherein our Apex Court held that service of notice as required by section 91 of the Local Government Ordinance (XC of 1976) is mandatory and in the absence of notice the suit could not be instituted and in other words the suit is not maintainable. The learned Advocate for the petitioner draws analogy from this judgment with the case before this court at present and submits that upon comparison therefore it is evident that the other laws of the land also generally contemplate issuance of prior notice to the concerned statutory authorities prior to filing of any suit where the authorities are involved or otherwise concerned. He concludes his submission upon assertion that in this case since no notice under the statutory provisions was served upon the plaintiff and the customs and usages laws of the CHT regin not being complied with therefore the suit is not maintainable in limine and the orders of the courts below are not sustainable whatsoever and is liable to be set aside and the Rule be made absolute for ends of justice.

7. Learned Advocate for the opposite party upon filing a counter affidavit submits that the courts below correctly gave the orders and those need not be interfered with in Revision. Upon elaborating his submissions he however concedes that the existing customary laws and usages of the Chittagong Hill Tracts region were not repealed and or otherwise amended and therefore those must be followed in a suit in an appropriate case arising therein. However regarding the instant case he contends that in the instant case the dispute arises between two private parties wherein one party challenged the validity of the deed being a Bainapatra and therefore the dispute arising out of execution of a deed between two private parties therefore, the statutory authorities whatsoever are not concerned in this matter. He refers to section 64 of the Ordinance of Bandarban Zila Parishad Ain, 1989 and agitates that section 64 of the Ain contemplates the involvement of the Zila Parishad as to the competence of a party in respect of transfer of any property by way of lease, sale deed etc whatsoever to another person in the Chittagong Hill Tracts region. He assails that the Zila Parishad's function is confined only in determining the competence of a person or a party to transfer the property and the competence of the other party to receive such property following such transfer. He also submits that in this case the Zila Parishad is not authorized or involved in the execution of the registered deed whatsoever and therefore no notice need to be served upon the Zila Parishad prior to filing the suit and therefore section 71 of the Ain of 1989 is not applicable in the instant case. He submits that this case is not a case against the Zila Parishad nor does it involve any of the Zila Parishad Officer or employees in any manner and therefore notice need not to be served under section 71 of the Ain. He next submits that the Deputy Commissioner of the Bandarban District is also on board in the suit since he is a defendant in the suit and therefore there are no defect of parties in the suit and the suit is maintainable being in proper form. From the supplementary affidavit filed by the petitioner he shows that the Mutation Case No. ২৩/স/২০১১ was not acted upon and as such the defendant filed Miscellaneous Case No. 252 (D0-/2012. He submits that the defendant filed the Miscellaneous Case NO. 252 (D0-/2012 and against this miscellaneous case injunction was sought by the plaintiff and the courts below correctly passed the order allowing the

application restraining the respondent No. 32 proceeding with the miscellaneous case and the appellate court correctly modified the order granting status-quo. He also submits that the case of Nur Mohammad Vs Asen Ali and others, reported in 24 BLT (HCD) Page- 371 is applicable in the instant case, since in the 24BLT(HCD) case it was held that the civil court can restrain the parties from proceeding with any case pending before a revenue authority. He submits that in the instant case the Deputy Commissioner and the other officers are acting as revenue officer and therefore the civil courts can restrain the parties from proceeding from any case pending before such revenue authority. He continues that no direct involvement of the Zila Parishad being found in this case relating to the original dispute arising out of execution of the impugned Deed and for the Deputy Commissioner being made a defendant in the suit there has been no violation of any laws under the existing laws of the CHT Regulation and the Ain of 1989 and no customary laws were violated in the instant suit and therefore the orders were correctly given and the Rule bears no merits and may be discharged for ends of justice.

8. Learned Deputy Attorney General Mr. Protiker Chakma assisted the court and made his submission in this case. He submits that Section 64 and Section 71 of the Ain of 1989 contemplates a mandatory notice to the Zila Parishad before filing any suit arising out of any dispute in which the parishad or any of its employee may be involved. He also submits that according to existing customary laws in the Chittagong Hill Tracts region and supported by decisions of this court and of our Apex Court the Deputy Commissioner is the concerned authority and should be notified prior to filing any case in the Chittagong Hill Tracts. In support of his submissions he cited a decision in the case of Satvabarata Chakma Vs Trinovan Chakma reported in 24 BLT (HCD) 2016 page-281.

9. Heard the learned Advocate from both sides and also heard the learned Deputy Attorney General, perused the application, materials on records including the judgment and order of the courts below and also perused the provisions of the CHT Regulation, 1900 and the "বান্দরবন পার্বত্য জেলা পরিষদ আইন, ১৯৮৯". I have examined Section 64 of the "বান্দরবন পার্বত্য জেলা পরিষদ আইন, ১৯৮৯" read along with section 71 of the Ain which are reproduced here under:

Section 64 (1) (ক) (খ) of the Ain reads:

(1) "আপাততঃ বলবৎ অন্য কোন আইনে যাহা কিছু থাকুক না কেন-

(ক) বান্দরবন পার্বত্য জেলার এলাকাধীন বন্দোবস্তযোগ্য খাস জমিসহ যে কোন জায়গা জমি, পরিষদের পূর্বানুমোদন ব্যতিরেকে, ইজারা প্রদান, বন্দোবস্ত, ক্রয়-বিক্রয় বা অন্যবিধভাবে হস্তান্তর করা যাইবে না।

তবে শর্ত থাকে যে, সংরক্ষিত (Reserved) বনাঞ্চল, কাপ্তাই জলবিদ্যুৎ প্রকল্প এলাকা, বেতবুনিয়া ভূ-উপগ্রহ এলাকা, রাষ্ট্রীয় মালিকানাধীন শিল্পকারখানা ও সরকার বা স্থানীয় কর্তৃপক্ষের নামে রেকর্ডকৃ জমির ক্ষেত্রে এই বিধান প্রযোজ্য হইবে না।

(খ) পরিষদের নিয়ন্ত্রণ ও আওতাধীন কোন প্রকারের জমি, পাহাড় ও বনাঞ্চল পরিষদের সহিত আলোচনা ও উহার সম্মতি ব্যতিরেকে সরকার কর্তৃক অধিগ্রহণ ও হস্তান্তর করা যাইবে না।

Section 71(1) (ক) (খ) of the Ain reads:

৭১। (১) পরিষদের বিরুদ্ধে বা পরিষদ সংক্রান্ত কোন কাজের জন্য উহার কোন সদস্য বা কর্মকর্তা বা কর্মচারীর বিরুদ্ধে কোন মামলা দায়ের করিতে হইলে মামলা দায়ের করিতে ইচ্ছুক ব্যক্তিকে মামলার কারণ এবং বাদীর নাম ও ঠিকানা উল্লেখ করিয়া একটি নোটিশ-

(ক) পরিষদের ক্ষেত্রে, পরিষদের কার্যালয়ে প্রদান করিতে হইবে বা পৌছাইয়া দিতে হইবে;

(খ) অন্যান্য ক্ষেত্রে, সংশ্লিষ্ট সদস্য, কর্মকর্তা বা কর্মচারীর নিকট ব্যক্তিগতভাবে বা তাঁহার অফিস বা বাসস্থানে প্রদান করিতে হইবে বা পৌছাইয়া দিতে হইবে।

10. Upon perusal of the provisions of Section 64 it is clear that prior approval of the concerned Zila Parishad for transfer of property by way of sale or lease is mandatory and no such transfer can be a valid transfer in any property in the Chittagong Hill Tracts region without prior notice under Section 64 of the Ain.

11. The learned advocate for the opposite party contended that the Zila Parishad need not be notified in this case since section 64 of the Ain of the 1989 contemplates that the approval of the Zila Parishad is confined only up to determining and ascertaining the competence of parties to transfer by way of sale or lease whatsoever. Upon perusal of the relevant provisions section 64, I am however inclined to hold that the learned advocate for the opposite party failed to comprehend and appreciate the provisions of section 64 (1). Upon scrutiny I do not find anything in this section which may contemplate or intend that prior approval of the Zila Parishad is necessary 'only' to determine the competence any of party or person to transfer or receive any property by way of sell or lease whatsoever and not in any other matter related to such property.

12. The language of section 64 broadly contemplates that prior approval of the Zilla Parished is necessary for any transfer of any property by way of lease, settlement purchase, sale whatsoever. For the purpose of addressing the issue before us presently Section 64(1) (ka) must be read together with section 71 of the Ain. Therefore I have simultaneously examined section 71(1) of the Ain which provide that in any suit against the Zila Prashid or in any suit involving the Zila Prashid "পরিষদ সংক্রন্ত" prior notice before filing a suit must be given to the Parishad.

13. To further appreciate the relevant laws e.g the provisions of Section 64 and Section 71 of the Ain of 1989 including Rule 20 of the CHT inter alia the provisions of CHT Regulation of 1900 and to draw an analogy with the facts of the instant case, it is necessary to discuss the documents marked as Annexure 5 series of the supplementary Affidavit filed by the petitioner.

14. From the supplementary affidavit in Annexure-D series filed by the petitioner from the "আদেশ পত্র" dated 14.02.2012 it transpires that prior approval of the Zila Parishad in the instant case for purpose of execution of the deed between the parties was taken in accordance with the Ain and also in accordance with the existing customary laws of the Chittagong Hill Tracts region. Summing up Section 64 read along with Section 71 and from the "আদেশ পত্র" dated 14.02.2012 and from Annexure-5 series in the supplementary filed by the petitioner, I am of the considered view that in accordance with the Ain of 1989 and from the documents on record it is clear that the Zila Parishad is directly involved in this case and therefore notice under Section 71 is to be mandatorily served upon the Parishad.

15. Countering the contention of the petitioner that the Deputy Commissioner was also a necessary party but yet he was not served any notice before filing the suit, the opposite party contends that notice is not mandatory upon the Deputy Commissioner since he is already a party to the suit by way of being a defendant in the suit representing the government. In this context, the learned advocate for the petitioner however contends that it is clear from the records that the Deputy Commissioner was all through involved in the process of transfer of this land in the alleged deed. While addressing this issue he draws this court's attention to Annexure-D series of the supplementary affidavit wherefrom he draws this court's attention to the several documents annexed herein. Upon examination into these documents it is revealed that through out the whole process, from the process of permission to transfer of the said property in the alleged deed the office of the Deputy Commissioner was directly involved from the inception and the approval was accorded by them. He also points out to the কানুনগো surveyor's enquiry report which was submitted to the Deputy Commissioner's office. I have perused all these documents including the আদেশ in the নামজারি মিস কেস নং ২৩/স/২০১১ and I

have also perused the document in the Mutation Case No. 252/(D0)-/2012. Upon perusal of the Mutation Case it transpires that the miscellaneous case was filed before the Deputy Commissioner's office. The laws and regulations of the Chittagong Hill Tracts are different from other regulation or laws. It is evident from the procedures before transfer as in the officials documents placed before me that the customary and existing laws of the Chittagong Hill tracts contemplate direct involvement of the Deputy Commissioner's office at all stages prior to transfer of any land. Furthermore Rule 20 of the Regulation 1900 also provides that the function of a registering officer to register any deed shall be performed by the Deputy Commissioner or sub-divisional office of that district. It is therefore reasonable to hold that the function of registration of the deed also being vested upon the Deputy Commissioner's office therefore any dispute arising out of any property by challenging whatsoever between any person prior to filing such suit a notice to the Deputy Commissioner is absolute mandatory in conformity with the customs, usages and existing laws of the CHT region.

16. The learned Advocate for the petitioner cited a case in the case of District Council Vs Feni Alia Madrasha reported in 69 DLR (AD) (2017) page- 46 including some decisions of this Division where in the same principle is expounded. I have perused the 69 DLR(AD)2017 page 46 judgment which concerned a case under section 91 of the Local Government Ordinance (XC of 1976) and the principle set out in that Apex Court Judgment is reproduced here under:

"Maintainability of suit for non-service of notice –where there are mandatory provision of law to be complied with before filing a suit, such provision must be complied with before institution of the suit. Since the provision of section 91 of the Ordinance was not complied with the suit was not maintainable."

"Service of notice as required by section 91 of the ordinance was mandatory and i the absence of such notice, the suit could not be instituted, in other words the suit could not be maintained."

17. I am also of the considered opinion that the principle of pari materia may be applied in the instant case before me and an analogy may be drawn to be effect that section 91 of the Local Government Ordinance (XC of 1976) also contemplates mandatory issuance of notice upon the statutory authorities before filing of any suit in accordance with the relevant laws and also taking into consideration the existing customary laws of the Chittagong Hill Tracts which contemplate mandatory service of notice to the concerned authorities prior to filing any suit.

18. It is also necessary to be reminded that laws, regulations relating to the Chittagong Hill Tracts are special statutory enactments and they must be read along with the existing laws and customs of the CHT region and which have not been repealed by any enactment or otherwise by any constitutional amendment. Article 152 of the constitution clearly provides the definition of 'law' and 'existing law' wherefrom it may be understood that the customary laws and usages of the Chittagong Hill Tracts are all within the ambits of law and violation of any such law, custom, usage etc is also a violation of the provisions of the constitution of Bangladesh. The continuance of the applicability of the customary laws and usages received support in some of our Apex Court Decisions which have been cited by the petitioner inter alia in the cases of Wagachara Tea Estate Vs. Md. Abu Taher reported in 69 DLR (AD) (2017) page-381 and another in the case of Bangladesh Vs Rangamati Food Products reported in 69 DLR (AD) (2017) page- 432 Under the facts and circumstances of the cases and from the foregoing discussions made above and from the relevant laws and in the light of

the submissions made by the learned Advocates from both sides and relying upon the decisions cited by the learned Advocates from both sides. I find merits in the Rule.

19. Hence, I find merit in the Rule.

20. In the result, the Rule is made absolute and the judgment and order dated 30.03.2017 passed by the learned Additional District Judge, Bandarban Hill District in Miscellaneous Appeal No. 05 of 2016 is hereby set aside.

21. The order of stay granted earlier by this court is hereby recalled and vacated.

22. Communicate the judgment and order at once.

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

Suo-Motu Contempt Rule No. 26263 OF 2017.

**State**
**…..Petitioner**
-Versus-
**Advocate Noor-E-Alam Uzzal and others**
**……Contemnors.**

Mr. Gazi Md. Mamunur Rashid, A.A.G
with
Mr. Md. Asaduzzaman, A.A.G
**…….. For the Peitioner.**

Mr. Abdul Baset Majumder, Advocate
with
Mr. Yusuf Hossen Humayun, Advocate,
Mr. Zainal Abedin, Advocate,
Mr. A.M Mahbub Uddin, Advocate,
Mr. S.M Rezaul Karim, Advocate,
Mr. Bashir Ahmed, Advocate,
Mr. A.M. Amin Uddin, Advocate,
Mr. Md. Badruddoza Badal, Advocate,
Mr. Md. Ozi Ullah, Advocate,
Mr. S.M. Abul Hosen, Advocate,
Mr. Azhar Ullah Bhuiyan, Advocate
**…..... For the Contemnors.**

Heard on the 2nd, 10th & 20th of July,2017
Judgment on: the 20th of July, 2017

**Present:**
**Justice Md. Nazrul Islam Talukder**
**And**
**Justice Khizir Ahmed Choudhury**

**Contempt of Court;**
**Whether the conduct, behavior and activities like shouting, assaulting the Bench Officer and ransacking the case records, fall within the purview of contempt of court. Contempt may be constituted by any conduct that brings authority of the court into disrespect, disregard and/or disrepute or undermines the dignity and prestige of the court. By the aforesaid act of the Advocates, the administration of the justice and the court proceedings had been seriously interfered with and the course of justice had also been obstructed. The behavior and the conduct of the Advocates by beating and assaulting the Bench Officer is insulting, disrespectful and threatening to the administration of justice. ... (Para 37)**

**Editor's Note:**
**However, the contemnors prayed for unconditional apology and the Court has accepted it as an exception but not as a rule. Accordingly the Rule was disposed of with cautions and strictures upon the contemnors.**

**JUDGMENT**

**Md. Nazrul Islam Talukder, J:**

1. This Suo-Motu Contempt Rule was issued calling upon the contemnors namely (1) Advocate Noor-E-Alam Uzzal, (2) Advocate Billal Hossen Lizen Patwary, (3) Advocate B.M. Sultan Mahmud, (4) Advocate Mati Lal Bepari and (5) Advocate Mohammad Ali, to show cause as to why they shall not be proceeded against for committing contempt of this Court and punished suitably and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The facts leading up to issuance of the contempt Rule against the contemnors are as follows:-

The Hon'ble Chief Justice of Bangladesh in exercise of his authority under Article 107(3) of the Constitution of the People's Republic of Bangladesh constituted a vacation bench comprising their lordships mentioned above in order to perform judicial functions in the vacation bench. In view of the above, the learned Judges of the aforesaid bench started performing their judicial functions in the vacation bench sitting in Court No. 24 (annex) from 11.06.2017. The Hon'ble Judges of the vacation bench performed their legal duties with great endeavor and utmost sincerity by dispensing justice to the litigant people. On 19.06.2017, the Hon'ble Judges of the vacation bench performed their judicial functions till 2.00 p.m considering the large number of the cases pending before the court, though the Court hour was up to 1.00 p.m. When the court was functioning, a number of Advocates made different prayers particularly in respect of hearing of their listed and unlisted motions and prayed to have their matters heard before rising of the Court as a result of which a hue and cry was started for which the functions of the Court were obstructed. It is to be mentioned here that on that day, the listed motions alongwith some unlisted motions at the prayer of the learned Advocates were heard and necessary orders were passed after hearing the same. At one stage, the learned Judges rose from the Court. Immediately after rising from the Court, a number of Advocates namely (1) Advocate Noor E Alam Uzzal, (2) Advocate Billal Hossen Lizen Patwary, (3) Advocate B.M. Sultan Mahmud, (4) Advocate Mati Lal Bapari and (5) Advocate Mohammad Ali came in front of the Bench Officer namely Md. Rafiqul Islam, fell upon him, assaulted him by inflicting blows upon his head and different parts of the body and ransacked the case record remained in the Court on the plea that their listed as well unlisted motions were not heard in spite of their repeated demand and endeavour. Besides, Advocate Mohammad Ali and some others Advocates standing besides the dias of the court room instigated the aggressive Advocates mentioned above to beat and kill the said Bench Officer and they also started throwing case records from the table. By this way, the contemnors had shown breathtaking arrogance by making enormous outburst in the court room. The court rooms descended into chaos when breathtakingly arrogant Advocates and the Bench Officer became embroiled in conflicts with bad tempered hot talks with each other and at one stage, the contemnors assaulted the bench officer. The conduct of the arrogant Advocates had been rude and discourteous to the court staff. By this way, the behaviors and conducts of the contemnors undermined the dignity, honour, respect, majesty and status of the court, which hindered the administration of justice and also degraded the court in the estimation of the public. Such conducts of the aforesaid Advocates are tantamount to contempt of court, which are punishable under the law. Under the circumstances, this court was inclined to issue a contempt Rule upon the contemnors to show cause as to why they shall not be proceeded against for committing contempt of this court and punished suitably and/or pass such other order/orders as to this court may seem fit and proper.

