LEX/BDAD/0095/2012

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IN THE SUPREME COURT OF BANGLADESH (APPELLATE DIVISION)

Civil Appeal No. 132 of 2006

Decided On: 08.11.2012

Appellants: **Anwarul Huq**
Vs.
Respondent: **Iqbal Ahmed and Ors.**

Hon'ble Judges:
Muzammel Hossain, C.J., Surendra Kumar Sinha, Abdul Wahhab Miah, Nazmun Ara Sultana and Muhammad Imman Ali, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Rafique-ul-Huq, Abdul Wadud Bhuiyan, Senior Advocates and Shah Monjurul Hoque, Advocate instructed by Khursheed Jahan, Advocate-on-Record

For Respondents/Defendant: Mahmudul Islam and Fida M. Kamal, Senior Advocates instructed by Sufia Khatun, Advocate-on-Record

JUDGMENT

Muzammel Hossain, C.J.

1. I have gone through the judgments proposed to be delivered by my brothers, Surendra Kumar Sinha, J. and Md. Abdul Wahhab Mian, J. I. agree with the reasoning and findings given by Md. Abdul Wahhab Miah, J. Surendera Kumar Sinha J. The precise questions that arise in this appeal are firstly, whether the High Court Division in exercise of its revisional power can interfere with the findings of fact arrived at by the lower appellate Court and secondly, whether in view of the specific findings of the court of appeal below that the defendant-appellant having got a register lease deed in respect of the suit plot after the cancellation of the allotment of the plaintiffs-respondents' predecessor and possession of the said plot, the suit without seeking cancellation of the registered lease deed and recovery of khas possession is maintainable.

2. Short facts relevant for the disposal of these points are as under. Respondents instituted the suit in question seeking declaration of leasehold right in respect of plot No. 41 of Sector No. 13, Uttara Residential Model Town, measuring an area of 612 sq. yards 6 fts more or less 3 kathas of land and a further declaration that the cancellation of their predecessor's lease is illegal. The plot in question was allotted to one Mrs. Khaleda Rahman, who having got possession of the same on 12th February, 1970, executed a lease deed with the Rajdhani Unnayan Kartipakha (RAJUK) on 12th January, 1970. Subsequently with prior permission of RAJUK she transferred the said plot in favour of late Md. Aman Ullah, the predecessor-in-interest of the plaintiffs. Thereafter, the Chairman, RAJUK cancelled the Allotment of the suit plot. Respondent No. 1 (defendant) Anwarul Haque contested the suit. The substance of his claim is that he got allotment and delivery of possession of the suit plot along with other lands measuring an area of 7 kathas 10 chhattaks 23 sq. ft. and thereupon RAJUK executed a registered lease deed in his favour on 23rd September, 1996. The suit without seeking cancellation of his registered lease deed and recovery of khas

possession is not maintainable and therefore, the suit is barred under sections 39 and 42 of the Specific Relief Act.

3. The trial Court dismissed the suit and on appeal by the plaintiffs, the Court of appeal below affirmed the said judgment. The plaintiffs then took a revision petition in the High Court Division which made the rule absolute and decreed the suit. The High Court Division without repelling the findings of the courts below, particularly those of the appellate court on the question of possession and the maintainability of the suit, interfered with the judgments. The point that falls for determination is whether the High Court Division was guided in its approach to correct legal principles in the circumstances of the case.

4. There is no dispute that Khaleda Rahman sold a portion of the suit plot with prior permission of RAJUK without making any construction. RAJUK accorded permission on 24th January, 1988 and the deed of sale was also executed and registered on 30th December, 1990. The Courts below concurrently held that RAJUK accorded permission for transfer of the plot attaching condition that the purchaser would have to file the sale deed within 4(four) months from 26th June, 1988 and that as the plaintiffs predecessor filed the deed after two years although he was required to file the same within four months of according permission, the allotment was cancelled for violation of the terms. The trial court held that admittedly Khaleda did not make any constructions within the stipulated time as per terms of the lease deed; that Amanullah did not mutate his name with RAJUK; that he did not take any step for mutation of his name even after issuance of ext. C; that as RAJUK did not recognize him as leasee, it is not required to issue any notice upon him before cancellation of the lease deed of Khaleda and that RAJUK allotted the suit plot in favour of the defendant after following legal formalities. The court of appeal below held that the documentary evidence appeared that RAJUK rescinded the allotment of the original allottee after complying legal formalities and then the plot was allotted in favour of the defendant; that P.W. 1 admitted in course of cross-examination that allottee Khaleda did not make any constructions on the suit plot; that he could not say when his father got possession from Khaleda; that the evidence on record revealed that a boundary wall of the plot had been constructed abound the suit plot but that he could not say who had constructed the same; and that as the plaintiffs are not claiming that they have constructed the said boundary wall, it is apparent that the plaintiffs are not in possession of the suit plot.

5. The High Court Division held that the cancellation of the transfer permission was not communicated to Khaleda Rahman and Amanullah as evident from the fact that it was not available with the record and that the same was not exhibited. The High Court Division further held that this cancellation without affording a hearing to Amanullah is violative of the principles of natural justice. On the other breath, it held that 'Except the time limit, other requirements were fulfilled by the predecessor of the petitioners within time'. This finding is inconsistent with the earlier finding and this finding proved that the plaintiff's predecessor Amanullah had knowledge about the time limit of transfer within 4 months. The High Court Division did not disturb any of the findings arrived at by the courts below, particularly the findings of possession and the maintainability of the suit.

6. It is now settled that the rule as to finding of fact is not so rigid that it might not be departed from if such a state of things existed as facts appearing from some undisputed document or evidence which are completely destructive of the finding of fact by the courts below. But, without repelling the finding of fact the High Court Division has no power to reverse the judgments of the courts below. Though leave was granted to consider this point, my learned brother expressing the majority

opinion is totally silent on this question. The High Court Division has not at all assigned any reasons as to whether the findings of the court of appeal below constitute error apparent on the face of the record which have occasioned failure of justice. The revisional power can be invoked only when there is misreading or non-consideration of the material evidence which has occasioned a failure of justice. In Abdus Sattar V. Mohiuddin, 38 DLR (AD) 97, the point in controversy was whether the respondent Mohiuddin was appellant Abdus Sattar's tenant by holding over or that is father. Kala Mia had been a tenant under the appellant. On behalf of the appellant it was urged that the evidence of the respondent's, showed that he had got possession of the land by purchase and that his father was not a tenant of the appellant; that he did not inherit it on his father's death and that as such, there was no question of holding over. This Division in the context of these disputed fact held that these questions had been decided finally by the appellate court and they could not be reopened and re-agitated in revision unless it is shown that the findings had not been made on due consideration of all material evidence according to the established principles of assessment of evidence.

