

LEX/BDAD/0099/2015

Equivalent Citation: 13ADC(2016)1, 13ADC(2016)517, 68 DLR(AD) (2016) 242

IN THE SUPREME COURT OF BANGLADESH (APPELLATE DIVISION)

Civil Appeal Nos. 68 and 03 of 2009 With Criminal Petition No. 421 of 2012

Decided On: 16.09.2015

Appellants: **Anti Corruption Commission**
Vs.

Respondent: **Mohammad Shahidul Islam and Ors.**

Hon'ble Judges:

Surendra Kumar Sinha, C.J., Nazmun Ara Sultana, Syed Mahmud Hossain and Hasan Foez Siddique, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Mahbubey Alam, Attorney General, Khorshed Alam Khan, Adv. and instructed by Sufia Khatun, Advocate-on-Record.

For Respondents/Defendant: Shah Monjurul Haque, Advocate, instructed by Mvi. Wahidullah, Advocate-on-Record

JUDGMENT

Hasan Foez Siddique, J.

1. The delay of filing in Criminal Petition for leave to Appeal No. 421 of 2012 is condoned. Civil Appeal No. 68 of 2009, Civil Appeal No. 03 of 2009 and Criminal Petition for Leave to Appeal No. 421 of 2012 have been heard together and they are being disposed of by this common judgment.

2. Facts of Civil Appeal No. 68 of 2008, in short, are that the respondent Mohammad Shahidul Islam @ Mufti Shahidul Islam filed Writ Petition No. 9905 of 2007 challenging the proceeding of Special Case No. 02 of 2008 arising out of ACC G.R. No. 40 of 2007 corresponding to Kotwali Police Station Case No. 68 dated 30.05.2007 under section 409/104 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 (Act II of 1947). In the said petition, he sought for direction upon the writ respondent Nos. 1-3 to accept customs duty and penal demand made by the writ respondent No. 3 dated 05.11.2007 pursuant to adjudication order No. 1033 dated 05.11.2007 passed by the writ respondent No. 2 and also challenged the continuation of the aforesaid criminal case stating, inter alia, that he was Member of Parliament for the term of 2001-2006. Taking privilege given by S.R.O. No. 266-Ain/2005/2098/ Shulka 22.08.2005 he imported Lexus-LX 470-model, UZJIOOR-GNAGK1, Japan origin Jeep under L/C. No. 16825010037 dated 21.08.2005 giving undertaking pursuant to the certificate issued by the Speaker of Parliament. Thereafter, the writ respondent No. 2 issued a show cause notice on 26.09.2007 to the writ petitioner asking him as to why legal action should not be taken against him for illegal transfer of the said jeep. The writ respondent No. 2 by an order dated 05.11.2007 demanded duty of taka 51,00,000/- from the writ petitioner. The writ respondent No. 3 issued another notice on 05.11.2007 demanding duty and penalty amounting to tk. 148,76,068,96/-from him. Thereafter, on 30.05.2007, a Deputy Director of Anti-Corruption Commission lodged a First Information Report which was registered as Kotwali Police Station Case No. 68 dated 30.05.2007 under Section 409/109 of the Penal Code stating that the writ petitioner

transferred the aforesaid tax free Jeep to accused Abdul Jabbar Mian before the expiry of four years from the date of importation of the said Jeep violating the provision of law and thereby committed offence. Holding investigation, Anti-Corruption Commission submitted Chargesheet against the writ petitioner under the aforesaid provisions of law and accordingly impugned proceeding was started. The writ petitioner, challenging the said proceeding, filed the instant writ petition in the High Court Division and obtained Rule. The High Court Division made the said Rule absolute by the impugned judgment and order. Thus, the Anti-Corruption Commission has filed this appeal getting the leave.

3. The facts of Civil Appeal No. 03 of 2009, in short, are that the respondent No. 1 filed Writ Petition No. 8578 of 2007 challenging the proceeding of Special Case No. 15 of 2007 arising out of Pallabi Police Station Case No. 37 dated 17.03.2007 under section 5(2) of the Prevention of Corruption Act, 1947 read with Section 409/420 of the Penal Code and Section 156 of the Customs Act. One Md. Yunus Ali, Sub-Inspector of Police, lodged a First Information Report with Pallabi Police Station against the writ petitioner stating, inter alia, that at about 13.15 hours on 05.03.2007 members of RAB-2 found a black Hummer Jeep bearing registration No. Dhaka Metro-Gha-11-6195 at the basement-1 of the UTC building. They asked about the ownership of the said Jeep and came to know that the owner of the Jeep was one Enayetur Rahman. Then the RAB personnel asked Enayetur Rahman to appear before the RAB-2 on 06.03.2007 who met the officials of RAB-2 and produced documents in support of his claim of Jeep but finding inconsistencies in the documents, RAB-2 arrested him and seized the Jeep. Writ petitioner Harun-or-Rashid imported the said Jeep under M.P. quota and transferred the same to Enayetur Rahman by showing lesser price than that of market price. The Anti-Corruption Commission holding investigation, submitted charge sheet against the writ petitioner and others under the aforesaid provisions of law. The Metropolitan Special Judge, Dhaka took cognizance of the offence and, thereafter, transferred the case before the Special Judge, Court No. 4, Dhaka where the case was registered as Special Case No. 15 of 2007. At the stage of examination of witnesses, the writ petitioner filed the instant writ petition in the High Court Division and obtained Rule. The High Court Division ultimately made the said Rule absolute. Thus, the Anti-Corruption Commission has filed this appeal getting leave.