3. It may be noted that we, by the order dated 19.06.2017, directed the contemnors to appear before this court in person on 02.07.2017 at 10.30 a.m. positively.

4. Pursuant to our order dated 19.06.2017, all the contemnors appeared before this court in person and of them, contemnor Nos. 1 and 2 submitted applications for exoneration of their personal appearance and also prayed for time for submitting affidavit-in-opposition/affidavit against the Rule. On the other hand, contemnor Nos. 3-5 prayed for acceptance of their appearance and also prayed for time for submitting affidavit-in-opposition/affidavit against the Rule. This Court, on the prayer of the contemnors and in

consideration of the submissions of their learned Advocates, accepted the appearance of all the contemnors and directed them to submit their explanation in black and white by way of affidavit-in opposition/affidavit on 10.07.2017.

5. On 10.07.2017, contemnor Nos. 1 and 2 submitted two applications offering unconditional apology with a prayer for accepting unconditional apology and exonerating them from the charge of contempt of Court. On that day, contemnor No. 3 submitted an affidavit praying for exoneration from the contempt proceeding stating therein as under:-

''That after receiving the copy of suo moto rule I became surprised to see my involvement in inflicting blows upon the bench officer Md. Rafiqul Islam and I ignore my involvement in any kind of subversive activities occurred that day. I was not present at that time in the concerned court but it is true that I protested in writing against the immoral financial transaction in making the daily cause list done by the said bench officer of the concerned court; that as an advocate of Supreme Court I believe in independence of the judiciary, supremacy of the constitution and upholding the prestige of the courts. I think that somebody misguided the Hon'ble Court to include my name in issuing of the said suo-moto rule; that I am denying all the allegations brought against me, I was not involved in the occurrence that day, at that time I was out of the court, so I cannot be involved in such kind of occurrence, I personally ashamed of the incident; that as I was not present on the place of occurrence, I pray for exoneration from personal appearance before the court.''

6. However, contemnor No. 3 in the midst of hearing changed his mind and prayed for unconditional apology by adding a new paragraph striking off his defence plea.

7. Contemnor No. 4 submitted an affidavit of compliance and stated therein as follow:-

''That on the last 19th June of 2017 I proceeded for one case, item No. 48 before your lordships and then I left the court premises and I started for Barisal, 19th June at the time of occurrence. I was not present in the court room, which allegation is brought against me is absolutely not truth; that your excellencies and Highness I have great respect to the court, I did not cause to pain to others in the court and did not make any hindrance and trouble to anybody in the court room; I am fervently praying that under the circumstances come what may I want to say may kindly be accepted my honest and sincere explanation which is shortly explained which facts and circumstances your highness be exonerated me from the charge of committing contempt Rule of this court for the ends of justice.''

8. However, contemnor No. 4 during hearing of the case could not stand on his defence plea and ultimately, he changed his mind and prayed for unconditional apology by striking off his defence plea.

9. Contemnor No. 5 also submitted an affidavit of compliance and disclosed therein as follows:-

''That on 19th June 2017 I conducted a case before your lordships at serial No. 86 and I had no other commitment before your lordships, hence, I left the court room immediate after my item was heard. At the relevant time I was not present in the court room. Thus I no way could shout as has been alleged against me and as such, allegation brought against me could be under an impression, which is not true and correct; My lords I am always respectful to the Hon'ble court and I will never indulge any disturb in any court room in any manner.''

10. However, this contemnor also could not stick to his defence plea, and thereby he changed his mind in the midst of hearing and prayed for unconditional apology by striking off his defence case.

11. Mr. Abdul Baset Majumder, learned Advocate alongwith Mr. Yusuf Hossen Humayun, Mr. Zainul Abedin, Mr. S.M Rezaul Karim, Mr. A.M. Amin Uddin, Mr. Bashir Ahmed, Mr. Md. Badruddoza Badal, Mr. A.M. Mahbub Uddin, Mr. Md. Ozi Ullah, Mr. Azhar Ullah Bhuiyan, learned Advocates, appearing on behalf of the contemnors, submits that after the commission of contempt of court, the contemnors have realized that they committed wrong making outburst in the courtroom assaulting the Bench Officer and ransacking the case records and for these reasons, they at the initial stage have surrendered to the jurisdiction of the court by offering unconditional apology and as such, all the contemnors may be exonerated from the charge of contempt of court.

12. He next submits that the contemnors shall not indulge in this kind of atrocities which amount to contempt of court in future and as such, for this reason also, the contemnors may be exonerated from the charge of contempt.

13. He candidly submits that with a view to keeping congenial atmosphere in the court premises and making harmony and good relationships between the Bench and the Bar, the exoneration prayer of the contemnors from the charge of contempt of court may kindly be accepted and they may be let off thereby from the charge of contempt of court.

14. He lastly submits that since the contemnors have committed this kind of contempt of court for the first time, they may be exonerated from the charge of contempt of court.
Mr. Gazi Md.Mamunur Rashid, learned A.A.G with Mr. Md. Asaduzzaman, A.A.G appearing for the State, submits that since all the contemnors have offered and prayed for unconditional apology, and Vice-chairman of Bangladesh Bar Council, President and Secretary of Supreme Court Bar Association alongwith other learned Advocates have approached this court for the exoneration of the contemnors, it is up to the court to decide what orders are required to be passed by their lordships for ends of justice.

15. Before coming to a decision in this Rule, we would like to make some highlights on the profession of Advocates and on their professional duties, conducts and etiquettes. In so many legal decisions of this Sub-continent, the Advocacy has been regarded as a noble profession and the learned Advocates are the most accountable, privileged and erudite persons of the society. The good acts of the learned Advocates are the role model for the society. The professional misconduct is the behaviour outside the bounds what are considered unacceptable or unworthy of its membership by the governing body of profession. The professional misconduct refers to disgraceful and dishonourable conducts which are not befitting for an Advocate. Generally, legal profession is not a trade or business. It is a gracious, noble and decontaminated profession of the society. The members belonging to these professions should not encourage deceitfulness and corruption but they have to strive to secure justice to their clients. The credibility and reputation of the profession depend upon the manner in which the members of the profession conduct themselves. The measured and disciplined conduct is a symbol of healthy relationship between the bench and the bar. The credibility and reputation of the profession comes under a clout on account of acts, omissions and commissions by any member of the profession. It is different from other types of jobs. It requires skills in learning laws and in handling the cases in accordance with law. The necessary skills of an Advocate are supposed to be improved with the experience following

the passage of time on the profession. There is no short-cut way to become a good Advocate save and except hard working and intuition to learn more and more for becoming a good lawyer.

16. Misconduct, according to Oxford dictionary means a wrongful, improper, or unlawful conduct motivated by premeditated act. The behavior of an Advocate not conforming to prevailing laws and rules of land is not proper behavior of an Advocate who is entrusted or engaged to act on behalf of his clients or litigant public. The expression professional misconduct in the simple sense means improper conduct. In law profession, misconduct means an act done willfully with a wrong intention by the people engaged in the profession. It means any activity or behaviour of an advocate in violation of professional ethics for his selfish ends. If an act creates disrespect to his profession and makes him unworthy of being in the profession, it amounts to professional misconduct. In other word, an act which disqualifies an advocate to continue in legal profession is professional misconduct.

17. By many celebrated judgments, the following activities are termed to be the professional misconducts of an Advocate:-

1. An Advocate is said to have indulged in professional misconducts when he is found to have accepted money in the name of a Judge;
2. When an Advocate is found to have tampered with the court record or court order;
3. When an Advocate browbeats or abuses a Judge or judicial officer;
4. When an Advocate is found to have sent or spread unfounded and unsubstantiated allegations or petitions against judicial officer or a Judge of the superior court;
5. When an Advocate actively participates in a procession and involves in any programme which is against the interest of the court and a Judge or judicial officer;
6. When an Advocate appears in the court under influence of liquor;
7. When an Advocate enters the chamber of a Judge or judicial officer with mala-fide intention keeping his client outside the chamber in order to show to his client that he has good relationship with a Judge or judicial officer giving a thought to his client that he can do something favorable for his client;
8. When an Advocate meets a Judge or judicial officer with oblique motives immediately before moving his case before a Judge or judicial officer;
9. When an Advocate enters the chamber of a Judge or judicial officer with a view to making tadbir/tadbirs in the matter of case or cases pending or supposed to be pending before a Judge or judicial officer;
10. When an Advocate violates ethics and etiquettes as well as rules and decorums of the court as prescribed by laws;
11. When an Advocate is found in commission of dereliction of duty, professional negligence, misappropriation of money and properties, changing sides, contempt of court and improper behavior before a court, furnishing false information, giving improper advice, misleading the clients in court, non speaking the truth, disowning allegiance to court, moving application without informing that a similar application has been rejected by another court/authority, suggesting to bribe the court officials, forcing the prosecution witness not to tell the truth.

18. In India, when an Advocate commits professional misconduct, generally the Bar Council of India deals with the matter in order to combat the allegations against the Advocates in accordance with its law and rules. But on the face of rampant allegation against the Advocates, the Bar Council of India was very ineffective in dealing with erring Advocates. Under the circumstances, the Madras High Court came forward and took up the

issue in its own shoulder to redress the same. The Madras High Court in many judgments took upon itself the power to debar an Advocate from professional misconducts though this power vests with the Bar Council of India. As per decisions of Madras High Court, if any misconduct is committed by an Advocate before the High Court, the High Court shall have power to initiate action against the Advocate concerned and debar him from appearing before High Court and all subordinate courts, and if the misconduct is committed before the court of District Judge, the District Judge shall have the power to initiate action against the Advocate concerned and debar him from appearing before any court within such district. The subordinate courts have also been conferred power to recommend to the District Judge for debarring a delinquent Advocate.

The essence of the aforesaid findings are found from the cases of Daroga Singh and Others vs. B.K Pandey, (2004)5 SCC 26, R.D Saxena vs. Balram Prasad Sharma, (2000)7 SCC 264, Mahabir Prasad Singh vs. Jacks Aviation Pvt. Ltd., (1999)1 SCC 37, Ajay Kumar Pandey, Advocate, In Re: (1998) 7 SCC 248, Chetak Construction Ltd. vs. Om Prakash & Ors. , (1998)4 SCC 577, Radha Mohan Lal vs. Rajasthan High Court, (2003) 3 SCC 427, M.B & Sanghi, Advocate vs. High Court of Punjab & Haryana, (1991) 3 SCC 600, L.D Jaikwal V. State of Uttar Pradesh, (1984)3 SCC 405, Lalit Mohan Das vs. Advocate General, Orissa & Another, AIR(1957)SC 250, Shamsher Singh Bedi vs. High Court of Punjab & Haryana, ( 1996) 7 SCC 99 and M.B Sanghi, Advocate vs. High Court of Punjab & Haryana & ors, State of Punjab V. Ram Singh, AIR (1992) Supreme Court 2188, Sambhu Ram Yadav V. Hanuman Das Khatry (2001) 6 SCC 165, Noratanmal Courasia V. M.R. Murali (2004) AIR 2440, N. G. Dastance V. Shrikant S. Shinde AIR (2001) SC 2028, Bar Council of Maharashtra v. M.V. Dahbolkar AIR (1976) SC 242, B.M. Verma v. Uttrakhand Regulatory Commission. Appeal No. 156 of 2007, Court of Its Own Motion V. State 151 (2008) DLT 695 (Del., DB), SC Bar Association v. Union of India (1998)4 SCC 409, Anil Kumar Sarkar v. Hirak Ghosh (2002) 4 SCC 21, R.K. Ananad V. Registrar of Delhi HC (2009) 8 SCC 106, Hikmat Ali Khan V. Ishwar Prasad arya and ors. (1997) RD-SC 87, Vinay Chandra Mishra, in re,(1995) 2 SCC 584, Ex-capt. Harish Uppal V. Union of India 2003(1) ALLMR(SC)1169, Lieutenant Colonel S.J. Chaudhary V. State (Delhi Administration (1984) CriLJ 340, K. John Koshy and Ors. V. Dr. Tarakeshwar Prasad Shaw (1998) 8 SCC 624, India Council of Legal Aid and Advice V. Bar Council of India (1995)1 SCR 304, In Re: Sanjeev Datta (1995) CriLJ 2910, Rajendra V. Pai V. Alex Fernandes and Ors, AIR(2002) SC 1808, Harish Chandra Tiwari V. Baiju (2002)AIR SC 548.

19. The code of conduct of the Bar of England and Wales prescribes the following core duties to be maintained by the Barristers and the learned Advocates:-

Code No.1- he/she must observe his/her duty to the court in the administration of justice;
Code No. 2- he/she must act in the best interest of each client;
Code No.3- he/she must act with honesty and integrity;
Code No. 4- he/she must maintain his/her independence;
Code No.5- he/she must not behave in a way to diminish the trust and confidence which the public places in his/her or in the profession;
Code No.6- he/she must keep the affairs of each client confidential;
Code No. 7- he/she must provide a competent standard of work and service to each client;
Code No. 8- he/she must not discriminate unlawfully against any person;
Code No. 9- he/she must be open and co-operative with their regulators;
Code No. 10- he/she must take reasonable steps to manage his/her practice, or carry out his/her role within his/her practice competently and in such a way so as to achieve compliance with his/her legal and regulatory obligations.

20. The Bangladesh Bar Council has approved and adopted the Cannons of Professional Conduct and Etiquette for the Advocates with regard to their duties and responsibilities towards their clients, the courts and the public in general.

21. In chapter I of Bangladesh Bar Council Canons of Professional Conduct and Etiquette, it has been stated in clause 1 as under:-

1. It is the duty of every Advocate to uphold at all times the dignity and high standing of his profession, as well as his own dignity and high standing as a member thereof.

   In chapter 3 of Bangladesh Bar Council Canons of Professional Conduct and Etiquette, it has been stated in clause 1 as follows:-

   1. It is the duty of an Advocate to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judge not being wholly free to defend themselves are peculiarly entitled to receive the support of the Bar against unjust criticism and clamour. At the same time whenever there is proper ground for complaint against a judicial officer, it is the right and duty of an Advocate to ventilate such grievances and seek redress thereof legally and to protect the complainant and persons affected.

22. The Supreme Court of India in so many cases delivered judgments giving a new dimension to the contempt of court law. The court spelt out that if an Advocate is found guilty of contempt of court, he cannot practice till he is cleared by the court itself. Merely serving the sentence would not entitle him to resume practice. It is not enough that he tenders an apology. The apology tendered should impress the court to be genuine and sincere. If the court, on being impressed of its genuineness, accepts the apology, then it could be said that the contemnor has purged himself of the guilt. Generally contempt of court may be classified into three categories, namely (1) disobedience of court orders and breach of undertakings given to the court, (2) scandalization of the court and (3) interference with the administration of justice. The first category is termed as civil contempt where the other two categories are contempts of a criminal nature. The civil contempt as stated above is the willful disobedience of the court orders including breach of an undertaking giving to the court but criminal contempt includes an act which tends to scandalize or lower the authority of the court or tends to interfere with or obstruct the course of judicial proceedings.

23. In the case of Moazzem Hossain, Deputy-Attorney General vs. The State, reported in 3BLD(AD)(1983)251, it was held in paragraph No. 36 as follows:-

> ‘‘Contempt’ may be constituted by any conduct that brings authority of the Court into disrespect or disregard or undermines its dignity and prestige. Scandalizing the Court is a worst kind of contempt. Making imputations touching the impartiality and integrity of a Judge or making sarcastic remarks about his judicial competence is also contempt. Conduct or action causing obstruction or interfering with the course of justice is a contempt. To prejudice the general public against a party to an action before it is heard is another form of contempt.’’

24. In the case of The State Vs. Mr. Swadesh Roy reported in 12ADC(2015)932, it was observed in paragraph No. 3 as under:-

> ‘‘This Court has power to draw a contempt proceeding if any person undermines the authority or lowers the dignity of the Court, or if any person scandalizes the Court or any Judge or interferes with the administration of justice, or if any person makes

comments calculated to undermine public confidence in the Judges and the justice delivery system.''

25. In the case of Advocate Riaz Uddin Khan and others vs. Mahmudur Rahman and others reported in 63DLR(AD)(2011)29, it was spelt out in paragraph No. 94 as follows:-

''This Court has a duty of protecting the interest of public in due administration of justice and to protect the dignity of the Court against insult and injury. This Court did not hesitate to use its arm of contempt of court where the use of such arm is necessary in order to protect and vindicate the right of the public. It has been argued that ''It is a mode of vindicating the majesty of law, in its active manifestation against obstruction and outrage. The law should not be seen to sit by limply; while those who defy it go free, and those who seek its protection lose hope''. So we approach the question not from dignity was vindicated, but from the point of view of the public who have entrusted us the task of due administration of justice. We think that a contumacious disregard of all decencies that exhibited by the contemnor in this case can only lead to a serious disturbance of the system of administration of justice, unless duly repaired at once by inflicting an appropriate punishment on the contemnor which must be to send him to jail alone for his misconduct.''

26. It was further opined in paragraph No. 95 as follows:-

''It should be remembered that the arms of law are long enough to reach a contemnor who acts in severe contumacious disregard of the dignity of the highest Court of the country. For the judiciary to perform its duties effectively and true to the sprit with which it is sacredly entrusted, the dignity and authority of the Courts have to be respected, we find this is a fit case in which exemplary punishment should be awarded to the contemnor.''

27. In the case of **Supreme Court Bar Association V. Union of India and another,(1984)4 SCC 409,** it was observed as follows:

"The contempt of court is a special jurisdiction to be exercised sparingly and with caution whenever an act adversely affects the administration of justice or which tends to impede its course or tends to shake public confidence in the judicial institutions. This jurisdiction may also be exercised when the act complained of adversely affects the majesty of law or dignity of the courts. The purpose of contempt jurisdiction is to uphold the majesty and dignity of the courts of law…..This jurisdiction is not exercised to protect the dignity of an individual judge but to protect the administration of Justice from being maligned. In the general interest of community it is imperative that the authority of courts should not be imperiled and there should be no unjustifiable interference in the administration of Justice…..It is exercised in a summary manner in aid of the administration of Justice, the majesty of law and the dignity of the courts. No such act can be permitted which may have the tendency to shake the public confidence in the fairness and impartiality of the administration of Justice."