7. On the question of finding of fact, the views taken by the Judicial Committee of the Privy Council in Durga Choudhrain V. Jawhir Singh, 17 I.A. 122 have been approved by the Supreme Courts of India and Pakistan and this Division. In that case, it was observed, there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however, cross or inexcusable the error may seen to be and it added a note of warning that no court in India has power to add or enlarge the grounds specified in section 100 of the Code of Civil Procedure. In Ramappa v. Bajjappa, MANU/SC/0008/1963 : AIR 1963 SC 1633, it also cautioned that in reaching its decision in second appeals, the High Court contravenes the express provisions of section 100, it would inevitably introduce in such decisions an clement of disconcerting unpredictability which is usually associated with gambling; and that is an approach which judicial process must constantly and scrupulously endeavour to avoid'

8. The Pakistan Supreme Court repeatedly reminded the High Courts the scope of section 100 and 115 and observed that section 115 is attracted in the case of jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it and that section 115 is not directed against conclusion of law or fact in which the question of jurisdiction is not involved. Of course, the language used in section 115 is a bit of distinct from the earlier provision, liven under the present provisions of section 115, in Shamser Ali Md. V. Mosammat Kafizan Bibi, 44 DLR (AD) 231, this Division interfered with the judgment of the High Court Division when it found that the High Court Division disturbed the findings of the lower appellate court on re-appraisal of the evidence and held that the High Court Division committed error of law when there was no misreading of evidence and misconstruction of the document.

9. In Rupjahan Begum V. Lutfay Ali Chowdhury, 17 BLD (AD) 66, the question was whether the defendant No. 1 was the benamder of the plaintiff in respect of the suit land. The lower courts concurrently found that the transaction in respect of the suit land was not benami. The High Court Division sent the matter back on remand by setting aside the concurrent findings. This Division was of the view that the finding as to the benami being essentially a finding of fact is immune from interference unless it is found that the finding is based on gross misreading of evidence or non-consideration of material evidence or it has been founded on mis-conception of law occasioning failure of justice. In that case the courts below disbelieved the plaintiff's possession. In view of the above, this Division held that "the first two court's below concurrently found that the plaintiff had no possession in the suit lands and that

without a prayer for recovery of khas possession the suit as framed was not maintainable, but the learned Judge of the High Court Division did not reverse the said findings and thus committed an error of law in passing the judgment".

10. In Haji Nurul Alam V. Alhaj Abdus Sobhan Wakf Estate, 45 DLR (AD) 168, the prayer for temporary injunction was refused by the courts below on the grounds that it could not be established by two reports of the Advocate Commissioner that there was any vacant space in between two plots which was the sheet-anchor of the plaintiff's case. The High Court Division without repelling that finding allowed the prayer for temporary injunction. This Division in the premises, held "In disturbing the concurrent judgment of two courts below, it was imperative on the part of the learned Single Judge of the High Court Division to reverse the said concurrent findings and hold that the respondent had made out a prima-facie case for temporary injunction".

11. In Hussain Ahmed Chowdhury V. Nurul Ali, 47 DLR (AD) 162, the High Court Division remanded the suit to the trial Court by setting aside the concurrent findings after reassessment of the evidence. This Division interfered with the judgment on the reasoning that it is to be stated here that if there is misreading of evidence or non consideration of same material evidence then it was incumbent on the revisional Court to consider the same and to arrive at a proper finding on the material evidence on record and to finally dispose of the case.' In Bangladesh V. Chand Mia, 44 DLR (AD) 98, the question was whether summons of the suit was served upon the defendant No. 2. The court of appeal on consideration of the materials on record found that there was no service of summons upon the defendant. The High Court Division sitting on revision interfered with the said finding. This Division held "It was no function of the High Court Division to sit in appeal over that finding of the lower appellate court in the revisional jurisdiction. The High Court Division was only concerned with the question as to whether the lower court in giving that finding committed an error of law resulting in an error in the decision occasioning failure of justice".

12. It needs no elaboration that it has authoritatively been settled that a finding of fact is immune from interference by exercising revisional jurisdiction unless it is shown that the finding is based on gross misreading or of non-consideration of material evidence or it has been founded on misconception or misapplication of law or on misconstruction of any material document. The expression "error apparent on the face of the record" clearly shows that the error must be such which can be detected or noticed without any lengthy argument, that is to say, a conclusion which no one acting judicially could have arrived at from the evidence, in which case it constitutes an error of law, or the Court, in arriving at that finding, has been influenced by inadmissible evidence or has refused to admit admissible evidence.

13. Rule as to finding of fact is that in disposing a revision petition, the revisional court will not constitute itself into a. third court of fact and re-weigh the evidence which has impressed the courts of facts. In exceptional cases the High Court Division interferes with findings of fact, where the finding is based on no evidence or is against the weight of evidence or is vitiated by any legal error or is unreasonable interference is justified. When there is no misreading or non-consideration of evidence or no misconstruction of documentary evidence, the High Court Division cannot sit over the facts finding court as a court of appeal. This settled law has totally been ignored by the High Court Division.

14. The High Court Division has given emphasis on the letter dated 26th June, 1988, observing that the defendant could not show that letter was served upon Amanullah,

the plaintiff's predecessor. In the majority opinion also it was observed that his letter was not filed and exhibited in the suit as found by the trial court. As a matter of fact the trial court has not made such observation. Admittedly Amanullah neither intimated RAJUK about the deed executed by Khaleda nor mutated his name after the execution of the deed. So he was not recognised as lessee by RAJUK. Even after the execution of the deed, Khaleda remained as lessee with RAJUK's record. This fact was totally ignored. It may be noted that the reference of this letter elated 26th June, 1988 has been made in Ext. 9-D (through oversight it was mentioned as Ext-D), which is the minutes of the resolution of RAJUK, in which, it was directed that Aman Ullah should submit the certified copy of the transfer deed, agreement and the deed of undertaking for mutation of his name within 4(four) months from the date of its issuance but he submitted the same after two years. Admittedly, on the prayer of the original allottee Khaleda Rahman on 10th April, 1987, RAJUK accorded permission to transfer the plot in favour of Amanullah Mia. It was a resolution of the Board of RAJUK would be evident from the deposition of A. Mannan Sarkar, (D.W. 3) deposed on behalf of RAJUK, who stated in chief that in the sale permission letter it was

'নাঃ জমিটি রেজিস্ট্রি করে
৪ মাসের মধ্যে নাম খারিজের জন্য রাজউকের নিকট
দাখিল করিতে হবে হলফনামা ও অঙ্গিকার নামা তৈরী
করে।'

mentioned that . The minutes of the meeting of RAJUK show that the notice was served upon Khaleda Rahman. So there is positive evidence that after the registration of the deed, it should be submitted along with the affidavit and undertaking within four months for mutation. He then stated that he filed the Khaleda's allotment letter, Ext. 9-A, the minutes of RAJUK's Board decision relating to the cancellation of the disputed plot dated 26th September, 1995, Ext. 9-B, the decision of the Board dated 21st May, 1995 Ext. 9-D and Khaleda's sale permission letter, Ext 9-E.

15. This witness has reproduced the relevant portion of the RAJUK's Board's resolution in verbatim. The plaintiff's side did not challenge this statement of the witness in course of cross examination. The plaintiffs also did not give any suggestion to this witness that no such decision was taken in the Board's meeting or that it was not served upon Khaleda. So, there are uncontroverted evidence on record that the transfer permission order was conditional one that the purchaser must submit the deed of transfer with other documents within 4(four) months for mutation. Therefore, it is not sound to accept that the plaintiff's predecessor had no knowledge about the conditional order of permission for transfer. In Ext. 9-D it was pointed out that as there was violation of the terms of permission, a show cause notice was issued on 29th September, 1991 within 15 days but no reply was given.

