

2014

Legal Alert 2014

LEGAL ALERT: SUMMARY OF CASES ON BANKING, CORPORATE, COMMERCIAL AND CONSTITUTIONAL ISSUES AS REPORTED IN DECEMBER 2014

1. Abandoned Buildings (Supplementary Provision) Ordinance 1985

Section 5 (1)(b), Parties: Aftab Uddin (Md) vs Chairman, Court of Settlement, Case Name: Writ petition No. 561 of 1989, Name of the Court: APPELLATE DIVISION (Civil), Judges: Nazmun Ara Sultana (J), Syed Mahmud Hossain (J), Md Imman ali (J), (Reported in LXVI D.L.R. HC 253).

Since the original owners Kulsum Bibi and her husband Abdur Rahman was in possession and control of the property and never failed to manage the property in question the same cannot be declared as abandoned property allowing the authority to list in the 'Kha' list in pursuance of Ordinance No.LIV of 1985. Section 5 of Ordinance No.LIV of 1985. It is to be noted that Section 5 of Ordinance No.LIV of 1985 authorised the Government to publish a list of abandoned building in possession of the Government.

Accordingly the appeal was allowed without any order as to cost since the Court of Settlement did not take into consideration the veracity, value and weight of document provided by appellant, therefore, decided that the Appellate Division decided that continuance of the property as abandoned is not maintainable and sent the matter concern on remand to the Court of Settlement to assess the documentary evidence of the case and then decide the case based on principle of law.

2. Surplus Public Servants Absorption Ordinance, 1985

Section 5, Parties: Md. Samsuzzoha and 254 others Vs. Government of Bangladesh, Case Name: Writ Petition No. 2076 of 2009 & Others, Name of the Court: High Court Division (Special Original Jurisdiction), Judges: Farah Mahbub (J), Farid Ahmed (J), (Reported in 2 C.L.R. HC 523).

In determining the duty of Ministry of Establish while absorbing surplus employees, the Court decided that first and foremost, the surplus public servant is to be declared as 'surplus'. Having declared as 'surplus' by the Government, any surplus public servant acquires the right to be absorbed in the same pay-scale the incumbent held immediately before becoming surplus. If this not possible then Government has discretion to offer them post carrying lower scale of pay. However the petitioner's right to direct absorption has not been accepted by the court.

The court also decided that although the petitioners did not give any explanation for the delay of two years that does not defeat the right of the petitioners to be absorbed since the petitioners accrued the legal right in accordance with Section 5, *Surplus Public Servants Absorption Ordinance*, 1985.

3. Evidence Act 1872

Parties: Firoz Miah Vs. The State, **Case Name:** CrL Petition No. 451 of 2010, **Name of the Court:** Supreme Court of Bangladesh (Appellate Division), **Judges:** Syed Mahmud Hossain (J), Muhammad Imman Ali, (J), Mohammad Anwarul Haque (J), (Reported in 2 C.L.R. SC 305).

In a criminal case such as criminal trial punishable under section 302/34 of the Penal Code 1860, a confessional statement is considered to be an important piece of evidence. It is to be noted that evidence is either direct which directly proves a fact or circumstantial which if found to be true, proves a fact from which an inference of the existence of another fact may be drawn. Therefore, evidence may consist of the direct evidence, circumstantial evidence or by a combination of both and confessional statement.

The judgment in the given case established that if the confessional statement is found true, voluntary, and inculpatory in nature then the conviction on confession alone can be maintained. Moreover, unretracted voluntary confessional statement can form the basis of conviction against its maker as the accused did not alleged that he has not made the confession voluntarily or that he has made the confession as a result of mental or physical torture that amounts to retraction under s342 of the Code of Criminal Procedure 1861.