28. Now, we want to speak something about Rule of law which is very important to keep the society in order from chaos and disorder. The concept of Rule of law is of old origin and is an ancient ideal. It was initially discussed by ancient Greek philosophers such as Plato and Aristotle around 350 BC. The Rule of law is one of the basic principles of the English Constitution and the doctrine is accepted in the constitution of USA and India as well. Sir Edward Coke, the Chief Justice of King James I's reign was also the originator of this

concept. He maintained that the King should be under God and the law and he established the supremacy of the law against the executive and that there is nothing higher than law. Later, Albert Venn Dicey, a British jurist and constitutional theorist, developed this concept in his book 'The Law of the Constitution' in 1885. As per Rule of law, no man is above law and no man is punishable except for a distinct breach of law established in an ordinary legal manner before ordinary courts. The government/any authority/any person cannot punish anyone merely by its own fiat. Persons in authority do not enjoy wide, arbitrary or discretionary powers. Every man, whatever his rank or condition, is subject to the ordinary law and jurisdiction of the ordinary courts. No person should be made to suffer in body or deprived of his property except for a breach of law established in the ordinary legal manner before the ordinary courts of the land. The very basic human right to life and personal liberty has also been enshrined under Article 32 of our constitution. As per Article 32 of the Constitution of the People's Republic of Bangladesh, no person shall be deprived of life or personal liberty save in accordance with law. Article 39(1) of the Constitution guarantees the freedom of thought and conscience and of speech subject to reasonable restriction imposed by law. No person can be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence is also very well recognized in Article 35 of the Constitution. In this regard, we may refer to a decision in the case of the State Vs. Adv. Md. Qamrul Islam. M.P. & Others, reported in 25BLT(AD)(2017)83, wherein it was observed as follows:-

> "Rule of law is the basic rule of governance of any civilized democratic policy. Our constitutional scheme is based upon the concept of ''Rule of Law'' which we have adopted and given to ourselves. Everyone, whether individually or collectively is unquestionably under the supremacy of law. Whoever the person may be, however high he or she is, no one is above the law notwithstanding how powerful and how rich he or she may be. Even the Supreme Court is subordinate to the law and not above the law. For achieving the establishment of the rule of law, the Constitution has assigned the special task to the judiciary in the country. It is only through the Courts that the rule of law unfolds its contents and establishes its concept. For the judiciary to perform its duties and functions effectively and true to the spirit with which it is sacredly entrusted, the dignity and authority of the Courts have to be respected and protected at all costs. The only weapon of protecting itself from onslaught to the institution is the long hand of contempt of court left in the armoury of judicial repository which, when needed, can reach any neck howsoever or far away it may be. Judiciary is central pillar of democracy."

29. In the case of Bangladesh vs. Idrisur Rahman, reported in 15BLC(AD)(2010)49, wherein it was observed in paragraph No. 204 as under:-

> ''The expression of rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done in accordance with law, in other words, it speaks of rule of law and not of men and everybody is under the law and nobody is above the law. The other meaning of the rule of law is that Government should be conducted within a framework of recognized rules and principles which restrict discretionary power and our Constitution is the embodiment of the supreme will of the people setting forth the rules and principles. But the most important meaning of rule of law is that the disputes as to the legality of the acts of the Government are to be decided by Judges who are independent of the executive''.

30. Hence, it can be concluded by saying that everyone, how high so ever he or she may be, must abide by the law of the land. The law of the land includes all under the law as

defined and accepted as law by the Constitution. Every citizen is obliged to follow and obey the provisions of the Constitution which is the manifestation of the will of the people. There are multitudes of rights given by the Constitution to the citizen, but those are subject to restrictions imposed by law. However, the Constitution has provided for the citizen an independent judiciary which will establish the rule of law.

31. It was held in the case of Bangladesh Vs. Idrisur Rahman cited above in paragraph No. 170, as follows:-

‘‘The judiciary is a cornerstone of our Constitution, playing a vital role in upholding the rule of law.’’

32. Now, we can refer some incidents from which we can easily understand about the necessity of establishment of Rule of law in the society.

33. In 1999, a federal Judge of U.S.A held President Bill Clinton in contempt of court for giving intentionally false testimony about his relationship with Monica S. Lewinsky in the Paula Jons lawsuit and fined him $ 90,686 for lying in paula Jones case.

34. The learned Judge Susan Webber Wright delivered her judgment observing, inter-alia, that Clinton gave false, misleading and evasive answer that were designed to obstruct the judicial process. The learned Judge further observes that no court had ever taken an action against a President but it was important to act to protect the integrity of the judicial process and therefore sanction must be imposed, not only to redress the president’s misconduct, but to deter others who might themselves consider emulating the president of the United States by engaging in misconduct that undermines the integrity of the judicial system.

35. Recently, the Supreme Court of India sentenced a sitting High Court Judge of Calcutta High Court to 6 months in prison on charge of contempt of court for his unbecoming conduct and behaviour. The Court opined that Contempt is contempt, it has no color and whether you are a common man or a judge, it does not matter.

36. From the cases mentioned above, we find that the Supreme Court as well as different High Courts of India imposed punishment on the Advocates who were found guilty for contempt of court for their unbecoming conducts and behaviors in the court room as well as in the court premises. Furthermore, some of them were debarred from practicing before the court for a certain time.

37. In view of the above facts and circumstances of the case, and the proposition of law discussed above, now we want to come to a decision as to whether the conduct, behavior and activities like shouting, assaulting the Bench Officer and ransacking the case records, fall within the purview of contempt of court. We have stated earlier that contempt may be constituted by any conduct that brings authority of the court into disrespect, disregard and/or disrepute or undermines the dignity and prestige of the court. By the aforesaid act of the Advocates, the administration of the justice and the court proceedings had been seriously interfered with and the course of justice had also been obstructed following the aforesaid acts of the Advocates. The behavior and the conduct of the Advocates by beating and assaulting the Bench Officer is insulting, disrespectful and threatening to the administration of justice. The conducts of the Advocates are bound to infect the other members of the bar of the country. In order to stop this kind of activities exemplary punishment is required to be meted out to them. The purpose of contempt jurisdiction is to uphold the majesty and dignity of the

court in the minds of the public. In essence, the law of contempt is the protector of the seat of justice more than a person or judge sitting in that seat and it is not for the personal protection. The court has a duty to protect interest of the public in the due administration of justice. It is hence entrusted with the powers to punish for contempt of court, not only to protect the rights of the public but also to protect dignity of the court against any insult and injury. It is to be mentioned here that punishment must be resultant effect of the acts complained of. The punishment must be commensurate with the offences. The more serious is the violation, the more severe is the punishment and that has been the accepted norm in the matters though however within the prescribed limits.

38. Contemnor No. 1 and 2 prayed for unconditional apology to the court for their professional misconduct as well as contempt of this court. Contemnor 3 filed an application for exoneration alleging, inter-alia, that he was not involved in inflicting blows upon the Bench Officer and at the time of occurrence he was out of the court. This contemnor during hearing of the case changed his mind and then prayed for unconditional apology by striking off his defence case. Contemnor No. 4 and 5 also filed affidavits-in-opposition stating therein that they were not involved in the alleged contempt of court and were not present at the place of occurrence. The aforesaid contemnors also in the hearing of the case in the 2nd thought changed their mind and prayed for unconditional apology by striking off their defence cases.

39. Mr. Abdul Baset Majumder, learned Advocate alongwith Mr. Yusuf Hossen Humayun, learned Advocate, Mr. Zainul Abedin, learned Advocate, Mr. S.M Rezaul Karim, learned Advocate, Mr. Bashir Ahmed, learned Advocate, Mr. Md. Badruddoza Badal, learned Advocate, Mr. A.M Mahbub Uddin, learned Advocate, Mr. Md. Ozi Ullah, learned Advocate, Mr. Azhar Ullah Bhuiyan, learned Advocate have appeared before this Court and submitted for acceptance of unconditional apology offered by all the contemnors.

40. As for the acceptance of an apology from the contemnors, we would like to refer a decision in the case of L.D Jaikwal V. State of Uttar Pradesh, (1984) 3 SCC 405, wherein the Supreme Court of India opined as under:-

> ‘‘We do not think that merely because the appellant has tendered his apology, we should set aside the sentence and allow him to go unpunished. Otherwise, all that a person wanting to intimidate a Judge by making the grossest imputations against him to do, is to go ahead and scandalize him, and later on tender a formal empty apology which costs him practically noting. If such an apology were to be accepted, as a rule, and not as an exception, we would in fact be virtually issuing a license to scandalize courts and commit contempt of court with impunity. It will be rather difficult to persuade members of the Bar, who care for their self-respect, to join the judiciary if they are expected to pay such a prices for it. And no sitting Judge will feel free to decide any matter as per of his conscience on account of the fear of being scandalized and prosecuted by an Advocate who does not mind making reckless allegations if the Judge goes against his wishes. If this situation were to be countenanced, Advocates who can cow down the Judges, and make them fall in line with their whishes, by threats of character assassination and persecution, will be preferred by the litigants to the Advocates who are mindful of professional ethics and believe in maintaining the decorum of courts.’’

41. We are at one with the aforesaid decision delivered by the Supreme Court of India. We are of the view that if any person commits any contempt of court and then we the Judges of this court frequently accept the unconditional apology offered by the contemnors, it means

that we are virtually issuing a license to the contemnor to commit further contempt of court with impunity.

42. Accordingly, we have accepted the unconditional apology of the contemnors as an exception but not as a Rule.

43. However, before coming to the conclusion and decision, we want to make some observations regarding the lawyer's duty and responsibility to their clients to the court and to the society while performing their professional duties and activities.
The role of the lawyers in the society is of great importance. They being part of the system of delivering justice holds great reverence and respect in the society. Each individual has a well defined code of conduct which needs to be followed by the person living in the society. A lawyer in discharging his professional assignment has a duty to his client, a duty to his opponent, a duty to the court, a duty to the society at large and a duty to himself. It needs a high degree of probity and poise to strike a balance and arrive at the place of righteous stand, particularly when there are conflicting claims in the issue. While discharging duty to the court, a lawyer should never knowingly be a party to any deception, design or fraud. While placing the law before the court, a lawyer is at liberty to put forth a proposition and canvass to the best of his wits and ability so as to persuade an exposition which would serve the interest of his client and the society. The Advocate, as an officer of the Court, also has the responsibility to render services of sound quality. Lapses in services like remaining absence in court when the matters are called out for hearing, the filing of cases, motions and applications with illegible, incomplete and inaccurate information without proper check and verification, the non-payment of court fees and process fees, the failure to take proper legal steps to serve the parties are not merely professional omissions, they amount to positive disservices to the litigants and create embarrassing situation in the court leading to unavoidable unpleasantness and delay in the disposal of matters, and detrimentally affects the entire judicial system causing huge backlogs of cases. Furthermore, as the officers of the court, the lawyers are required to uphold the dignity of the judicial office and maintain a respectful attitude towards the court. This is because the Bar and the Bench form a noble and dynamic partnership with each other in order to gear up our great social goal for establishment of rule of law, administration of justice in the society and independence of judiciary and the mutual respect of the Bar and the Bench in a bid to do the same is essential for maintaining cordial relations between the two. It is the duty of an advocate to uphold the dignity and decorum of the Court and must not do anything to bring the Court itself into disrepute, and ensure that at no point of time, he oversteps the limits of propriety.

45. An Advocate's duty is as important as that of a Judge. Advocates have a large responsibility towards the society. A client's relationship with his/her Advocate is underlined by utmost trust. An Advocate is expected to act with utmost sincerity and respect. In all professional functions, an Advocate should be diligent and his conduct should also be diligent and should conform to the requirements of the law by which an Advocate plays a vital role in the preservation of society and justice system. An Advocate is under an obligation to uphold the rule of law and ensure that the justice delivery system is enabled to function at its full potential. Any violation of the principles of professional ethics by an Advocate is unfortunate and unacceptable. Ignoring even a minor violation/misconduct militates against the fundamental foundation of the justice delivery system. An Advocate should be dignified in his dealings to the court, to this fellow lawyers and to the litigants. He should have integrity in abundance and should never do anything that erodes his credibility. An Advocate has a duty to enlighten and encourage the juniors in the profession. Most importantly, he should

faithfully abide by the standards of professional canons, conduct and etiquette prescribed by the Bangladesh Bar Council in chapter Nos. I-IV of Bangladesh Bar Council Canons of Professional Conduct and Etiquette under the Bangladesh Legal practitioners and Bar Council Order and Rules, 1972. An Advocate being a member of the legal profession has a social duty to show the people a beacon of light by his conduct and actions rather than being adamant on an unwarranted and uncalled for issue. It is expected that the entire legal fraternity would set an example for other professionals by adhering to all the above-mentioned principles.

46. Charles Evan Hughes (11 April 1862- 27 August 1948) was a republican politician and jurist who served as Governor of New York, United States, Secretary of State, Associate Justice and Chief Justice of the United States, who warned and cautioned the people of the United States saying as under:-

''The peril of this Nation is not in any foreign foe. We, the people, are its power, its peril, and its hope.''

47. Considering the facts and circumstances of the case and the submissions advanced by the learned Advocates for the contemnors, the Rule against the contemnors is disposed of with cautions and strictures upon the contemnors with some observations and findings to be followed by the contemnors.

48. Accordingly, the contemnors are let off the charge of contempt of Court.

However, the contemnors are hereby cautioned with strictures not to repeat this sort of practice in future failing which serious legal action within the ambit of law would be taken if circumstances demand so. The allegation against the bench officer is that he resorted to some corruptions in the matter of making the case-item up and down which, if found true, is very much unwanted and undesirable. It is to be mentioned that no clappings are made by one hand, and it needs two hands to make clappings.

49. Anyway, this Court will show zero tolerance to all corruption and is against all types of corruption. Under the circumstances, Registrar, High Court Division of the Supreme Court of Bangladesh is directed to make enquiry into the matter of corruption as alleged, by himself or by a probe committee and to take necessary legal actions against the bench officer and any other persons whosoever if prima-facie allegation of corruption is found against them. The Bangladesh Bar Council and Supreme Court Bar Association are also directed to arrange training programs for the new Advocates so that they can learn something on the canons of professional conduct and etiquette and on the rules and decorums of the court.

50. Let a copy of this judgment be communicated to the Secretary, Bangladesh Bar Council, the Secretary, Supreme Court Bar Association, Registrar General, Supreme Court of Bangladesh and Registrar, Supreme Court of Bangladesh, High Court Division forthwith for their information and necessary action.

51. Let a copy of this judgment also be transmitted to each of the contemnors for their information and rectification.

**১৪ স্কব [২০২০] হাইকোর্ট বিভাগ**

**বাংলাদেশ সুপ্রীম কোর্ট**
**হাইকোর্ট বিভাগ**
**(বিশেষ মূল অধিক্ষেত্র)**

**রীট পিটিশন নং ১৭২৯/২০১৮**

আব্দুল্লা আল মামুন
..... দরখাস্তকারী।
-বনাম-
বাংলাদেশ সরকার ও অন্যান্য
..... প্রতিপক্ষগণ।

এ্যাডভোকেট মোঃ শামীম খালেদ সংগে
এ্যাডভোকেট মোঃ জাকির হোসেন
..... দরখাস্তকারী পক্ষে।

এ্যাডভোকেট ওয়ায়েস আল হারুনী, ডেপুটি এটর্নী জেনারেল সংগে
এ্যাডভোকেট ইলিন ইমন সাহা, সহকারী এটর্নী জেনারেল
এ্যাডভোকেট সায়রা ফিরোজ, সহকারী এটর্নী জেনারেল
এ্যাডভোকেট মাহফুজুর রহমান লিখন, সহকারী এটর্নী জেনারেল
..... রাষ্ট্রপক্ষে পক্ষে।

শুনানীর তারিখ ঃ ১৭.১১.২০১৯ এবং রায় প্রদানের তারিখ ঃ ০৩.১২.২০১৯।

**উপস্থিতঃ**
**বিচারপতি মোঃ আশরাফুল কামাল**
**এবং**
**বিচারপতি রাজিক আল জলিল**

Bangladesh Civil Service Recruitment Rules 1981 এর ৪(৩) (এ) (বি) উপবিধি:

দুরভিক্রম্য চারটি ধাপ তথা প্রয়োজনীয় শিক্ষাগত যোগ্যতা, এমসিকিউ, লিখিত ও মৌখিক পরীক্ষা অতিক্রম করে আসা একজন প্রার্থীকে বাংলাদেশের সর্বজন গ্রহণযোগ্য সাংবিধানিক প্রতিষ্ঠান তথা বাংলাদেশ সরকারী কর্ম কমিশন কর্তৃক নিয়োগের সুপারিশ করা সত্ত্বেও যথাযথ সংস্থা (appropriate agency) কর্তৃক কোনরূপ উপযুক্ত কারণ প্রদর্শন না করে নিয়োগের অনুপযুক্ত মর্মে মতামত প্রদান বেআইনী, সংবিধান বিরোধী ... (প্যারা ৫২)

**রায়**

**বিচারপতি মোঃ আশরাফুল কামালঃ**

১. দরখাস্তকারী আব্দুল্লা আল মামুন কর্তৃক গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের অনুচ্ছেদ ১০২(২)(ক)(অ)(আ) এর অধীন দরখাস্ত দাখিলের প্রেক্ষিতে প্রতিপক্ষগণের উপর কারণ দর্শানোপূর্বক নিম্নোক্ত রুলটি ইস্যু করা হয়েছিলঃ-

*"Let a Rule Nisi be issued calling upon the respondents to show cause as to why the impugned order as contained প্রজ্ঞাপন নম্বর ০৫.০০.০০০০.১৪৭.৩৩.০১০.১৩-৯১ dated 10.07.2014 (Annexure-C) and প্রজ্ঞাপন নম্বর ০৫.০০.০০০০.১৪৭.৩৩.০১০.১৩-২৫৯ dated 14.12.2016 (Annexure-E)publishing the list of 6033 and 42 candidates respectively in the post of Bangladesh Civil Service (Health) based upon the result of the 33rd B.C.S. Examination without including the name and registration number of the petitioner should not be declared to have been issued without lawful authority and is of no legal effect and why a direction should not be passed upon the respondents to appoint the petitioner in the post/cadre of the Assistant Surgeon of the Bangladesh Civil Service (Health) and why a further direction should not be passed upon the respondents for giving the service benefits to the petitioner as has been given to the 6033 candidates from 07.08.2014 and/or pass such other or further order or order as to this Court may seem fit and proper."*