16. It is evident from Ext. 9-D that despite service of notices the recipient did not respond to the notices. Then the Board decided to cancel the permission in its meeting and in pursuance of the resolution No. 4/95 dated 21st May 1995, the lease was cancelled and recalled the decision taken on 26th September, 1995. The resolutions of the Board were taken for transacting the business of RAJUK in accordance with law. It is a statutory organization. The court may presume that in the common course of business, RAJUK has conducted its business in accordance with law and in course of such transaction it cancelled the allotment of the disputed plot since the recipient did not act in accordance with the direction. When the common course of business of RAJUK has been proved by production of the minutes of the Board, the court may under illustration (f) of section 114 of the Evidence Act presume that the cancellation of the allotment of the plot was made after following the legal formalities.

17. While section 114 of the Evidence Act states general maxim that all acts are

presumed to have been rightly and regularly done, illustration (c) of section 114 draws attention to a special application of the maxim with particular reference to judicial and official acts. As regards the cancellation of allotment the consistent findings of the courts below are that Amanullah was not recognized as lessee by RAJUK as he did not intimate it regarding the transfer of the plot within the stipulated time and therefore, he was not entitled to receive a notice of cancellation. This finding is based on proper appreciation of the materials on record and the High Court Division ignoring this finding made out a third case.

18. Apart from what is stated above, the High Court Division failed to notice that it is the responsibility of the plaintiffs to prove their case. It was positively asserted by evidence that such letter was issued. It is none of the business of the defendants to produce the plaintiffs' document. If the plaintiffs' predecessor did not receive the letter as it was not allegedly served upon him, they ought to have called for the same from RAJUK for ascertaining the truth of their claim. The initial onus to prove about the fact of non-existence of the letters dated 26th June, 1988 and 29th September, 1991 or any other document is upon the plaintiffs. Where there is a presumption as to existence of a fact, the burden of proving the non-existence of that fact is on the party who asserts its non-existence. The High Court Division made observations on the basis of the submissions of the plaintiffs' lawyer. The plaintiffs' witness Iqbal Ahmed (P.W. 1) did not say that Khaleda Rahman did not receive the said notice. He simply stated that without service of notice upon them regarding the cancellation, of the allotment, the allotment of the plot was given in favour of the defendant. So, the High Court Division made out a third case as regards the non-service of notice. Besides, D.W. 3 specifically mentioned the contents of the first notice in his evidence but the plaintiffs did not challenge his claim. Therefore, the finding that the plaintiffs were not aware of the direction of RAJUK is based upon misreading and/or non application of judicial mind.

19. The order of cancellation of plot was communicated to Khaleda Rahman under memo dated 9th November, 1995, page 149 of the supplementary paper book dated 1st August, 2010. The cancellation was made on the ground that she could not make construction as per terms of the lease deed. So, the finding of the High Court Division that this letter was not communicated to Khaleda Rahman is also based on non-consideration of this letter. It failed to notice that Khaleda Rahman being the recipient of the letter, it is only Khaleda who could prove this fact of non-service of the notice but the plaintiffs have not examined her.

20. As regards the maintainability of the suit, the High Court Division has overlooked the findings of possession made by the fact finding Court. This finding of possession is final and binding upon the High Court Division unless it is reversed on the ground of misreading or non-consideration of the material evidence. Where the plaintiff is able to seek further relief than a mere declaration and omits to do so, the Court shall not grant declaratory decree. The plaintiffs are therefore, required to seek some consequential relief directly flowing from the right in respect of which they seek relief and if they do not, they are not permitted by law to a mere declaration without asking for consequential relief. In a suit if other side pleads the bar under the proviso, the Court cannot pass a decree without coming to a finding on the question.

21. Another fundamental error committed by High Court Division is that without application of its judicial mind it has held that the plaintiffs have prayed for cancellation of the defendant's deed, but as a matter of fact, they have not sought for cancellation of the defendant's lease deed. Keeping a registered instrument outstanding in the name of the defendant relating to the suit plot, the plaintiffs are not entitled to a decree in the suit. Therefore, this finding of maintainability of the

suit is perverse and was made without application of judicial mind. Right to sue is dependent on the cause of action and cause of action arises when one's right is violated. In order to have that relief the person claiming a right has to seek appropriate relief and in the absence of appropriate relief the action is not entertain able. Having realized the defeat and the finding of the High Court Division on the question of cancellation of the deed, the plaintiffs filed an application in this Division on 8th July, 2010, for amendment of the plaint for addition of a relief to the effect that "the registered lease deed dated 23.6.1996 executed by RAJUK in favour of defendant No. 1 is illegal and not binding upon the plaintiffs". This time also, the plaintiffs did not seek consequential, relief for recovery of khas possession.

22. Now, the question is whether this amendment can be allowed at this belated stage even if it is found that this amendment is relevant for the purpose of determining the real question in controversy, and secondly, whether the plaintiffs" are entitled to a decree in the suit without a prayer for recovery of khas possession or in the alternative, without any finding that as the plaintiffs are in possession, they need not seek consequential relief. It should be noted that in the written statement which was filed on 3rd March, 1998, the defendant specifically pleaded that after getting allotment of the suit plot, a registered lease deed was executed on 23rd September, 1996 and that the delivery of possession of the plot was also given on that date. In view of this positive statement, the plaintiffs cannot say that they have no knowledge about the lease deed and the delivery of possession. The natural presumption flowing from the pleadings is that the plaintiffs had knowledge about the defendant's lease deed and the delivery of possession at least in March, 1998. Under such circumstances, this prayer for amendment cannot be allowed after more than twelve years of knowledge.

23. Following the opinion of the Judicial Committee of the Privy Council, the Supreme Court of Pakistan in Keramat Ali v. Md. Younus, 15 DLR (SC) 120, held that amendment of pleading should not be allowed ignoring the plea of limitation. In that case, the auction purchasers filed a suit in 1945 claiming that they were the auction purchasers of the property and not benamder of the decree holder. They did not claim for recovery of khas possession although the judgment debtors in pursuance of the award in their favour had actually restored possession of the land and claimed in their written statement that the suit was barred under section 42 of the Specific Relief Act in the absence of consequential relief. The plaintiffs then came up with an application for amendment of the plaint. The Supreme Court following the cases of Md. Zahoor Ali Khan v. Mst. Thakooraneen Ruttar Koer, 11 MIA 458 and Charan Das v. Amir Khan, MANU/PR/0043/1920 : AIR 1921 PC 50 held that "in exercising this power, (amendment) no doubt, this court would be reluctant to allow an amendment which would have the effect of totally altering the nature of the suit or of taking away a valuable right accrued by lapse of time, but where the circumstances of a particular case it would be plainly inequitable to receive such a relief this court will not hesitate to do what the Judicial Committee did (Emphasis added).

24. In Nurun Nahar v. Md. Fazlur Rahman 1979 BSCR 135, K. Hossain, J. speaking for this Division reiterated the language used by the Judicial Committee of the Privy Council and the Supreme Court of Pakistan observing that the question of delay is always considered as an important consideration in allowing or refusing amendment of pleadings. K. Hossain, J. then answered the question of limitation in paragraph 9 observing that the question of limitation would arise in two ways; first, whether the claim to be included was barred on the date of institution of the suit and secondly, whether the claim is barred on the date of prayer for amendment. On the first, it is observed, the prayer for amendment can not be allowed as it was barred on the date of the suit. On the second, however, the prayer could be allowed subject to

fulfillment of certain conditions' (Emphasis Added), that is to say, the prayer could not be allowed, even if it was not barred on the date of institution of the suit, if the other side had accrued a valuable right by lapse of time.