4. The facts of Civil Petition for Leave to Appeal No. 421 of 2012, in short, are that the respondent Obaidul Karim filed an application under Section 561A of the Code of Criminal Procedure in the High Court Division challenging the proceeding of Special Case No. 13 of 2008 corresponding to Metropolitan Special Case No. 120 of 2008 arising out of Tejgaon Police Station Case No. 17(8) of 2007 under section 409/109 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947. One Abdul Karim, Deputy Director of Anti-Corruption Commission lodged a First Information Report with Tejgaon Police Station against the respondent No. 1 stating that Mr. Saidul Haque, Member of Parliament, imported an Infinity Jeep from the U.S.A. opening L/C. No. 133505010254 dated 04.05.2005 under M.P. quota. Said Md. Saidul Haque used the address of Orion group, House No. 153-154, Tejgaon Industrial Area, Dhaka. On the date of opening L/C, the respondent No. 1, through his employee deposited taka 5,00,000/- in the account of Md. Saidul Haque. After receiving the said Jeep, said Md. Saidul Haque gave undertaking stating that he would not transfer the Jeep during the tenure of his membership in Parliament or before expiry of three years from the date of importation. Before delivery of the said Jeep, the respondent No. 1 deposited taka 40,00,000/- in the account of Md. Saidul Haque through an employee of Orion Laboratory Limited. Md. Saidul Haque, in collusion with respondent No. 1, misappropriated taka 85,50,680/- transferring the said jeep to respondent No. 1 thereby they committed offence. The Anti-Corruption

Commission, holding investigation, submitted charge sheet against the respondent No. 1 and others under the aforesaid provisions of law. The case was transferred before the Special Judge, Court No. 8, Dhaka for holding trial. Challenging the said proceeding, the respondent No. 1 filed the instant application under section 561A of the Code of Criminal Procedure in the High Court Division and obtained Rule. The High Court Division by the impugned judgment and order dated 16.6.2011 made the Rule absolute, thereby, quashed the proceeding. Thus the Anti-Corruption Commission has filed this criminal petition.

5. Mr. Mahbubey Alam, learned Attorney General with Mr. Khorshed Alam Khan appeared on behalf of the appellant and the petitioner in all the cases. On the other hand, Mr. Shah Manjurul Haque, learned Advocate appeared for the respondent No. 1 in Criminal Appeal No. 68 of 2009 and Mr. Mvi. Md. Wahidullah, learned Advocate-on-Record on behalf of the respondent No. 1 in Criminal Petition for Leave to Appeal No. 421 of 2012.

6. The submissions of the learned Attorney General in all the cases are same, those are, the respondents have committed offences within the meaning of sections 409/109 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act by transferring or purchasing the tax free Jeep before expiry of prescribed time limit. He submits that since the prima-facie cases against the respondents have been made out under the aforesaid provisions of law, the High Court Division erred in law in making the Rules absolute. He submits that the writ petition Nos. 9905 of 2007 and 8578 of 2007 against the Criminal proceedings were not maintainable since Criminal Procedure Code provides efficacious remedy to get redress against such types of proceedings if the writ petitioners feel themselves aggrieved. He further submits that members of Parliament are public servants in view of the provisions of Section 21 of Penal Code read with Section 2(b) of the Criminal Law Amendment Act.

7. Mr. Shah Manjurul Haque, learned Advocate appearing for the respondent No. 1, in Civil Appeal No. 68 of 2008 and Mvi. Md. Wahidullah, learned Advocate-on-Record in Civil Petition for Leave to Appeal No. 421 of 2012 submit that the respondents being Members of Parliament were not Public Servants, so initiation of criminal proceedings under Sections 5(2) of the Prevention of Corruption Act read with Section 409/109 of the Penal Code against them were bad in law, the High Court Division rightly passed the impugned judgments.

8. The facts and relevant laws related to the cases are identical. The High Court Division quashed the proceedings mainly on the ground that the Members of Parliament are not Public Servant within the meaning of the expression in any of the clauses of Section 21 of the Penal Code and Section 2(b) of the prevention of Corruption Act, so the initiations of proceedings against them under Sections 409/109 of the Penal Code read with Section 5(2) of Act II of 1947 were bad in law. The High Court Division relied on the decision in the case of R.S. Nayek Vs. A.R. Antulay reported in AIR 1984 SC 684=(1984) 2 SCC 183. In the cited case it was observed that MLA was not and is not a "public servant" within the meaning of the expression in any of the clauses of Section 21 IPC. It was further observed that MLA does not perform public duty but he discharges constitutional functions and thus he is not a public servant. In the case Ramesh Balkrishna Kulkarni Vs. State of Maharashtra (AIR 1985)SC 1655 Indian Supreme Court further held that a public servant is an authority who must be appointed by Government or a semi government body and should be in the pay or salary of the same, secondly, a "public servant" is to discharge his duties in accordance with the rules and regulation made by the Government.

9. The relevant expressions regarding the definition of Public Servant are:

Section 21. Public Servant: The words "Public Servant" denote a person falling under any description hereinafter following namely:-

Twelfth-every person-

(a) in the service or pay of the Government or remunerated by the Government by fees or commissions for the performance of any public duty;

(b) in the service or pay of a local authority or of a corporation, body or authority established by or under any law or of a firm or company in which any part of the interest or share capital is held by, or vested in the Government.

10. Explanation 1- persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

11. Mr. Haque submits that an M.P. occupies in the Parliament as has been referred to as "seat" instead of "office" in part V. Chapter 1 of the Constitution. They do not hold any "office" and that they do not get any salaries. So they are not "Public servant".

12. It would not be out of place to reproduce the related provisions regarding financial benefits provided in law for the members of Parliament.

13. Article 68 of the Constitution provides-

"Remuneration etc. of members of Parliament- Members of Parliament shall be entitled to such remuneration, allowances and privileges as may be determined by Act of Parliament or, until so determined, by order made by the President."

