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2003

S²⁰⁰ANGLADESH LEGAL DECISION

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CORRIGENDUM

In May Issue, 2003 BLD Volume XXIII at page 294 (HCD)

The names of the Advocates Mr. A.F.M. A. Rahman for the petitioner and Mr. Khan Saifur Rahman for the respondent No. 1 have been printed wrongly at page 294 due to sheer inadvertence. The correct names are as follows:

Mr. J.N. Deb with Mr. Khijir Ahmed and Ms. Rezina Chowdhury for the petitioners.

Mr. Nirmalendu Deb with Ms. Reshma Sultana for the opposite party No.1

The error is regretted.

Editor (BLD)

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SUBJECT INDEX, 2003

APPELLATE DIVISION

INDEX (CIVIL)

Abandoned Property Rules

Rule 3

The notices under Rule 3 of the Abandoned Property Rules for taking over possession of abandoned property must be in conformity with the Form prescribed therein. Unless the notice is in conformity with the Rules, it cannot be termed as a notice under the law for the purpose of taking over possession of property from alleged unauthorised occupier. (Bangladesh represented by the Secretary, Ministry of Works and others v. Kazi Ashrafuddin Ahmed) (AD) 49

All incidental question of title should be decided in a partition suit.

In a suit for partition all the incidental questions of title, however complicated, can be decided and finally disposed of. The parties should not be thrown away or driven out on the ground of maintainability of the suit. (Cinmoy Chowdhury & anr. v. Sree Mridul Chowdhury & Ors.) (AD) 83

Arbitration Act, 2001

Section—10

The petitioner filed an application under section 10 of the Arbitration Act 2001 with clear averments for staying the further proceedings of the suit and to refer the matter to arbitration under clause 18 of the contract. It is absolutely the domain and the discretion of the Court to grant the relief sought for or to grant any other general or other relief that may be thought fit and proper. The Court stayed the proceedings as per the prayer and allowed the reference pursuant to section 10 of the Arbitration Act. (Maico Jute and Bag Corporation v. Bangladesh Jute Mills Corporation & ors.) (AD) 38

Section—30

The term 'misconduct' under section 30 of the Arbitration Act, includes neglect of duties and responsibilities by an arbitrator. In the instant case there is no negligence of the arbitrator. Arbitrator gave award with regard to the rates of the works actually done. The High Court Division missed this vital aspect of the case and unconsciously thought that physical verification of the works at the site was necessary. Finding of the High Court Division is erroneous. (Managing Director, Foundation Engineer Shatu Ltd. v. The Civil Engineer (RHD) Sarak Bhaban) (AD) 1

Artha Rin Adalat Ain

Section—5(4)

Civil Procedure Code, 1908 (V of 1908)

Order 21 Rule 90

Artha Rin Adalat is a Civil Court having all powers and jurisdiction under Civil Procedure Code, 1908 subject to the provisions of the Ain. Writ Jurisdiction is not maintainable for deciding the question of fraud and material irregularities as the Artha Rin Adalat is a Civil Court. Petitioner could avail the provision of Order 21 Rule 90 of the Code of Civil Procedure in setting aside the auction sale on the ground of material irregularity and fraud. (M/s. Antibiotic Stores & ors. v. Subordinate Judge & Artha Rin Adalat) (AD) 8

Bangladesh Agricultural Development Corporation (BADC) Service Regulations, 1968 & 1990

Merit is not defined nor its criteria is given in BADC Service Regulations, 1968. But it is definitely wider compared to "Educational Qualification" of an employee under the BADC Regulations, 1990. The degree in engineering is only an academic qualification and a part of the term "Merit", which includes experience, efficiency, regularity etc.

While there is no right of promotion, an employee has a right to be considered for promotion which is a condition of his service. Article 133 of the Constitution gives the authority the power to regulate the appointment and service conditions but it does not give power to prohibit promotion beyond the provision of law. The term "regulate" is not complementary to the term "prohibition". (Monirul Rahman and others v. Chowdhury Md. Mahfuzul Islam and ors.) (AD) 147

Bangladesh Jute Research Institute Service Regulations, 1990**Section—43(8)**

The inquiry by an appointed committee against an employee must be completed within 180 days, failing which the accused employee should be discharged from the charge levelled against him.(Director General, Bangladesh Jute Research Institute (BJRI) & anr. v. A.S.M. Serajuddin & anr.) (AD)18

Bangladesh Service Regulation

The petitioner on accepting the terms and conditions offered to her by BSRS and having continued to work as the temporary Librarian but drawing the pay of the substantive post of LDA-Cum-Typist, did not acquire any vested right to the scale of Librarian under BSRS that might have accrued to her by lapse of time, as she herself voluntarily acted as such denouncing any benefit attached to the post. (Syeda Mazeda Khatun v. Bangladesh Shilpa Rin Sangsta (BSRS). (AD)143

Building Construction Rules, 1996**Rule 12, Sub-Rule (1).****5(3)(KA) of Building Construction Regulations, 1996**

Building Construction Regulation, 1996 imposes restriction on the heights of the buildings depending on the width of the road on which such building is to be constructed. Sub-rule (1) of Rule 12 of Building Construction Rules provides that if the width of a road is between 4.55 meters to 7.59 meters the maximum height of the building cannot be above 18.50 meters, approximately six storied. (Oriental Real Estate Ltd. v. Feroz U. Haider and others) (AD)43

Chittagong University Act, 1973**Section—26**

No illegality has been committed by the High Court Division in holding that in exercise of the power under section 26 of the University Act, the Syndicate took a preliminary decision to set up the Institute of Fine Arts at Chittagong. (Syed Abdullah Khalid v. The University of Chittagong Hathazari & ors.) (AD) 189

Code of Civil Procedure, 1908 (V of 1908)**Specific Performance of Contract****Order of Remand**

It is settled principle of law that order of remand should not be made lightly by the superior court and if materials on record are sufficient for the disposal of the suit instead of sending the suit back on remand, the superior court should dispose of the same. But there may be cases where though there is no prayer from the parties for sending the suit back to the trial court or where right of the parties to send back on remand is depended on the result of a suit filed earlier which is pending, the order of remand by the higher court cannot be considered unjustified.(Begum Lutfunnessa v. Md. Shafiullah and others) (AD) 205

Section—51(a)**Order 21, Rule 11(2)(j)(i)**

Section 51(a) read with Order 21, Rule 11(2)(j)(i) of the Code of Civil Procedure requires that a decree for delivery of possession of an immovable property must specify the immovable property to facilitate execution of the case. The executing Court can neither go beyond nor behind the decree to supply the specification which is not there in the decree itself.(Sahera Khatun & ors. v. Abdul Gaffar @ Abdul Gafar & ors.) (AD) 98

Section—151**Inherent Power of the Court**

The Court has an inherent power under section 151 of the Code to set aside its order passed under a misapprehension of facts when true facts are brought to the light. Even if there may be an alternative remedy by way of an appeal, it would not bar the exercise of inherent power for ends of justice. (Government of Bangladesh & anr. v. Mr. M.A. Khair Bhuiyan) (AD) 122

Section—152**Order 20 Rule 3****Order 47 Rule 1**

Order 20 Rule 3 of the Code of Civil Procedure provides that the judgments shall be dated and signed by the Judge in open court at the time of pronouncing it. Judgments in the High Court Divi-

sion are dictated in open court and the court signs the same. Judgment delivered, signed and sealed cannot be changed and only recourse for any alteration, addition or modification can be done by the court hearing the matter under section 152 or on review on the ground specified in Order 47 Rule 1 of CPC. (Abdul Rashid v. Sree Santi Bhushan Deb & ors.) (AD) 156.

Order—41, Rule—25

Order 41 Rule 25 of the Code of Civil Procedure provides for a remand only if the court below has omitted to frame or try an issue and has failed to determine a question of fact essential to the right decision of the case on merit. (Sahani Bibi being died her heirs: Mohammad Aziz and others v. Nurul Islam being dead his heirs: Doly Islam and others) (AD) 209.

Constitution of People's Republic of Bangladesh, 1972

Articles—26 & 27

Bangladesh Biman Corporation Employees (service) Regulations, 1979

Regulation 11A(2)

On perusal of the writ petitions it appears that no case was made out by respondent no. 1 to show that Bangladesh Biman Corporation Employees (Service) Regulations 1979 is devoid of any guideline and there is scope for arbitrary exercise of power by the corporation. The High Court Division was not justified in declaring Regulation 11A(2) violative of Articles 26 & 27 of the Constitution. (Bangladesh Biman Corporation & ors. v. Md. Yousuf Haroon & ors.) (AD) 110

Article—102

Suspension of Chairman of Pourashava

There may be occasions where public representative by his conduct has made him undesirable to perform the functions of the office elected representative and in such situation the authority on consideration of tangible materials is quite competent to act within its limit to form opinion to put such public representative out of his office. (Md. Abdur Rashid v. Bangladesh & Ors.) (AD) 119

Article—102

The writ petitions need be heard afresh by the High Court Division for affording opportunity to the petitioners to controvert the contents of the papers affirmed by the officials denying the genuineness of their signatures in the documents relating to allotments and also for affording opportunity to the petitioners to put forward their case as against the material which was not part of the record of the office of the Chief Engineer. (Shamsu Miah and others v. Government of Bangladesh) (AD) 191

Article—102

Once privilege is given to a person on condition of doing any act and if such condition is fulfilled and continues to be fulfilled, such privilege or right cannot be taken away or cancelled without giving him a chance of being heard. (Bangladesh & ors. V. Md. Abul Hossain) (AD) 129

Article—102

The order of appointment conferred a vested right in the appellant to hold the post of Tax Inspector, which could not be taken away without affording him an opportunity of hearing. Any order passed in violation of principle of natural justice is rendered void. (Government of Bangladesh v. Md. Selim Reza) (AD) 193

Article—102

We find that while the petitioner submitted her application filling up the BPSC Form No. 2 she indicated her preference for the police cadre and accordingly she qualified in her written examination and viva voce examination and was selected for the service. Long after the selection she was informed that she did not fill up the form properly and the selection was cancelled. The High Court Division has given correct and cogent reason to declare the cancellation order illegal. (Govt. of Bangladesh and others v. Farida Yesmin) (AD) 108

Article—105

Review of Judgments or Order by Appellate Division

Article 104 of the Constitution—Power to do "complete justice"

A review lies only when the alleged error in the judgment is so evident that it can be established without going into elaborate arguments and factual matrix of the case. One of the universally acknowledged fundamental principles of review is that an error is necessary to be a ground for review but it must be one, apparent on the face of the record. The contention that the Court has gone wrong

in the application of law to the facts or the exposition of law is erroneous does not constitute valid grounds for review. (Ekushey Television Ltd. & anr. v. Dr. Chowdhury Mahmood Hasan & ors) (AD) 10
Contract Act, 1872