25. In P.A. Ahmed Ibrahim v. Food Corporation of India, MANU/SC/0485/1999 : AIR 1999 SC 3033, by an amendment the plaintiff sought to introduce totally a different case which is inconsistent with the prayer made in the application. In the amendment the plaintiff realizing that the suit was barred, prayed for addition of a relief to refer the dispute to arbitration. This was sought 11 years after the cause of action had arisen. The prayer was refused on the reasoning that "such amendment would cause serious prejudice to the contention of the appellant that the claim of the respondent to recover the alleged amount was barred by the period of limitation as it was pointed out the cause of action for recovery of the same amount arose in the year 1975 and the amendment application was filed on 30.3.1986".

26. In Radhika Devi v. Bajrangi Singh, MANU/SC/0594/1996 : AIR 1996 SC 2358, in a partition suit, the defendant in written statement specifically pleaded about gift deed made in his favour regarding property in dispute. Amendment of plaint seeking declaration that gift deed was obtained fraudulently was filed beyond the period of limitation. Amendment was refused on the reasoning that the defendant acquired right by bar of limitation, observing "The ratio therein (MANU/SC/0019/1963 : AIR 1964 SC 11) applies to a fact situation where the party acquires right by bar of limitation and if the same is sought to be taken away by amendment of pleading, amendment in such circumstances would be refused". In Muni Lal v. The Oriental Fire & general Insurance Company ltd., 1995 AIR SCW 4656, a truck owner, on not returning of truck merely prayed for declaration that he is entitled to payment for loss of truck but not seeking consequential relief of payment of quantified amount. Truck owner sought permission in appeal to amend plaint to include unsought for relief. It was held that the plaintiff cannot be permitted to amend the plaint after suit for relief in question was barred by time during pendency of proceeding.

27. In K. Raheja constructions Ltd. v. Alliance Ministries, AIR 1995 SC, 1768, the suit was for permanent injunction. Subsequently the plaintiff prayed for amendment for relief of specific performance of contract on the plea that the amendment was necessary in view of subsequent knowledge about permission granted by the Commissioner. The Supreme Court rejected the prayer on the reasoning that the plaintiff had admitted in plaint that the defendant had refused to abide by the terms of contract and that the relief for specific performance having been made after seven years, the amendment would defeat the valuable right of limitation accrued to the defendant. Similar views have been expressed in Pirgonda Hongonda Patial v. Kalgonda Shid Gonda Patial, MANU/SC/0002/1957 : AIR 1957 SC 363.

28. In S. Kumar v. The Institute of C & P studies, MANU/SC/0341/1983 : AIR 1984 SC 59, the plaintiff instituted a suit for declaration and injunction. The trial court dismissed the suit holding that his remedy lay in damages. The appellate Court held the same view. In a second appeal, the plaintiff prayed for amendment of the plaint which prayer was rejected. The Supreme Court in the context held "we are constrained to reject it inasmuch as it is for the first time through out this protracted proceeding commencing with the institution of the suit in 1975 that the appellant is now seeking to include the relief although he had been dismissed. No circumstance has been shown explaining why the appellant should be permitted at this stage to amend the plaint. It has also not been established by the appellant that if a suit is filed now against the order of dismissal it would be within the period of limitation".

29. Thus we find consistent views of Judicial Committee, the Supreme Court of

Pakistan, India and this Division that the question of limitation should be kept in mind while considering the prayer for amendment of pleadings and that if the prayer is barred by limitation, the question of acquiring right on the other side would arise and under such circumstance, no amendment should be allowed affecting the right of the opponent side. This is evident from the language used by this Division in Nurun Nahar that instead of using the expression 'should be' it used the words 'could be' that is, if the prayer is bar Bed by limitation, the Court cannot allow the prayer. In that case, the prayer for amendment which was allowed by the High Court Division was maintained by this Division mainly on the reasoning that "in the plaint all facts were mentioned at the time the suit was instituted. The question of delay is not very material, as it is more a case of rearranging the facts and making a suitable prayer, than bringing new fact and praying for it for the first time by way of amendment. It is to be remembered that the appellant had notice of all facts from the inception of the suit, and it can not be said that she was taken by surprise when the amendment was prayed for". These observations are self-explanatory and need no further elaboration on the question of limitation.

30. This Division not only approved the views taken in Keramat Ali (supra), but also approved its earlier unreported case in Gulam Hafiz V. Khadem Ali Mia, C.A. No. 26 of 1975, in which, on the question of limitation it was observed that the High Court Division was not justified in rejecting the prayer for amendment overlooking the fact that 'obviously the prayer was made at a time when prima facie the other side might not have acquired any right by lapse of time'. (Emphasis supplied). Therefore, this Division kept in mind the question of limitation. The consistent views of the apex Courts are that the courts should not he oblivious about the question of accrual of right on the other side by the law of limitation while allowing or rejecting a prayer for amendment of pleadings. So the question of limitation is obviously a vital point to be looked into while considering a prayer for amendment of the plaint. If the delay is a material point for determining the controversy, that is, if the other side has acquired a right in the meantime, the court has no power to allow the amendment even if the proposed amendment is relevant for the purpose of determining all the issues in controversy between the parties.

31. It has been specifically pleaded in the written statement regarding the registration of the lease deed and thus, the plaintiffs cannot say that they are taken by surprise by the disclosure about the registration of the deed. It is not the case of the plaintiffs that they had no knowledge about the instrument in question earlier. They did not explain any reason why they made the prayer after 12 years of the date of disclosure. The only ground mentioned in the petition was that this relief is necessary for determining the real question in controversy between the parties. True, it is one of the main dispute in controversy between the parties but, this is not alone a ground for allowing an amendment for, the limitation is a law which is designed to impose of quietus on legal remedies with due diligence. It is intended to put an end to litigation and it requires that a litigant must come to Court and take recourse of legal remedies with due diligence otherwise it guillotines cases which seek relief at a point of time which is beyond the period specified thereunder. Principle of justice and fair play do not help those who are negligent in asserting their right and despite becoming aware about alleged void deed adverse to their interest remain in deep slumber. The facility regarding amendment of pleadings cannot be legitimately stretched to any length of unreasonable period at the whims, choices or sweet will of the affected party. When a person presumes that a deed is a nullity or totally devoid of lawful authority and ignores it beyond the period specified by the law of limitation, he does so at his own risk.

32. It is evident from the above authoritative pronouncements, the Court does not

possess uncontrolled and unlimited power in considering an application for amendment of pleadings at any stage of the proceedings and the powers are circumscribed by certain limitations. The Court should not allow amendment only because it is relevant for the purpose of determining the real question in controversy. This is probably because, even if the prayer is lawful, if the party seeking amendment sat over his rights, his rights will be extinguished by lapse of time if the relief is not sought within the period of limitation prescribed by law. Article 91 of the Limitation Act provides the limitation of 3 years for cancellation or setting aside an instrument from the date of knowledge. Such amendment would certainly cause serious prejudice to the defendant because the claim is barred.

33. The plaintiffs sat over their right and in the mean time, the defendant had acquired a right in the suit plot on the strength of this deed and if this right is taken away by amendment of pleading, amendment in such circumstances would be refused. Secondly, the plaintiffs were left with two options for getting full relief(s) in the suit. They can seek for cancellation of the deed under section 39 or a declaration that the deed is void. The plaintiffs in their application stated that since they were not parties to the deed, they need not seek for cancellation of the deed and that a declaration that the deed is illegal and not binding upon them would serve the purpose. This is based on misconception of law.