14. In Bengali version of Article 68 of the Constitution the word "remuneration" has been translated as "পারিশ্রমিক". In the case of Accountant General, Bihar Vs. N. Bakshi reported in AIR (1962) SC 505 Indian Supreme Court held that if a man gives his services, whatever consideration he gets for giving his services is a remuneration for him. Consequently, if a person was in receipt of a payment, or in receipt of a percentage, or any kind of payment which would not be actual money payment, the amount he would receive annually in respect of this would be remuneration. The Supreme Court of India relied upon in In R Vs. Postmaster General, (1986) 1QBD658 where Justice Blackburn observed, "I think the word "remuneration" -----as a quid pro quo". It is a wider term than salary.

15. There is no definition of "remuneration" in the Constitution, but that is not a ground for holding that the expression is used in any limited sense as merely salary. The expression "remuneration" in its ordinary connotation means "reward", recompense pay, wages or salary for service render. It is payment for services rendered or work done. In S & V Stores Ltd. V. Lee, (1969)2 All Er 417, 419 (QBD) it was observed that "remuneration" is not mere payment for work done, but is what the doer expects to get as the result of the work he does in so far as what he expects to get is quantified in terms of money.

16. The mere fact that the position which an M.P. occupies in the Parliament has been referred to as "seat" instead of office is not a sure indicium of the fact that an M.P. is not a "public servant" and it would not be proper to place reliance thereupon

for the conclusion of the fact that an M.P. is not a "Public servant". It is true that in the Constitution Member of Parliament has been referred to as a person who holds "seat" of Parliament. But the words "seat" and "Office" are interchangeable terms and either of them can be used while referring to a member of Parliament.

17. The term "office" has been defined in the Oxford English Dictionary, in the following words:- "Duty attaching to one's station, position or employment; a duty service, or charge, falling or assigned to one; a service or task to be performed; A position or place to which certain duties are attached, especially one of a more or less public character, a position of trust, authority, or service under constituted authority; a place in the administration of Government, the public service, the direction of a corporation, company, society etc.

18. The word, "office" has got the following meaning as given to it in Stroud's Judicial Dictionary of Words & Phrases.

"In any case, an office necessary implies that there is some duty to be performed".

19. Blackstone defined an "office" as "a right to exercise a public or private employment, and to take the fees and employments thereunto belonging." Cockburn C.J. thought that "an office necessarily implies that there is some duty to be performed." The formulation of Rowlatt J. has frequently been endorsed in the House of Lords "- an office or employment which was a subsisting, permanent, substantive position which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders.-"

20. The word "office" has been defined in Black's Law Dictionary, an "assigned duty" or "function". Synonyms are "post", "appointment", "situation", "place", "position", and "office" commonly suggests a position of (especially public) trust or authority."

21. The word "Office" is of indefinite content. One of its various meanings is a position or place to which certain duties are attached, especially one of a more or less Public Character (Rajendra Shankar Tripathi V. State of U.P. 1979 Cr.LJ 243) Black's Law Dictionary further defines office" as right, and correspondent duty, to exercise a public trust. The most frequent occasions to use the word "office" arise with reference to a duty and power conferred on an individual by the Government, and when this is the connection, "Public Office" is a usual and more discriminating expression. But a power and duty may exist without immediate grant from government, and may be properly called an "office". Public office defines as, "The right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of Government for the benefit of the public. An agency for the state, the duties of which involve in their performance the exercise of some portion of the sovereign power either great or small."

22. The term "office" has also been a subject matter of interpretation in American Jurisprudence, in following manner;

".....Ordinarily and generally, a public office is defined to be the right, authority, and duty created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. The position is an office whether the incumbent is selected by appointment or by election and whether he is appointed during the pleasure

of the appointing power or is elected or a fixed term." "A public officer is such an officer as is required by law to be elected or appointed, who has a designation or title given him by law, and who exercises functions concerning the public assigned to him by law".

23. Grahm Zellic in an article "Bribery of Members of Parliament and the Criminal Law" published in Public Law, 1979, has cited the observations of Sir Issac J, which are in the following words :-

"When a man becomes a Member of Parliament, he undertakes high public duties. Those duties are inseparable from the position; he cannot retain the honour and divest himself of the duties. The position, independent of the Member, is subsisting, permanent and substantive and will be filled by others after him; this is provided by law; and it is certainly of a more, rather than less, public character, Erskine May in fact speaks of "Corruption in the Execution of their office as Members. There is nothing to stop a Court, therefore, holding that membership of Parliament constitutes an office....."

24. Taking into consideration the above quoted definitions and observations, the Delhi High Court in the case of L.K. Advani V. Central Bureau of Investigation reported 1997 Cri.LJ. 2559 has observed: "Let us now see as to whether an M.P. holds an office? Admittedly, an M.P. enjoys a status and position. He is also required to perform public duties under the Constitution. Thus it can be safely concluded there from that a Member of Parliament is holder of an office."

25. In R.V. Whitaker (1914-3KB.1283) it was held, "A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go supply his payment and the public have an interest in the duties he discharges, he is a public officer".