২. অত্র রুলটি নিষ্পত্তির লক্ষ্যে, ঘটনার সংক্ষিপ্ত বিবরণ, এই যে,

দরখাস্তকারী রংপুর মেডিকেল কলেজ, রংপুর হতে এমবিবিএস ডিগ্রী লাভ করে ৩৩তম বিসিএস পরীক্ষায় অংশগ্রহণ করেন এবং এমসিকিউ, লিখিত এবং মৌখিক পরীক্ষায় সফলতার সাথে উত্তীর্ণ হন। অতঃপর দরখাস্তকারীসহ ৮৫২৯ জন প্রার্থীকে কমিশন কর্তৃক বিভিন্ন ক্যাডার পদে নিয়োগের জন্য সাময়িকভাবে সুপারিশ প্রদান করা হয়। তন্মধ্যে, সহকারী সার্জন [বিসিএস (স্বাস্থ্য)] পদে দরখাস্তকারীসহ মোট ১২২৪ জনকে সুপারিশ করা হয়। সুপারিশকৃত ১২২৪ জন হতে ১২২৩ জনকে বিগত ইংরেজী ১০.০৭.২০১৪ (সংযুক্তি-সি) এবং ১৪.১২.২০১৬ তারিখের মধ্যে নিয়োগ প্রদান করা হয় এবং তারা যথারীতি কর্মে যোগদান করেন। কিন্তু সকল পরীক্ষায় উত্তীর্ণ এবং বাংলাদেশ কর্ম কমিশন কর্তৃক সাময়িকভাবে সুপারিশ প্রাপ্ত হওয়া সত্ত্বেও, দরখাস্তকারী বরাবরে নিয়োগপত্র ইস্যু করা হয়নি। অতঃপর দরখাস্তকারী বিগত ইংরেজী ২৫.০১.২০১৮ (সংযুক্তি-এফ) তারিখে সিনিয়র সচিব জনপ্রশাসন মন্ত্রণালয়, বাংলাদেশ সচিবালয় বরাবরে লিখিত দরখাস্ত দাখিলের মাধ্যমে নিয়োগপত্র ইস্যুর জন্য অনুরোধ করেন। পরবর্তীতে দরখাস্তকারী বিগত ইংরেজী ২৯.০১.২০১৮ তারিখে নোটিশ অব ডিমান্ড জাস্টিস প্রেরণ করেন। প্রতিপক্ষগণ দরখাস্তকারীর উপরিল্লিখিত নোটিশের কোনরূপ জবাব প্রদান না করায় অত্র দরখাস্তকারী বাধ্য হয়ে অত্র বিভাগে সংবিধানের অনুচ্ছেদ ১০২(২)(ক)(আ) এর আওতায় রীট পিটিশন দাখিল করে অত্র রুল নিশি প্রাপ্ত হন।

৩. দরখাস্তকারী পক্ষে বিজ্ঞ এ্যাডভোকেট মোঃ শামিম খালেদ সংগে এ্যাডভোকেট মোঃ জাকির হোসেন বিস্তারিতভাবে যুক্তিতর্ক উপস্থাপন করেন। অপরদিকে এ্যাডভোকেট মাহফুজুর রহমান লিখন সহকারী এটর্নী জেনারেল ১নং প্রতিপক্ষে যুক্তিতর্ক উপস্থাপনপূর্বক নিবেদন করেন যে, নিরাপত্তা গোয়েন্দা সংস্থার প্রতিবেদনের ভিত্তিতে দরখাস্তকারী বরাবরে নিয়োগপত্র ইস্যু করা হয়নি।

৪. দরখাস্তকারীর দরখাস্ত এবং এর সহিত সংযুক্ত সকল প্রদর্শনী- ১নং প্রতিপক্ষের হলফান্তে জবাব এবং উভয় পক্ষের বিজ্ঞ এ্যাডভোকেটগণের যুক্তিতর্ক শ্রবণ করা হলো।

৫. এটা স্বীকৃত যে, ৩৩তম বিসিএস এর এমসিকিউ, লিখিত ও মৌখিক পরীক্ষায় দরখাস্তকারী সাফল্যের সাথে উত্তীর্ণ হন এবং বাংলাদেশ কর্ম কমিশন কর্তৃক তিনি নিয়োগের নিমিত্তে যথারীথি সুপারিশ প্রাপ্ত হন। কিন্তু নিরাপত্তা গোয়েন্দা সংস্থার প্রতিবেদনের কারণে দরখাস্তকারীর বরাবরে সহকারী সার্জন পদের নিয়োগপত্র ইস্যু করা হয়নি।

৬. সরকারী কর্ম কমিশনের সুপারিশের পর Bangladesh Civil Service Recruitment Rules 1981 এর ৪(৩)(এ)(বি) উপবিধি অনুযায়ী সুপারিশকৃত প্রার্থীদের প্রাক চাকুরী বৃত্তান্ত যাচাই ও স্বাস্থ্য পরীক্ষায় উপযুক্ত বিবেচিত হওয়ার পর বিসিএস ক্যাডার সার্ভিসে চূড়ান্তভাবে নিয়োগ প্রদান করা হয়।

৭. Bangladesh Civil Service Recruitment Rules 1981 এর ৪(৩)(এ)(বি) উপবিধিতে নিম্নরূপ বিধান আছেঃ

***"No appointment to a service by direct recruitment shall be made untill;***

***(b) The antecedents of the person so selected have been verified through appropriate agencies and found to be such as do not render him unfit for appointment in the service of the Republic.***

৮. Bangladesh Civil Service Recruitment Rules 1981 এর ৪(৩)(এ)(বি) উপবিধি অনুযায়ী ৩৩তম বিসিএস এ সুপারিশকৃত প্রার্থীদের প্রাক-চাকুরি বৃত্তান্ত যাচাইয়ের জন্য যথাযথ এজেন্সিকে অনুরোধ করা হয়। সে অনুযায়ী জাতীয় নিরাপত্তা গোয়েন্দা অধিদপ্তর কর্তৃক প্রেরিত প্রতিবেদন দরখাস্তকারী সম্পর্কে *" unsatisfactory"* রয়েছে মর্মে ১নং প্রতিপক্ষ দরখাস্তকারী নিয়োগপত্র ইস্যু করেন নাই।

৯. BCS Rules 1981 এর ৪ (৩) (এ) (বি) মোতাবেক নির্বাচিত ব্যক্তির পূর্ব ইতিহাস পার্যালোচনা করে সরকারী চাকুরীতে নিয়োগে অনুপযুক্ত (unfit) কিনা তা যথাযথ কর্তৃপক্ষ কর্তৃক যাচাই বাছাই করা বাধ্যতামূলক। যথাযথ কর্তৃপক্ষ নির্বাচিত ব্যক্তির পূর্ব ইতিহাস যাচাই বাছাই করে সংশ্লিষ্ট ব্যক্তি সরকারী চাকুরীর নিয়োগের উপযুক্ত কিংবা অনুপযুক্ত নির্ধারণ করবেন।

**১০. যদি নির্বাচিত ব্যক্তি অনুপযুক্ত (Unfit) হয় তাহলে কি কারণে তিনি সরকারী চাকুরীতে নিয়োগের অনুপযুক্ত সে সম্পর্কে সুস্পষ্ট এবং সুনির্দিষ্টভাবে যথাযথ কর্তৃপক্ষকে ব্যাখ্যা প্রদান করতে হবে। এর কোন ব্যত্যয় চলবে না। অর্থাৎ সরকারী চাকুরীতে নিয়োগের অনুপযুক্ততার বিষয়টি সুনির্দিষ্ট, সুস্পষ্ট, স্বচ্ছ এবং আইনানুযায়ী ভাবে করতে হবে।**

১১. ***কোনো অস্পষ্ট (Vague) সিদ্ধান্ত বা মন্তব্য আইনের চোখে গ্রহণযোগ্য নয়। অস্পষ্টতা আইনের পরিপন্থী।***

কিন্তু বর্তমান মোকদ্দমায় জাতীয় গোয়েন্দা অধিদপ্তর কর্তৃক প্রেরিত প্রতিবেদনে দরখাস্তকারী কি কারণে সরকারী চাকুরীতে নিয়োগ লাভে অযোগ্য তা না বলে শুধুমাত্র *"unsatisfactory"* রয়েছে মন্তব্য করেন যা বিধি বহির্ভূত এবং বেআইনী। বর্তমান BCS Rules 1981 এর বিধি ৪(ত)(এ) (বি) মোতাবেক জাতীয় গেয়েন্দা অধিদপ্তর দরখাস্তকারী সরকারী চাকুরীতে অযোগ্যতা (unfit) বিষয়ে তথ্য প্রদান না করে বিধি বহির্ভূত বক্তব্য তথা ***"unsatisfactory"*** মর্মে বক্তব্য প্রদান করেন, যা বিধি সঙ্গত নয়। অর্থাৎ বর্তমান মোকদ্দমায় দরখাস্তকারী কি কারণে সরকারী চাকুরীতে নিয়োগ লাভে অযোগ্য তদবিষয়ে সুনির্দিষ্ট এবং সুস্পষ্ট কোন তথ্য প্রমাণ দিতে ১ নং প্রতিপক্ষ সম্পূর্ণরূপে ব্যর্থ হয়েছে।

১২. ববি হাজ্জাজ বনাম বাংলাদেশ নির্বাচন কমিশন (প্রতিবেদিত ৭১ ডিএলআর পাতা-৮৯) মোকদ্দমায় অভিমত প্রদান করা হয় যে,

*" It has been stated in " Administrative Law" by H.W.R. Wade, 5th edition at page-465:*

*"For the purpose of natural justice, the question which matters is not whether the claimant has some legal right, but whether the legal power is being exercised over him to his disadvantage. It is not a matter of property or of vested interests, but simply of the exercise of Government power in a manner which is fair....."*

*It is often said that mala fides or bad faith vitiates everything and a mala fide act is a nullity. Now a pertinent question arises: what is mala fides? Relying on some observations of the Indian Supreme Court in some decisions, Durgadas Basu J held;*

*"It is commonplace to state that mala fides does not necessarily involve a malicious intention. It is enough if the aggrieved party establishes; (i) that the authority making the impugned order did not apply its mind at all to the matter in question; or (ii) that the impugned order was made for a purpose or upon a ground other than what is mentioned in the order." (Ram Chandra -vs- Secretary to the Government of W.B. AIR 1964 Cal 265).*

*The principle of reasonableness is used in testing the validity of all administrative actions and an unreasonable action is taken to have never been authorized by the Legislature and is unreasonable when it is so unreasonable that no man acting reasonably could have taken it. This has now come to be known as Wednesbury unreasonableness. (Associated Provincial Picture...vs... Wednesbury Corporation [1948] 1KB 223).*

***১৩. "প্রশাসনিক বিবেচনা (administravie discretion) একটি জটিল বিষয়। সরকারী কর্মকর্তাগণ কর্তৃক কতিপয় কার্য তাদের নিজস্ব বিবেচনার উপর ভিত্তি করে নিষ্পত্তি ভিন্ন কোন সরকারই রাষ্ট্র পরিচালনা করতে পারবে না। আধুনিক সরকার ব্যবস্থায় প্রশাসনিক ক্ষমতার ব্যক্তিকেন্দ্রীকতা এ কারণে প্রয়োজন যে, প্রত্যেক আধুনিক সরকারের জটিল বিষয়গুলো বিধি দ্বারা লিপিবদ্ধ করা মানুষের পক্ষে অসম্ভব।***

***১৪. আবার সমভাবে এটাও সত্য যে, চূড়ান্ত ইচ্ছাধীনতা হল নির্দয় মনিব সমতুল্য। সেকারণে 'প্রশাসনিক চূড়ান্ত ইচ্ছাধীনতার দাবী' এবং 'যুক্তিসংগত চূড়ান্ত ইচ্ছাধীন সিদ্ধান্ত পাওয়ার ব্যক্তির দাবী' এ দুইয়ের মধ্যে বিরোধ নিরবিচ্ছিন্নভাবে চলে আসছে।***

**১৫. এটা বলার অপেক্ষা রাখে না যে, ১ নং প্রতিপক্ষের ইচ্ছাধীন ক্ষমতা আছে। কিন্তু এটাও মনে রাখতে হবে যে, ১ নং প্রতিপক্ষ তার ইচ্ছাধীন ক্ষমতা অবশ্যই ন্যায়সঙ্গতভাবে, নিরপেক্ষভাবে এবং যুক্তিসঙ্গতভাবে ব্যবহার করবেন।**

***১৬. এটা সাধারণভাবে বলা যায় যে, অসদুদ্দেশ্যে (malafide) হতে হলে সংশ্লিষ্ট কাজটির (act or ommission) ক্ষেত্রে বিদ্বেষপূর্ণ বা বিদ্বেষ প্রসূত বা বিদ্বেষমূলক (malicious) ইচ্ছা থাকতেই হবে এমন নয় । যদি বিক্ষুব্ধ ব্যক্তি এটা প্রমাণ করতে পারেন যে, (ক) কর্তৃপক্ষ তর্কিত আদেশ প্রদানের সময় তর্কিত বিষয়ে সঠিকভাবে বিবেচনা করেন নাই ;(খ) কর্তৃপক্ষ তর্কিত আদেশে বর্ণিত কারণ ভিন্ন অন্য কারণে তর্কিত আদেশ প্রদান করেছিলেন; কিংবা (গ) বিক্ষুব্ধ পক্ষ যদি এটা প্রতিষ্ঠিত করতে পারেন যে, কর্তৃপক্ষ কর্তৃক প্রদত্ত তর্কিত আদেশটি অবিবেচনা প্রসূত তথা সঠিক বিবেচনা প্রসূত নয়; সেক্ষেত্রে তর্কিত আদেশটি অসদুদ্দেশ্যে (malafide) প্রদত্ত বলে গণ্য হবে। ন্যায় বিচারের উদ্দেশ্য সাধনের নিমিত্ত এটা জরুরী যে, নির্বাহী ক্ষমতা প্রয়োগ এমনভাবে করতে হবে যাতে একজন সাধারণ মানুষও এর কোন দোষ খুঁজে না পায়। সকল নির্বাহী কার্যের (action) বৈধতা পরীক্ষা করা হয় যুক্তিসংগত এবং ন্যায়সংগত নীতির ভিত্তিতে।***

**১৭.** "আপাত দৃষ্টিতে প্রতীয়মান ভ্রম বা ভুল " (apparent error) হল সেই ভুল যা একজন সাধারণ প্রজ্ঞার মানুষও অতি সহজে বুঝতে পারে। অর্থাৎ "**আপাত দৃষ্টিতে প্রতীয়মান ভ্রম"** হল সেই ভ্রম যার জন্য কোন বিশেষজ্ঞের শরণাপন্ন হওয়ার প্রয়োজন নেই। বর্তমান মোকদ্দমায় গোয়েন্দা সংস্থা কর্তৃক কেবলমাত্র *"unsatisfactory"* মন্তব্যের কারণে প্রদত্ত প্রতিবেদনটি সাধারণ যুক্তিতর্কে স্পষ্টতই একটি ***"আপাত দৃষ্টিতে প্রতীয়মান ভ্রম বা ভুল" (apparent error)***।

**১৮. সংবিধানের অনুচ্ছেদ ৩১ মোতাবেক আইনানুযায়ী ব্যতীত কোন ব্যক্তিকে তার ন্যায্য অধিকার থেকে তথা ন্যায্য প্রাপ্যতা থেকে তথা ন্যায্য প্রত্যাশা থেকে তথা আইনসম্মত অধিকার থেকে বঞ্চিত করা যায় না।**

বর্তমান মোকদ্দমায় দরখাস্তকারীর ন্যায্য অধিকার হল নিয়োগ পত্র পাওয়া। কিন্তু প্রতিপক্ষগণ স্পষ্টতঃ দরখাস্তকারীকে দরখাস্তকারীর ন্যায্য অধিকার থেকে বেআইনীভাবে বঞ্চিত করেছে।

১৯. **সংবিধানের অনুচ্ছেদ ৩১ মোতাবেক প্রত্যেক নাগরিক আইনানুযায়ী ও কেবল আইনানুযায়ী ব্যবহার লাভের অধিকারী।** এটি স্পষ্টই প্রতীয়মান যে বর্তমান মোকদ্দমায় প্রতিপক্ষগণ দরখাস্তকারীর সাথে আইনানুযায়ী আচরণ করেন নাই।

২০. বর্তমান মোকদ্দমায় নিরাপত্তা গোয়েন্দা অধিদপ্তরের প্রতিবেদনে ***"unsatisfactory"*** মন্তব্যটি অযৌক্তিক, অসদভিপ্রায় *(bad faith*) এবং অসদুদ্দেশ্যে (*malafide*) ভাবে গৃহীত। কেননা উক্ত প্রতিবেদন প্রদানকালে গোয়েন্দা অধিদপ্তর বিষয়টি সঠিকভাবে বিবেচনা করেনি। অপরদিকে প্রতিবেদনে ***"unsatisfactory"*** মন্তব্য মোটেও যুক্তিসংগত এবং ন্যায়সংগত নয় বরং বিশদ কারণ উল্লেখ ব্যতিরেকে নিছক এই মন্তব্য সম্পূর্ণ অস্পষ্ট, অসুনির্দিষ্ট, অবিবেচনা প্রসূত এবং ভ্রম মর্মে প্রতীয়মান ভ্রম। সুতরাং উক্ত অস্পষ্ট, অসুনির্দিষ্ট, অবিবেচনা প্রসূত এবং প্রতীয়মান ভ্রম আদেশটি এখতিয়ার বহির্ভূত এবং প্রাকৃতিক বিচার (*natural justice*) এর নিয়মবিরোধী বা পরিপন্থী।

২১. শুধুমাত্র ভিন্ন মত, দর্শন এবং বিশ্বাস প্রচার করার জন্য ৩৯৯ বিসি (399 B.C)-তে এথোনিয়ান সরকার (Athanion Government) সর্বকালের সেরা দার্শনিক সক্রেটিস (SOCRATES) কে মৃত্যুদন্ড প্রদান করেছিলেন মৃত্যুর পূর্বে তার অমর বাণীর শেষ দুই লাইন হলো,

***"The hour of departure has arrived, and we go our ways—I to die, and you to live. Which is better God only knows."***

**২২.** মধ্যযুগীয় সহিংসতা থেকে বের হয়ে এসে একটি অধিকতর উদার এবং আলোকিত/জ্ঞানদীপ্ত সমাজ বিনির্মানে ইউরোপ যে কঠিন সংগ্রাম করেছে তারই ফলশ্রুতীতে ইউরোপে আজ ভিন্নমত, পথ এবং বিশ্বাস একসাথে শান্তিপূর্ণ ভাবে অবস্থান করছে এবং বিশ্বের দরবারে নিজেদেরকে প্রতিষ্ঠিত করে তুলেছে। যদিও এটি রাতারাতি হয়নি, তবে এও সত্য যে এর পরিপূর্ণ বাস্তবায়ন এখনও চলমান। ইউরোপের এই সহিষ্ণু সমাজ ব্যবস্থার চিত্রটি সকলের নিকট সাবলিল ভাষায় উপস্থাপন করেছেন ফরাসি দার্শনীক ***Denis Lacorne*** তাঁর সুলিখিত বই ***"The Limits of Tolerance—Enlightenment Values and Religious Fanaticism"- এ।***