34. The remedy available under section 39 of the specific Relief Act is open to persons who are not parties to the instrument because even in respect of void instrument, there is reasonable apprehension that if the instrument is left outstanding may cause serious injury to the aggrieved party. Section 39 is founded on the administration of a protective justice for fear either that the instrument may be veraciously or injuriously used against the plaintiff, whether he is a party to it or not, when the evidence to impeach it may be lost or that it may throw a cloud or suspicion over his title or interest. The distinction between a suit for declaration that the instrument is not binding on the plaintiff and a suit for cancellation of an instrument is that when the plaintiff seeks to establish a title to himself and cannot establish that title without removing an obstruction such as, a decree or a deed to which he has been a party, then he must get that decree or deed cancelled or declared void. If the deed in respect of the suit plot stands even though the plaintiff is not a party, the defendant's title does not extinguish and in that case the plaintiff's title to in the suit plot will be clouded.

35. Therefore, the plaintiff's are required to seek either for cancellation of deed under section 39 or in the alternative, to seek a relief declaring the deed void under section 42. Reference in this connection may be made in Sufia Khanam v. Faizun Nessa, 39 DLR (AD) 46. In that case this Division approved the views taken by the Full Bench is Debaki Lal v. Iqbal Ahmed, LEX/HEPK/0030/1964 : 17 DLR 119 (FB and observed that "section 42 does not specifically provide for declaration of nullity of any written instrument; nevertheless, a decree for nullity of any instrument comes in under this section in view of the general provision therein as to declaration of any legal character as expressed in the words "any person entitled to any legal character". If, by an instrument a person's right and title is clouded or threatened, he may seek a declaration under this section to the effect that by the instrument his right and title has not been affected or that any other person who denies his title or claims title in himself has not acquired any right or title thereby.

36. It was further observed:

> "If the suit is filed for a declaration that a written instrument, whether it is a sale deed or a court's decree, "is void", it clearly comes under section 39,

since it is covered by the expression "any person against whom a written instrument is void or voidable....may sue to have it adjudged void or voidable'. But if a further prayer is included in the suit that by the void instrument the plaintiffs right has not been affected, then this prayer comes straight under section 42; similarly, if this prayer is framed in a different form, that is, the defendant acquired no right or interest thereby, it will make no difference, for this prayer is also covered by section 42. If his suit includes the reliefs that the instrument in question is void and his right has not been affected thereby and, or, the defendant acquired no right thereby, then the reliefs are covered by both sections 39 and 42. In such cases provisions of sections 39 and 42 will overlap."

37. So, a registered instrument cannot be avoided unless it is declared void or cancelled by a court of law. The plaintiffs having knowledge about the registered deed and on the strength of the said deed, the defendant has got possession of the suit plot; mutated his name, paid rent to the Government, and thereby he has acquired a valuable right in respect of the suit plot which right cannot be taken away by way of amendment when such claim is barred by law. Save in exceptional cases; leave to amend pleadings will ordinarily be refused when the effect of the amendment would be to take away from a party a legal right which had accrued to him by lapse of time.

38. More so, this amendment cannot be legally allowed because the plaintiffs are claiming right on the suit plot on the strength of Khaleda Rahman's lease and the deed of sale executed by her in favour of their predecessor, Exts. 4 and 4 (a) Khaleda Rahman was allotted 612 sq. yards 6 sft. land equivalent to 3 kathas of land and in her deed the said area was mentioned which she sold to Amanullah. Thus, the plaintiffs cannot claim any right in excess of 3 kathas of land in the suit plot but they are now seeking nullity of the lease deed of the defendant in respect of an area of 7 Kathas 10 Chattaks 23 sft, which is more than 4 kathas of land and this will be evident from the said deeds and the letter of RAJUK dated 17th April, 1996, after the measurement of the plot, page 83 of the supplementary paper book dated 1st August, 2010. The defendant paid for the excess land and got delivery of possession. The plaintiffs are also not claiming any right in respect of this excess 4(four) kathas of land and therefore, they can not legally seek a relief in respect of a subject matter over which they have no right or interest. Further, they did not give any boundary of their 3 kathas of land. Thus, in the absence of specific boundary of their 3 kathas of land, if the prayer for amendment is allowed the suit land would be vague and indefinite, and the suit would be liable to be dismissed on this ground alone .

39. Now the question is whether this Division can allow the prayer for amendment for doing complete justice. In the majority opinion, though it was noticed that the prayer for amendment was legally rejected, allowed the prayer by invoking Article 104 of the Constitution. I am unable to agree with the applicability or Article 104 in the facts of the given case. In appropriate cases, this Division can disturb the findings of fact for doing complete justice but this power is meant to supplement the existing legal frame work to do complete justice between the parties and not to supplement it. It is conceived to meet a situation which can not be effectively and appropriately tackled by the existing provisions of law. The Court cannot do anything for doing justice to one party which affects substantive rights of the other party. The power to do complete justice has been given to this Division and on no one else, is itself an assurance that it will be used with due restraint and circumspection, keeping in view the ultimate object of doing justice between the parties. This power of doing complete justice is not to be exercised frequently but sparingly. One should not lose sight of the fact that doing complete justice does not contemplate doing justice to

one party by ignoring statutory provision and thereby doing complete injustice to the other party by depriving him the benefit of law.

40. It is the fundamental principles of law that statutory provisions of law cannot override the constitutional provisions. If a valuable right is accrued to the other side, this fact should not be ignored in invoking power of complete justice. Generally, no court has competence to issue an order or direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. An order which this Division can make in order to do complete justice between the parties, must not only be consisted with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the statutory laws. This Division also cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. References in this connection are the cases of State of Punjab v. Renuka Singla, MANU/SC/0131/1994 : (1994) 1 SCC 175, State of U.P.V. Harish Chandra, (1996) 9 SCC 309, Union of India v. Kirloskar Pneumatic Co. Ltd. MANU/SC/0881/1996 : (1996) 4 SCC 453, University of Allahabad v. Dr. Anand Prakash Mishra, MANU/SC/1486/1997 : (1997) 10 SCC 264, Karnataka SRTC V. Ashrafulla Khan, MANU/SC/0022/2002 : AIR 2002 SC 629, Prem Chand Grag v. Excise Commissioner, MANU/SC/0082/1962 : AIR 1963 SC 996, Supreme Court Bar Association v. Union of India, MANU/SC/0291/1998 : AIR 1998 SC 1895, State of Karnataka v. Ameerbi, (2007) 11 SCC 681, Union of India v. Shardindu, MANU/SC/7667/2007 : AIR 2007 SC 2204, Raziul Hasan v. Badiuzzaman Khan, 1996 BLD (AD) 253 and AFM Nasiruddin V. Mrs. Hamida Banu, 45 DLR (AD) 38.

41. On the question of possession, the appellate Court as observed above, on assessment of the evidence on record particularly the evidence of P.W. 1 who could not say when his father got possession of the plot from Khaleda Rahman and also admitted that a boundary wall around the suit plot is in existence, but could not say when and who constructed the said wall, held that the plaintiffs failed to prove possession in the suit plot; that the defendant has been able to prove his possession and that suit without seeking recovery of khas possession is not maintainable. The High Court Division without reversing these findings decreed the suit on extraneous grounds observing that since RAJUK accorded permission for transfer, it waived the terms of the lease deed; that it could have cancelled the lease for non-construction but it had cancelled the allotment without affording the plaintiffs' predecessor any opportunity of being heard; that while mutation proceedings was pending before RAJUK, the plot was allotted in favour of third person and thereby, it had violated section 101 of the Town Improvement Act, 1992; that the original allottee did not violate any terms of the lease deed and that the Court of appeal below was wrong in holding that the suit is not maintainable.