26. Best C.J. in Henly V. Mayor of Lyme, (1928) 5 Bing 91, to the view that "--- every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer--- It seems to me that - if a man takes a reward- Whatever be the nature of that reward, whether it be in money from the crown, whether it be in land from the crown, whether it be "in lands or money from any individual, - for the discharge of a public duty, that instant he becomes a public officer -"

27. Well discussed case in this regard is the case of P.V. Narashima Rao Vs. State (CBI/SPE) reported in (1998) 4 SCC page 626. In that case, facts, in short, were that, in the General Election for the Tenth Lok Sabha held in 1991 the Congress (I) party emerged as the single largest party and it formed the Government with P.V. Narasimha Rao as Prime Minister. On 26-7-1993, a motion of no confidence was moved in the Lok Sabha against the minority Government of P.V. Narasimha Rao. The support of 14 Members was needed to have the no-confidence motion defeated. On 28-7-1993, the no-confidence motion was lost, 251 Members having voted in support and 265 against. Suraj Mandal, Shibu Soren, Simon Marandi and Shailendra Mahto, Members of the Lok Sabha owing allegiance to the Jharkhand Mukti Morcha (the JMM), and Ram Lakhan Singh Yadav, Ram Sharan Yadav, Roshan Lal, Anadicharan Das, Abhay Pratap Singh and Haji Gulam Mohammed, Members of the Lok Sabha owing allegiance to the Janata Dal, Ajit Singh group (the JD, AS), voted against the no-confidence motion. Ajit Singh, a Member of the Lok Sabha owing allegiance to the JD, AS, abstained from voting thereon. One Shri Ravindra Kumer of Rashtriya Mukti Morcha filed a complaint dated 1-2-1996 with the "CBI" wherein it was alleged that in July 1993 a criminal conspiracy was hatched pursuant to which the above -

named Members agreed to and did receive bribes, to the giving of which P.V. Narasimha Rao, MP & Prime Minister, Satish Sharma, MP & Minister, Buta Singh, MP. V. Rajeshwara Rao, MP, N.M. Revanna, Ramalinga Reddy, MLA, M. Veerappa Moily, MLA & Chief Minister, State of Karnataka, D.K. Adikeshavulu, M. Thimmegowda and Bhajan Lal, MLA & Chief Minister, State of Haryana, were parties, to vote against the no-confidence motion. A prosecution being launched against the aforesaid alleged bribe-givers and bribe takers subsequent to the vote upon the no-confidence motion, cognizance was taken by the Special Judge, Delhi. The persons sought to be charged as aforesaid filed petitions in the High Court at Delhi seeking to quash the charges. By the judgment and order under challenge, the High Court dismissed the petitions. They preferred appeals. The appeals were heard by a Bench of three learned Judges and then referred to a Constitution Bench. The argument on behalf of the appellants to be considered by the Constitution Bench, broadly put, was that by virtue of the provisions of Article 105, members of Parliament are immune from the prosecution and that, in any event, they cannot be prosecuted under the Prevention of Corruption Act, 1988.

28. Relevant portions of the majority view of the cited case was as follows:

"We will first examine the question whether a Member of Parliament holds an office. The word "office" is normally understood to mean "a position to which certain duties are attached, especially a place of trust, authority or service under constituted authority. In *Macmillan V. Guest* Lord Wright has said:

The word "office" is a indefinite content. Its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for purposes of this case the following: "A position or place to which certain duties are attached, especially one of a more or less public character.

29. Lord Atkin gave the following meaning:

an office or employment which was subsisting, permanent, substantive position, which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders."

30. Lord Wright said:

An office means no more than a position to which certain duties are attached.

31. In *R.V. White*, 13 SCR (NSW) 332 the Supreme court of New South Wales has held that a Member of the State Legislature holds an office. That view has been affirmed by the High Court of Australia in *Boston* (1923) 33 CLR 386. Issacs and Rich, JJ. said:

32. A Member of Parliament is, therefore, in the highest sense, a servant of the State; his duties are those appertaining to the position he fills, a position of no transient or temporary existence, a position forming a recognized place in the constitutional machinery of government. Why, then, does he not hold an "office"? In *R. V. White* it was held, as a matter of course, that he does. A person authoritatively appointed or elected to exercise some function pertaining to public life. "Clearly a Member of Parliament is a "public officer" in a very real sense, for he has, in the words of Williams, J.

33. In *Habibullah Khan V. State of Orissa* (1993 Cr.LJ 3604) the Orissa High Court has held that a Member of the Legislative Assembly holds an office and performs a

public duty. The learned Judges have examined the matter keeping in view the meaning given to the expression "office" by Lord Wright as well as by Lord Atkin in *McMillan V. Guest* (1942 AC 561).

34. The next question is whether a Member of Parliament is authorized or required to perform any public duty by virtue of his office. In *R.S. Nayak V. A.R. Antulay* Supreme Court of India has said that though a Member of the State Legislature is not performing any public duty either directed by the Government or for the Government but he no doubt performs public duties cast on him by the Constitution and by his electorate and he discharges constitutional obligations for which he is remunerated fees under the Constitution."

35. In *P.V. Narashima Rao's* case it was further observed that under the Constitution M.P. is responsible to Parliament and act as watchdogs on the functioning of the Council of Ministers. In addition, a Member of Parliament plays an important role in parliamentary proceedings, including enactment of legislation, which is a sovereign function. The duties discharged by him are such in which the State, the public and the community at large have an interest and the said duties are, therefore, public duties. It can be said that a Member of Parliament is authorised and required by the Constitution to perform these duties and the said duties are performed by him by virtue of his office.

36. *Issac, J.*, (1920)-27 CLR 494, has further said:

"One of the duties is that of watching on behalf of the general community the conduct of the executive, of criticising it, and if necessary, of calling it to account in the constitutional way by censure from his place in Parliament-censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possess."

37. In *R.V. Boston* (1923) 33 CLR 386 it was further observed that the fundamental obligation of a Member in relation to Parliament of which he is a constituent unit still subsists as essentially as at any period of our history. That fundamental obligation which is the key to this case is the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community.

38. Those duties are of a transcendent nature and involve the greatest responsibility, for they include the supreme power of moulding the laws to meet the necessities of the people, and the function of vigilantly controlling and faithfully guarding the public finances.

39. In *P.V. Narashima Rao's* the Supreme Court of India finally observed:

"1. A Member of Parliament does not enjoy immunity under Article 105(2) or under Article 105(3) of the Constitution from being prosecuted before a criminal court for an offence involving offer or acceptance of bribe for the purpose of speaking or by giving his vote in Parliament or in any committees thereof.