২৩. ১৬০০ সালের ১৭ ফেব্রুয়ারী তারিখে ইটালিয়ান দার্শনিক ***Giordano Bruno*** এর মৃত্যুদন্ড প্রদানকারী রোমান ইনকুইজিটর (Roman Enquisitors)-দের উদ্দেশ্যে তিনি সাহসের সাথে যে কথাটি বলেছিলেন তা হলো,

***"You may be more afraid to bring that sentence against me than I am to accept it. "***

২৪. ভিন্ন মতালম্বী বিট্রিশ খেয়ালী লেখক Charles Caleb Colton বলেছেন যে,

***"Liberty will not descent to a people. A People must raise themselves to liberty. It is a blessing that must be earned before it can be enjoyed."***

২৫. আমাদের বাঙ্গালী সমাজ সহিষ্ণু সমাজ (Tolerant Society)। জাতি হিসাবেও আমরা সহিষ্ণু জাতি (Tolerant Nation)।

আমাদের সমাজে প্রথম অসহিষ্ণুতার (Intolerant) বীজ বপন করেছিল ব্রিটিশ ইস্ট ইন্ডিয়া কোম্পানী। পরবর্তীতে এই কোম্পানীর হাত ধরে ব্রিটিশ দখলদার সরকার ভারত বর্ষে অস্ত্র দেখিয়ে জোর জবরদস্তি করে ঢুকে দখল করে। ব্রিটিশ তাদের অবৈধ দখলদারিত্ব বজায় রাখার স্বার্থে ধর্মীয় অসহিষ্ণুতা ছড়িয়ে দেয়। ব্রিটিশরা যখন তাদের দখলদারিত্ব আর রক্ষা করতে পারছিলনা তখন তারা পরিকল্পিত ভাবে উন্নত কৃষ্টি এবং সংস্কৃতির অধিকারী আমাদের সহিষ্ণু ভারতবর্ষকে স্থায়ীভাবে অপসংস্কৃতি এবং অসহিষ্ণু রাষ্ট্রে পরিণত করার হীন মানসে তথা ধর্মীয় বিরোধ সৃষ্টিকারী কালা কানুন তৈরী করে দিয়ে ভারতবর্ষকে অসহিষ্ণু রাষ্ট্রে (Intolerant State) ব্যবস্থার দিকে চালিত করে দিয়ে যায়। পরবর্তীতে পাকিস্তান হওয়ার পর পাকিস্তানি মিলিটারী শাসন

ব্যবস্থা তাদের কায়েমী স্বার্থ রক্ষার কারণে ধর্মীয় জঙ্গিবাদকে উস্কিয়ে দিয়ে পাকিস্তান নামক রাষ্ট্রটিকে আরো অসহিষ্ণু রাষ্ট্রে (More Intolerant State) পরিণত করেন। এমনি একটি অবস্থায় সর্বকালের সর্বশ্রেষ্ঠ বাঙ্গালী জাতির জনক বঙ্গবন্ধু শেখ মুজিবুর রহমান এর নেতৃত্বে তদানিন্তন পূর্ব পাকিস্তানের বাঙ্গালীরা বাংলাদেশ নামক সহিষ্ণু রাষ্ট্র (Tolerant State) প্রতিষ্ঠা করেন এবং বাঙ্গালী জাতি ব্রিটিশ এবং পাকিস্থানী দখলদার ও অপশাসকদের নাগপাশ থেকে দীর্ঘদিন পর মুক্ত হয় ১৯৭১ সালে। কিন্তু বাঙ্গালীদের এই সহিষ্ণু রাষ্ট্রের দিকে চলা বেশীদিন স্থায়ী হয়নি। একদল হায়েনাদের ছোবলে আমাদের পবিত্র দেশ ক্ষত-বিক্ষত হলো ১৯৭৫ সালের ১৫ই আগষ্ট।

২৬. জনগণের বেতনভুক কতিপয় মিলিটারী কর্মকর্তা ও কর্মচারী জনগনের কেনা অস্ত্রে জনগণের নির্বাচিত রাষ্ট্রপতিকে রাতের অন্ধকারে হত্যা করে এদেশকে দখল করে। সেসব কতিপয় জনগণের বেতনভুক মিলিটারী কর্মকর্তা ও কর্মচারী কর্তৃক জনগণের নির্বাচিত রাষ্ট্রপতিকে হত্যার বিষয়ে দুর্ভাগ্যজনকভাবে নিরবতা পালন করেছিলেন তৎকালীন সময়ে সাংবিধানিকভাবে দায়িত্ব পালনকারী সকলে যা ছিল জাতীর সবচেয়ে কলংককর অধ্যায়।

২৭. ১৯৭৫ সালের ১৫ ই আগষ্টের সেই কালরাত্রিতে জনগণের বেতনভুক কতিপয় মিলিটারী কর্মকর্তা ও কর্মচারীরা শুধুমাত্র জনগণের নির্বাচিত রাষ্ট্রপতিকেই হত্যা করে নাই, হত্যা করেছে পাকিস্তানী বাহিনীর মতো শিশু, নারী এবং সাধারণ নিরস্ত্র নাগরিকদের, হত্যা করেছে জাতীয় চার নেতাকে জেলখানার মতো নিরাপদ স্থানে, হত্যা করেছে সমগ্র জাতিকে, হত্যা করেছে সমগ্র জাতির উদীয়মান ভবিষ্যতকে, হত্যা করেছে স্বাধীনতার আদর্শকে, হত্যা করেছে মুক্তিযুদ্ধের চেতনাকে, হত্যা করেছে সহিষ্ণু সমাজ ব্যবস্থাকে। অতঃপর ১৫ই আগষ্ট, ১৯৭৫ সালের পর থেকে বাংলাদেশ একটানা একুশ বৎসর উল্টো পথে, মুক্তিযুদ্ধের চেতনার বিপক্ষ স্রোতে, স্বাধীনতার আদর্শের বিপক্ষ স্রোতে এবং সর্বোপরী অসহিষ্ণু জাতি (Intolerance State) হিসেবে চলেছে। বর্তমানে জাতি আবার সহিষ্ণুতার দিকে পথ চলা শুরু করে সহিষ্ণু রাষ্ট্র বিনির্মানে দৃঢ়ভাবে এগিয়ে চলেছে।

২৮. এমনি একটি ঐতিহাসিক বাস্তবতার প্রেক্ষাপটে রাষ্ট্রের সকল প্রশাসনিক কর্মকর্তা এবং কর্মচারী, সিভিল এবং মিলিটারী কর্মকর্তা এবং কর্মচারীগণকে খুবই গুরুত্বপূর্ণের সাথে তাদের প্রতিটি কর্মকান্ডে সতর্কতার সাথে একটি সহিষ্ণু রাষ্ট্রের নীতি এবং আদর্শ যা আমাদের পবিত্র সংবিধানে ও রাষ্ট্রের স্থপতি সর্বকালের সর্বশ্রেষ্ঠ বাঙ্গালি জাতির পিতা বঙ্গবন্ধু শেখ মুজিবুর রহমান এঁরও নীতি এবং আদর্শ, তা পুঙ্খানুপুঙ্খভাবে প্রতিপালন করতে হবে। তাহলেই এবং কেবল মাত্র তাহলেই আমাদের প্রিয় দেশ পৃথীবির বুকে একটি সুন্দর সহিষ্ণু উন্নত জাতি হিসেবে গড়ে উঠবে। মনে রাখতে হবে আমাদের এই স্বাধীনতা অনেক কষ্টে পাওয়া। অনেক রক্তের বিনিময়ে পাওয়া। অনেক ত্যাগের বিনিময়ে পাওয়া। লক্ষ শহীদের ত্যাগ এবং তিতীক্ষার বিনিময়ে পাওয়া আমাদের এই স্বাধীনতা তখনই স্বার্থক হবে যখন আমরা আমাদের আচরণ, কর্মকান্ডে নিজেদেরকে একটি সহিষ্ণু উন্নত জাতি হিসেবে নিবেদীত করবো।

২৯. বাংলাদেশের সকল আদালতের বিচারকরা, সকল সরকারী-আধাসরকারী এবং স্বায়ত্বশাসিত প্রতিষ্ঠানের কর্মকর্তা ও কর্মচারী তথা সকল সিভিল এবং মিলিটারী কর্মকর্তা ও কর্মচারী তথা বাংলাদেশ সেনাবাহিনী, বাংলাদেশ নৌবাহিনী, বাংলাদেশ বিমান বাহিনী, বাংলাদেশ পুলিশ বাহিনী, বাংলাদেশের সকল প্রকার আইন শৃঙ্খলা রক্ষাকারী বাহিনী, বাংলাদেশের প্রসাশনিক ক্যাডারসহ সকল ক্যাডারভুক্ত কর্মকর্তা, সকলকে তাদের কর্ম জীবনের প্রতিটি মুহূর্তে মনে রাখতে হবে যে, **আমরা সকলেই বিনাযুদ্ধে ও বিনা রক্তপাতে মুক্তিযুদ্ধের উপকারভোগী, স্বাধীনতার উপকারভোগী (Beneficiary)**। আজকে তাঁরা সকলে যে সম্মান, মর্যাদা এবং যাবতীয় সুযোগ সুবিধা ভোগ করছেন তা কেবল মাত্র স্বাধীনতা যুদ্ধে জীবন দানকারী ত্রিশ লক্ষ শহীদের রক্তের বিনিময়ে এবং সম্ভ্রম হারানো দুই লক্ষ মা-বোনের সম্ভ্রমের বিনিময়ে অর্জিত। সুতরাং উপরিল্লিখিত সকল কর্মকর্তা এবং কর্মচারীগণকে দেশের জন্য জীবন দিতে হবেনা, রক্ত দিতে হবেনা; শুধুমাত্র সৎ এবং নিরপেক্ষ ভাবে তাঁদের উপর জনগণ কর্তৃক অর্পিত বিশ্বাস এর মর্যাদা এবং অর্পিত দায়-দায়িত্ব পালন করলেই চলবে।

৩০. পাকিস্তানের কারাগার থেকে মুক্ত হয়ে জাতির পিতা বঙ্গবন্ধু শেখ মুজিবুর রহমানের ১৯৭২ সালের ১০ই জানুয়ারি স্বদেশ প্রত্যাবর্তন করে বিমান বন্দর থেকে সরাসরি ঐতিহাসিক রমনা রেসকোর্স ময়দানে (বর্তমানে সোহরাওয়ার্দী উদ্যানে) এসে বাঙ্গালি জাতির উদ্দেশ্যে যে গুরুত্বপূর্ণ ভাষণ দিয়েছিলেন প্রাসঙ্গিক হওয়ায় তা নিম্নে অবিকল অনুলিখন হলোঃ

*''আমি প্রথমে স্মরণ করি আমার বাংলাদেশের ছাত্র, শ্রমিক, কৃষক, বুদ্ধিজীবী, সেপাই, পুলিশ, জনগণকে- হিন্দু-মুসলমানকে হত্যা করা হয়েছে; তাদের আত্মার মঙ্গল কামনা করে এবং তাদের প্রতি শ্রদ্ধা নিবেদন করে আমি আপনাদের কাছে দু-এক কথা বলতে চাই।*

*আমার বাংলাদেশ আজ স্বাধীন হয়েছে, আমার জীবনের সাধ আজ পূর্ণ হয়েছে, আমার বাংলার মানুষ আজ মুক্ত হয়েছে। আমার বাংলা স্বাধীন থাকবে। আমি আজ বক্তৃতা করতে পারবো না। বাংলার ছেলেরা, বাংলার মায়েরা, বাংলার কৃষক, বাংলার শ্রমিক, বাংলার বুদ্ধিজীবী যেভাবে সংগ্রাম করেছে- আমি কারাগারে বন্দি ছিলাম, ফাঁসি কাষ্ঠে যাবার জন্য প্রস্তুত ছিলাম। কিন্তু আমি জানতাম আমার বাঙালিকে কেউ দাবায়ে রাখতে পারবে না। আমার বাংলার মানুষ স্বাধীন হবে। আমি আমার সেই যে ভাইয়েরা আত্মাহুতি দিয়েছে, শহিদ হয়েছে, তাঁদের আমি শ্রদ্ধা নিবেদন করি, তাঁদের আত্মার মাগফেরাত কামনা করি। আজ শতকরা-আমার*

*খবর হয়েছে, প্রায় ৩০ লক্ষ লোককে মেরে ফেলে দেয়া হয়েছে বাংলায়। দ্বিতীয় মহাযুদ্ধেও এবং প্রথম মহাযুদ্ধেও, এতো লোক, এতো সাধারণ নাগরিক মৃত্যুবরণ করে নাই, শহীদ হয় নাই, যা আমার এই সাত কোটির বাংলাদেশে হয়েছে।*

*আমি জানতাম না আপনাদের কাছে আমি ফিরে আসবো। আমি খালি একটা কথা বলেছিলাম, তোমরা যদি আমাকে মেরে ফেলে দেও আমার আপত্তি নাই। মৃত্যুর পরে আমার লাশটা আমার বাঙালির কাছে দিয়ে দিও, এই একটা অনুরোধ তোমাদের কাছে আমার।*

*আমি মোবারকবাদ জানাই ভারতবর্ষের প্রধানমন্ত্রী শ্রীমতি ইন্দিরা গান্ধীকে, আমি মোবারকবাদ জানাই ভারতবর্ষের জনসাধারণকে, আমি মোবারকবাদ জানাই ভারতবর্ষের সামরিক বাহিনীকে, আমি মোবারকবাদ জানাই রাশিয়ার জনসাধারণকে, আমি মোবারকবাদ জানাই ব্রিটিশ, জার্মানি, ফ্রান্স সব জায়গার যে গভর্নমেন্ট, জনসাধারণ আছে, তাদের আমি মোবারকবাদ জানাই যারা আমাকে সমর্থন করেছে। আমি মোবারকবাদ জানাই আমেরিকার জনসাধারণকে, আমি মোবারকবাদ জানাই বিশ্ব দুনিয়ার মজলুম জনসাধারণকে, যারা আমার এই মুক্তি সংগ্রামকে সাহায্য করেছে।*

*আমার বলতে হয়, এক কোটি লোক এই বাংলাদেশের থেকে ঘর বাড়ি ছেড়ে ভারতবর্ষে আশ্রয় নিয়েছিলো। ভারতের জনসাধারণ, মিসেস ইন্দিরা গান্ধী তাদের খাবার দিয়েছে, থাকবার দিয়েছে, তাদের আমি মোবারকবাদ না দিয়ে পারি না। যারা অন্যরা সাহায্য করেছে তাদের আমার মোবারকবাদ দিতে হয়।*

*তবে মনে রাখা উচিত, বাংলাদেশ স্বাধীন সার্বভৌম রাষ্ট্র। বাংলাদেশ স্বাধীন থাকবে। বাংলাদেশকে কেউ দাবাতে পারবে না। বাংলার বিরুদ্ধে ষড়যন্ত্র করে লাভ নাই। আমি বলেছিলাম যাবার আগে, ও বাঙালি এবার তোমাদের সংগ্রাম স্বাধীনতার সংগ্রাম, এবার তোমাদের সংগ্রাম মুক্তির সংগ্রাম। তোমরা তা করেছো। আমি বলেছিলাম, ঘরে ঘরে দুর্গ তৈরি কর। তোমরা ঘরে ঘরে দুর্গ তৈরি করে সংগ্রাম করেছো।*

*আমি আমার সহকর্মীদের মোবারকবাদ জানাই। আমার বহু ভাই, আমার বহু কর্মী, আমার বহু মা-বোন, আমার বহু ভাই আজ দুনিয়ায় নাই, তাদের আমি দেখবো না। আমি আজ বাংলার মানুষকে দেখলাম, বাংলার মাটিকে দেখলাম, বাংলার আকাশকে দেখলাম, বাংলার আবহাওয়া অনুভব করলাম, বাংলাকে আমি সালাম জানাই। আমার সোনার বাংলা তোমায় আমি বড় ভালোবাসি, বোধহয় তার জন্য আমাকে ডেকে নিয়ে এসেছে।*

*আমি আশা করি, দুনিয়ার সমস্ত রাষ্ট্রের কাছে আমার আবেদন, যে আমার রাস্তা নাই, আমার ঘাট নাই, আমার জনগণের খাবার নাই, আমার মানুষ গৃহহারা-সর্বহারা, আমার মানুষ পথের ভিখারী। তোমরা আমার মানুষকে সাহায্য করো, মানবতার খাতিরে তোমাদের কাছে আমি সাহায্য চাই। দুনিয়ার সমস্ত রাষ্ট্রের কাছে আমি সাহায্য চাই। আমার বাংলাদেশকে তোমরা রিকোগনাইজ করো। জাতিসংঘের ত্রাণ দাও; দিতে হবে, উপায় নাই দিতে হবে। আমি, আমরা হার মানবো না, আমরা হার মানতে জানি না। কবিগুরু, কবিগুরু রবীন্দ্রনাথ বলেছিলেন-''সাত কোটি বাঙালিরে হে বঙ্গ জননী, রেখেছো বাঙালি করে মানুষ করোনি।''*

*কবিগুরুর কথা মিথ্যা প্রমাণ হয়ে গিয়েছে। আমার বাঙালি আজ মানুষ। আমার বাঙালি দেখিয়ে দিয়েছে দুনিয়ার ইতিহাসে, দুনিয়ার ইতিহাসে, স্বাধীনতার সংগ্রামে এতো লোক আত্মহুতি, এতো লোক জান দেয় নাই। তাই আমি বলি আমায় দাবায়ে রাখতে পারবে না।*

***আজ থেকে আমার অনুরোধ, আজ থেকে আমার আদেশ, আজ থেকে আমার হুকুম, ভাই হিসাবে-নেতা হিসাবে নয়, প্রেসিডেন্ট হিসাবে নয়, প্রধানমন্ত্রী হিসাবে নয়, আমি তোমাদের ভাই, তোমরা আমার ভাই। এ স্বাধীনতা আমার ব্যর্থ হয়ে যাবে- যদি আমার বাংলার মানুষ পেট ভরে ভাত না খায়, এ স্বাধীনতা আমার পূর্ণ হবে না- যদি বাংলার মা-বোনেরা কাপড় না পায়, এ স্বাধীনতা আমার পূর্ণ হবে না- যদি এদেশের মা-বোনেরা ইজ্জতের কাপড় না পায়, এ স্বাধীনতা আমার পূর্ণ হবে না- যদি এদেশের মানুষ, যারা আমার যুবক শ্রেণি আছে তারা চাকরি না পায় বা কাজ না পায়।***

*মুক্তিবাহিনী, ছাত্রসমাজ, কর্মী বাহিনী তোমাদের মোবারকবাদ জানাই। তোমরা গেরিলা হয়েছো, তোমরা রক্ত দিয়েছো, রক্ত বৃথা যাবে না, রক্ত বৃথা যায় নাই।*