42. Mr. Mahmudul Islam, learned counsel contended that the finding of possession is based on improper appreciation of evidence on record and that although there is no finding regarding possession by the High Court Division, since the plaintiffs are in possession of the suit land and their possession has not been taken over by RAJUK, the High Court Division is perfectly justified in interfering with the judgment of the courts below. I find fallacy in his contention for, keeping these findings of possession, no court can pass a decree in a simple suit for declaration in respect of immovable property. This finding is being based on correct assessment of the evidence, the same is not open to scrutiny by a court exercising revisional power. The High Court Division did not say that those findings were perverse as not based on evidence on record. Without arriving at such finding, the High Court Division

cannot pass a decree as a final Court of fact. If we accept the contention of Mr. Mahmudul Islam, learned counsel, there will be left with no demarcation between the exercise of appellate and revisional powers and the High Court Division will be at its wisdom to interfere with judgments whenever it feels necessary to do so and in doing so, this power will be transformed into an appellate power. It should not be ignored that the Court of revision is a Court of law, not a court of fact and there should be a demarcating line in the exercise of powers of appeal and revision. If this latitude is given to a Court of revision, there will be no difference between a Court exercising appellate power and a court exercising revisional power. The characteristic attribute of a judicial act or decision is that it binds, whether it be a right or an error. An error of law or fact committed by a judicial body cannot, in general be impeached otherwise than on appeal unless erroneous determination relating to a matter on which jurisdiction of the body depends.

43. The court of appeal below held that plaintiffs are not in possession of the suit plot and that the defendant has been able to prove his possession by raising boundary wall. This finding having not been disturbed and keeping this finding intact, the High Court Division cannot pass a decree. This finding is binding on the High Court Division. The court of appeal is, therefore, perfectly justified in holding that the suit is barred under section 42 of the Specific Relief Act.

44. The High Court Division did not assail the finding the appellate court about the maintainability of the suit. In the majority opinion it was pointed out that in the written statement the defendant did not mention the exact date of taking possession and thus the reception of evidence of D.W. 1 in this regard is barred under order VI rule 7. It was further observed that RAJUK did not state by filing written statement that it took over possession from Khaleda Rahman and that Ext. A not being a letter of delivery of possession, Aman Ullah or the plaintiffs may be deemed to be in possession. On the question of existence of boundary wall, it was observed that as Khaleda Rahman did not deliver possession to RAJUK, the question of construction of boundary walls in the suit property by defendant No. 1 does not arise. In arriving at such conclusion my learned brother has reassessed the evidence on record as if he were deciding a first appeal. The question is whether the plaintiffs suit is maintainable in the absence of their possession.

45. What's more, in paragraph 4 of the written statement, it was specifically asserted that the suit is not maintainable under section 42 of the Specific relief Act since the plaintiffs have no possession in the suit plot and in paragraph 12, it was stated that the registered lease deed was registered on 16th October, 1996 in his favour and that the delivery of possession was given to him. Order VI Rule 2 lays down the guiding principles of system of pleading that pleadings should be statements in a concise from, and should state only material facts relied on and not the evidence by which they are to be proved. This rule further provides what are and what are not material facts to be pleaded; (a) when the pleadings the effect or purport of a document on conversation; (b) when presumptions of law arise; and (c) when conditions precedent exist. An analysis of these terms throws the basic principles of pleading should state (i) material fact, not law; (ii) malarial facts, not evidence; (iii) all material facts only and (d) in a summary form. The statement that the defendant was given delivery of possession after the execution of the lease deed is sufficient under the rules of pleading to lead evidence in support of his claim. Allegations in anticipation of the opponent's answer should not be made. Therefore, it is rule 2, not rule 7, is applicable in this case.

46. Learned counsel for the respondent has drawn our attention to the evidence of Faruk Ahmed (P.W. 2) and Nur Mohammad Khan (P.W. 3) and submits that these

witnesses prove the plaintiffs possession. He further submits that in view of the findings of the court of appeal below, there is no scope for this Division to reassess the evidence afresh. I fully agree with the learned counsel. In the absence of any finding by the High Court Division, there is no scope for this Division to reopen the issue of possession. In view of the above, if we accept the contention of the learned counsel for the respondent, this Division will be sprouted with huge number of cases which were never entertained by it earlier from the inception of Privy Council. If we reassess the evidence for deciding a point even if the High Court Division decides the matter ignoring the point of law argued by the last court of fact, the language used in Article 103(3) of the Constitution would be rendered nugatory. In granting leave to appeal, this Division imposes limitations upon the subject matter of appeal or the materials to be used at the hearing. The circumstance that an appeal has been admitted by leave does not entitle the appellant or respondent to open out the whole case and contest all findings of facts and raise every point which could be raised in the High Court Division. At the final hearing only those points can be urged which are fit to be urged when the leave to appeal is asked for. It should be remembered that Article 103(3) does not confer a right of appeal upon a party but merely vests a discretion in this Division to interfere in exceptional cases. The Apex Court should interfere with finding of fact with great caution and circumspection.

47. It should be remembered that in exercise of its revisional jurisdiction, the High Court Division is not entitled to reexamine or reassess the evidence on record and substitute its own finding on facts for those of the subordinate Courts and we are exercising power from the judgment of the High Court Division exercising its revisional jurisdiction. Apart from the language used in section 115(1) of the Code of Civil Procedure, the limits of the jurisdiction of the High Court Division under this section are well defined by a long course of judicial decisions; when the aid of the High Court Division is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying error of the courts below which has occasioned a failure of justice. Section 115(1) circumscribes the limit of that jurisdiction. Over and above, the patent illegality the High Court Division has committed in this case is that it decreed the suit without disturbing the finding of possession in a simple suit for declarations which is unheard of. Thus there is no doubt that the High Court Division has exceeded its jurisdiction in interfering with the judgment of the court of appeal below.

48. It is the positive case of the defendant that after purchase he has constructed the boundary wall through Jahid Hossain (D.W. 2). A Mannan Sarker (D.W. 3) an employee of RAJUK corroborated him. He stated that Khaleda was served with a notice in 1988 for her failure to make construction; that the plot was handed over to Anwarul Hug after allotment and that allotment of Khaleda was cancelled for violation of the terms of lease. From the above evidence, it cannot be said that the findings of possession of the suit plot found the Court of appeal is perverse or is based on non consideration of material evidence. As regards the submission that RAJUK did not legally take possession from Aman Ullah, the Courts below made positive findings that both Khaleda Rahman and Aman Ullah violated the terms of lease and the letter of permission for transfer respectively and that RAJUK in exercise of its inherent power assumed possession and then handed over it to the defendant. In the lease deed, Ext. 1, there was a deeming clause of automatic vesting of possession of the suit plot if there is violation of any terms of the lease deed. More so, there are documentary evidence of handing of possession by RAJUK in favour of the defendant on 17th April, 1996, Page 83 of the supplementary paper book and P.W. 3 has proved the same. The courts below took into consideration of the same and arrived at the findings. On the contrary, apart from the inconsistent evidence of P.Ws. 1, 2 & 3, the plaintiffs failed to show any scrap of paper showing delivery of possession in their

favour.