Section—176

The legislature in making available to the pawnee the remedies in case of default on the part of the pawnor has provided two options, i.e. for relaization of the debt amount to file the suit keeping the pledged goods as a collateral security or to sell the pawned goods. These rights are two distinct and separate rights, and independent of each other. (Islami Bank Bangladesh Ltd. v. Sub-Judge & Additional Artha Rin Adalat) (AD) 90

Customs Act, 1969, (IV of 1969)

Section—25(7)

The High Court Division found that the letters of credit in all the cases were opened subsequent to the fixation of the required tariff value and the notification made in the Official Gazette as per provisions of section 25(7) of Customs Act, 1969. No illegality has been committed by the High Court Division as the customs authority has assessed the customs duty as per the tariff value prevalent at the time of opening the L.Cs. (Md. Sydul Anwar v. The Collector of Customs and others) (AD) 224

Section—25(7)

It is common knowledge that a vessel is usually built with some constituent material and weight of the ship is construed as Light Displacement Tounage (LDT) and the other additional tools are not included in LDT. The vessel to be scraped is taxed on LDT and not on dead weight. The contention of the petitioners that LDT includes the dead weight cannot be accepted. (Bangladesh Ship Breakers Association v. The National Board of Revenue) (AD) 55

Sections—25A & 30A

The importers having acted on the promise made by the appellant under section 25A of the Act to accept the price determined by the Government appointed inspectors the appellants cannot go back on that promise. Section 25A would prevail over all other sections including section 25(7) and section 30 of the Act. (The Commissioner of Custom & Ors. v. Monohar Ali & Ors.) (AD) 59

Section—30

Section 30 of the Customs Act provides for the time on which the duty is to be assessed, on presentation of the bill of entry. Thus fixing of duty on the bill of entry is the date on which the bill of entry was presented for assessment of customs duty and taxes on the basis of the impugned notification. (M. A. Halari v. Commissioner of Customs, Chittagong & ors.) (AD) 179

Sections—81, 33

Limitation Act, 1908 (IX of 1908)

Section—33(2).

Section 81 of the Customs Act provides for provisional assessment of duty on the imported goods. Section 33 of the said Act provides for refund of duties or charges paid or over paid through inadvertent error. Section 33 in no way disentitles the respondent to seek direction for refund of excess duties realised at the time of provisional assessment. (Government of Bangladesh & ors. v. Md. Salim Hossain) (AD) 132

Divorce Act, 1869

Section—17

Constitution of People's Republic of Bangladesh, 1972

Article—41

The High Court Division travelled beyond its legal limits and the subject-matter of the divorce suit in making impertinent recommendation to the effect that "Unified Marriage and Divorce Act for all the citizens should be enacted by the Parliament keeping in pace with the modern time." The said recommendation violated the fundamental right of the community to profess the personal religion of the said community and the freedom of choice of regulating their personal institutions concerning different aspects of life as per direction of the Holy Quran and Hadit as guaranteed by Article 41 of the Constitution. (Islamic Law Research Centre & Legal Aid Bangladesh v. Eva Sunanda Chowdhury) (AD) 21

Evidence Act, 1872(I of 1872)**Sections—41, 42 & 43**

Judgments whether inter parties or not, are conclusive evidence for and against all persons whether parties, privies, or strangers of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered. A previous judgment is admissible also to prove statement or admission or an acknowledgement made by a party or the predecessor in interest of a party, in his pleadings in a previous litigation. (Robert Pinaru v. Moulana Habibur Rahman & ors.) (AD) 136

Sections—102, 103 and 104

In a civil litigation the onus of proof does not remain fixed as it is in criminal proceeding. Onus of proof in civil litigation generally lies upon the plaintiff but sometimes it is splitted up between the parties and sometime it is shifted upon the defendants as well, as per sections 102, 103 and 104 of the Evidence Act. (Cinmoy Chowdhury & anr. v. Sree Mridul Chowdhury & Ors.) (AD) 83

Excise and Salt Duty Act, 1944**Section—3(4)****Constitution of People's Republic of Bangladesh, 1972****Article—65(1)**

Although sub-section (4) of section 3 of the Excise and Salt Duty Act did not furnish any guideline to regulate the exercise of delegated power of the Board of Revenue but the said section is not in the nature of impermissible delegation as the power of delegation may vary not only with the scope of the authority of the delegating body but also with the variety of the conditions a particular law is intended to meet.

Article 65(1) of the Constitution provides that nothing shall prevent the Parliament from delegating to make order, rules or other enactments having legislative effect. The Parliament has authorized the National Board of Revenue by way of contingent legislation to make rules under section 3(4) of the Excise and Salt Duty Act, 1944 and this could not be termed as excessive delegation. (Bangladesh and others v. M/s. Eastern Beverage Industries Ltd & anr.) (AD) 68

Letter of Credits

The process of establishing a letter of credit begins with the buyer requesting the Issuing Bank to open a letter of credit in favour of the seller. With the opening of a letter of credit, a contract is entered into by the Issuing Bank with the Negotiating Bank. As soon as the letter of credit is established between the Issuing Bank and the Negotiating Bank, it becomes an independent agreement between the two Banks. (Zyta Garments Ltd. v. Union Bank Ltd. and another) (AD) 52

Limitation Act, 1908**Section—113**

As per Article 113 of the Limitation Act, limitation begins to run from "The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused." Article 113 has nothing to do with reasonable time. Reasonable time for performance of contract under section 46 of the Contract Act is an alien conception to limitation under the Act. The suit is not barred by limitation. (Secretary Ministry of Works & anr. v. Md. Yusuf Ali Khan & ors.) (AD) 165

Article—181

The decree-holders not required to file an application for proceeding with the pending execution case, it was the duty of the Court to proceed with the same suo moto. The executing court wrongly held that the execution case in question was barred by limitation as per provisions of Article 181 of the Limitation Act. (Shah Newaz Ebne Mostaque and others v. Shah Alam and others) (AD) 46

Non Agricultural Tenancy Act, 1949**Section—7(2)**

Under section 7(2) of the Non-Agricultural Tenancy Act, 1949 a tenant must show that he had been holding the property in question for a period of not less than twelve years without any lease. Mere suggestion of uninterrupted possession for "12 years" is not enough to raise a plea of adverse possession. (Sree Mati Gouri Das & ors. v. A.B.M. Hasan Kabir & ors.) (AD) 160

Ordinance No. 54 of 1985

The house of the respondents was not legally enlisted as abandoned property but it was enlisted on vague and false allegations that the whereabouts of the owners were not known at the relevant

time, although it has been established before the Court of Settlement and the High Court Division that the owner of the house was very much in Bangladesh. The Court of Settlement and the High Court Division committed no illegality. (*Government of Bangladesh v. The Chairman, Court of Settlement*)

(AD) 202

Section—5

The High Court Division was in serious error in holding that the property in question was listed under the provision of the Ordinance while a suit for specific performance of contract was pending and thus the list prepared under the Ordinance was violative of section 5 of the Ordinance. There is nothing in section 5 to the effect that property that has assumed the character of abandoned property and has vested in the government cannot be listed as abandoned property when a suit in respect of the same is pending seeking a decree for specific performance of contract. (*Govt. of Bangladesh v. Mr.K.M. Zaker Hossain & ors.*)

(AD) 24

Pourashava Ordinance, 1977 (XXVI of 1977)**Section—18A(1)****General Clauses Act, 1897(X of 1897)****Section—21**

The High Court Division held that section 18A(1) of the Pourashava Ordinance, 1977 gave unfettered power to the government to appoint an administrator involving the function of the Pourashava of that municipality till that Pourashava was constituted in accordance with law. Government can replace the administrator exercising its power under section 21 of the General Clauses Act. In view of section 21 replacement to the post could not be held to be without any lawful authority. (*Md. Abdur Rahman v. Bangladesh and others*)

(AD) 131

Section—21

Section 21 of the Pourashava Ordinance is directory, not mandatory. It has been designed to re-allocate the area and delimitate the wards with emphasis on distribution of population, taking into consideration the territorial unity and the administrative convenience. This provision is in keeping with the spirit of the Constitution that State shall encourage the local government institutions composed of representatives of the area enabling more effective participation in the election process. (*Abdul Mannan v. Bangladesh and others*)

(AD) 173

Private University Act, 1992**Section 7(d)**

A close scrutiny of the relevant dates does not show that prior to the amendment there resided in the respondent, a legal right to the performance of a legal duty by the concerned authority, which the authority is in breach of. The submission that the amended section 7(d) should not receive a retrospective construction would have applied, if a right had already accrued in favour of the respondent. (*The Sec., Mini. of Education, Government of Bangladesh, & ors. v. North Point University*)

(AD) 101

Representation of People Order, 1972**Article—49(4)**

The learned Single Judge committed an error of law in not holding that the meaning of the word 'petitioner shall deposit' does not mean that the petitioner shall, in person, have to deposit, and not by anyone on his behalf and if so the election petition shall not be registered; that there being no such consequential term that unless the deposit is made by the appellant himself in person election petition will be dismissed in limine, deposit made on behalf of the appellant through his advocate is valid in terms of Article 49(4) of the Representation of People Order, 1972. (*Mr. Giasuddin Quader Chowdhury v. A.B.M. Fazle Karim Chowdhury and others*)

(AD) 215

State Acquisition and Tenancy Act, 1950 (XXVIII of 1951)**Section—76(1)**

The High Court Division held that neither G.O. nor the implementation clause had anything to show that the same could supersede the provision of section 81B of the Act which must be complied with in leasing out agricultural khas land. Section 76(2) impliedly provided that government is the highest authority to pass any order as to the settlement and civil court could not interfere with the same unless it is malafide and coram non judice. (*Abdullah & ors. v. Abdul Kadar & ors.*)

(AD) 184

Section—68C

The period for which the rent suit was filed is prior to the date of the State Acquisition and Tenancy Act came into force. The provision of section 68C does not make any suit for realisation of the arrear rent by the ex-landlord either barred or prohibited. Therefore the said rent suit was not barred or invalid as was illegally found by the trial court and upheld by the High Court Division.(Amulya Ranjan Das and others v. Gol Bahar Khatun and others) (AD) 225

Title Suit for Specific Performance of Contract

Medical Certificate about the illness of a certain person and his inability to move is not admissible in evidence without the examination of the Medical Officer giving the certificate in Court. The High Court Division rightly held that without examination of doctor, the Medical certificate granted by him is inadmissible in evidence. (Anwara Begum & ors. v. Shah Newaj) (AD) 127

Transfer of Property Act, 1882 (IV of 1882)**Section—41**

Applicability of section 41 of the Act requires: (i) the ostensible owner, who has no real title, was clothed with the insignia of ownership with the consent, express or implied, of the real owner; and (ii) the person purchasing for value from the ostensible owner shall take reasonable care to ascertain that transferor has authority to make the transfer. (Rebeya Khatun & ors. v. Moniruddin & ors.) (AD) 153