*একটা কথা-আজ থেকে বাংলায় যেন আর চুরি-ডাকাতি না হয়। বাংলায় যেন আর লুটতরাজ না হয়। বাংলায় যে অন্য লোকেরা আছে, অন্য দেশের লোক, পশ্চিম পাকিস্তানের লোক, বাংলায় কথা বলে না; আজও বলছি, তোমরা বাঙালি হয়ে যাও। আর আমি আমার ভাইদের বলছি, তাদের উপরে হাত তুলো না। আমরা মানুষ, মানুষ ভালোবাসি।*

*তবে যারা দালালি করেছে, যারা আমার লোকদের ঘরে ঢুকে হত্যা করেছে, তাদের বিচার হবে এবং শাস্তি হবে। সরকারের কাছে, বাংলার স্বাধীন সরকারের হাতে ছেড়ে দেন, একজনকেও ক্ষমা করা হবে না। তবে, আমি চাই, স্বাধীন দেশে, স্বাধীন নাগরিকের মতো, স্বাধীন আদালতে, বিচার হয়ে এদের শাস্তি হবে। আপনারা, আমি দেখায়ে দিবার চাই দুনিয়ার কাছে, যে শান্তিপূর্ণ বাঙালি রক্ত দিতে জানে, শান্তিপূর্ণ বাঙালি শান্তি বজায় রাখতেও জানে।*

*আমারে আপনারা পেয়েছেন। আমি আসছি। জানতাম না আমার ফাঁসির হুকুম হয়ে গেছে। আমার সেলের পাশে আমার জন্য কবর খোঁড়া হয়েছিল। আমি প্রস্তুত হয়েছিলাম, বলেছিলাম-আমি বাঙালি, আমি মানুষ, আমি মুসলমান- একবার মরে দুইবার মরে না। আমি বলেছিলাম, আমার মৃত্যু এসে থাকে যদি আমি হাসতে হাসতে যাবো। আমার বাঙালি জাতকে অপমান করে যাবো না, তোমাদের কাছে ক্ষমা চাইবো না। এবং যাবার সময় বলে যাবো, জয় বাংলা, স্বাধীন বাংলা, বাঙালি আমার জাতি, বাংলা আমার ভাষা, বাংলার মাটি আমার স্থান।*

*ভাইয়েরা আমার, যথেষ্ট কাজ পড়ে রয়েছে, আপনারা জানেন। আমি সমস্ত জনসাধারণকে চাই যেখানে রাস্তা ভেঙে গেছে, নিজেরা রাস্তা করতে শুরু করে দাও। আমি চাই জমিতে যাও, ধান বুনাও।* ***কর্মচারীদের বলে দিবার চাই, একজন ঘুষ খাবেন না। মনে রাখবেন, তখন সুযোগ ছিলো না, আমি ঘুষ ক্ষমা করবো না।***

*ভাইয়েরা আমার, যাওয়ার সময় যখন আমাকে গ্রেফতার করে নিয়ে যায়। তাজউদ্দিন, নজরুলেরা আমার দিকে যায়। আমি বলেছিলাম, ৭ কোটি বাঙালির সাথে আমাকে মরতে দে তোরা। আমি আশীর্বাদ করছি। তাজউদ্দীনেরা কাঁদছিল। তোরা চলে যা। সংগ্রাম করিস। আমার আস্থা রইলো। আমি এই বাড়িতে মরতে চাই। এই হবে বাংলার জায়গা, এখানেই আমি মরতে চাই। ওদের কাছে মাথা নত করে আমরা পারবো না।*

*ভাইয়েরা আমার, ডাঃ কামালকে নিয়ে তিন মাস পর্যন্ত সেখানে ইন্টারোগেশন করেছে, মুজিবের বিরুদ্ধে সাক্ষী দেওয়ার। কয়েকজন বাঙালি আমার বিরুদ্ধে সাক্ষী দিয়েছে, তাদের আমরা জানি এবং চিনি। তাদের বিচার হবে।*

*আপনারা, আজ অমি বক্তৃতা করতে পারছি না। আপনারা বুঝতে পারেন- ''নম নম নম সুন্দরী মম জননী জন্মভূমি, গঙ্গার তীর স্নিগ্ধ সমীর, জীবন জুড়ালে তুমি।''*

*আজ আমি যখন ঢাকায় নামছি, আমি আমার চোখের পানি রাখতে পারি নাই। আমি জানতাম না, যে মাটিকে আমি এতো ভালবাসি, যে মানুষকে আমি এতো ভালোবাসি, যে জাতকে আমি এতো ভালবাসি, যে বাংলাদেশকে আমি এতো ভালোবাসি, সে বাংলায় আমি যেতে পারবো কি না। আজ আমি বাংলাদেশে ফিরে এসেছি। আমার ভাইদের কাছে, আমার মা'দের কাছে, আমার বোনদের কাছে। বাংলা আমার স্বাধীন, বাংলার মানুষ আজ আমার স্বাধীন।*

*আমি পশ্চিম পাকিস্তানের ভাইদের বলি, তোমরা সুখে থাকো। তোমাদের মধ্যে আমাদের ঘৃণা নাই। তোমাদের আমরা শ্রদ্ধা করতে চেষ্টা করবো। তোমার সামরিক বাহিনীর লোকেরা যা করেছে, আমার মা-বোনের উপর রেপ করেছে, আমার ত্রিশ লক্ষ লোককে মেরে ফেলে দিয়েছে। যাও সুখে থাকো। তোমরা সুখে থাকো। তোমাদের সঙ্গে আর না। শেষ হয়ে গেছে। তোমরা স্বাধীন থাকো, আমিও স্বাধীন থাকি।*

*তোমাদের সঙ্গে আমার স্বাধীন দেশের নাগরিক হিসেবে বন্ধু হতে পারে, তাছাড়া বন্ধু হতে পারে না। তবে, যারা, অন্যায়ভাবে অন্যায় করেছে তাদের সম্বন্ধে যথেষ্ট ব্যবস্থা করা হবে। আপনাদের কাছে আমি ক্ষমা চাই। আরেকদিন আমি বক্তৃতা করবো। কিছু দিন পরে একটু সুস্থ হয়ে লই। আপনারা দেখতে পাচ্ছেন, আমি সে মুজিবুর রহমান এখন আর নাই। আমার বাংলার দিকে চাইলে দেখেন, সমান হয়ে গেছে জাগা, গ্রাম গ্রাম পোড়ায়ে দিয়েছে। এমন কোন ফ্যামিলি নাই, যার মধ্যে আমার লোককে হত্যা করা হয় নাই। কত বড় কাপুরুষ, যে নিরপরাধ নাগরিককে এভাবে হত্যা করে; সামরিক বাহিনীর লোকেরা। আর তারা বলে কি? যে আমরা পাকিস্তানের মুসলমান সামরিক বাহিনী। ঘৃণা করা উচিত। জানা উচিত দুনিয়ার মধ্যে ইন্দোনেশিয়ার পরে এই বাংলাদেশই দ্বিতীয় স্থান মুসলিম কান্ট্রি। মুসলমান সংখ্যায় বেশি- দ্বিতীয় স্থান। আর ইন্ডিয়া তৃতীয় স্থান। আর পশ্চিম পাকিস্তান চতুর্থ স্থান। আমরা মুসলমান। মুসলমান মা-বোনদের রেপ করে! আমরা মুসলমান। আমার রাষ্ট্রে এই বাংলাদেশে হবে সমাজতন্ত্র ব্যবস্থা। এই বাংলাদেশে হবে গণতন্ত্র। এই বাংলাদেশে হবে ধর্মনিরপেক্ষ রাষ্ট্র।*

*যারা জানতে চান, আমি বলে দিবার চাই। আসার সময় দিল্লিতে শ্রীমতি ইন্দিরা গান্ধীর সঙ্গে ঐ সময় আলোচনা হয়েছে। আমি আপনাদের বলতে পারি, যেহেতু জানি আমি তাঁকে। তাঁকে আমি শ্রদ্ধা করি। সে পন্ডিত নেহেরুর কন্যা। সে মতিলাল নেহেরুর ছেলের মেয়ে। তাঁরা রাজনীতি করেছে, ত্যাগ করেছে। তাঁরা আজকে সেখানে ভারতের প্রধানমন্ত্রী হয়েছে। যেদিন আমি বলবো, সেইদিন ভারতের সৈন্য বাংলার মাটি ছেড়ে চলে যাবে এবং তিনি আস্তে আস্তে কিছু কিছু সরায়ে নিচ্ছেন।*

*তবে যে সাহায্য করেছেন আমি আমার সাত কোটি দুঃখী বাঙালির পক্ষ থেকে ইন্দিরা গান্ধীকে, তাঁর সরকারকে, ভারতের জনসাধারণকে মোবারকবাদ জানাই, অন্তরের অন্তঃস্থল থেকে ধন্যবাদ জানাই। ব্যক্তিগতভাবে এমন কোন রাষ্ট্রপ্রধান নাই, যার কাছে তিনি আপিল করেন নাই যে, শেখ মুজিবকে ছেড়ে দাও। তিনি নিজে ব্যক্তিগতভাবে দুনিয়ার সকল রাষ্ট্রের কাছে বলেছেন, তোমরা ইয়াহিয়া খানকে বল শেখ মুজিবকে ছেড়ে দেবার জন্য, একটা রাজনৈতিক সল্যুশন করার জন্য।*

*এক কোটি লোক মাতৃভূমি ত্যাগ করে কোনো দেশে চলে গেছে। এমন অনেক দেশ আছে যেখানে লোক সংখ্যা দশ লাখ, পনেরো লাখ, বিশ লাখ, ত্রিশ লাখ, চল্লিশ লাখ, পঞ্চাশ লাখ। শতকরা ষাটটা রাষ্ট্র আছে, যার*

*জনসংখ্যা এক কোটির কম। আর আমার বাংলা থেকে এক কোটি লোক মাতৃভূমির মায়া ত্যাগ করে ভারতে স্থান নিয়েছিলো। কত সেখানে অসুস্থ অবস্থায় মারা গেছে, কত না খেয়ে কষ্ট পেয়েছে, কত ঘর-বাড়ি জ্বালিয়ে দিয়েছে এই পাষন্ডের দল।*

*ক্ষমা করো আমার ভাইয়েরা, ক্ষমা করো। আজ আমার কারো বিরুদ্ধে প্রতিহিংসা নাই। একটা মানুষকে তোমরা কিছু বলো না। অন্যায় যে করেছে তাকে সাজা দেবো। আইন শৃঙ্খলা তোমাদের হাতে নিও না। মুক্তিবাহিনীর যুবকরা, তোমরা আমার সালাম গ্রহণ করো। ছাত্রসমাজ, তোমরা আমার সালাম গ্রহণ করো। শ্রমিকসমাজ, তোমরা আমার সালাম গ্রহণ করো। কৃষক সমাজ, তোমরা আমার সালাম গ্রহণ কর। তোমরা করো, বাংলার হতভাগ্য হিন্দু-মুসলমান আমার সালাম গ্রহণ করো।*

*আর আমার যে কর্মচারীরা, যে পুলিশ, ইপিআর, যাদের উপর মেশিনগান চালিয়ে দেয়া হয়েছে, যারা মা-বোন ত্যাগ করে পালিয়ে গিয়েছে, তার স্ত্রীদের গ্রেফতার করে কুর্মিটোলা নিয়ে যাওয়া হয়েছে, তোমাদের সকলকে আমি সালাম জানাই, তোমাদের সকলকে আমি শ্রদ্ধা জানাই।*

***নতুন করে গড়ে উঠবে এই বাংলা। বাংলার মানুষ হাসবে। বাংলার মানুষ খেলবে। বাংলার মানুষ মুক্ত হাওয়ায় বাস করবে। বাংলার মানুষ পেট ভরে ভাত খাবে। এই আমার জীবনের সাধনা, এই আমার জীবনের কাম্য। আমি যেন এই কথা চিন্তা করেই মরতে পারি- এই দোয়া, এই আশীর্বাদ আপনারা আমাকে করবেন।*** *এই কথা বলে আপনাদের কাছে থেকে বিদায় নেবার*

*চাই। আমার সহকর্মীদের আমি সকলকে ধন্যবাদ জানাই। যারা আমার, যাদের আমি যে কথা বলে গেছিলাম, তারা সকলে, যত এখানে আছে আমার, তারা একজন একজন করে তা প্রমাণ করে দিয়েছে, যে না, মুজিব ভাই বলে গেছে, তোমরা সংগ্রাম করো, তোমরা স্বাধীন করো, তোমরা জান দাও, বাংলার মানুষকে মুক্ত করো। আমার জন্য চিন্তা করো না। আমি চললাম। যদি ফিরে আসি, আমি জানি আমি ফিরে আসতে পারবো না। কিন্তু আল্লাহ আছে, তাই আজ আমি আপনাদের কাছে ফিরে এসেছি।*

*তোমাদের আমি, আমার সহকর্মীরা, তোমাদের আমি মোবারকবাদ জানাই। আমি জানি, কী কষ্ট তোমরা করেছো। আমি কারাগারে বন্দি ছিলাম। ৯ মাস পর্যন্ত আমাকে কাগজ দেওয়া হয় নাই। এ কথা সত্য- আসার সময় ভুট্টো সাহেব আমাকে বলেছিলেন, শেখ সাব, চেষ্টা করেন দুই অংশকে কোন একটা বাঁধনে রাখা যায় কিনা। আমি বললাম, আমি কিছু বলতে পারি না। আমি কোথায় আছি জানি না। আমার বাংলাদেশের মাটিতে যেয়ে আমি বলবো। আজ বলছি, ভুট্টো সাহেব, সুখে থাকো, বাঁধন টুটে গেছে, আর না। তুমি যদি কোন বিশেষ শক্তির সঙ্গে গোপন পরামর্শ করে, আমার বাংলার স্বাধীনতা হরণ করতে চাও, এবার মনে রেখ, এবার দলের নেতৃত্ব দেবে শেখ মুজিবুর রহমান। মরে যাবে, স্বাধীনতা আর হারাতে দেবো না।*

*ভাইয়েরা আমার, আমার ৪ লক্ষ বাঙালি আছে পশ্চিম পাকিস্তানে। আমি অনুরোধ করবো, তবে একটা জিনিস আমি বলতে চাই, তোমাদের এ্যাপ্রুভাল নিয়া আমার সহকর্মীরা, ইন্টারন্যাশনাল ফোরামে, জাতিসংঘের তত্ত্বাবধানে অথবা ওয়ার্ল্ড জুরি এসোসিয়েশনের পক্ষের থেকে একটা ইনকোয়ারি হতে হবে। যে কী পাশবিক অত্যাচার, যেভাবে হত্যা করেছে আমাদের লোকদের, এ সত্য দুনিয়ার মানুষকে জানাতে হবে। আমি দাবি করবো জাতিসংঘকে, ইমেডিয়েটলি বাংলাদেশকে আসন দাও এবং ইনকোয়ারি করো।*

*ভাইয়েরা আমার, যদি কেউ চেষ্টা করেন, ভুল করবেন। আমি জানি ষড়যন্ত্র শেষ হয় নাই। সাবধান বাঙালিরা, ষড়যন্ত্র শেষ হয় নাই। একদিন বলেছিলাম, ঘরে ঘরে দুর্গ গড়ে তৈরি করো, বলেছিলাম? বলেছিলাম, যার যা আছে তাই নিয়ে যুদ্ধ করো, বলেছিলাম? বলেছিলাম, এ সংগ্রাম স্বাধীনতার সংগ্রাম, মুক্তির সংগ্রাম। এই জায়গায়, ৭ই মার্চ তারিখে। আজ বলে যাচ্ছি, তোমরা ঠিক থাকো। একতাবদ্ধ থাকো, কারো কথা শুনো না। ইনশাল্লাহ, স্বাধীন যখন হয়েছি, স্বাধীন থাকবো। একজন মানুষ এই বাংলাদেশে বেঁচে থাকতে পর্যন্ত সংগ্রাম চলবে।*

*আজ আমি আর বক্তৃতা করতে পারছি না। একটু সুস্থ হলে আবার বক্তৃতা করবো। আপনারা আমারে মাফ করে দেন। আপনারা আমাকে দোয়া করেন। আপনারা আমাকে দোয়া করবেন। আপনারা আমার সাথে সকলে আজকে একটা মোনাজাত করেন।''*

৩১. ১৯৭০ সালে জনগণ জাতির পিতাকে ১৯৭৫ সাল পর্যন্ত দেশ পরিচালনা করার ক্ষমতা প্রদান করেছিল। তৎপর তথা ১৯৭৫ সালের পর সংবিধান প্রণয়নের কথা বলে জাতির পিতা পাকিস্তানের মত নয় বৎসর, ভারতের মত ৩ বৎসর ৬ মাস এবং আমেরিকরার মত ১১ বৎসর আরও ক্ষমতায় থাকতে পারতেন। অর্থাৎ জাতির জনক ১৯৭৫ থেকে অন্ততঃ ১০ বৎসর তথা ১৯৮৫ সাল পর্যন্ত সংবিধান প্রণয়নের কথা বলে নির্বিঘ্নে থাকতে পারতেন। দ্রুত সংবিধান প্রণয়ন করে নির্বাচন দেওয়ার কথা তৎকালীন সময়ে জনগণ দাবীই করেন নাই। কারণ জনগণ স্বাধীন দেশ পেয়ে তখন আনন্দ উদ্‌যাপন করছিল। কিন্তু জাতির পিতা ১৯৮৫ সাল পর্যন্ত দেশ পরিচালনার সুযোগ পেয়েও তার পূর্বেই দ্রুত জনগণকে শাসনতন্ত্র দেওয়ার তাগিদে এবং দেশে গণতন্ত্র এবং আইনের শাসন দেওয়ার প্রয়োজনে ১৯৭২ সালের ১০ই জানুযায়ী পাকিস্তানের কারাগার থেকে দেশে ফিরে ১৯৭২ সালের ৪ঠা নভেম্বর গণপরিষদে সংবিধান গ্রহণ ও পাস করেন। ১৬ই ডিসেম্বর ১৯৭২ সংবিধান কার্যকর করে ১৯৭৩ সালে উক্ত সংবিধানের অধীনে নির্বাচন অনুষ্ঠান করে জনগণের ক্ষমতা জনগণকে ফিরিয়ে দিয়ে পৃথিবীর ইতিহাসে বিরল ও অনন্য নজির স্থাপন করেন।

৩২. জাতির জনক আইনের শাসনে বিশ্বাসী ছিলেন। তাইতো তিনি এককভাবে ১৯৮৫ সাল পর্যন্ত ক্ষমতায় থাকার সুযোগ পেয়েও জাতিকে সংবিধান তথা শাসনতন্ত্র প্রদান করে নিজেই তার অধীনে চলে যান এবং সংবিধান এর বিধান অক্ষরে অক্ষরে মেনে চলেন।