49. D.W. 1 stated in chief that on 17th April, 1996, RAJUK made over physical possession to him and that after taking possession, he raised boundary wall and installed an iron gate. Though the plaintiffs gave suggestion to him in cross-examination that he did not construct the boundary wall, they did not challenge the statement of the installation of iron gate. Coupled with these statements, the letter of delivery of possession is also dated 17th April, 1996, which corroborate his statement. In this letter it was pointed out that the area of plot as found was 7 kathas 10 Chateaus. This letter was issued in pursuance of the defendant's letter dated 12th February, 1996 praying for making over possession of the plot, page 78 of the additional paper book dated 1st August, 2010. In the schedule of the lease deed, 7 kathas and odd area of land was mentioned. More so, the plaintiffs did not state in the plaint that their father or Khaleda Rahman constructed boundary wall around the plot. In his evidence, P.W. 1 admitted that a boundary wall is in existence around the plot but he could not say who constructed the same. Where there is in fact existence of a boundary wall, which is not a disputed fact, there is any scope to say nonexistence of the same. When one party claims to have the constructed the said wall and the other party has expressed his ignorance about its construction, the presumption that can be drawn is that it was constructed by the party which claimed to have constructed it. The plot, in question is a residential plot and not horticultural or agricultural one. So, in the absence of any building, the claim of the defendant that he is in possession of the plot by constructing boundary wall is established beyond doubt. The court of appeal below, in the premises, is perfectly justified in believing the defendant's claim of possession.

50. One fundamental principle of law which was totally ignored by my learned brother while expressing the majority opinion is that in this appeal, one of the questions on which leave was granted to consider was whether the High Court Division was justified in decreeing the suit without prayer for recovery of possession of the suit land since the appellate court found possession of the defendant. Admittedly the High Court Division did not at all consider the issue of possession. The plaintiffs have accepted the judgment of the High Court Division despite the fact that the judgment is perverse as it passed the decree in the suit ignoring the findings of possession by the appellate court. So, the finding of possession recorded by the appellate court is final. None of the courts including the High Court Division found possession in favour of the plaintiffs. Therefore, the decision on the question of law on which leave was granted by this Division must be either in positive or in negative. There is no scope on the part of this Division to examine the question of possession afresh ignoring the question of law formulated in the leave granting order. It can decide the question of possession if there are conflicting findings by the courts. So, the Division cannot embark upon an inquiry into the legality of the finding of possession upon assessment of the evidence on record afresh ignoring the question on which leave was granted. If this process is demonstrated, it would lead to judicial extravagance, which might defeat the ends of justice. It will not also be healthy for the administration of justice. In that case, there will be no need for granting leave by this Division on any question of law. If we support this sort of judgment, the High Court Division will also be let free to interfere with the lower courts judgments ignoring the findings of the last court of fact, and this Division will be converted into a court of appeal.

51. It should not be ignored that in common law legal systems, a precedent or authority is a principle or rule established in a previous legal case that is either binding on or persuasive for a court when deciding subsequent cases with similar issues. Stare devises is a legal principle by which Judges are obliged to respect

precedents established by prior decisions. Courts should generally abide by precedent and not disturb settled matters. This is necessary for the administration of justice otherwise the lower courts and the High Court Division will be confused in determining any particular issue in a suit or a matter. There should be consistency in the opinion of this Division on any particular issue.

52. It is not disputed that Judges have a fundamental obligation to apply the law. We accept this judicial obligation as so basic to our legal system and to our conception of the judicial function that we rarely consider the obligation's origin. Stare devises is one of the fundamental doctrines of common law systems. This doctrine is also referred to as the doctrine of precedent. Precedent influences all common law Judges, to varying degrees. Rupert Cross and J.W. Harris on their Precedent in English Law, 4th Edn. explain:

> 'Precedent rules confer authority on they rations decedent of various courts; but they derive their authority not from such rations, but from a more widely defused judicial practice which transcends the outcome of particular cases. To the extent that this practice is settled, they are conceived of as imposing obligations which are as peremptory as any other legal obligations, and in that sense they constitutes rules of law. However, the dwell at a higher level than ordinary rules of substantive case-law whose authenticity they control'

53. Precedent can be either persuasive or binding. A court may refer to or rely on persuasive precedent, but it is not obliged to do so. A court is presented with binding precedent, it is required, by common law method and reasoning, either to follow the precedent or to justify its deviation. So stare devises requires Judges to follow precedent and apply the law as they find it or to justify their deviation from the established rule. In majority of cases, there will be no justification for divergence; the Judge will be obliged to apply the law as it is. This is why stare devises is the foundation of the judicial obligation to apply decisional law. The injunction to treat like cases alike or not to unsettle things which are established requires courts to follow precedent. As this injunction has evolved within common law method, any departure from the doctrine of Stare devises demands special justification. See Arizona V. Rumsey, 467 U.S. 203, 212, 104 S.ct. 2305)

54. In general the rules of precedent apply to discussions on construction of statutes or on the principles of law being followed by the courts. Though a decision of this Division on the meaning of a section, or on any question of law will bind all courts including the High Court Division, there is nothing which prevents this Division from departing from a previous decision if it is convinced of its error and its baneful effect on the general interests of the public. The use of precedent as an indispensable foundation upon which to decide what is the law on the point under consideration. It has been held in Bourne v. Keane, 1919 AC 815 (874) that a construction of a statute of doubtful meaning once laid down and accepted for a long period ought not to be altered unless it was wrong and inconvenient. Evershed, M.R. in Brownsea Haven Properties v. Poole Corporation, 1958 Ch 574 (CA) observed 'There is well-established authority for the view that a decision of long standing, on the basis of which many persons will, in the course of time, have arranged their affairs, should not lightly be disturbed by a superior court not strictly bound itself by the decision'. In the majority opinion the established principles and norms have been totally ignored.

55. In view of the above, the High Court Division acted in excess of power in interfering with the judgments of Courts below. The Court of appeal was correct in holding that the suit is barred under section 42 of the Specific Relief Act. The appeal

is allowed.

Abdul Wahhab Miah, J.

This appeal; by leave, has arisen from the judgment and order dated 19.04.2005 passed by the High Court Division in Civil Revision No. 1910 of 2003 making the Rule absolute.