Section—53A

There is no material on record to show that in pursuant to the agreement for sale, respondent no. 1 was put into possession of the property before 28-2-1972. Since on and from 28-2-1972 the property vested in the government, respondent No. 1's possession is not protected under section 53A of the Transfer of Property Act. (Government of Bangladesh v. Mr. K. M. Zaker Hossain & ors.) (AD) 24

Section—53 (A)

The respondent, admittedly in possession of property on the basis of agreement of sale, has the protection of section 53(A) of Transfer of Property Act. The Government has not terminated the agreement. Possession is protected under section 53(A) entitling the respondent to maintain the possession. (Bangladesh represented by the Secretary, Ministry of Works and others v. Kazi Ashrafuddin Ahmed) (AD) 49

Section—58

It is the case of the writ petitioner that the property was not properly mortgaged under section 58 of the Transfer of Property Act and that the property outside Dhaka may only be mortgaged by depositing title deed as provided under section 59 and also by executing a mortgage deed. The High Court Division on consideration of the materials on record summarily rejected the writ petition holding that the writ petitioner though filed a written statement before the trial court she allowed the suit to be decreed *ex parte*. The High Court Division found that when there is an alternative remedy available, the writ petition cannot be maintained. (Mosammat Nilufa Yasmin (Nila) v. Artha Rin Adalat, Khulna and others) (AD) 45

INDEX (CRIMINAL)

Arms Act, 1878 (XI of 1878)**Section—19A, 19(f)**

The appellant has been convicted under section 19A and 19(f) of the Arms Act and sentenced thereunder to suffer imprisonment for life. The ingredients of section 19A of the Arms Act do not appear to have been proved. The appellant has already suffered imprisonment for more than the minimum period prescribed by section 19A of the Arms Act. The sentence is, therefore, reduced to the period already undergone.(Tafazzal Hossain @ Shahjahan v.The State) (AD) 171

Children Act, 1974**Section—4****Section—6(1)**

The counsel for the petitioner fails to convince us by presenting any material from the evidence on record or from the judgments of the courts below that the petitioner was below 16 years at the time of framing charge and holding of trial and as such the trial could not be held legally, as being barred under section 6(1) of the Children Act, 1974. (Mona alias Zillur Rahman v. The State) (AD) 187

Code of Criminal Procedure, 1898 (V of 1898)**Sections—200, 202**

The Magistrate, received the charge-sheet, took cognizance of the case against the accused, accepted the Final Report and released the petitioners. Against the acceptance of the Final Report the informant made naraji petition but the Magistrate rejected the same. The High Court Division rightly held that the Magistrate did not comply with the provision of section 200 or 202 of the Code of Criminal Procedure. (Abdus Sabur & anr. v. The State & anr.) (AD) 106

Section—561A**Section—195(1)(C)**

In the light of the provision of section 195(1)(c) of the Code of Criminal Procedure if upon conclusion of trial of the Title Suit the court finds the deed in question not genuine, then it is for the court to decide whether to proceed against the appellant for the offence committed under section 195(1)(c). (Md. Abu Daud Sarder v. The State and anr.) (AD) 95

Nari O Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995**Section—6(3)**

The law is now settled that evidence of the witness, who has been declared hostile would ipso-facto not be of any worth for the prosecution, rather if it is found that the fact stated prior to declaring the witness hostile supports the prosecution then the evidence of such witness can be looked into along with other evidence on record by the court. (Mobarak Hossain alias Mobarak v. The State) (AD) 175

Section—17(1)

No illegality has been committed for violation of the provision of section 17(1) of the Nari-O-Shishu Nirjatan Daman Ordinance, 1995, as the proviso to the section allows the Court to take cognizance against a person when cognizance is not taken by the authorized person on the basis of the complaint. (Md. Hafizur Rahman Biswas v. The State & anr.) (AD) 181

Section—24**Limitation Act, 1908****Section—5**

Section 24 of the Nari O Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 provides for filing of appeal against the judgment and order of conviction within 30 days of the date of judgment and it being a special law and there being no provision for getting any benefit under section 5 of the Limitation Act, the proceeding before the High Court Division was barred by limitation. (Most. Sharifa Begum alias Sharu Bibi v. The State) (AD) 170

Penal Code, 1908(V of 1908)**Sections—302, 326, 34**

The law is well settled that mere relationship of the witnesses and/or relationship with the victim do not make them unreliable. The court can rely on the evidence of a witness who is related to the victim if it considers the same reliable and that evidence is corroborated by other reliable witnesses who are not related to the victim. (Zahed Ali Foreman (Driver) & ors. v. The State) (AD) 182

Section—324

The law is now settled that a fugitive has no right to seek any kind of redress as against his grievance, if any, against the judgment and order of a court convicting him. (Md. Monsur Ali and others v. The State) (AD) 208

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Sections—3 and 8

Number of arbitrators in a dispute

When an agreement is silent on the number of arbitrators for a dispute, the case will be governed by section 3 of the Arbitration Act and the reference shall be made according to the provisions of Schedule 1 of the Arbitration Act, which provides that the reference shall be to a sole arbitrator.

Section 8 of Act shall come into play only when the parties fail to concur in the appointment of a sole arbitrator. (Bangladesh Water Development Board Vs. M/s. M. R. Sikder). (HCD) 433

Artha Rin Adalat Ain, 1990

Section—7

Section 7 of Artha Rin Adalat Ain, 1990 postulates that any person aggrieved by any judgment or decree of Artha Rin Adalat can file appeal before the High Court Division within 30 days of the judgment and decree. The requirement is deposit of half of the decretal amount. Under the Ain of 1990 two remedies were available to the judgment-debtor. One, a petition under Order 9 Rule 13 of the Code of Civil Procedure and the other an appeal before the High Court Division. (Delwar Hossain and others v. Janata Bank and others) (HCD) 481

Bangladesh Shilpa Rin Sangstha Ordinance, 1972 (P.O 178 of 1972)

Article—33(1)

Under the Order the Sangstha has to file an application under Article 33(1) before the District Judge. A Subordinate Judge acting as an Artha Rin adalat cannot directly entertain such an application. (Azizur Rahman v. B.S.R. Sangstha & ors) (HCD) 102

Article—33(1)

Artha Rin Adalat Ain, 1990 (IV of 1990)

Section—5

Bangladesh Shilpa Rin Sangstha as a financial institution can avail of the opportunity of promptly realising its outstanding dues from the defaulting loanees either under its parent Ordinance or it can have recourse to the provisions of the Artha Rin Adalat Ain, 1990. (Azizur Rahman v. B.S.R. Sangstha & ors) (HCD) 102

Code of Civil Procedure, 1908 (V of 1908)

Pre-emption

A transaction does not become colourable only because it has been made after the disposal of an application for pre-emption by the trial court or other superior court. (Kadam Ali v. Asiran Nessa) (HCD) 656

Code of Civil Procedure, 1908

Companies Act

Transfer of Property Act

Sections—105, 107

The term 'Allotment' has been used in the Companies Act in connection with allotment of shares of the company. The terms "allotment" and "allotee" cannot be synonymous to the terms 'lease' and 'lessee'.

Allotment of a government plot or house means to give a right to a person to enjoy the same on certain conditions and by such allotment no right to permanent nature for perpetual lease can be claimed. The concept of 'allotment' is a new device of Government to give the right of enjoyment

of the government property to a person, which has its own distinct feature and cannot be equated with the term 'lease'. (Bangladesh Sugar and Food Industries Corp. v Md. Kashem, Proprietor of Kashem Motor Works and ors)

(HCD) 659

Order I, Rule 10(2)**Adding or striking out a party**

The expression "at any stage of the proceeding" occurring in Order I Rule 10(2) of the Code confers a wide discretion to the Court to add or strike out a party to a proceeding whenever it finds if necessary for a complete adjudication of the matters in controversy. (IFIC Bank Ltd. Dhaka v. Chittagong Steel Mills Ltd. & anr.)

(HCD) 243

Order 3, Rule 2 and Order 6, Rule 14

The application for addition shows that the same was made for and on behalf of Binode Bhari Dutta, son of original shebait late Kalipada Dutta and it was signed by one Ramesh Chandra Bharmon, the constituted Power of Attorney of Binode Bhari Dutta. The Court finds that the presentation of the application satisfied the requirement of Order 3, Rule 2 read with Order 6, Rule 14 of the Code of Civil Procedure. (Sree Iswar Kala Chand Jew Thakur Estate v. Sree Bhola Nath Ghosh and others)

(HCD)39

Order IV Rule I(b)**Order V Rule 19B(2)**

Copy of the plaint is an integral part of the summons. A summons must accompany the plaint. The summons of the respective suit which was returned by the postal peon with the endorsement 'refused' did not accompany the plaint. Such refusal to receive the summons, could not be construed as refusal within the meaning of Rule 19B(2) of Order V of the Code. (Mohammadullah & ors. v. Janab Md. Shamsul Alam)

(HCD)414

Order 9, Rule 13

Medical Certificate about the illness of a certain person and his inability to move is not admissible in evidence without the examination in Court of the Medical Officer giving the certificate. (Anwara Begum & ors. v. Shahriewaj & ors.)

(HCD) 632

Order 20, Rule 4(2)**Chapter 9 of Civil Rules & Orders**

The Trial Court arrived at findings necessary for the purpose of a case of this nature but neither any issue was framed nor any decision was arrived at on the point as to whether it was a case of waiver or acquiescence. Findings have not been based on any reasoning arrived from assessment of evidence on record as contemplated by the mandatory provisions of Rule 4(2) of Order 20 of the Code of Civil Procedure.(Md. Mozibar Rahman Molla & anr. v. Md. Rehazuddin & ors.)

(HCD) 360

Order XXI, Rule 58

It is palpably clear that when trawler namely Taiko Maru No. 5 was handed over by the Jimmadar to the auction purchaser decree holder, the whole proceeding came to an end. On payment of the sale fees and after actual delivery of possession of the vessel, whole proceedings of the execution, started with the attachment, followed by auction and thereafter sale, reached its finality and can not be reopened under Order XXI not to speak of under Rule 58. The miscellaneous case thus filed under Order XXI Rule 58 of the Code, praying for release of the trawler was misconceived and not maintainable. (A. K. Khan and Co. Ltd. v. Zanak Enterprise)

(HCD) 103

Order 21 Rule 35(2)

A decree passed in a suit for specific performance of contract indicates that there was a contract between the plaintiff and the defendant for transfer of property at certain consideration. The decree may not have contained a clear specific term for delivery of possession, yet the executing court should pass necessary orders for delivery of possession of land under the decree to the decree holder.(Dipok Kumar Roy v. Noor Mohammad Yousuf)

(HCD)500

Order 39, Rule 1 and 2

In view of the fact that the petitioners did not oppose any development under taken by the Government, rather they are in favour of the proper utilization of the fund approved by the Government through the proper site selection, the learned court below ought to have granted the injunction as prayed for. (Md. Shohag Mia and others v. Upazilla Nirbahi Officer, Kuloura, Moulvibazar and others)

(HCD) 41

Order XXXIX Rule 1 and 2

A mandatory injunction including an interlocutory mandatory order ordains the doing of some positive act by a party to a legal proceeding, restoring aggrieved party to his original position. Mandatory injunction is a most exceptional remedy which is not to be applied except with the greatest safe guard. It is to be granted only in cases where the order of the court is flouted and flagrantly violated.