**৩৩. তাইতো জাতির পিতা বঙ্গবন্ধু শেখ মুজিবুর রহমান একদিকে যেমন ছিলেন বাঙ্গালীর অবিসংবাধিত নেতা তেমনি তিনি ছিলেন সৎ ও আদর্শ বিশ্ব নেতা। এতদসংক্রান্ত বিভিন্ন গণমাধ্যম ও ব্যক্তির বক্তব্য ও বিবৃতি নিম্নে অবিকল অনুলিখন হলোঃ**

***মুজিব না থাকলে বাংলাদেশ কখনোই জন্ম নিত না***
***ব্রিটিশ দৈনিক ফিনান্সিয়াল টাইমস***
***"Bangladesh would never have been born without Mujib"***
***-British Daily Financial Times***
***সূত্রঃ বাংলাদেশ প্রতিদিন, ১৫ আগস্ট ২০১৮***

***শেখ মুজিব ছিলেন এক বিস্ময়কর ব্যক্তিত্ব***
***ব্রিটিশ দৈনিক দ্য গার্ডিয়ান***
***"Sheikh Mujib was an amazing personality"***
***-British Daily The Guardian***
***সূত্রঃ দৈনিক জনকণ্ঠ, ১৮ আগস্ট ২০১৮***

*বঙ্গবন্ধুর ৭ই মার্চের ঐতিহাসিক ভাষণ বিশ্ব প্রামাণ্য ঐতিহ্যের অংশ*
*ইউনেস্কো*
***"The historic 7th March Speech of Bangabandhu Sheikh Mujibur Rahman is a part of the world's documentary heritage"***
***-UNESCO***
*সূত্রঃ দি ডেইলি স্টার, ৩১ অক্টোবর ২০১৭*

*তাঁর অনন্য সাধারণ সাহসিকতা এশিয়া ও আফ্রিকার জন্য ছিল প্রেরণাদায়ক*
*ইন্দিরা গান্ধী*
*সাবেক প্রধানমন্ত্রী, ভারত*
***"His extraordinary heroism has been a source of inspiration for the people of Asia and Africa"***
***-Indira Gandhi, Former Prime Minister, Republic of India***
*সূত্রঃ http://mujib100.gov.bd/pages/mujib/recognition*

*শেখ মুজিব কেবল বঙ্গবন্ধু নন তিনি আজ থেকে বিশ্ববন্ধু*
*রমেশ চন্দ্র*
*সাবেক সেক্রেটারি জেনারেল, ওয়ার্ল্ড পিস কাউন্সিল*
***"Sheikh Mujib is not just the Bangabandhu (Friend of Bangladesh), from today he is also the Viswabandhu (Friend of the World)"***
***-Ramesh Chandra, Former Secretary General, World Peace Council***
*সূত্রঃ https://www.7thmarch.com/people-on-bangabandhu*

*আপোষহীন সংগ্রামী নেতৃত্ব আর কুসুম কোমল হৃদয় ছিল মুজিব চরিত্রের বৈশিষ্ট্য*
*ইয়াসির আরাফাত*
*সাবেক প্রেসিডেন্ট,প্যালেস্টিনিয়ান ন্যাশনাল অথরিটি*
***"The greatest attribute of Mujib's character was the blend of an uncompromising and combative leadership with a soft, sympathetic heart"***
***-Yasser Arafat, Former President, Palestinian National Authority***
*সূত্রঃ https://www.7thmarch.com/people-on-bangabandhu*

*আমি হিমালয় দেখিনি বঙ্গবন্ধুকে দেখেছি ব্যক্তিত্ব ও নির্ভিকতায় এই মানুষটি হিমালয়ের মতো*
*ফিদেল ক্যাস্ট্রো*
*সাবেক রাষ্ট্রপতি, কিউবা*
***"I have not seen the Himalayas. But I have seen Sheikh Mujib. In personality and in courage, this man is the Himalayas."***
***-Fidel Castro, Former President, Republic of Cuba***
*সূত্রঃ http://www.theindependentbd.com/printversion/details/70028*

*বঙ্গবন্ধু হত্যাকান্ডে বাংলাদেশই শুধু এতিম হয়নি বিশ্ববাসী হারিয়েছে এক মহান সন্তানকে*
*জেমস লামন্ড*
*সাবেক ব্রিটিশ এমপি*
***"The murder of Bangabandhu makes not only Bangladesh an orphan, but also the world loses a great child"***
***-James Lamond, Former British Member of Parliament***
*সূত্রঃ দি ডেইলি স্টার, ৩১ অক্টোবর ২০১৭*

*পোয়েট অব পলিটিক্স*
*নিউজ উইক*

*আমেরিকার সাপ্তাহিক নিউজ ম্যাগাজিন*
***"Poet of politics."***
***-Newsweek, American Weekly News Magazine***
***সূত্রঃ https://www.7thmarch.com/people-on-bangabandhu***

*তোমরা আমারই দেওয়া ট্যাংক দিয়ে আমার বন্ধু মুজিবকে হত্যা করেছ আমি নিজেই নিজেকে অভিশাপ দিচ্ছি*
*আনোয়ার সাদাত*
*সাবেক রাষ্ট্রপতি, মিশর*
***"You killed my friend Mujib with my tank! I curse myself"***
***-Anwar Sadat, Former President, Egypt***
*সূত্রঃ দৈনিক জনকণ্ঠ, ১৮ আগস্ট ২০১৮*

*যারা মুজিবকে হত্যা করেছে তারা যেকোনো জঘন্য কাজ করতে পারে*
*উইলি ব্র্যান্ট*
*নোবেল বিজয়ী জার্মান চ্যান্সেলর*
***"Those who have murdered Mujib can do any despicable job"***
***-Willy Brandt, Nobel Laureate Chancellor of Germany***
***সূত্রঃ https://www.7thmarch.com/people-on-bangabandhu***

*শেখ মুজিব সরকারিভাবে বাংলাদেশের ইতিহাস এবং জনগণের হৃদয়ে উচ্চতম আসনে পুনঃ প্রতিষ্ঠিত হবেন এটা শুধু সময়ের ব্যাপার*
*ব্রায়ান ব্যারন*
*দ্য লিসেনার, লন্ডন*
***"Sheikh Mujib will be officially restored to the highest seats in the history of Bangladesh and the hearts of the people. It's just a matter of time"***
***-Brian Barron, The Listener, London***
*সূত্রঃ বাংলাদেশ প্রতিদিন, ১৫ আগস্ট ২০১৮*

৩৪. গুরুত্বপূর্ন বিধায় ভলটেয়ার (Voltaire) এর সেরা উক্তি নিম্নে অবিকল অনুলিখন হলোঃ
***"I disapprove of what you say, buy I will defend to the death your right to say it."***
***৩৫.*** গুরুত্বপূর্ন বিধায় ইভলি হল ***(Evelyh Beatrice Hal)*** এর উক্তিও অবিকল নিম্নে অনুলিখন হলোঃ
***"I do not agree with what you have to say, but I'll defend to the death your right to say it."***

৩৬. জাতির পিতা জীবনের শেষ দিন পর্যন্ত ভলটেয়ার এবং ইভলি হল এর উপরিল্লিখিত উক্তি মনে প্রাণে বিশ্বাস করে অক্ষরে অক্ষরে পালন করেছেন। তাইতো জাতির পিতা বলেছেনঃ

*"দুনিয়া দুভাগে বিভক্ত, নিপীড়িত ও অত্যাচারী।*
*আমি নিপীড়িতদের সাথে আছি।"*
*বঙ্গবন্ধু শেখ মুজিবুর রহমান।*

৩৭. জাতির পিতার প্রণীত সংবিধান অনুযায়ী সকলেই সংবিধান দ্বারা নিয়ন্ত্রিত এবং সংবিধান মোতাবেক চলতে হবে। আশা করি, নিরাপত্তা গোয়েন্দা সংস্থা জাতির পিতার উপরিল্লিখিত বক্তব্যের সাথে একমত হয়ে, জাতির পিতার আদর্শ এবং তাঁর প্রণীত সংবিধান মোতাবেক অসহায় এবং নিপীড়িতের পাশে থাকবে। জাতির পিতা বঙ্গবন্ধু শেখ মুজিবুর রহমানের জন্মশতবার্ষিকী তথা মুজিববর্ষে সকল নিরাপত্তা গোয়েন্দা সংস্থা সহ আমরা সকলেই আজ দৃপ্ত কণ্ঠে শপথ করি নিপীড়নমুক্ত উন্নত বাংলাদেশ গড়ার। তাহলেই বাস্তবায়ন হবে জাতির পিতার স্বপ্নের প্রকৃত সোনার বাংলাদেশ।

৩৮. বিশ্ববিদ্যালয়ের সর্বোচ্চ ডিগ্রি অর্জন করে, বাংলাদেশের সবচেয়ে কঠিন প্রতিযোগীতামূলক পরীক্ষায় অংশগ্রহণ করে সাফল্যের সাথে উক্ত পরীক্ষা তথা বিসিএস পরীক্ষায় এমসিকিউ, লিখিত ও মৌখিক পরীক্ষায় পাশ করে এবং বাংলাদেশ কর্ম কমিশন কর্তৃক সুপারিশকৃত হওয়া সত্ত্বেও নিরাপত্তা গোয়েন্দা সংস্থা কর্তৃক বেআইনীভাবে, সংবিধান বিরোধীভাবে এবং স্বেচ্ছাচারীভাবে অত্র দরখাস্তকারীকে সরকারী চাকুরীতে অনুপযুক্ত ঘোষণা করা হয়।

৩৯. এটা সকলকে মনে রাখতে হবে যে, একটি সন্তানকে লালন পালন করে সুশিক্ষিত করে গড়ে তোলা প্রতিটি মা-বাবার জন্য কত কঠিন কাজ তা সংশ্লিষ্ট সকলে ওয়াকিবহাল। এমন কঠিন কষ্টকর পরিশ্রমের পর যখন মা-বাবা দেখেন তার সারা জীবনের পরিশ্রমকে একজন নিরাপত্তা গোয়েন্দা সংস্থার কর্মকর্তা একটি শব্দে ধ্বংস করে দেয়, ব্যার্থ করে দেয়, ধুলোয় মিশিয়ে দেয়, তখন সে মা-বাবা যে বুক-ফাটা কান্না করেন তাতে আরশ কেপে ওঠে। কেপে ওঠে আদালত, কেপে ওঠে সভ্যতা। এমনতর বাংলাদেশের স্বপ্ন জাতির পিতা দুঃস্বপ্নেও দেখেন নাই। এমনতর বাংলাদেশের জন্য জাতির পিতা বাংলাদেশ স্বাধীন করেন নাই। বঙ্গবন্ধু সকল জনগণকে সমান দৃষ্টিতে দেখতেন। সেকারনেই বাংলাদেশের জনগন তাঁকে যেমনি বঙ্গবন্ধু উপাধী প্রদান করেছে তেমনি করেছে জাতির পিতা।

৪০. গণপ্রজাতন্ত্রী বাংলাদেশ সরকারে মাননীয় প্রধানমন্ত্রী শেখ হাসিনা কর্তৃক ২৬শে পৌষ ১৪২৬, ১০ই জানুয়ারি ২০২০ তারিখে প্রদত্ত বানী গুরুত্বপূর্ণ বিধায় নিম্নে অবিকল অনুলিখন হলোঃ

বানী

"*সর্বকালের সর্বশ্রেষ্ঠ বাঙালি, জাতির পিতা বঙ্গবন্ধু শেখ মুজিবুর রহমানের জন্মশতবার্ষিকী উদ্‌যাপনের ক্ষণগণনা কর্মসূচির উদ্বোধন উপলক্ষ্যে সবাইকে আমি আন্তরিক শুভেচ্ছা জানাচ্ছি। ১০ই জানুয়ারি জাতির পিতার স্বদেশ প্রত্যাবর্তনের দিন হতে এই ক্ষণগণনা শুরু হবে। আর ১৭ই মার্চ ২০২০ বর্ণাঢ্য উদ্বোধনের মধ্য দিয়ে শুরু হবে বঙ্গবন্ধুর জন্মশতবার্ষিকী উদ্‌যাপন অনুষ্ঠানমালা।*

*এ উপলক্ষ্যে আমি জাতির পিতার স্মৃতির প্রতি গভীর শ্রদ্ধা জানাচ্ছি। আমি শ্রদ্ধার সঙ্গে স্মরণ করছি জাতীয় চার নেতা, মুক্তিযুদ্ধের ৩০ লাখ শহিদ, ২ লাখ নির্যাতিত মা-বোন এবং সকল বীর মুক্তিযোদ্ধাকে, যাঁদের অপরিসীম ত্যাগের বিনিময়ে আমরা অর্জন করেছি মহান স্বাধীনতা।*

*বাঙালির জাতীয় ইতিহাসে বঙ্গবন্ধু শেখ মুজিবুর রহমান এক সাহসী অগ্নিপুরুষের নাম। পরাধীনতার শৃঙ্খলে আবদ্ধ বাঙালি জাতি যুগে যুগে স্বাধীনতার জন্য লড়াই করেছে, কিন্তু সফল হতে পারেনি। অবশেষে বিংশ শতাব্দির গোড়ার দিকে মুক্তির দূত হিসেবে জন্মগ্রহণ করেন বঙ্গবন্ধু। তাঁর নেতৃত্বেই বাঙালি জাতি শেষ পর্যন্ত পরাধীনতার শৃঙ্খল ভেঙে স্বাধীনতা লাভ করে।।*

***বঙ্গবন্ধুর জন্ম হয়েছিল মানুষের কল্যাণের জন্য- বাঙালির মুক্তির জন্য। মানুষের অধিকার আদায় ও মুক্তির লক্ষ্যে শাসকদের বিরুদ্ধে তিনি আজীবন লড়াই করেছেন।*** *তাঁর জীবনের শ্রেষ্ঠ সময় কেটেছে কারাগারের অন্ধকার প্রকোষ্ঠে। এমনকি জনগণের জন্য জীবন উৎসর্গ করতেও তিনি প্রস্তুত ছিলেন।* ***তাঁর আজীবনের আরাধ্য ছিল রাজনৈতিক স্বাধীনতার পাশাপাশি দেশের মানুষের অর্থনৈতিক মুক্তি নিশ্চিত করা।*** *কিন্তু রাজনৈতিক স্বাধীনতা অর্জিত হলেও মুক্তিযুদ্ধের পরাজিত শক্তি ১৯৭৫ সালের ১৫ই আগস্ট কালরাতে বঙ্গবন্ধুকে সপরিবারে হত্যা করে অর্থনৈতিক মুক্তির পথ রুদ্ধ করে দেয়। অনেক বাধা-বিপত্তি অতিক্রম করে জনগণের রায়ে আমরা বঙ্গবন্ধুর স্বপ্নের 'সোনার বাংলাদেশ' বিনির্মাণে নিরলসভাবে কাজ করে যাচ্ছি। আমরা ২০২১ সালের মধ্যে বাংলাদেশকে একটি মধ্যম আয়ের দেশ এবং ২০৪১ সালের মধ্যে উন্নত-সমৃদ্ধ দেশে পরিণত করতে বাস্তবমুখী পরিকল্পনা গ্রহণ ও বাস্তবায়ন করে যাচ্ছি। জনগণের আকাঙ্খা পূরণে আমরা কাঙ্ক্ষিত লক্ষ্যে উপনীত হবই, ইনশাআল্লাহ।*

*জাতির জন্য গৌরবময় এই উদ্‌যাপনে আপামর জনসাধারণ-বিশেষ করে আগামী প্রজন্মের কাছে বঙ্গবন্ধুর জীবন ও কর্ম সম্পর্কে তুলে ধরতে আমরা ১৭ই মার্চ ২০২০ থেকে ১৭ই মার্চ ২০২১ সময়কে 'মুজিববর্ষ' ঘোষণা করেছি।* ***আমি মনে করি, বঙ্গবন্ধু সকলের।*** *কাজেই সকলের কাছে তাঁর জীবন ও কর্ম সম্পর্কে তুলে ধরতে সরকারি-বেসরকারি সকল দপ্তর, সংস্থা, শিক্ষাপ্রতিষ্ঠান, মুক্তিযুদ্ধের পক্ষের সকল দল ও সামাজিক-সাংস্কৃতিক সংগঠন জন্মশতবার্ষিকী উদ্‌যাপন সফল করে তুলবে-এ আমার প্রত্যাশা।*

*বঙ্গবন্ধুর জন্মশতবার্ষিকী উদ্‌যাপনের ক্ষণগণনা উপলক্ষ্যে সারাদেশে স্থাপিত ক্ষণগণনার ঘড়ি এবং বঙ্গবন্ধুর জীবন ও কর্ম তুলে ধরতে স্থাপিত ডিসপ্লেগুলো জনসাধারণের মধ্যে বিপুল উৎসাহ ও উদ্দীপনা সৃষ্টি করবে বলে আমি আশা করি।*

*আমি বঙ্গবন্ধুর জন্মশতবার্ষিকী উদ্‌যাপনের ক্ষণগণনা উপলক্ষ্যে গৃহীত সকল কর্মসূচির সার্বিক সাফল্য কামনা করছি।*"

জয় বাংলা, জয় বঙ্গবন্ধু
বাংলাদেশ চিরজীবী হোক।
শেখ হাসিনা

৪১. মাননীয় প্রধানমন্ত্রী শেখ হাসিনা দ্ব্যার্থহীন ভাবে আমাদের সকলকে বারবার যে কথাটি বলতে চেয়েছেন তা তাঁর সর্বশেষ উপরিল্লিখিত বানীতেই স্পষ্ট এবং কাঁচের মত স্বচ্ছ, তা হলো, ***জাতির পিতা বঙ্গবন্ধু সকলের। তিনি বাংলাদেশের সকল জনগণের জাতির পিতা। এমনকি যারা তার আদর্শ ও মতামতের বিরোধী তিনি তাদেরও জাতির পিতা।*** অবৈধ ক্ষমতা দখলদারদের নীতি আদর্শ কখনই জাতির পিতা এবং তাঁর তৈরী দলটির আদর্শ হতে পারে না। অবৈধ ক্ষমতা দখলদাররা যে পদ্ধতিতে জনগণকে তার ন্যায্য অধিকার থেকে বঞ্চিত করেছে সেই একই পদ্ধতিতে জনগনকে তাঁর অধিকার থেকে বঞ্চিত করা জাতির পিতার আদর্শের পরিপন্থী।

৪২. গুরুত্বপূর্ণ বিধায় গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের বর্ষপঞ্জি তথা ক্যালেন্ডারের উপরের অংশে বর্নিত উদ্ধৃতি নিম্নে অবিকল অনুলিখন হলোঃ