4. Constitution of Bangladesh 1972

Article 102 (2), Parties: Alvi Spinning Mills Ltd & Others Vs Government of Bangladesh, **Case name:** Writ Petition Nos. 1529 of 2013 & Others, **Name of the Court:** High Court Division (Special Original Jurisdiction), **Judges:** Md. Ashraful Kamal, (J) & Md Ashfaul Islam J, (Reported in LXVI D.L.R. HC 558.)

The decision established the well-known principle that where an enquiry into *complicated* questions of fact arises in a *petition* the court should not entertain the merit and record a finding as to disputed question of fact. Therefore, the genuineness of Letters of Credit shall have to be decided by the Court of Original jurisdiction.

The court also directed the petitioner to get alternative remedy from the proper forum as the *Court* would be reluctant to *give a Rule of Mandamus where the petitioner's claim is not rooted in the Statute or statutory Rule, i.e. they do not t have the specific legal right to enforce the performance of the duties.*

5. Evidence Act 1872

Section 115, Parties: Government of Bangladesh Vs. Dr Md Nazrul Islam Bhuiyan, Case Name: Writ Petition No.2919 of 2006, Name of the Court: APPELLATE DIVISION (Civil), Judges: Md Muzammel Hossain (CJ), Md. Abdul Wahhad Miah (J), Nazmun Ara Sultana (J), Syed Mahmud Hossain (J), Md Inman ali (J), (Reported in LXVI D.L.R. HC 255).

The judgment has been given in compliance with principle of legitimate expectation that a public body should keep promises. As far as public body's dealings with public are concerned, there is legitimate expectation that a decision-maker will follow a procedure to make a decision, if that procedure is not followed or that decision is made arbitrarily, an aggrieved person may be entitled to the law's protection. Therefore, the court will interfere if the authority acts arbitrarily, unreasonably, acts beyond jurisdiction, and do not comply with the principle of natural justice.

The court also decided that public body should be stopped from denying the regularization of the service of the respondents under Section 115 of evidence Act 1872 and decided that one cannot invoke the principle of Promissory Estoppel where the promise made was in violation of rules and regulations of statutory provision and is not maintainable in the eye of law. Therefore, the Court can find the protection of 'legitimate' expectations—in the sense of their being reasonable—on a basis which is analogous to, or sometimes based on, Doctrines of Estoppel.

6. Negotiable Instruments Act 1881

Section 138, Parties: Dr Shyamal Baidya vs Islami Bank Bangladesh Ltd, Case Name: CR Case No. 263 of 2007, Name of the Court: High Court Division (Criminal Appellate Jurisdiction), Judges: ANM Bashir Ullah (J), (reported in (Reported in LXVI D.L.R. HC 547).

It is crystal clear from the prevailing law under section 138 of the Negotiable Instruments Act 1881 that when a check is issued by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability such a check will be returned by the bank on which they are drawn if the amount is not mentioned in the check by the drawer of the check and such person shall be deemed to have committed an offence under the Act. Therefore, in form of the Banking a criminal remedy of penalty was inserted in Negotiable Instruments Act, 1881, to ensure promptitude and remedy against defaulters and to ensure credibility of the holders of the negotiable instrument.

7. Prevention of Corruption Act 1947, s 5(2) & Penal Code 1860, s 161 &167

Parties: Mostafa Kamal vs State, Case name: Petition Case No. 3795 of 2003, Name of the Court: High Court Division (Criminal Appellate Jurisdiction), Judges: Naima Haider (J), Zafar Ahmed (J) (Reported in LXVI D.L.R. HC 534).

The Corrupt Public servants are under Legal Scrutiny and there is a mandatory obligation to criminalize embezzlement, misappropriation or other diversion of property by a public official.

The Penal Code criminalizes the act of Criminal breach of trust (Section 405) and criminal breach of trust by a public servant (Section 409).

Under section 405 of the Penal Code 1860 whenever a person is entrusted with any property or has any dominion over property and dishonestly misappropriates, or converts, or uses it in violation of any direction of law prescribing the mode in which the trust is to be discharged or intentionally suffers any other person so to do commits then the offence of criminal breach of trust is committed by that person. It is to be noted that entrustment of property is an essential requirement before any offence under this section takes place. The implication of the word entrustment is very wide.