Order XXXIX Rule 1 and 2 do not expressly authorise the exercise of power of granting interlocutory injunction in mandatory form. The court in exercise of power under section 151 has got the jurisdiction to grant interlocutory mandatory injunction. (Mercantile Bank Ltd. & ors. v. M. S. Ahsan)

(HCD) 516

Order XLI Rule 27(2)**Acceptance of additional evidence by the Appellate Court**

The Appellate Court can allow additional evidence only when the trial Court refused to accept it or when the Appellate Court itself requires it for pronouncing a proper judgment or for any other 'substantial cause'. (Pronab Kanti Mondal v. Shannayashi Mondal & ors.)

(HCD) 327

Order XLVII, Rule 1**Amendment of Pleading**

Law confers ample power upon Court to permit amendment of pleadings to decide the real points in controversy. This authority is restricted when proposed amendment is likely to change the character of cause of action. The Court must also ensure that the proposed amendment shall not cause any harm to other party by destroying right already accrued to it by omission to include proposed claim in suit. (Haji Md. Siddique Master v. Samsul Hoque and others)

(HCD) 214

Section—10

Majority of the parties are not the same. Relief sought for in the suit are also not the same. Having regard to the facts that both the parties are litigating about the same suit land for a decree of declaration, it is desirable that both suits should be tried analogously by the same Court. (Md. Nurujjaman & Ors. v. Md. Sajjad Ali & ors.)

(HCD) 294

Section—115

In exercising revisional jurisdiction under Section 115 of the Code two conditions are to be satisfied. One: There must be an error of law resulting in an error in the decision. Two: By that error a failure of justice occasioned. Mere error of law is not the only ground for interference in revisional jurisdiction. (Waliullah v. Hasina Begum and others)

(HCD) 67

Section—115(1)**Re-hearing of civil revision case**

After the disposal of a civil revision on merit the matter reaches its finality and the Court no longer remains in the seisin of the case. Re-hearing of a civil revision case decided on merit is not permissible in law (Bijoy Kumar Saha v. D.C.Chuadanga and ors.)

(HCD) 158

Section—115(1)

The lower appellate court being the final court of fact has held that plaintiffs have proved their prima facie title in the suit land and their exclusive possession. The lower court recorded finding with regard to prima facie title and exclusive possession of plaintiff on consideration of evidence on record. There is no vagueness in the description of suit land. There is no illegality in the judgment of the lower appellate court. (Md. Abdul Baten v. Bebla Chandra Mistry & ors.)

(HCD) 445

Section—115(1)

To believe or to disbelieve a witness is within the jurisdiction of the courts below and the High Court Division sitting in revision cannot interfere with its jurisdiction unless there is misreading or non-reading of the material evidence affecting the ultimate decision of the courts below. (Nasir Ahmed v. Bangladesh & ors.)

(HCD) 555

Section—151**Order 9, Rule 13**

Section 151 of the Code has no application in which relief is available by way of appeal from dismissal of an application filed under Order 9 Rule 13. But where the default is due to the mistake of the officer of the court or the court itself, the aggrieved person may avail of section 151 for redress. (Mukshed Ali Dafadar v. Alahibox Sardar and others)

(HCD) 502

Contract Act, 1872**Invitation to treat and offer**

An advertisement in the newspapers inviting tenders, was not an offer made by the Railway department, but a mere invitation to treat, an invitation to the people at large for making offers. In response to such an invitation, when the plaintiff and many others submitted their tenders they were making offers to purchase the plots of lands. Those tenders which were mere offers to buy the plots of land, did not constitute any agreement enforceable under the law. (Shaikh Jahangir Hossain v. Government of Bangladesh & others)

(HCD) 161

Section—18

The discrepancy (between the claim of the plaintiff and the survey report) in respect of the quantity of jute damaged is a matter of opinion and in circumstances may vary and do not at all substantiate a case of misrepresentation of fact as envisaged under section 18 or do not bring it within the ambit of section 17. (M/s Fibre Deals Ltd. v. Sadharan Bima Corporation and others)

(HCD) 32

Section—28

Save as otherwise provided in the contract, the liability of the surety under the section is co-extensive with that of the principal debtor. The liability of the guarantor/surety is immediate and this need not be deferred until the creditor exhausts his remedies against the principal debtor. (IFIC Bank Ltd. Dhaka v. Chittagong Steel Mills Ltd. & anr.)

(HCD) 243

Section—201**Termination of Agency or Revocation of Authority**

Under section 201 of the Contract act a power of attorney ceases to have any legal effect and it terminates automatically on the death either of the principal or of the agent. (Sultan Ahmed v. Mrs. Shamima Khatun & ors.)

(HCD) 403

Co-operative Societies Ordinance, 1984**Section—132 & 133****Order VII Rule 11 of the Code of Civil Procedure, 1908**

Section 133 of the Ordinance bars jurisdiction of civil courts in certain matters. As per section 132 and 133 of the Ordinance, action of the Deputy Registrar, who acted in good faith, cannot be challenged in civil court. If the jurisdiction of the Civil Court is barred by any law, the plaint shall be rejected under Order VII, Rule 11(d) of the Code. (Md. Abul Kasem Meah v. Md. Jillur Rahman Biswas and others)

(HCD) 512

Electoral Rolls Ordinance, 1982

With regard to the finding of the appellate tribunal as to the disqualification of the petitioner, the appellate tribunal has correctly considered the evidence and it being the final court of fact having come to the definite finding that the present petitioner did not attain the age of 25 years on the date of filing of the nomination paper that finding cannot be disturbed in this revisional jurisdiction. (Ziaul Hoque @ Bakul v. Md. Sirajul Islam & ors.)

(HCD) 306

Guardians and Wards Act, 1890**Section—17**

The rule, which is of tradition, is based on the reason that if a woman marries a man not closely related to the child, the child may not be treated kindly. The rule of tradition does not appear to be absolute. "It is the welfare of the child which will be of paramount consideration. A mother who is married to a stranger loses her preferential right of custody over a minor child, but that will not totally exclude her from being considered fit for guardianship if she is otherwise held on consideration of all circumstances to be competent." In the appointment of a guardian of a Mohammedan minor under section 17 of the Act, the Court is obliged to consider the application of the above rule of Mohammedan law in a given facts and circumstances of the case. (Md. Rahmatullah & ors. v. Most. Sabana Islam & ors.)

(HCD) 165

Legitimate expectation

Legitimate expectation is a concept of administrative law which means that an administrative authority cannot abuse its discretion by disregarding undertaking or statement of its intent. Where an action of the administrative authority adversely affects legal right of an individual, duty to act fairly and reasonably is implicit. (Asaf Khan & ors. v. The Court of Settlement, Dhaka & ors.)

(HCD) 7

Limitation Act, 1908**Section—5**

The defendant-appellant did not know exactly the correct number of the days of delay and the learned District Judge also failed to apply his judicial mind in finding out the exact number of days of delay. Though the court has a discretion to condone, the delay of each and every day should be explained. (M. Saleem Ullah v. Dhaka City Corporation)

(HCD) 648

Limitation Act, 1908 (IX of 1908)**Section—5**

The provisions of section 5 of the Limitation Act are such that the applicant is bound to satisfy the Court that he had sufficient cause for not preferring the appeal within the stipulated period. The court can condone the delay if it is satisfied that there was sufficient cause for the delay.

When there is no explanation for delay of a certain period, there cannot be any ground for condoning the delay. (Abdul Jalil v. Government of Bangladesh and others)

(HCD) 690

Limitation Act, 1908 (IX of 1908)**Article 86 and the stipulated period**

Since the suit was filed as late as on 7.6.1988 within the period of limitation under article 86 still the same is liable to be dismissed because of the failure of the plaintiffs to file the suit within the stipulated period as specifically mentioned in the policy document. (M/s Fibre Deals Ltd. v. Sadharan Bima Corporation and others)

(HCD)32

Maintenance and Dower

Under the Mohammedan law, the wife can remit the dower or any part thereof. The wife did not voluntarily sell the land to help the husband. The Court of appeal below erred in law in holding that the money given by the plaintiff was not dower but loan and the said dispute cannot be adjudicated upon by the Family Court. The Family Court has rightly directed the defendant No. 1 to give 5 bighas of land as dower. (Most. Rowshan Ara Begum Chowdhury v. Md. Mashaque Ahmed)

(HCD) 302

Money realisation through money suit in commercial court**Redeeming factors considered in disallowing pendentile interest**

It appears from the evidence on record that the concerned consignment of chemicals were imported in 1973 and since then were in the go-down of the plaintiff Bank. The quality of those chemicals were bound to deteriorate with passage of time. It is a matter of prudence to let the defendants know about such intended sale to procure a better price which would have adjusted against their loan, to the relief of both the parties. We are not inclined to allow interest pendentile. (M/s. Bangladesh Tannery v. Janata Bank)

(HCD) 291

Non-Agricultural Tenancy Act, 1949**Section—24(1)**

By now it is well-settled that for the purpose of pre-emption under section 24(1) of the Non-Agricultural Tenancy Act 'co-sharership in the land' is material. A co-sharer in the land becomes entitled to pre-empt under section 24(1) of the Act if any portion of such land is transferred to a stranger. (Md. Shah Alam v. Alhaj Md. Shahidur Rahman and others) (HCD) 464

Premises Rent Control Ordinance, 1963**Sections—18(1), 18(5) 19.**

There may be a case of waiver and acquiescence or such supervening facts and circumstances as to make the compliance of the enactment beyond the control of the tenant. It will however depend on the facts and circumstances of a particular case whether there has been default in payment of rent but once default is established in terms of the Ordinance, legal consequences flowing therefrom cannot be avoided.

A tenant by making payment of rent in lump in terms of section 18(1) and 18(5) of the Premises Rent Control Ordinance, 1963 is not protected unless there is a contract to the contrary or such payment is covered by waiver and acquiescence on the part of the landlord. (Abdul Kadir and another v. Abdul Muttallib and others) (HCD) 477

Stamp Act, 1899 (II of 1899)**Section—18**

Section 18 of Stamp Act, 1899 provides for stamping an instrument chargeable with duty and executed outside Bangladesh within three months after it has been first received. A document presented after 3 months of its receipt in Bangladesh will be impounded after duty and penalty have been paid as required by the Stamp Act.