2. A Member of Parliament is a public servant under Section 2(c) of the Prevention of Corruption Act, 1988.

3. Since there is no authority competent to remove a Member of Parliament and to grant sanction for his prosecution under Section 19(1) of the

Prevention of Corruption Act, 1988, the court can take cognizance of the offences mentioned in Section ' in the absence of sanction but till provision is made by Parliament in that regard by suitable amendment in the law, the prosecuting agency, before filing a charge-sheet in respect of an offence punishable under section 7, 10, 11, 13 and 15 of the 1988 Act against a Member of Parliament in a criminal court, shall obtain the permission of the Chairman of the Rajya Sabha/Speaker of the Lok Sabha, as the case may be."

40. Indian Supreme Court lastly held, "Having considered the submissions of the learned Counsel on the meaning of the expression "public servant" contained in section 2 (c) of the 1988 Act we are of the view that a Member of Parliament is a Public Servant for the purpose of the 1988 Act."

41. Relevant provision provides in Section 2(b) of the Criminal Law Amendment Act (XL of 1958) regarding expanded definition of "public servant" is as follows:

2. Definitions- In this Act, unless there is anything repugnant in the subject or context-

(a)-----

(a)(a)--

(b)"Public servant" means a public servant as defined in section 21 of the Penal Code and includes a Chairman, Director, Trustee, Member, Commissioner, Officer or other employee of any local authority, statutory corporation or body corporate or of any other body or organisation constituted or established under any law;'

42. There can be no doubt that coverage of section 2(b) of Act XL of 1958 is far wider than that of section 21 of the Penal Code. The two provisions have only to be looked at by side to be sure that more people can now be called public servants for the purposes of the anti-corruption law.

43. Realising the importance of honesty and probity in public life and to weed out the corruption rampant amongst the Public servants, the legislators thought it fit and proper to frame a comprehensive legislation in the form of Anti-corruption Commission Act (Act-V of 2004). Before that they provided the above mentioned expanded definition of "Public servant" substituting 2(b) quoted above in Criminal Law Amendment Act, 1958 by the Ordinance No. VI of 1978.

44. In the expanded definition of the public servant, the legislators, amongst others, added, "a.....Member.....of any other body".

45. The word "any" as mentioned section 2(b) included "all" or "every" as well as "some" or "one" depending on the context of the subject matter of the statute. The word "any" used in section 2(b) has diversity and may be employed to indicate "all" or "every" as well as "some" or "one". The word "body" as used section 2(b) means a number individually spoken of collectively, usually associated for a common purpose, joined in a certain cause or united by some common tie or occupation. The parliament is a legislative body which is a creation of the Constitution itself. The main function of parliament is law making, that is, legislative. Earlier a member of the parliament had no specific function as to the custody, receipt or disbursement of any public money. But, today, that is not whole true. There is little change of the situation. It would not be irrelevant here to give some examples regarding activities of the members of Parliament. For example: "Probidhan 5 of

মাধ্যমিক ও উচ্চ মাধ্যমিক শিক্ষা বোর্ড, ঢাকা (মাধ্যমিক ও উচ্চ মাধ্যমিক বেসরকারী শিক্ষা প্রতিষ্ঠানের গভর্নিং বডি ও ম্যানেজিং কমিটি) প্রবিধানমালা, ২০০৯ provides- 5। গভর্নিং বডির সভাপতি মনোনয়ন।-(১) কোন স্থানীয় নির্বাচিত সংসদ সদস্য তাঁহার নির্বাচনী এলাকায় অবস্থিত বোর্ড কর্তৃক স্বীকৃতি প্রাপ্ত এমন সংখ্যক উচ্চ মাধ্যমিক স্তরের বেসরকারী শিক্ষা প্রতিষ্ঠানের গভর্নিং বডির সভাপতির দায়িত্ব গ্রহণ করিতে পারিবেন যেন উক্ত এলাকায় অবস্থিত, এই প্রবিধান মামলার আওতাভুক্ত নহে এইরূপ অন্যান্য বেসরকারী শিক্ষা প্রতিষ্ঠানসহ তাঁহার এইরূপ দায়িত্ব গ্রহণকৃত শিক্ষা প্রতিষ্ঠানের সংখ্যা চার এর অধিক না হয়।" Similarly Section 25 of the উপজেলা পরিষদ আইন, ১৯৯৮ provides ২৫। পরিষদের উপদেষ্টা।-(১) গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের অনুচ্ছেদ ৬৫ এর অধীন একক আঞ্চলিক এলাকা হইতে নির্বাচিত সংশ্লিষ্ট সংসদ সদস্য পরিষদের উপদেষ্টা হইবেন এবং পরিষদ উপদেষ্টার পরামর্শ গ্রহণ করিবে।"

There are instances of the activities of the members of Parliament which are related to the executive functions of the State and money disbursement. By different ways the members of Parliament involved themselves in executive functions.

46. As per provision of Article 3 of P.O. No. 28 of 1973 a Member shall be entitled to receive a remuneration at the rate of twenty seven thousand and five hundred take per mensem and to the privileges and amenities provided in the order during the whole of his term of office. That is, the Members of Parliament received remuneration from the government during the whole of his term in office. Article 3C(1) of P.O. 28 of 1973 provides that a member shall be, entitled to import free of customs duty, value added tax, development surcharge and import permit fee during the whole of his term of office, one car, jeep or microbus of such specification, and on such conditions, as the Government may specify in this behalf. Article 3CC says, "A member shall be entitled to receive a transport allowance at the rate of forty thousand take per mensem. Article 3D provides:

"A member shall be entitled to receive office expenses allowance at the rate of nine thousand take per mensem for maintaining an office in his constituency. A member shall also get laundry and miscellaneous expenses allowances, allowances relating to journey performed for the purposes of attending a session, daily allowances travel allowance within the country, insurance coverage, discretionary grant, medical facilities for family members etc."