Moreover, according to the Prevention of Corruption Act, 1947, the act of dishonest or fraudulent misappropriation or conversion by a public servant for his or her own use of any property entrusted to him or her or under his or her control as a public servant or allowing any other person so to do is punishable, criminal, misconduct (Section 5(1) (c)); on the other hand, definitions of the offences of dishonest misappropriation of property (Section 403) and criminal breach of trust (Section 406) are criminalized by the Penal Code, 1860.

8. Income Tax Ordinance, 1984

Section 52, Parties: Hyundi Engineering Vs. NBR, Case Name: Writ petition No. 11919 of 2013, Name of the Court: High Court Division (Special Original Jurisdiction), Judges: A.F.M Abdur Rahman (J), Md. Emdadul Hoque Azad (J), (Reported in 2 C.L.R. HC 539).

The court decided that the composite agreement can be divided into separate parts having separate implications. Consequently, under the terms of payment of contract agreement the entire job was impliedly divided into two parts. Under the first category the party is required to supply permanent equipments and materials. Whereas, the second part of the contract concerns the installation of those equipments and materials at the sites.

International Treaty Convention made between the People's Republic in Bangladesh and People's Republic in Korea for the Avoidance of Double Taxation, however, the court ruled that deduction of advance income tax under s52, rule 16 is in this instance held not to be valid.

Under the prevailing Bangladesh Statute 'Arbitration Act 2006' the interpreting task of the provision of the International Treaty (Convention) concerning the question of law is only entrusted with the High Court Division of Bangladesh Supreme Court.

LEGAL ALERT: SUMMARY OF CASES ON BANKING, CORPORATE, COMMERCIAL AND CONSTITUTIONAL ISSUES AS REPORTED IN JULY/AUGUST 2014

The Artha Rin Adalat Ain, 2003

1. Section-13(3), Parties: Tajuddin VS Bangladesh, Case name: Writ Petition Nos.4579 & 4580 of 2013, Name of the Court: High Court Division, Judges: Farah Mahbub(J),Kazi Md Ejarul Haque Akondo (J), (Reported in 19 B.L.C HC 526).

Summary: In order to pass judgment and decree under the provision the Adalat has to be satisfied that there is an admission by the defendant concern over the claim so made by the plaintiff bank and to that effect the Bank is required to make an application. The legislature having used the word “এবং” after the words “বাদীর আরজির বক্তব্য স্বীকৃত হইয়া থাকিলে” and “উক্তরূপ স্বীকৃতির ভিত্তিতে যে রূপ রায় বা আদেশ পাইতে বাদী অধিকারী” made those two requirements conjunctive.

2. Section-26, Parties: Rafia Ashraf Polly VS Bangladesh, Case name: Writ Petition No. 3094 of 2004, Name of the Court: High Court Division, Judges: Md. Ashiaqul Islam (J), Md Ashraful Kamal (J), (Reported in 19 B.L.C. HC 546).

Summary: It has made provision for depositing of 25% of the decretal amount where any 3rd party wants to join in execution proceeding to ventilate grievances. Since the Artha Rin Adalat Ain, 2003 is a special law it will override any other law if there is no inconsistency in the special law itself.

3. Section- 32(2), Parties: Gias Uddin Chowdhury VS Bangladesh, Case name: Civil Petition for Leave to Appeal No.385 of 2011, Name of the Court: APPELLATE DIVISION (Civil),Judges: Md Muzammel Hossain (CJ) ,Md. Abdul Wahhad Miah (J),Hasan Foez Siddique (J),AHM Shamsuddin Chowdhury (J), (Reported in 66 D.L.R. AD 213).