The required duty would be the duty as prescribed in Bangladesh on the date of execution of the document. (Md. Joynal Abedin v. Sree Gurupada Chakraborty and others) (HCD) 26

State Acquisition and Tenancy Act, 1950 (XXVIII of 1951)**Section—96(4) and (6)****Statutory deposit**

Under sub-section (1) of section 96 of the Act making the statutory deposit is a condition precedent for filing a pre-emption case but it is not so in case of an application under sub-section (4) of section 96. In the latter case, the co-applicant is required to make the necessary deposit within the time allowed by the Court. (Chand Miah v. Dabirul Islam Khan & ors.) (HCD) 285

Section—117(1)(c)

Separation of jama or sub-division of a holding or tenancy distributing rents, whether in the case of agricultural land under State Acquisition and Tenancy Act or in the case of non-agricultural land under Non-Agricultural Tenancy Act, takes place under section 117(1)(c) of State Acquisition and Tenancy Act and the original co-sharers on such separation cease to be co-sharers as such and cannot apply for pre-emption on the ground of co-sharership. The principle is equally applicable in both the cases of agricultural and non-agricultural land. (Md. Shah Alam v. Alhaj Md. Shahidur Rahman and others) (HCD) 464

Transfer of Property Act, 1882 (IV of 1882)**Section—106**

Section 106 of the Transfer of Property Act provides that the lease of immovable property other than for agriculture or manufacturing purposes shall be deemed to be a lease from month to month, terminable either by the lessor or the lessee by 15 days notice expiring with the end of a month of the tenancy. Any of the lessors, if they are more than one, may issue the notice and non-issuance of the notice by all the lessors would not disentitle the landlord to get a decree for ejectment of the tenant. (Sree Mangal Chandra Sarker v. Chunni Lal Nandi & ors.) (HCD) 406

Union Parishad Ordinance, 1983**Article 29(4)**

Article 29(4) of the Union Parishad Ordinance, 1983 though provides for an appeal to the learned District Judge against a decision of the Election Tribunal but for transfer of an election petition from one tribunal to another, the learned District Judge has not been vested with any power, but it is the Election Commission who may transfer. All provisions of the Code of Civil Procedure have not been made available to the Election Tribunal and the power of superintendence remains with the Election Commission. Election tribunal is not a Civil Court under the Civil Courts Act (Mabbubur Rahman v. Syed Mostofa Jaman & ors.)

(HCD) 289

Unauthorised Work

Since the opposite parties No. 1-3 hurriedly undertook the construction works, without prior approval of the site by the Government as per the established principle being followed, the works should not be allowed to be implemented. If this illegal acts of the opposite parties No. 1 and 2 are approved by a court of law, they would repeat similar acts defying the Government instruction. (Md. Shohag Mia and others v. Upazilla Nirbahi Officer, Kuloura, Moulvibazar and others)

(HCD)41

Waqf Ordinance, 1962**Sections—47, 49, 50 & 35(1)**

The Administrator allowed enrolment of property as per the order of the learned District Judge, Dhaka, though there is no such provision in the Waqf Ordinance empowering the District Judge to pass an order for enrolment of a property as waqf property. The property is not waqf property and the waqf Administrator is not required to decide the question as directed by the District Judge. (Al-haj Md. Yusuf Sarder Waqf Estate v. Al-Haj Md. Hussain Khan)

(HCD) 350

Section—83

For establishment of right, title and interest and for confirmation of possession and for recovery of possession of the waqf property wrongfully possessed by any person or for having any waqf property discharged of an encumbrance or obligation wrongfully created, it is the duty of the mutawalli to institute a suit for those reliefs and if any mutawalli refuses or neglects to do so, the administrator may, in his own name, institute a suit for those reliefs as mentioned in section 83 of the Waqf Ordinance, 1962. (Subash Das Chowdhury v. Sheikh Reazuddin Ahmed Siddique, B.L. Waqf State)

(HCD) 682

INDEX (CRIMINAL)**Arms Act, 1878 (XI of 1878)****Section—19(A), (f)****Jana Nirapatta (Bishesh Bidhan) Ain, 2000**

The charges framed by the Jana Nirapatta Bighnakari Aporadh Daman Tribunal relating to section 19(A) and (f) of the Arms Act is set-aside and the Tribunal is directed to frame charge under the Jana Nirapatta (Bishesh Bidhan) Ain, 2000 altering the charges under sections 225 and 227 of the Code of Criminal Procedure. (Ahmed Hossain and others v The State)

(HCD) 658

Children Act, 1974 (XXXIX of 1974)**Section—66**

Before going into an inquiry, on the very face of the accused, who is standing on the dock, if it appears to the court concerned that he is a child, in that case only he should go for an inquiry as contemplated under sub-section (I) of section 66 of the Act and not otherwise. Therefore, the Tribunal, exercising its judicious discretion under section 66, rightly held the appellant to be above 16 years. (Anarul Islam @ Md. Anurul Islam v. The State)

(HCD)46

Code of Criminal Procedure, 1898 (V of 1898)**Sections—10 & 491****Special Powers Act, 1974****Section—3(2)**

A District Magistrate or an Additional District Magistrate, appointed under Section 10 of the Code of Criminal Procedure has powers to pass orders of detention to a person under Section 3(2) of the Special Power Act, 1974, who has acted or is acting or is about to act prejudicial activities in Metropolitan Areas. (Md. Anwar Hossain & ors. v. The State & ors.) (HCD) 346

Sections—164, 364**Nari-O-Shishu Nirjatan Daman Ain, 2000****Section—22**

Section 164 of the Code makes provision for recording statement of a witness or of an accused. 'Confession' clearly refers to the statement of an accused person.

Section 22 of Nari O Shishu Nirjatan Daman Ain 2000 makes provision for putting down statement of a person by a Magistrate, who is aware of the incident or himself witnessed commission of the offence. Section 22 of the Ain is almost akin to section 164 of the Code. (Md. Wasim Mia and another v. The State) (HCD) 621

Section—173

The most striking feature of this case is that the investigating officer submitted supplementary charge-sheet against accused appellant as per direction of the Trial Court which is illegal. The name of the accused appellant was not in this record as an accused till the P.Ws. 1 to 13 were examined and cross-examined but he has been brought on record just after submission of supplementary charge-sheet as desired by the Trial Court. (Omarali @ Shafiq @ Kutub and others v. The State) (HCD) 62

Sections—202, 203

Magistrate dismissing a complaint under section 203 of the Code of Criminal Procedure has to exercise his own independent judgment on receipt of report under section 203 and cannot rely on the recommendation made under section 202 of Cr.P.C. by the Inquiry Magistrate. (Hasanul Hoq Inu v The State) (HCD) 462

Sections—221, 222, 223 & 225

A charge forms the foundation of a trial as such it is matter of great importance in a criminal trial. A charge is framed for giving the accused a clear idea of what he is being tried for. He must be told in clear and unambiguous terms as to what are the charges brought against him. Sections 221, 222 and 223 of the Code of Criminal Procedure envisage what a formal charge must contain. Section 225 of the Code equally provides that no error, omission or irregularity in the charge or even total absence of any charge shall vitiate a trial unless the accused has been misled or prejudiced by it and that it has occasioned a failure of justice. (Rashid @ A. Rashid Talukder v. The State) (HCD) 177

Section—241A

On perusal of the first information report the role of the accused opposite parties is not clear. Similarly in the charge-sheet no such material is disclosed against the accused as to their involvement in the commission of alleged offence. In the absence of any material disclosing any offence alleged to have been committed by the accused, the impugned order discharging them from the charge, does not call for interference. (Syed Ahmed Chowdhury v. Abdur Rashid Mridha & ors.) (HCD) 420

Sections—241-A, 561-A

An application under section 561-A of the Code can be maintained at any stage of hearing of the proceeding as the allegation against the accused in the F.I.R. and Charge-sheet do not constitute the offence alleged and prolongation of the prosecution would amount to abuse of the process of the court. (Dewan Mominkul Mouzidin v. The State) (HCD) 634

Section—340**Legal Remembrance Manual****Rule 1 of Chapter XII****Article—33 of the Constitution of People's Republic of Bangladesh, 1972**

In agreement with principles of law and in consonance with section 340 of the Code of Criminal Procedure and Rule 1 of Chapter XII of the Legal Remembrance's Manual right of an accused to be defended by a lawyer in a case charged under section 302 of the Penal Code, being punishable with death, is an inalienable right guaranteed by law of land. (*Babu Khan v The State*)

(HCD)373

Section—374**Penal Code, 1860 (XLV of 1860)****Sections—396, 302**

The accused having been kept in police custody for 3 days preceding the recording of his confession, his confession cannot be considered as voluntary confession.

Though the charge under section 396 against other co-accused has failed, he can be safely convicted under section 302 of the Penal Code as he had full notice of the charge under section 302 which is inherent in the charge under section 396 of the Penal Code. (*The State v. Rafiqul Islam alias Gadan*)

(HCD) 318

Section—476

Holding of a preliminary inquiry before lodging a complaint by the Court is never mandatory. The Court is competent to lodge complaint when from the facts proved it is prima facie satisfied that an offence has been committed before him in a proceeding or in relation thereto even without hearing the party complained against. (*The Noagaon Rice Mills Ltd. v. Pubali Bank Ltd.*)

(HCD) 537

Section—491**Special Powers Act, 1974 (XIV of 1974)****Section—3(I)(a)**

The order of detention detaining the detenu for more than 90 days as issued by the Govt. under section 3(1)(a) of the Special Powers Act, 1974, without supplying the grounds of detention is illegal and improper for which the detenu should be released from detention. (*Hedayet Ali v. Govt. of Bangladesh*)

(HCD) 28

Section—540

Section 540 of the Code is intended to enable the Court to get at the truth and to come to a proper conclusion in the matter under enquiry or trial. By dint of this power the court can examine any witness as a Court witness at any stage of the case. But this discretion has to be exercised with caution and circumspection, consistent with the provisions of the Code and the principles of criminal justice. The Court cannot use this power to advance the cause of the prosecution or that of the defence. In no circumstances, the Court should abandon its high place of an impartial arbiter and assume the role of a prosecutor, however altruistic its motives may be. (*Shahinur Alam @ Shahin v. The State*)

(HCD) 688

Section—561A**Environment Courts Act****Section—5Ka, 5Ga, 7**

A plain reading of section 5 Ka, 5Ga and 7 of the Environment Courts Act, it is clear that an S.I. of Police is competent as a "পরিদর্শক" to submit a report to the special magistrate in respect of the polythene shopping bag offences and that no approval of his higher authority is necessary.

There is no provision in law requiring an authorized person to mention his authority in the report. Non-mentioning of the reporting officer's authority is not an illegality. (*Sirajul Islam @ Siraj and another v. The State*)

(HCD) 694

Section—561A

Judicial proceeding before a Court starts after the Magistrate takes cognizance of an offence on police report or on complaint. Before such cognizance there is no proceeding that may be quashed under section 561-A of Cr.P.C. Cognizance is taken on the basis of the charge sheet and

on a proper occasion for quashing the proceedings certainly the High Court shall examine the charge sheet to ascertain as to whether the allegations made therein constitute a criminal offence.