47. The oath that they took referred to their obligation to "faithfully discharge the duty" upon which they were about to enter. They are public servants since they held office by virtue of which they were authorized or required to perform public duty. The word "office" has been used in Articles 3 and 3D of P.O. 28 of 1973 meaningfully.

48. Furthermore, regarding the object of legislation of Anti-corruption Act as stated in the preamble is:

“দেশে দুর্নীতি এবং দুর্নীতিমূলক কার্য প্রতিরোধের লক্ষ্যে দুর্নীতি এবং অন্যান্য সুনির্দিষ্ট অপরাধের অনুসন্ধান এবং তদন্ত পরিচালনার জন্য একটি স্বাধীন দুর্নীতি দমন কমিশন প্রতিষ্ঠা এবং আনুষ্ঠানিক বিষয়াদি সম্পর্কে বিধানকল্পে প্রণীত আইন যেহেতু দেশে দুর্নীতি এবং দুর্নীতিমূলক কার্য প্রতিরোধের লক্ষ্যে দুর্নীতি এবং অন্যান্য সুনির্দিষ্ট অপরাধের অনুসন্ধান এবং তদন্ত পরিচালনার জন্য একটি স্বাধীন দুর্নীতি দমন কমিশন প্রতিষ্ঠা এবং আনুষ্ঠানিক বিষয়াদি সম্পর্কে বিধান করা সমীচীন ও প্রয়োজনীয়।”

49. In the schedule of the ACC Act section, 161 and 409 of the Penal Code and Prevention of Corruption Act, 1947 have been included objectively. Section 17 of ACC Act empowered the Commission to hold inquiry and investigation in respect of the offence as described in the schedule of the Act which runs as follow:

- ১৭। কমিশনের কার্যাবলি।-কমিশন নিম্নবর্ণিত সকল বা যে কোন কার্য সম্পাদন করিতে পারিবে, যথাঃ-
- (ক) তফসিলে উল্লিখিত অপরাধসমূহের অনুসন্ধান ও তদন্ত পরিচালনা,
 - (খ) অনুচ্ছেদ (ক) এর অধীন অনুসন্ধান ও তদন্ত পরিচালনার ভিত্তিতে এই আইনের অধীন মামলা দায়ের ও পরিচালনা;
 - (গ) দুর্নীতি সম্পর্কিত কোন অভিযোগ স্ব উদ্যোগে বা ক্ষতিগ্স্থ ব্যক্তি বা তাহার পক্ষে অন্য কোন ব্যক্তি কর্তৃক দাখিলকৃত আবেদনের ভিত্তিতে অনুসন্ধান;
 - (ঘ) দুর্নীতি দমন বিষয়ে আইন দ্বারা কমিশনকে অর্পিত যে কোন দায়িত্ব পালন করা;
 - (ঙ) দুর্নীতি প্রতিরোধের জন্য কোন আইনের অধীন স্বীকৃত ব্যবস্থাদি পর্যালোচনা এবং কার্যকর বাস্তবায়নের জন্য রাষ্ট্রপতির নিকট সুপারিশ পেশ করা;
 - (চ) দুর্নীতি প্রতিরোধের বিষয়ে গবেষণা পরিকল্পনা তৈরি করা এবং গবেষণালব্ধ ফলাফলের ভিত্তিতে করণীয় সম্পর্কে রাষ্ট্রপতির নিকট সুপারিশ পেশ করা;
 - (ছ) দুর্নীতি প্রতিরোধের লক্ষ্যে সততা ও নিষ্ঠাবোধ সৃষ্টি করা এবং দুর্নীতির বিরুদ্ধে গণসেচন গড়িয়া তোলার ব্যবস্থা করা;
 - (জ) কমিশনের কার্যাবলি বা দায়িত্বের মধ্যে পড়ে এমন সকল বিষয়ের উপর সেমিনার, সিম্পোজিয়াম, কর্মশালা ইত্যাদি অনুষ্ঠানের ব্যবস্থা করা;
 - (ঝ) আর্থ সামাজিক অবস্থার প্রেক্ষিতে বাংলাদেশে বিদ্যমান বিভিন্ন প্রকার দুর্নীতির উৎস চিহ্নিত করা এবং তদনুসারে প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য রাষ্ট্রপতির নিকট সুপারিশ পেশ করা;
 - (ঞ) দুর্নীতির অনুসন্ধান, তদন্ত, মামলা দায়ের এবং উক্তরূপ অনুসন্ধান, তদন্ত ও মামলা দায়েরের ক্ষেত্রে কমিশনের অনুমোদন পদ্ধতি নির্ধারণ করা; এবং
 - (ট) দুর্নীতি প্রতিরোধের জন্য প্রয়োজনীয় বিবেচিত অন্য যে কোন কার্য সম্পাদন করা।

50. Section 19 provides:

“১৯। অনুসন্ধান বা তদন্তকার্যে কমিশনের বিশেষ ক্ষমতা।-(১) দুর্নীতি সম্পর্কিত কোন অভিযোগের অনুসন্ধান বা তদন্তের ক্ষেত্রে, কমিশনের নিম্নরূপ ক্ষমতা থাকিবে, যথাঃ-

(ক) সাক্ষীর নোটিশ জারি ও উপস্থিতি নিশ্চিতকরণ এবং সাক্ষীকে জিজ্ঞাসাবাদ করা;

(খ) কোন দলিল উদঘাটন এবং উপস্থাপন করা;

(গ) সাক্ষ্য গ্রহণ;

(ঘ) কোন আদালত বা অফিস হইতে পাবলিক রেকর্ড বা উহার অনুলিপি তলব করা;