***"যারা সৎ পথে জীবিকা অর্জন করে, তারা আল্লাহর প্রিয় বন্ধু"***
***- আল কোরআন।***
***"সরকারি কর্মচারীদের প্রতি আমার নির্দেশ দায়িত্ব পালনে আরো মন দিন। প্রশাসন থেকে দুর্নীতি দূর করুন।"***
***- বঙ্গবন্ধু।***
***"মুক্তির সংগ্রামের চেয়েও দেশে গড়ার সংগ্রাম কঠিন; তাই দেশ গড়ার কাজে আমাদের সর্বশক্তি নিয়োগ করতে হবে।"***
***- বঙ্গবন্ধু।***
***"ঘুষদাতা ও ঘুষ-গ্রহীতা উভয়ই জাহান্নামি"***
***- আল হাদিস।***
***"মানুষের জন্য প্রশাসন, প্রশাসনের জন্য মানুষ নয়"***
***- শেখ হাসিনা।***
***"আমরা মানুষের কল্যাণে কাজ করতে অঙ্গীকারবদ্ধ"***
***- শেখ হাসিনা।***
***দুর্নীতি ছেড়ে সেবা দিন, নৈতিকতার শপথ নিন।***

৪৩. ২০৩০ সালের মধ্যে একটি উন্নত বিশ্ব গড়ার স্বপ্নে জাতিসংঘ কর্তৃক যে উচ্চাভিলাসী পরিকল্পনা ২০১৫ সালে গৃহীত হয় তাতে যে মূল কথাটি স্পষ্টভাবে উঠে এসেছে তা হলো ***একজন ব্যক্তিকেও উন্নয়নের সুযোগ থেকে বঞ্চিত করা যাবে না।*** অর্থাৎ **কাউকে বাদ রেখে কোন উন্নয়ন নয়**। এই **Sustainable Development Goals** (SGDs) গুলো কি এবং কি পক্রিয়ায় এই লক্ষ্যগুলো তৈরী হলো সে সম্পর্কে জাতি সংঘের ওয়েব পেজ থেকে নিম্নে অবিকল অনুলিখন করা হলো ঃ

**WHAT ARE SUSTAINABLE DEVELOPMENT GOALS?**

***Sustainable Development Goals, also known as the Global Goals, are the architecture of the global plan for better future. That plan is called 2030 Agenda for Sustainable Development.***

***The 2030 Agenda for Sustainable Development, adopted by all the UN member states, represents the vision of a better world and clear direction to the mankind for advancement of quality of life in the period 2015-2030. It directs countries' development towards eradication of poverty and hunger, reduction of inequalities, improvement of education, gender equality, addressing climate change, responsible consumption, preservation of biodiversity, economic empowerment and towards strengthening institutions essential for human rights protection, peace and justice.***

***In a nutshell- sustainable Development Goals are the global guidance towards better, sustainable future.***

***The 2030 Agenda is, above all, inclusive plan. Sustainable Development Goals particularly focus on empowering marginalised groups, such as women, children, elderly, poor, disabled, refugees, etc. That is way the key principle of SDGs is: Leave no one behind!***

***The 2030 Agenda is, above all, inclusive plan. Sustainable Development Goals particularly focus on empowering marginalised groups, such as women, children, elderly, poor, disable, refugees, etc. That is why the key principle of SDGs is: Leave no one behind!***

***HELEN KLARK, Under-Secretary-General of the United Nations and UNDP Administrator***

***All 17 SDGs are interconnected. It is impossible to address them separately. In order to have them achieved, it is essential to address them integrally, as a broader developmental***

***framework set to enable better quality of life for all in next 15 years. Therefore, partnership is crucial for achievement of 17 SDGs. It is of utmost importance to establish cooperation among governments, civil society, international organisations, private sector and individuals.***

***Member states already committed to incorporate SDGs in their developmental policies. But sustainable development is possible only if all of us work towards achievement of these goals. And how to do it? Well, quite simple. By starting from ourselves. From our community. Accomplishment of the 2030 Agenda will be contributed by even the smallest actions such as rational water consumption, respect of diversities in local community, planting one new tree, equal treatment of men and women, girls and boys, responsible treatment of the resources and environment, etc. Any of those actions will contribute to the achievement of the vision of a better world envisaged by the Agenda for Sustainable Development by 2030.***

***HOW THE SDGS WERE MADE?***

***This is the first developmental agenda which was created, not exclusively by leaders and polititians, but also by ordinary citizens. During the Post-2015 consultations organised in the period 2013-2015, more than 8 million people around the world clearly said in what kind of world they want to live in. By doing so, they helped UN member states, all 193 of them, to create and adopt this ambitious plan at the UN General Assembly in September 2015, as a vision of a better world by 2030.***

***Montenegro had an active role in this process. More than 12.000 citizens i.e. 2% of its population, participated in post-millennium national consultations.***

***Sustainable Development Goals are continuation of Millennium Development Goals (MDGs), the largest anti-poverty push in the history of mankind, in the period of 2000-2015. The MDGs enabled human kind to cut in half the extreme poverty, to increase education rate, to decrease child mortality as well as to stop HIV/AIDS and malaria epidemics, but also to advance the position of women in may societies around the glove. The Sustainable Development Goals build on reaching the vision of better world by 2030.***

৪৪. অর্থাৎ জাতিসংঘের নেতৃত্বে পৃথিবীর সকল জাতি রাষ্ট্র এই অঙ্গীকার করেন যে, সকলকে তথা সকল মত ও পথকে সাথে নিয়ে ২০৩০ সালের মধ্যে টেকসই উন্নয়ন লক্ষ্যমাত্রা অর্জন করবে।

**৪৫. এটা আজ বিশ্বব্যাপী সুপ্রতিষ্ঠিত নীতি যে, সত্যিকার টেকসই উন্নয়নের অন্যতম পূর্বশর্ত হলো সকলের অংশগ্রহণ। অর্থাৎ সকল প্রকার মত, পথ এর অংশগ্রহণ ভিন্ন কোন স্থায়ী উন্নয়ন সম্ভব নয়।**

৪৬. আমাদের পবিত্র কোরআন শরীফে বর্ণিত আছে যে,
***"THERE SHALL BE NO COMPULSION IN [ACCEPTANCE OF] THE RELIGION" (QURAN 2:256)***

৪৭. ইসলাম সিটি নামক অনলাইন পত্রিকায় (www.islamcity.org) প্রকাশিত মজিদ আরবিল (MAJD ARBIL) এর লেখা *"The compassion of the Prophet towards those who abused him"* (প্রকাশিত ২৬শে জুন ২০১৮) এ আমরা আমাদের প্রিয় নবী হযরত মুহাম্মদ (সঃ) এর শান্তি, ন্যায়বিচার, প্রাণ এবং পরিবেশের অধিকার বিষয়ক চিন্তা চেতনা দেখতে পাই যা নিম্নে অবিকল অনুলিখন হলোঃ

***"Prophet Muhammad started the message of Islam in Arabia at a time when human rights had no meaning, might was right and the society was entrenched in paganism. In***

***this environment, Prophet Muhammad taught a message of justice, peace, human rights, animal rights and even environmental rights as ordained by God, the One True Creator of all that is in the universe.***

***God has shown us in the character of Prophet Muhammad the model of a companionate person. He treated everyone, friends and foe, man and woman, young and old, with kindness and respect.***

***Even when the pagan Arabs reacted to the message of the Prophet with extreme hatred he showed love and kindness.***
***The following examples. from the life of the Prophet show us how we showed react when faced with hat red.***

***We can see one of the most patient and tolerant aspects of the Prophet's character in the incident of an old woman who made a habit of throwing trash in the way of the Holy Prophet Muhammad whenever he passed by her house.***

***The story related about this incident, mentions a neighbor of the prophet that tried her best to irritate him by throwing garbage in his way every day. One day, when he walked out of his home there was no garbage. This made the Prophet inquire about the old woman and he came to know that she was sick. The Prophet went to visit her and offer any assistance she might need. The old woman was extremely humble and at the same time ashamed of her actions in light of the concern that the Prophet showed her.***

***By seeing the example of compassion of Prophet Muhammad she became convinced that Islam must be a true religion that the Prophet was preaching.***

***Another incident that is reported from the life of the Prophet is when the Prophet traveled to a neighboring town of Taif.***

***In Taif he thought be respectable to the message of Almighty God. The people of Taif turned out to be as hateful as the people of Makkah. The elders of the town planned an organized campaign to ridicule the Prophet. To escalate their disapproval of the Prophet and prevent him from preaching Islam, they set a group of children and vagabonds behind him. They pestered him and threw stones at him. Tired, forsaken and wounded, he sought refuge in a nearby garden. It belonged to Atabah and Shaibah, two wealthy chiefs of Quraish.***

***They were both there when Prophet Muhammad entered and sat under a distant tree. The Prophet raised his face towards heaven and prayed. "O Almighty! I raise unto you, my complaint for my weakness, my helplessness, and for the ridicule to which I have been subjected. O merciful! You are the Master of all oppressed people, You are my God! So to whom would You consign me? To the strangers who would ill-treat me, or to the enemies who have an upper hand over Me? It whatever has befallen me is not because of Your wrath, the I fear not. No doubt, the field of Your security and care is wide enough for me. I seek refuge in Your light which illuminates the darkness and straightens the affairs of this world and hereafter, that Your displeasure and wrath may not descend upon me. For the sake of Your pleasure, I remain pleased and resigned to my fate. No change in this world occurs without Your Will."***

***Atabah and Shaibah were watching. They sent for their servant named Adaas and gave him a plate full of grapes. "Take this to that man under the tree," they ordered. So he brought the grapes to Prophet Muhammad.***

***As the Prophet picked the grapes he said, "Bismillahir Rahmaanir Rahim" (In the Name of God, the Most Merciful, the Most Compassionate). Adaas had never heard this before. He was impressed by it, because the Prophet was invoking mercy and compassion of Almighty in spite of all the hardship he was subjected to.***

***"Who are You?" Adaas asked. Muhammad replied, "I am the Prophet of God. Where do you come from?"***

***The servant said: "I am Adaas, a Christian. I come from Nainava."***
***"Nainava? You come from a place where my brother Yunus bin Mati (Jonah son of Mati) lived," the Prophet said.***
***Adaas was surprised to hear the name.***
***"What do you know of Yunus? Here no one seems to know him. Even in Nainava there were hardly ten people who knew his father's name."***
***The Prophet said: "Yes, I know him because just like me, he was a Prophet of Almighty God."***

***Adaas fell on his knees before the Prophet, kissed his hand and embraced him.***
***It is further reported that after the Prophet took refuge from the stone-throwing mob, Angel Jibrael came to the Prophet and asked him if he so wished Jibrael would give the command to bury the city between two mountains. Although the prophet had suffered a great deal at the hands of these people, he replied that he did not wish destruction for the people of Taif because may be their off spring would proclaim the religion of truth.***

***The Islamic scholar Iman Ghazali (1058-1111 C. E.) summarizes the information he collected in the hadith regarding our Prophet's compassionate attitude to all those around him as follows:***

***"He was far from knowing anger and quickly showed compassion for things. He was the most loving of men toward other people. He was the most auspicious of men and did the most good to others, and the most useful and beneficial to others."***

***The Quran says that Prophet was sent as a mercy to the worlds. If we are to honor the Prophet, it will be by adopting the sublime character of our Prophet and not through the emotions of anger and hate."***

৪৮. উপরের লেখাটি সরজ সরল পাঠে এটি কাঁচের মতো স্পষ্ট যে, আমাদের প্রিয় নবী হযরত মুহাম্মদ (সঃ) কত বড় মহান মানুষ ছিলেন কত বড় সহিষ্ণু মানুষ ছিলেন। তাঁকে কখোনই কোন রাগ স্পর্শ করতে পারে নাই। তিনি ছিলেন সকলের ভালোবাসার পাত্র। এমনকি তিনি অবিশ্বাসীদের কাছেও ছিলেন আল-আমিন তথা বিশ্বাসী। যারা তাঁর ক্ষতি চেয়েছেন তাঁদেরও তিনি ক্ষমা সুন্দর দৃষ্টিতে দেখেছেন, তাঁদের অকল্যাণ স্বপ্নেও কামনা করেন নাই। যদি আমরা আমাদের প্রিয় নবীকে সত্যিকার ভাবেই সম্মান করতে চাই তাহলে আমাদেরকে তাঁর মতো চরিত্রের অধিকারী হতে হবে এবং রাগ এবং অসহিষ্ণুতাকে চিরতরে দূরে ঠেলে দিতে হবে। তাঁহলেই কেবল মাত্র আমরা একটি Inclusive Society প্রতিষ্ঠা করতে পারবো এবং এর মাধ্যমে ২০৩০ সালের মধ্যে টেকসই উন্নয়নের যে লক্ষ্যমাত্র স্থির করা আছে তা অর্জন করতে পারবো।

৪৯. আমেরিকার আর্চবিশপ (American archbishop) Fulton J. Sheen বলেছেন যে,

***"There is no other subject on which the average mind is so much confused as the subject of tolerance and intolerance..***

***Tolerance applies only to persons, but never to principles. Intolerance applies only to principles, but never to persons."***

৫০. ১৪৪২ বছর আগে আমাদের পবিত্র কোরআনে সহনশীল এবং সহিষ্ণু সমাজ গঠনের নির্দেশ প্রদান করা হয়েছে। সকল মত পথকে সম্মান করতে ইসলাম ধর্মে নির্দেশ প্রদান করা হয়েছে। এমনকি আমরা দেখি যারা রাসুল (সঃ) এর ক্ষতি করতে চেয়েছিল রাসুল (সঃ) তাঁদের সাথেও সহিষ্ণু আচরণ করেছেন, তথা সহিষ্ণু ছিলেন। সর্বকালের সর্বশ্রেষ্ঠ বাঙ্গালী জাতির জনক বঙ্গবন্ধু শেখ মুজিবুর রহমানও সহিষ্ণু সমাজ নির্মানে এবং সকলের অংশগ্রহণে একটি সত্যিকার টেকসই রাষ্ট্র বিনির্মানে আজীবন সংগ্রাম করে গিয়েছেন। তিনি কখোনই ভিন্ন মতকে দমন পীড়নে বিশ্বাসী ছিলেন না। তাইতো তিনি আমাদের পবিত্র সংবিধানের প্রস্তাবনায় সংযুক্ত করেছেন,

***"আমরা আরও অঙ্গীকার করিতেছি যে, আমাদের রাষ্ট্রের অন্যতম মূল লক্ষ্য হবে গণতান্ত্রিক পদ্ধতিতে এমন এক শোষণমুক্ত সমাজতান্ত্রিক সামাজের প্রতিষ্ঠা- যেখানে সকল নাগরিকের জন্য আইনের শাসন, মৌলিক মানবাধিকার এবং রাজনৈতিক, অর্থনৈতিক ও সামাজিক সাম্য, স্বাধীনতা ও সুবিচার নিশ্চিত হইবে;"***

৫১. আমাদের সংবিধানের অনুচ্ছেদ ১৯ মোতাবেক সকল নাগরিকের জন্য সুযোগের সমতা নিশ্চিত করতে রাষ্ট্র সচেষ্ট হবে।

সংবিধানের অনুচ্ছেদ ২৭ মোতাবেক সকল নাগরিক আইনের দৃষ্টিতে সমান। সংবিধানের অনুচ্ছেদ ২৯(১) মোতাবেক প্রজাতন্ত্রের কর্মে নিয়োগ বা পদলাভের ক্ষেত্রে সকল নাগরিকের জন্য সুযোগের সমতা থাকবে।

৫২. দুরভিক্রম্য চারটি ধাপ তথা প্রয়োজনীয় শিক্ষাগত যোগ্যতা, এমসিকিউ, লিখিত ও মৌখিক পরীক্ষা অতিক্রম করে আসা একজন প্রার্থীকে বাংলাদেশের সর্বজন গ্রহণযোগ্য সাংবিধানিক প্রতিষ্ঠান তথা বাংলাদেশ সরকারী কর্ম কমিশন কর্তৃক নিয়োগের সুপারিশ করা সত্ত্বেও **যথাযথ সংস্থা (appropriate agency)** কর্তৃক কোনরূপ উপযুক্ত কারণ প্রদর্শন না করে নিয়োগের অনুপযুক্ত মর্মে মতামত প্রদান বেআইনী, সংবিধান বিরোধী, স্বাধীনতা বিরোধী, জাতির পিতা এবং মাননীয় প্রধানমন্ত্রী শেখ হাসিনার আদর্শ পরিপন্থী।

৫৩. উপরিল্লিখিত সার্বিক পর্যালোচনা এবং আলোচনায় আমাদের দ্বিধাহীন মতামত হল নিরাপত্তা অধিদপ্তর কর্তৃক প্রতিবেদনটি একটি অযৌক্তিক (unreasonable), অসদভিপ্রায় (bad faith), অসদদুদ্দেশ্যে (malafide) এবং স্বেচ্ছাচারী (arbitrary) আদেশ। সর্বোপরি প্রতিবেদনটি ন্যায়বিচার বা প্রাকৃতিক বিচার (natural justice) এর নিয়মবিরোধী বা পরিপন্থী সুতরাং উক্ত প্রতিবেদনের উপর ভিত্তি করে ১নং প্রতিপক্ষ কর্তৃক দরখাস্তকারীর বরাবরে নিয়োগ পত্র ইস্যু না করা বেআইনী এবং এখতিয়ার বহির্ভুত। এমতাবস্থায়, রুলটি চূড়ান্ত হওয়ার উপযোগী।

৫৪. অতএব, আদেশ হয় যে, অত্র রুলটি বিনা খরচায় চূড়ান্ত করা হলো।

৫৫. অত্র রায় ও আদেশের অনুলিপি প্রাপ্তির পরবর্তী ৬০ (ষাট) কর্মদিবসের মধ্যে দরখাস্তকারীকে সহকারী সার্জন [বিসিএস (স্বাস্থ্য)] পদে নিয়োগপত্র প্রদান করার জন্য ১ নং প্রতিপক্ষকে নির্দেশ প্রদান করা হলো।

৫৬. আরও আদেশ হয় যে, যেহেতু দরখাস্তকারী বিনা দোষে নিয়োগ থেকে বঞ্চিত হয়েছেন সেহেতু দরখাস্তকারী তার প্রাপ্য পাওনা থেকে বিন্দু মাত্রও বঞ্চিত হবেন না। দরখাস্তকারী বিগত ইংরেজী ১০.০৭.২০১৪ তারিখে প্রকাশিত প্রজ্ঞাপণ অনুযায়ী নিয়োগ প্রাপ্ত মর্মে গণ্য হবেন এবং তদানুযায়ী তিনি জ্যেষ্ঠতা এবং বকেয়া পাওনা প্রাপ্ত হবেন।

৫৭. অত্র রায় ও আদেশের অবিকল অনুলিপি প্রয়োজনীয় ব্যবস্থা গ্রহণের নিমিত্তে সকল পক্ষকে দ্রুত অবহিত করা হোক।