The second F.I.R. lodged is still under investigation and no police report has yet been submitted and as such it is not a judicial proceeding pending before a Court. The same cannot be quashed under section 561A of Cr.P.C. (Yasinullah v. The State)

(HCD) 149

Criminal Law Amendment Act, 1958 (XL of 1958)

The learned trial court in awarding the sentence of fine committed illegality violating the provision of section 9 of the Criminal Law Amendment Act, 1958. Sentence of fine must not be less than the amount misappropriated. (Md. Abul Hossain v The State)

(HCD) 412

Criminal Law Amendment Act, 1987 (XIII of 1987)

Section—6(5)

Prevention of Corruption Act (II of 1947)

Section—5(2)

The offences alleged against the opposite parties, who are public servants, under sections 166/168/467/468/477 A/420 of the Penal Code and Section 5(2) of Prevention of Corruption Act, 1947 are triable under the Criminal Law Amendment Act. Section 6(5) of the Act requires previous sanction of the Government for prosecution of public servants. In the instant case the Government refused to accord sanction. The learned Session Judge receiving the letter refusing sanction discharged the opposite parties. The impugned order does not suffer from any illegality. (Malek Hossain Pir v. Begum Nurjahan Khanam & ors.)

(HCD) 311

Cruelty to Women (Deterrent Punishment) Ordinance, 1983

Section—4

Penal Code, 1860(XLV of 1860)

Section—494

The offence of kidnapping or abduction has been made a schedule offence under the Special Powers Act, 1974 as an offence under section 4 of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 and exclusively triable by a Special Tribunal established under the Act. Trial of such non-schedule offence with a schedule offence of kidnapping or abduction is also not permissible. (Butul Rabidas and another v. The State)

(HCD) 110

Dowry Prohibition Act, 1980

Section—4

For a conviction under section 4 of Dowry Prohibition Act, the word "Dowry" need not be interpreted in terms of the definition of "Dowry" as contained in section 2 of the Act. If dowry is demanded after marriage about which there was no agreement at the time of the marriage or at any time before or after the marriage, it will constitute the offence of demanding dowry, which is punishable under section 4 of the Dowry Prohibition Act, 1980. (Md. Hanif Howlader v. Most. Jahanara Begum and another)

(HCD) 510

Jail Code Rules

Rule 527

In view of the specific direction of the trial court vide judgment with regard to calculation of the term of jail in serving the sentence awarded to the accused, we are of opinion that the sentence passed in this case cannot be joined and mixed up with sentence passed in previous case treating the same as one sentence. Rule 527 of the Jail Code has no manner of application in the matter of calculation of two sentences consecutively treating those to be one single sentence. (Abdus Salam Kazi & Ors. v. The State & anr.)

(HCD) 296

Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 2000 (VIII of 2000)

Sections—10(1) and 14

Code of Criminal Procedure, 1898 (V of 1898)

Section—374

The Ain was promulgated to punish certain heinous offences against the children and women through special Adalat established by it. If the murder were committed for dowry, only then such

Adalat would have exclusive jurisdiction to try such offence. The motive for such offence will decide the jurisdiction of such Adalat. The moment, the Adalat finds no proof of existence of such motive of dowry, it must take its hands off. (The State v. Osena Begum@ Babuter Ma & anr.)

(HCD) 336

Section—26

The Nari-O-Shishu Nirjatan Daman Ain, 2000 does not empower the tribunal created under section 26 to take cognizance against any person who has filed a false case, in the absence of any written complaint made by any person under sub-section (2) of the said section and the Tribunal has no authority to direct the Magistrate or any other person to file any such complaint to enable it to take such cognizance. (Md. Nurul Huq v. The State). (HCD) 300

Negotiable Instruments Act, 1881 (XXVI of 1881)**Section—138****Code of Criminal Procedure, 1898 (V of 1898)****Sections—241A and 561A**

The question when the cheque was presented to the Bank for the first time cannot be decided in this application under section 561A of Cr.P.C. which is a disputed question of fact. The fact as to whether payment was made or not is also a disputed question which can be decided only by the trial court. (Md. Hasibul Bashar v. Mrs. Dilshad Huda) (HCD) 286

Sections—138

Under Section 138 of the Negotiable Instruments Act, an offence is committed if a cheque is dishonoured and if payment is not made within 15 days after receipt of a legal notice. If an offence is committed under the said section, the criminal court will be competent to try the case and pendency of civil suit will not be any hindrance to proceed with the criminal case. (Md. Monjur Alam v. The State & ors.) (HCD) 514

Sections—138(b),(c); 141(b)

Since the complainant availed of the provision of section 138(b) of the Act after the cheque was bounced for the first time, he cannot again avail of this section after subsequent bouncing, as in such event sections 138(c) and 141(b) of the Act becomes nugatory, which was not the intention of the legislature.

Complainant after issuing a notice under section 138(b) forfeits his right of presenting the cheque again for encashment, so as to give rise to a fresh cause of action as the cause of action stipulated in section 138(c) arises only for once. (Dr. Md. Mofizur Rahman v. Md. Bashirullah & anr.) (HCD) 539

Negotiable Instruments (Amendment) Act 1994**Sections—138 and 141****Penal Code, 1860 (XLV of 1860)****Section—420**

An offence under section 138 of the Act and section 420 of the Penal Code are two distinct offences, one independent of the other. The aggrieved party has right to seek remedy under either of the two penal provisions of law. (Md. Aminur Rahman v. The State and another) (HCD) 488

Penal Code, 1860 (XLV of 1860)**Section—34**

Section 34 lays down a principle of joint liability in the doing of a criminal act. Common intention implies acting in concert and existence of pre-arranged plan. (Bangladesh v. Md. Ershad Ali Sikder and others) (HCD) 423

Sections—302 & 149

Convictions under section 302 read with section 149 of the penal code are distinct and different kinds of conviction. section 302 of penal code involves direct and personal liability of accused or a group of accused where as section 149 of penal code involves constructive or vicarious liability. In order to find the accused guilty of the offence under section 302 read with section 149 of the Penal code the prosecution must establish that the offence was committed by

any member of unlawful assembly in prosecution of the common object of the assembly. (The State v. A. S.I. Md. Ayub Ali Sardar & anr.) (HCD) 181

Section—302/34

In a murder case, when the dead body of a person is handed over to the concerned doctor for post mortem examination along with the inquest report, the doctor is required to check out whether the injury or injuries mentioned in the inquest report are all there in the dead body. If any major injury, as mentioned in the inquest report, is not found in the deadbody the doctor must not undertake the post mortem examination without first seeking clarification in this regard from the I.O. Similarly when the post mortem report is silent about an injury which is mentioned in the inquest report, the I.O. must seek clarification from the concerned doctor and give an explanation in the charge sheet. (The State v. Mainul Haque @ Mainal) (HCD) 220

Section—302/34

Code of Criminal Procedure, 1898 (V of 1898)

Confessional Statement of Co-accused

Confessional statement of one co-accused cannot be used for corroborating the confession of another co-accused, as both are tainted evidence, much more so when they are retracted. The learned Additional Sessions Judge solely relied upon the alleged confessional statements of the co-accused in convicting the accused-appellant under section 302/34 of the Penal Code and thereby committed illegality. (Md. Rezaul Karim alias Rezaul Aalm Rikshawa v. The State) (HCD) 255

Sections—467 & 468

The instant case readily attracts the ingredients of an offence under section 468 of the Penal Code, as the accused petitioners fabricated certified copy of a fictitious deed to cheat the land owner. There is no law that an accused charged with offences under sections 467/468 of the Penal Code cannot be convicted for an offence under section 468 in case he is acquitted of the charge under section 467 of the Penal Code. (Hannan Gazi & anr. v. The State) (HCD) 409

Police Act, 1861 (V of 1861)

Sections—23 & 29

Contempt of Court Act, 1926

Section—3

Under section 23 of the Police Act, a Police Officer/Personnel is duty bound to obey and execute an order of the court. Where a police officer is found guilty of violation of duty or willful breach of a lawful order made by a competent authority, he is liable to be punished under section 29 of the Act. Failure to comply with any order of the High Court Division comes within the mischief of the offence of contempt of court under section 3 of the Contempt of Courts Act, 1926. (The State v. Officer-in-Charge, Kafrul & ors.) (HCD) 545

Special Powers Act, 1974

Section 25A(b), 27(1)

Final Report under section 27(1) of Special Powers Act is not binding on the Special Tribunal, which can disregard the same and take cognizance against the accused. In the instant case the Special Tribunal committed no illegality in taking cognizance under section 25A(b) disregarding the final report of the police. (Mokbul Hossain v The State) (HCD) 495

SPECIAL ORIGINAL JURISDICTION (WRIT)

Bangladesh Legal Practitioners and Bar Council Order, 1972

A lawyer is immune from an action for negligence so far his duty relates to actual advocacy in the court or in connection with the litigation. But so far it relates to giving legal opinion or doing other paperwork, not connected with litigations, he is liable for negligence.

In Bangladesh an advocate can also be proceeded against for breach of contract if he is negligent in discharging his professional responsibilities. (M/s. Islamia automatic Rice Mills Ltd. v. Bangladesh Shilpa Rin Sangtha) (HCD) 139

Bangladesh Rifles (Special Provisions) Ordinance, 1976

Section—8

As per column 2 of the schedule of the Bangladesh Rifles (Special Provisions) Ordinance, 1976, the Deputy Director General is the competent authority to exercise power under section 8 of the said Ordinance. Accordingly Deputy Director General may be appointed by transfer or deputation of an army officer not below of the rank of a Brigadier.

In the instant case the impugned order of discharge under section 8 of the Ordinance by Lieutenant Colonel Commander, 39 Rifle Battalion, Teknaf, Cox's Bazar was passed by a person, who was neither a Deputy Director General nor a Brigadier. Accordingly he was not a competent authority to pass the order for discharge. (Md. Anwar Hossain v. The Government of Bangladesh) (HCD) 113

Civil Aviation Authority Ordinance, 1985

Section—8

Delegation of powers of the authority as provided in section 8 of the Ordinance must be a delegation of specified powers of the authority under the Ordinance. Engagement of private contractors to do the job of cleaning of the Airport for a certain period under the authority is not a delegation of power, rather it is an exercise of power by the authority given to it under the Ordinance. Such exercise of power in the form of appointing cleaning contractor is within the purview of section 8 of the Ordinance. (Kazi Liakat Ali and others v Chairman, Civil Aviation Authority and another) (HCD) 504

Code of Criminal Procedure, 1898 (V of 1898)

Section—54

If a person is arrested on the basis of 'Credible information' nature of the information, source of information must be disclosed by the police officer and also the reason why he believed the information. 'Credible' means 'believable'. Belief does not mean make-belief.