(ঙ) সাক্ষীর জিজ্ঞাসাবাদ এবং দলিল পরীক্ষা করার জন্য নোটিশ জারি করা; এবং

(চ) এই আইনের উদ্দেশ্যে পূরণকল্পে, নির্ধারিত অন্য যে কোন বিষয়।

(২) কমিশন, যে কোন ব্যক্তিকে অনুসন্ধান বা তদন্ত সংশ্লিষ্ট বিষয়ে কোন তথ্য সরবরাহ করিবার জন্য নির্দেশ দিতে পারিবে এবং অনুরূপভাবে নির্দেশিত ব্যক্তি তাহার হেফাজতে রক্ষিত উক্ত তথ্য সরবরাহ করিতে বাধ্য থাকিবেন।

(৩) কোন কমিশনার বা কমিশন হইতে বৈধ ক্ষমতাপ্রাপ্ত কোন কর্মকর্তাকে উপ-ধারা (১)এর অধীন ক্ষমতা প্রয়োগে কোন ব্যক্তি বাধা প্রদান করিলে বা উক্ত উপ-ধারার অধীন প্রদত্ত কোন নির্দেশ ইচ্ছাকৃতভাবে কোন ব্যক্তি অমান্য করিলে উহা দণ্ডনীয় অপরাধ হইবে এবং উক্ত অপরাধের জন্য সংশ্লিষ্ট ব্যক্তি অনূর্ধ্ব ৩(তিন) বৎসর পর্যন্ত যে কোন মেয়াদে কারাদণ্ডে বা অর্থদণ্ডে বা উভয় প্রকার দণ্ডে দণ্ডনীয় হইবেন।”

51. Section 20 provides:

“২০। তদন্তের ক্ষমতা।-(১) ফৌজদারী কার্যবিধিতে যাহা কিছুই থাকুক না কেন এই আইনের অধীন ও উহার তফসিলে বর্ণিত অপরাধসমূহ কেবলমাত্র কমিশন কর্তৃক তদন্তযোগ্য হইবে।

(২) উপ-ধারা (১) এ উল্লিখিত অপরাধসমূহ তদন্তের জন্য কমিশন, সরকারি গেজেটে প্রজ্ঞাপন দ্বারা, উহার অধঃস্তন কোন কর্মকর্তাকে ক্ষমতা প্রদান করিতে পারিবে।

(৩) উপ-ধারা (২) এর অধীন ক্ষমতাপ্রাপ্ত কর্মকর্তার, অপরাধ তদন্তের বিষয়ে, থানার ভারপ্রাপ্ত একজন কর্মকর্তার মতা থাকিবে।

(৪) উপ-ধারা (২) ও (৩) এর বিধান সত্ত্বেও, কমিশনারগণের এই আইনের অধীন অপরাধ তদন্তের ক্ষমতা থাকিবে।”

52. Section 21 of the Act provides:

“২১। গ্রেফতারের বিশেষ ক্ষমতা।- এই আইনের অন্যান্য বিধানে যাহা কিছুই থাকুক না কেন, কমিশনের কোন কর্মকর্তার যদি বিশ্বাস করিবার যুক্তিসংগত কারণ থাকে যে, কোন ব্যক্তি তাহার নিজ নামে বা অন্য কোন ব্যক্তির নামে স্থাবর বা অস্থাবর সম্পত্তির মালিক বা দখলদার যাহা তাহাদের ঘোষিত আয়ের সহিত অসঙ্গতিপূর্ণ এবং যাহা ধারা ২৭ এবং অধীন দণ্ডনীয় অপরাধ, তাহা হইলে উক্ত ব্যক্তির বিরুদ্ধে কোন এজাহার দায়ের হইবার পূর্বেই অনুসন্ধানের প্রয়োজনে আবশ্যিক হইলে উক্ত কর্মকর্তা, কমিশনের পূর্বানুমোদন গ্রহন করিয়া, উক্ত ব্যক্তিকে গ্রেফতার করিতে পারিবেন।”

53. Section 26 of the Act provides:

“২৬। সহায় সম্পত্তি ঘোষণা- (১) কমিশন কোন তথ্যের ভিত্তিতে এবং উহার বিবেচনায় প্রয়োজনীয় তদন্ত পরিচালনার পর যদি এই মর্মে সন্তুষ্ট হয় যে, কোন ব্যক্তি, বা তাহার পক্ষে অন্য কোন ব্যক্তি, বৈধ উৎসের সহিত অসঙ্গতিপূর্ণ সম্পত্তির দখলে রহিয়াছেন বা মালিকানা অর্জন করিয়াছেন, তাহা হইলে কমিশন, লিখিত আদেশ দ্বারা, উক্ত ব্যক্তিকে কমিশন কর্তৃক নির্ধারিত পদ্ধতিতে দায় দায়িত্বের বিবরণ দাখিলসহ উক্ত আদেশে নির্ধারিত অন্য যে কোন তথ্য দাখিলের নির্দেশ দিতে পারিবে।”

54. Section 27 of the Act provides:

“২৭। জ্ঞাত আয়ের উৎস বহির্ভূত সম্পত্তির দখল।-
(১) কোন ব্যক্তি তাহা নিজ নামে বা তাহার পক্ষে অন্য কোন ব্যক্তির নামে, এমন কোন স্থাবর বা অস্থাবর সম্পত্তির দখলে রহিয়াছেন বা মালিকানা অর্জন করিয়াছেন, যাহা অসাধু উপায়ে অর্জিত হইয়াছে এবং তাহার জ্ঞাত আয়ের উৎসের সহিত অসঙ্গতিপূর্ণ বলিয়া মনে করিবার যথেষ্ট কারণ রহিয়াছে এবং তিনি উক্তরূপ সম্পত্তি দখল সম্পর্কে আদালতের নিকট বিচারে সন্তোষজনক ব্যাখ্যা প্রদান করিতে ব্যর্থ হইলে উক্ত ব্যক্তি অনূর্ধ্ব ১০(দশ) বৎসর এবং অনূন্য ৩ (তি)বৎসর পর্যন্ত যে কোন মেয়াদে কারাদণ্ডে দণ্ডনীয় হইবেন এবং তদুপরি অর্থ দণ্ডেও দণ্ডীয় হইবেন; এবং উক্তরূপ সম্পত্তিসমূহ বাজেয়াপ্ত যোগ্য হইবে।”