Summary: The language of sub-section (2) of section-32 of Artha Rin Adalat Ain,2003 is absolutely mandatory in nature as consequence of non-deposit of such security has been provided therein and since the petitioners did not deposit security equivalent to 25% of the decretal amount, their application was incompetent. And sub-section (2) of section-32 shows that it is the precondition to deposit security equivalent to 25% of the decretal amount in order to lay claim to an immovable property involved in an execution case ,but admittedly in this case.

4. Section-32(2), Parties: Mohammad Shahidullah VS Bangladesh Case name: WRIT PETITION NO.2047 OF 2006, Name of the Court:HIGH COURT DIVISION,Judges: Mrs. Farah Mahbub(J),Mr. Kazi Md. Ejarul Haque Akondo, (Reported in 2 C.L.R. HC 383).

Summary: So far rejection of application filed under Order XXI Rule 58 of the Code of Civil Procedure categorically observed that if such application fails to comply with the direction the Adalat shall reject the application under section 32(2) of the Artha Rin Adalat Ain .In this regard it is pertinent to observe that the contention of the petitioner to file the application upon depositing bond covering 10% of the decretal amount cannot be entertained, for it is the established principle of law that amendment of procedural law is always prospective and as such, the provision as contained in section 32 of the Artha Rin Adalat Ain,2003 having been amended vide section 11(2) of the Artha Rin Adalat Ain, 2010 (Amended Act,2010)(Act, No. 16 of 2010), cannot be made applicable in the instant case.

5. Sections-38,45,49 & 57,Parties: AB Mannaf Sheikh VS 1st Joint District Judge Court,Case name: Writ Petition No. 8742 of 2011,Name of the Court: High Court Division, Judges : Syed Ahmed (J),Mahmudul Hoque (J), (Reported in 19 B.L.C. HC 493).

Summary: The Adalat almost in every case is reluctant to extend its hands to help the litigants taking recourse to the sections 38, 45, 49 & 57 of the Artha Rin Adalat Ain, 2003 making them virtually ineffective.

The Negotiable Instruments Act, 1881

Section-138,Parties: Ahmed Lal Mia VS State, Case name: Criminal Petition for Leave to Appeal No. 563 of 2012,Name of the Court: APPELLATE DIVISION (Criminal),Judges: Md Muzammel Hossain (CJ),Surendra Kumar Sinha (J),Md Abdul Wahhab Miah.(J),Hasan Foez Siddique(J),AHM Shamsuddin Chowdhury (J), (Reported in 66 D.L.R. AD 204)

Summary: The cheque was dishonoured with the endorsement “payment stopped by the drawer”, a clear prima facie case of the commission of the offence punishable under section 138 of the Negotiable Instruments Act,1881 has been made out against the accused.

The Arbitration Act, 1940

Section-17,Parties: Project Director, PL VS A Latif Company Ltd,Case name: Civil Appeal No. 75 of 2006,Name of the Court: Appellate Division (Civil),Judges: Nazmun Ara Sultana (J),Syed Mahmud Hossain (J),Md. Imman ali (J), (Reported in 19 B.L.C. AD 199).

Summary: When the Court acts suo motu no question regarding making of deposit can arise. Suo motu power of the Court to invalidate an award can be exercised when there is a patent illegality or voidness. Under section of the Arbitration Act, 1940 the Court had ample power to go into the question of the validity of the award without any objection being filed by any of the parties to the arbitration.

The Constitution of Bangladesh, 1972

Article:102(2),Parties: Ayub Hossain Khan VS Bangladesh, Case name: Civil Petition for Leave to Appeal Nos. 1901-1901 of 2011,Name of the Court: APPELLATE DIVISION (Civil),Judges: Surendra Kumar Sinha (J),Md Abdul Wahhab Miah (J)AHM Shamsuddin Chowdhury (J), (Reported in 66 D.L.R. AD 215).

Summary: protection of legitimate expectation does not require the fulfillment of the expectation where an overriding public interest surfaces with greater accentuation. A change in policy can defeat a substantive legitimate expectation provided it can be justified on Wednesbury Reasonableness.