If a person is arrested on 'reasonable suspicion', the police officer must record the reasons on which his suspicion is based. Use of the expression 'reasonable suspicion' implies that the suspicion must be based on reasons and reasons are based on existence of some facts which is within the knowledge of that person. (Bangladesh Legal Aid & Services Trust (BLAST) v. Bangladesh) (HCD) 115

Section—167

While producing a person arrested without warrant before the Magistrate the police officer must state the reasons as to why the investigation could not be completed within 24 hours and what are the grounds for believing that the information received against the person is well-founded. The other requirement is that the police officer shall transmit to the nearest magistrate copy of the entries in the diary (case diary in section 172 of the code). (Bangladesh Legal Aid & Services Trust (BLAST) v. Bangladesh) (HCD) 115

Constitution of People's Republic of Bangladesh, 1972

President Order No. 16 of 1972

Articles—4 and 5

Abandoned Property (Buildings in the Urban Areas) Rules, 1972

Rule—10(1)

The Government is fully authorised to transfer any abandoned property by way of sale and as such the provision in clause (c) of Rule 10(1) framed thereunder does not divest the Government of its power to deal with the property in question in the manner as has been done by the memo. (Asaf Khan & ors. v. The Court of Settlement, Dhaka & ors.) (HCD) 7

Article—102

**Teachers and non-teaching staff of nationalized college (directorate of public instruction)
Absorption Rules, 1981**

Clause (6) of the registered deed of agreement executed between the Government and the Managing Committee of the College clearly states that all existing staffs of the College employed on or before 1.11.84, who will satisfy the requisite qualifications as required under the recruitment rules, may be absorbed in the Government service. The petitioners were appointed and joined the college before 1.11.84 and as such it created for them vested rights to be absorbed in Government service. (*Mukty Roy v. Government of Bangladesh & ors.*)

(HCD) 170

Article—102

Rule 4, 12, 13(2) (O) of Jatiya Bishwabiddalay Governing Body Rules, 1994

Any college, affiliated to the Jatiya Bishwabiddalay will be governed by the Jatiya Bishwabiddalay Governing Body Rules, 1994. Direction given by Senior Assistant Secretary, Ministry of Education for re-instatement of an Assistant Professor (suspended under Rule 13(2) (O) of Governing Body Rules, 1994) is without any lawful authority. No provision in the said Rule confers authority on the Ministry of Education to interfere in Jatiya Bishwabiddalay. (*Sadruddin Ahmed v. Director General, Intermediate & Higher Education Directory Dhaka & ors.*)

(HCD) 1

Article—102**“Legitimate Expectation:”**

The word ‘Legitimate’ connotes lawfully begotten. An expectation to become legitimate therefore should not be shorn of lawful begetting. The concept of legitimate expectation cannot be given such wide interpretation so as to allow any wishful hope without lawful root. (*Md. Hafizul Islam v. Government of Bangladesh & Ors.*)

(HCD) 153

Article—102

The present petitioner was the guarantor and was deliberately not made party in the writ petition and without making him a party, the judgment debtor obtained order from the High Court Division. As the petitioner was the judgment debtor No. 2, he ought to have been made a respondent in the writ petition. It is now a settled principle of law that without proceeding for realization of the Decretal amount against the Principal Judgment debtor, the property of the Guarantor cannot be sold for satisfaction of the Decree. (*Nirmal Chandra Datta alias Nirmal Chandra v. Joint District Judge and others*)

(HCD) 208

Article—102

Limitation Act, 1908

Sections—14 & 193

Customs Act, 1969

Section—193

The Customs Act is a special statute and the limitation provided for by the Act is a special limitation. Section 14 of the Limitation Act, which is a general law has no manner of application to the present case. We have already found that the writ petition is not maintainable and thus the court should follow the “Hands off” Doctrine. We refrain from giving any direction to the appellate authority in regard to computing the period of limitation, because that would override the statutory provision contained in section 193 of the Customs Act and this court sitting in Writ jurisdiction cannot arrogate to itself the power of legislature and extend the period of limitation without any sanction of law. (*M/s. Sonali Overseas v. The Commissioner of Customs & Ors.*)

(HCD) 209

Article—102 & 29**Railway Establishment Rule—509**

Running parcel clerks have been allowed running allowance benefit though they are not named in the list of categories mentioned in rule 509 of the code and that the same proves that apart from the categories of employees listed in rule 509 of the Code, the Railway board can give the running allowance benefit to its staff and there is no bar. The TTEs were denied the running

benefits allowance. Such denial to the TTEs has no reasonable basis but shows arbitrariness on the part of the Railway. (Jamshed Ahmed and others v. Bangladesh and others) (HCD) 237

Article—102

Druto Bichar Tribunal Ain, 2002 (Act No. 28/02)

Section—6

On perusal of the whole Ain it is found that even the departures as pointed out have not in any way affected the rights of the present petitioners. Section 9(3) provides that the same procedure of granting bail which is applicable in the Court from which the cases are transferred shall continue to apply in the Tribunal. Section 6 of the Ain does not infringe the right of getting equal protection of law. (Muhibur Rahman Manik v. Bangladesh and others) (HCD) 264

Article—102

Narcotic Control Act, 1990

Section 2(kha), 10 (ga) & 3(kha) of the Second Schedule

Drug Control Act, 1940 & Drugs (Control) Ordinance 1982

The manufacturers of homeopathic drugs and medicines are not affected in their pursuit by the Narcotics Control Act, 1990. The alleged provisions are not in conflict with the provisions of the Drugs Act, 1990, the Rules framed thereunder and the Drugs Control Ordinance, 1982. Section 18 and serial 3 of the Second Schedule of the Narcotics Control Act, 1990 are not ultra vires of the Constitution. (Bangladesh Homeopathic M. M. Association v. Bangladesh & Ors.) (HCD) 276

Article—102

VAT Rules, 1991

Rule 7

Rule 7 read with its proviso does not empower the Commissioner of VAT to authorize his subordinate officers to carry out inspection or search loaded vehicles with goods by setting up check post at a fixed place on the high way. Commissioner of VAT is empowered under Rule 7 to issue Order authorizing his subordinate officer to carry out inspection, search or seizure of goods, mentioning the name of the officer by whom inspection search is to be carried out and the area in which such checking should take place. (Chittagong Steel Re-Rolling Mills Assn. v. Commissioner of Customs, & ors.) (HCD) 313

Article—102

Citizenship Act, 1951

Electoral Rolls Ordinance, 1982

Bangladesh Citizenship (Temporary Provisions) Order, 1972 (P.O. 149 of 1972)

We do not think that only because of the concentration of urdu speaking people, who were citizens of the erstwhile East Pakistan, the so called Geneva Camp has attained any special status so as to be excluded from the operation of the laws of the land including the President Order 149 of 1972, the Electoral Rolls Ordinance, 1982 or the Citizenship Act, 1951. (Md. Abid Khan & ors. v. The Government of Bangladesh & ors.) (HCD) 364

Article—102

Jamuna Multipurpose Bridge Authority Ordinance, 1983,

Section—55

Since the petitioners appointed on muster roll basis and on consolidated pay basis under the project were subsequently regularized and their posts adjusted against newly created regular posts, cancellation of the regularization and adjustment orders by the same authority without assigning any reason and without giving them an opportunity of being heard is illegal and without lawful authority. (Md. Rana Masud & ors. v Vice-Chairman, (JMB) & ors.) (HCD) 369

Article—102

Employees Transferred from Development Project to Post of Revenue Budget Regularization & Seniority Fixation Rules, 1995

The petitioners were neither aware nor informed before 1997 that they were not appointed in the Revenue Budget of the BSTI but in the Development Project of BSTI. Hence, it was not

permissible in law for BSTI to regularize their service with retrospective effect from 1986 to the detriment and disadvantage of the petitioners. Such regularization is illegal.

The appointment of respondent Khademul Islam as an Assistant Director in the Revenue Budget of BSTI was a fresh appointment. His continuity in service as Assistant Director was broken. As per rule 3 (Kha) of the Employees Transferred from Development Project to the Post of Revenue Budget Regularization and Seniority Fixation Rules, 1995 it was not even permissible for BSTI to regularize the service of the respondent, far less to bridge up the gap. (Mohammad Ali & ors. v Bangladesh Standard & Testing Institution & ors. (BSTI).)

(HCD) 376

Article—102**Code of Civil Procedure, 1908****Sections—114, 151**

Any mistake, palpable, apparent or gross, may be corrected by the Court exercising power under sections 114 and 151 of the Code of Civil Procedure. The constitutional court exercising power under section 102 of the Constitution cannot correct such mistakes committed by the Artha Rin Adalat. (Agrani Bank v Artha Rin Adalat and others)

(HCD) 490

Article—102, 35(2)**Code of Criminal Procedure, 1878****Section—403(1), 236, 273(1)**

The whole basis of section 403(1) of the Code of Criminal Procedure as well as Article 35(2) of the Constitution is that the first trial should have been before a court competent to hear and determine the case and to record a verdict of conviction or acquittal. If the court is not so competent, the whole trial is null and void. (Muhammadullah v. Sessions Judge, Noakhali & ors.)

(HCD) 615

Constitution of Bangladesh, 1972**Securities and Exchange Ordinance, 1969****Articles—102(2)(a)(i) and (ii)**

There are various ways under the Securities and Exchange Ordinance 1969 by which the Securities and Exchange Commission (SEC) controls the activities of the Dhaka Stock Exchange Ltd. (DSE) to ensure that the DSE acts in the affairs of SEC to help it protect the interest of investors and develop the securities market.

The DSE has been performing its duties in carrying out its objects and business as an instrumentality or a subordinate functionary of the SEC, a local authority, which in fact has stepped into the shoes of the Government in respect of some matters provided in the erstwhile Capital Issues (Continuance of Control) Act 1947 (Act XXIX of 1947). DSE is amenable to the writ jurisdiction of the High Court Division under Article 102 of the Constitution. (Mrs. Farzana Moazzem v. Securities & Exchange Commission & ors.)

(HCD) 526

Article—102(1)(2)(a)(i)(ii), 31 & 32

The action of the respondents in converting the open space meant for park in Mirpur Housing Estate and known as "Lalmath" into residential plots is without any lawful authority as the same is violative of fundamental right and detrimental to the health and well-being of the people of the area. The Rule is made absolute in part. (Mr. M. Saleem Ullah, Advocate, and others v. Bangladesh, represented by the Secretary, Ministry of Housing and Public Works, and others)

(HCD) 58

Article—102(2)(ii)(a)

The government largess known as privileges is now regarded as rights and the government cannot enter into any agreement in respect of its largess arbitrarily. In the event of allowing any such right, the normal procedure is to call for competitive bids to show fairness on the part of the authority. (Engineer Mahmudul Islam and others v. Government of the People's Republic of Bangladesh and others)

(HCD) 80

Contempt of Court Act, 1926 (XII of 1926)

In contempt matters the intention of the contemner is not relevant. It is the effect of the contemner's action which is to be taken into account in deciding whether contempt was committed or not. It must be made clear that when this Court passes an order it is meant for execution and not for flouting it.