55. Analysing the scheme of the ACC Act, it can be said that there is complete departure from Penal Code and Act II of 1947. All those provisions are to be applicable for "any person" who committed the offences mentioned therein. Act has been enacted with the specific object of altering the existing anti-Corruption laws so as to make them more effective by widening their coverage and by strengthening the provisions and also to widen the scope of the definition of "public servant". Those persons should be tried by the Special Judge. Section 28 of the Act provides -

“২৮। অপরাধের বিচার, ইত্যাদি।-(১) আপাতত বলবৎ অন্য কোন আইনে ভিন্নরূপ যাহা কিছুই থাকুক না কেন, এই আইনের অধীন ও উহার তফসিলে বর্ণিত অপরাধসমূহ কেবলমাত্র স্পেশাল জজ কর্তৃক বিচারযোগ্য হইবে।”

56. From non-obstante clause as provided in section 28 of the Anti-Corruption Act cleared that the provision of the Anti-Corruption Act shall prevail over any other law.

57. In view of the provisions quoted above, it appears to us the Anti-Corruption Commission Act is applicable in respect of public servant as well as "any other person". The Prevention of Corruption Act, 1947 and Anti Corruption Commission Act and Criminal Law Amendment Act, 1958 are the enactments which are meant for the benefit of the public. The main aim of those Acts are eradication of the Corruption which is permeating every nook and corner of the country. Corruption by public servants has now reached a monstrous dimension in Bangladesh. Its tentacles have been grappling even the institutions established for the protection of the State. Those must be intercepted and impeded the orderly functions of the public officer, through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyze the functioning of such institutions and thereby hinder the democratic polity. Hence, the laws should be so interpreted which would serve the object of the Acts. The founding fathers of the Constitution envisioned the legislators as men of character, rectitude and moral uprightness whose sole object was to serve

the public with dedication, to be open, truthful and legal. We are reminded here of the memorable words of H.G. Wells. He was of the view:

58. "The true strength of rulers and empires lies not in armies or emotions, but in the belief of men that they are inflexibly open and truthful and legal. As soon as a Government departs from that standard, it ceases to be anything more than "the gang in possession" and its days are numbered." Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operative public institution.

59. Franklen has said-

"Let honesty be as the breath of they soul; then shall thou reach the point of happiness, and independence shall be they shield and buckle, they helmet and crown; then shall they soul walk upright, nor stoop to the silken wretch because he hath riches, nor pocket an abuse because the hand which officers it wears or ring set with diamonds"

60. Thomas Jefferson said-

"The whole of Government consists in the art of being honest."

61. J.A.G. Griffith in "Parliament" Functions, practice and procedure, has cited Edmund Bruke while Commentina on the functions of the Members of Parliament. Accordingly to him, "It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication, with his constituents. Their wishes ought to have great weight with him, their opinion, high respect, their business, unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions to theirs- and above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living-----your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you, if he sacrifices it to yours opinion.

62. In the case of Raja Ram Pal V. Hon'ble Speaker reported in (2007) 3 SCC 184 J. Raveendran, J, has observed that the appropriate course in case of allegation of corruption against a Member of Parliament, is to prosecute the Member in accordance with law.

63. In L.K. Advani's case (supra) it was finally observed, "Now each and every person who holds an office by virtue of which he is required to perform any public duty in the discharge of which the State, public or the community at large is interested would be deemed to be a 'public servant'. It is no more necessary that to be a "public servant" the said person must be in the pay of the Government or remunerated for the performance of any public duty by the Government." In fact, in India finally the controversy has been settled in the case of P.V. Narsimha Rao (Supra) in which it has been observed that Member of Parliament is a public servant for the purpose of Prevention of Corruption Act.

64. We are, therefore, of the view that a member of Parliament holds an office and by virtue of such office he is required or authorized to carry out duties and such duties are in the nature of public duties.

65. Another important aspect is that challenging the proceedings of Special cases writ Petition No. 9905 of 2007 and 8578 of 2007 are not maintainable inasmuch as

Code of Criminal Procedure provides efficacious remedy to get redress if one feels himself aggrieved due to initiation of such criminal proceedings. In such view of the matter those two writ petitions were not maintainable.

66. Whether the accused respondents have committed any offence within the meaning of section 409/109 of the Penal Code read with section 5(2) of Act II of 1947 or not are to be decided after recording evidence by the trial Court.

67. In view of such circumstances, we find substance in the submissions made by Mr. Mahbubey Alam, learned Attorney General.

68. Accordingly, we find merit in the appeals as well as in civil petition. Thus the judgment and order dated 14.02.2008 passed by the High Court Division in Writ Petition No. 9905 of 2007, judgment and order dated 18.05.2008 passed by the High Court Division in Writ Petition No. 8578 of 2007 and judgment and order dated 16.06.2011 passed by the High Court Division in Criminal Miscellaneous Case No. 10340 of 2011 are set aside. Consequently, C.A. 68 of 2009 and C.A. No. 03 of 2009 are allowed. The Criminal Petition for Leave to Appeal No. 421 of 2012 is hereby disposed of. The respective trial Court are directed to proceed with the respective proceedings in accordance with law.

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