The general notion in currency that the contempt application is not an execution proceeding and no consequential relief can be given in contempt proceedings is an erroneous view. In an appropriate case the mere imposition of imprisonment or fine or both may not meet the ends of justice and there it may be necessary to pass an order to purge the contempt by directing the contemner to implement the judgment issuing necessary and consequential directions for enforcing the same. (*Md. Faroque Hossain v Mr. M. Iqbal Hossain & ors.*)

(HCD) 578

Customs Act, 1969 (IV of 1969)**Section—196****VAT Act****Section—42**

This Rule decides an interesting question of law raised by the VAT Department as to whether the Appellate Tribunal constituted under section 196 of the Customs Act is authorised to pass an ad interim order on admission of an appeal under section 42 of the VAT Act.

The powers conferred on the appellate tribunal pursuant to the provisions of section 196(b)(1) of the Customs Act are of widest amplitude and it can pass an ad interim order during the pendency of an appeal which is reasonably ancillary and incidental to the main appellate jurisdiction. The power conferred upon the appellate tribunal under section 196B(1) of the Customs Act leads to the conclusion that the tribunal can pass an interim order pending hearing of the appeal before it. The provisions of the VAT Act read with the relevant provisions of the Customs Act do not show that there is an express bar in making any interim order. (*Commissioner Customs, Excise & VAT, Dhaka v. Customs Excise and Vat Appellate Tribunal Jushna Complex & ors.*)

(HCD) 49

Dhaka Metropolitan Police Ordinance, 1976, (Ordinance III of 1976)**Sections—3, 16, 51, 52****Police Regulation Bengal, 1943 Regulation No. 33, 280****Police Act, 1861****Code of Criminal Procedure, 1898 (V of 1898)****Sections—4(k), 4, 103, 165, 166**

Police is required to act cautiously in conducting a search and for any excesses done or for any vexatious search, the law provides for punishment. The police have been warned not to behave with people with rudeness, harshness or brutality. Police being protector of law, is subjected to strict punishment if violates the law.

Respondents no. 3 and 4 are found to have acted illegally in doing excesses in abuse of their power in the name of search causing loss, injury, humiliation and harassment to the petitioner and should be burdened with token compensation of Tk. 5000/- (*Mr. Mohammad Ali v Bangladesh and others*)

(HCD) 389

Druto Bichar Tribunal Ain, 2002**Sections—5 & 6**

The Judges of the Druto Bichar Tribunals are appointed with the approval of the Supreme Court and as such it cannot be said that they are appointees of the government and therefore the apprehension of the petitioner expressed on this score appears to be bereft of substance. (*Abdul Kader Mirza v. Bangladesh and others*)

(HCD) 673

Employment of Labour (Standing Order) Act, 1965**Section—4**

The term 'temporary worker' has a connotation which is different from popular and dictionary meaning of the term. The term temporary worker as defined in section 2(s) of the

Employment of Labour (Standing Order) Act, 1965 means "worker" who has been engaged for work which is essentially of a temporary nature and is likely to be finished within a limited period.(Samir Malaker v. The Chairman, Divisional Labour Court.)

(HCD) 417

Income Tax Act, 1922

Section—37

The onus of proving the source of sum of money received by an assessee is on him. Such proof includes proof of identity of the creditor, the capacity of the creditor to advance the money and lastly the genuineness of the transaction. In respect of loans mere proof of identity of the creditors without proof of capacity to advance loan is of no avail. (Mr. Md. Rahmatullah v. The Commissioner of Taxes)

(HCD) 3

Industrial Relations Ordinance, 1967

Sections—7-A, 10

Section 7(A)(1)(b) makes it clear that a person shall not be entitled to be a member or officer of a Trade Union if he is not employed or engaged in that establishment. The legal position under section 7A is that a dismissed member cannot be either an officer or member of the trade union.(Padma Oil Co. Ltd. v. The registrar of Trade Unions and another)

(HCD) 469

Pourashava Ordinance, 1977

Section—17(2)

As per section 17(2) of the Pourashava Ordinance a Panel Chairman shall perform the functions of the Chairman if the post of the Chairman falls vacant or if the Chairman of Pourashava is placed under suspension. If the conduct of the Panel Chairman is not satisfactory, he cannot be punished unheard, but be given opportunity to defend himself. (Mostafizur Rahman Miah v. Bangladesh and others)

(HCD) 611

Section—18(A)

The respondent no. 4 was appointed as Administrator of Teknaf Pourashava by the government in exercise of its power under section 18A of the Ordinance. Such order was passed ignoring articles 9, 11 and 59 of the Constitution. Such order of the government in exercise of its power under section 18A of the Ordinance is violative of the spirit of the Constitution. (Ejahr Miah v. Government of Bangladesh)

(HCD) 638

President Order 16/72

Ordinance 54/85

Neither under P.O. 16/72 nor under Ordinance, 1985 the Settlement Officer, Dhaka, is authorized to declare any property as abandoned property, without serving notice under the provisions of P.O. 16/72 and /or Ordinance 54/84 upon the occupants of any property for delivery of possession, treating such property as an abandoned property. It is also decided by the Government that apart from the properties listed in the gazette notification under Ordinance 54/84 no further property can be declared to be abandoned property. (Quazi Md. Obaidur Rashid & ors. v. Bangladesh)

(HCD) 533

Public Interest Litigation

Justice delivery system in this part of the world is based on the principle of liberty and justice for all. Public interest litigation means the legal action initiated in a Court of law for the enforcement of rights and interest of the citizens in general or a section thereof. The judiciary is to play a vital and important role not only in preventing and remedying abuse and misuse of power but also to eliminate injustice. (Engineer Mahmudul-ul Islam and others v. Government of the People's Republic of Bangladesh and others)

(HCD)80

Review Application under Martial Law Order 9 of 1982

It does not fall within the domain of the Review Committee to give a pre hearing to the petitioner as a review authority. Since the material part of the court's order has been implemented by the government within the prescribed time, the opposite parties have not committed contempt of the court. (Md. Hafizul Alam v Mr. Muhammad Enamul Huq and two others) (HCD) 473

VAT Act, 1991**Section—3(3)(Ka) & (Gha).****Section—5(1) & 5(2)**

According to section 3(3)(Ka) and (Gha) of the VAT Act, 1991 the importer is not liable to pay VAT both at the time of import and also at the time when he sells the same in the internal market. For payment of VAT by manufacturers, producers, second proviso to section 5(2) empowers the National Board of Revenue (NBR) to determine the rate or quantum of the value to be added for fixation of value of any goods other than the imported one for payment of VAT. (Fazlur Rahman v Commissioner, Customs, Excise & VAT) (HCD) 485

Sections—26, 24 & 48

In the present case the respondents were not authorized under section 26 or section 48 to enter the premises for inspection, search or seizure of books and documents of the petitioners. Section 48 does not empower the National Board of Revenue to authorize the respondents to carry out any raid for search and seizure of any documents as they were not VAT officers. Once any officer of VAT intends to carry out any search under section 26 or 48, he can legally command assistance of BDR, police, ansars to carry out his assignment to raid any premises for search & seizure under section 24. (Opsonin Chemical Industries Ltd. v. Director, Customs I&I.) (HCD) 677

SPECIAL APPELLATE JURISDICTION

Trade Mark Act, 1940**Sections—14, 15****Trade Mark Rules****Rules 33(1)**

Section 14 provides for application for registration, section 15 relates to opposition, section 15(4) provides that after filing of the counter statement it is the duty of the Registrar to send a copy to the opponent and after hearing the parties, he can decide the matter. Sub-section 15(4) if read in conjunction with Rule 33(1) it becomes clear that the opposition must be deemed to have been abandoned. In the present case there is non compliance with the provision of Rule 33(1) and the Registrar had the discretion to treat the matter as abandoned. (Abdul Motaleb & ors. v. Hajee Aftab Miah & anr.) (HCD) 271

STATUTORY APPELLATE JURISDICTION

Customs Act, 1969**Section—33**

The Commissioner of Customs taking an erroneous view of law and facts, illegally rejected the application of the respondent on the sole ground that at the time of making the payment of customs duties it was not made on protest. The correct view of law is that there is no such

provision in section 33 or in any other section of the Customs Act that if excess payment of customs duties is made at the time of releasing the goods it had to be made on protest. (Commissioner of Customs, Dhaka v. M. M. M. Electrical Industry Ltd. & ors.)

(HCD) 309

STATUTORY ORIGINAL JURISDICTION

Company Act, 1994

Sections—81(2) and 85(3)

Bank Company Act, 1991

Sections—46 and 47

Constitution of Bangladesh, 1972

Articles—109 and 110

It is well settled that it is the right of the share-holders and their representatives, the directors, to hold a meeting of the company and the court shall not normally abdicate their such functions as embodied in the Articles of Association. It is only in exceptional circumstances, the court under the provisions of Section 85(3) can assume such powers to call and hold meeting, when it finds that it is impracticable, in the circumstances, to call a meeting.

There is no fetter on the powers of the court in invoking sub-section 3 of Section 85 to call, hold and conduct a meeting and not restricted only to articles or the Act. The Court shall not invoke its power on a mere trifling domestic squabbles between the directors but only when it is necessary in the paramount interest of the company, looking at the fact from a reasonable commonsense point of view. (Jahangir Alam Khan v. Registrar of Joint Stock Co.)

(HCD) 449

Representation of the People Order 1972 (P.O. 155 of 1972)

Articles—63(1), 44AA(4), 44C(1)(a), 44C(2), 44C(2), 73(2), 74(2)

The provisions of Article 63(1) being couched in the alternative, satisfaction of any one of clauses (c) to (c) is sufficient to declare the election of the returned candidate void.

Since a corrupt or illegal practice has been committed by the returned candidate, in violation of articles 44AA(4), 44C(1)(a), 44C(2) and 44C(3), which is punishable under article 73(2) as a corrupt practice and under article 74(2) as an illegal practice, the election of the returned candidate, Allahma Delwar Hossain Sayedee is declared void. (Sudhangshu Shekhor Halder v. The Chief Election Commissioner)

(HCD) 559

ADMIRALTY JURISDICTION

Code of Civil Procedure, 1908 (V of 1908)

Order XXXIX Rule 1

Section—151

In issuing an order of restraint in the nature of mandatory injunction whether under Order XXXIX, Rule 1 or 2 or in exercise of the inherent jurisdiction of the Court under section 151 of the Code, the Supreme Court held that either of the provisions may be applicable, depending on the facts of each case.

The merit of the suit is not relevant in granting an order of mandatory injunction. The outcome of the suit will depend upon its merit on evidence but an order of mandatory injunction will be issued to remedy an immediate wrong, perpetrated by the offending party in obtaining an advantageous position. (Md. Mobashed Hossain v. M/s. Saidur Rahman (Pvt.) Ltd.)

(HCD) 247