57. Facts giving rise to this appeal are as follows:

58. Respondent Nos. 1-6 as plaintiffs filed Title Suit No. 252 of 1979 in the Court of Assistant Judge, Second Court, Dhaka for declaration that they were the sixteen annas owners of the suit plot on the averments, inter alia, that plot No. 41 of Road No. 15, Section 13 (old) New 3 of the Layout Plan of Uttara Residential Model Town measuring 612 square yards and 6 square feet (hereinafter referred to as the suit plot) of the then DIT, at present RAJUK, was allotted to one Mrs. Khaleda Rahman, wife of Md. Mujibur Rahman and a standard lease agreement was executed on 12.01.1970 and registered on 12.02.1970 on payment of full premium amounting to taka 19,029.94 and possession was handed over to the allottee along with a sketch map showing the location of the suit a plot. The aforesaid allottee, after getting delivery of possession enjoyed the suit plot from 12.12.1970 to 24.10.1998 by exercising all acts of possession through her caretaker and being in urgent need of cash money, obtained income tax clearance certificate vide T.P. Certificate No. 139/87-88 dated 01.06.1988 from the Deputy Commissioner of Taxes Circle-"P" and transferred the suit plot to the predecessor of the plaintiffs, namely; Amanullah on payment of transfer fee and service charges amounting to taka 1,72,313.00 and taka 886.00 respectively after obtaining necessary permission from RAJUK vide their letter No RAJUK U-PA(A) 173-Stha dated 24.01.1988. The transaction was complete between the vendor and the vendee in presence of defendant No. 2 and nothing was left to be done from their part as per the Transfer of Property Act, 1882 After purchase of suit plot from the original allottee, the predecessor of the plaintiffs had to stay in the United States of America and in the European Countries for quite a long tune for the purpose of business as well as for treatment and kept the suit plot under the custody of his caretaker In the meantime, defendant No. 1 brought some bricks and sand to make some construction therein and while the plaintiffs' predecessor protested defendant No 1 fled away and did never come forward. Thereafter, the plaintiffs' predecessor fell seriously sick and ultimately died leaving behind them to inherit his property. Getting knowledge of the death of the true owner of the suit plot, defendant No. 1 again "slapped in the scene and tried to start making construction" in the suit plot and when the plaintiffs lodged heavy protest, defendant No 1 stated that he got allotment from defendant No 2 (in the plaint, it has wrongly been written as defendant No. 1). Getting scent of allotment, the plaintiffs sent a letter to defendant No. 2 on 29.04.1997 which was received by him by putting original seal and signature, but he did not give any reply. Neither defendant No. 1 got any right and title in the suit plot nor defendant No. 1 got any, right to re-transfer the same to anybody including defendant No 1 No notice was served either upon the plaintiffs or their predecessor or on the original allottee "so far in respect of the suit land stating violation of the terms of lease agreement" and as such, if anything was done beyond the knowledge of the plaintiffs or their predecessor that will be simply illegal, ultravires and against the principle of equity and good conscience The cause of action for the suit first arose on 25.07.1997 and again on 15.08.1997 when defendant No. 1 verbally stated about getting allotment of the suit plot from defendant No 2 within Police Station-Gulshan and under the jurisdiction of the Court.

59. After filing the suit, the prayer was amended deleting the word "owner" by replacing the words "Lease hold right holder" and further prayer was added to the effect "and cancellation of lease if any in respect of the suit plot is illegal, malafide and not binding upon the plaintiffs."

60. The suit was contested by the defendants by filing separate set of written statements In the written statement filed by defendant No 1, it was contended, inter alia, that he was allotted Plot No 79 at Road No 18, Scctor-7, in Uttara Model Town, Dhaka by DIT, in 1984 The said plot was a small one being more or less than 3(three) kathas of land The defendant having a large family, the said plot was considered to be not suitable for his purpose and as such, he applied to the Chairman, RAJUK for a bigger plot preferably in its Baridhara Project and in the said application, all relevant facts including the allotment of the aforesaid Uttara plot to him were disclosed vividly Then RAJUK allotted a five kathas plot to him at Baridhara on 01.01.1986. Subsequently, by a letter dated 26.08. 1986, RAJUK cancelled the allotment of Baridhara plot. In the said circumstances, the defendant filed Writ Petition No. 241 of 1991 before the High Court Division "which was accepted" and operation of the order of cancellation of Baridhara plot was stayed. Thereafter, on 12.12.1995, the defendant filed an application to defendant No. 2 for allotment of a bigger plot above 7(seven) kathas in Uttara Model Town in exchange of the earlier 3(three) kathas plot. In reply, RAJUK by its-letter dated 06.01.1996 informed the defendant that his prayer for allotment of a bigger plot at Uttara Model Town could not be considered till disposal of the said writ petition. The defendant, therefore, filed an application before the High Court Division for withdrawal of the said writ petition and the application for withdrawal was allowed on 24.01.1996. The defendant filed an application to defendant No. 2 on 04.02.1996 with the certified copy of the order dated 24.01.1996 passed by the High Court Division praying for expeditious allotment of a bigger plot in Uttara Model Town. On the prayer of the defendant, defendant No. 2 allotted the suit plot comprising an area of 7(seven) kathas, 10 shitakes and 23 square feet on completion of all legal formalities and a standard lease deed was executed on 23.09.1996. Originally, the suit plot was shown measuring an area of 3(three) kathas, but subsequently, by measurement, it was found that actually, the area of land was 7(seven) kathas, 10 chaotic and 23 square feet equivalent to 5513 square feet and therefore, an excess of 4(four) kathas, 10 chhatack and 23 square feet was there in the plot. Accordingly, the price of the said excess land of 4(four) kathas, 10 chhatacks and 23 square feet was fixed at taka 2,72,556.00 and the defendant was directed by RAJUK under cover of letter dated 09.06.1996 to deposit the said amount as price of the excess land by 20.07.1996. The defendant, accordingly, deposited the said amount in Sonali Bank, RAJUK, Bhaban Branch, Dhaka by voucher No. 6186 dated 23.06.1996. The defendant got his name mutated and paid rents from 1390 B.S. up to 1403 B.S. The possession of the suit plot was duly delivered to the defendant by RAJUK and since then he has been in possession thereof by demarcation and specification as a bona fide lessee under RAJUK without any notice of the alleged right of the plaintiffs or their predecessor as claimed by them.

61. After amendment of the plaint, defendant No. 1 also filed an additional written statement stating, inter alia, that the plaintiffs are neither owners nor they have any lease hold right in the suit plot. The original allottee, Mrs. Khaleda Rahman, having failed to transfer the suit plot within 4(four) months in favour of Amanullah Mia, predecessor of the plaintiffs and not having deposited the certified copy of the "Deed purported to be executed by her in the office of RAJUK" as directed in RAJUK's letter dated 26.06.1988, the transfer permission stood cancelled. The lease of the suit plot in the name of original allottee, Mrs. Khaleda Rahman, on the basis of the standard lease agreement dated 12.01.1970 registered on 12.02.1970 having been cancelled

by RAJUK long before the filing of the instant suit and the" suit plot having been allotted to the defendant and the lease deed having been executed in his favour on 23.09.1996 for valuable consideration then registered by RAJUK before institution of the suit, the amended prayer of the plaintiffs was not entertain-able. The lease having been cancelled due to the failure of the original allottee to make construction on the suit plot within the specified time, she ought to have challenged the cancellation of lease. The plaintiffs had' no legal right and authority to challenge the cancellation.

62. Defendant No. 2 in his written statement contended, inter alia, that the plaintiffs did not file any agreement, affidavit and certified copy of the registered document within the stipulated time of 4(four) months from 26.06.88 and as 'a result, RAJUK cancelled the allotment of the original lease on 22.05.1995. After cancellation of the original lease, the suit plot was allotted to defendant No. 1 observing all formalities.

63. Eventually, the suit was transferred to the Court of Sixth Additional Assistant Judge, Dhaka and was renumbered as Title Suit No. 129 of 1999. At the hearing of the suit, the plaintiffs examined three witnesses including plaintiff No. 1 and filed documents which were marked as exhibits. On behalf of defendant No. 1, two witnesses including defendant No. 1 himself and on behalf of defendant No. 2, superintendent of RAJUK was examined as D.W. 3. The learned Assistant Judge by his judgment and decree dated 12.07.1999 dismissed the suit.

64. Being aggrieved by and dissatisfied with the judgment and decree of the trial Court, the plaintiff-respondents filed Title Appeal No. 520 of 1999 before the District Judge, Dhaka. The learned Additional District Judge, Second Court, Dhaka by his judgment and decree dated 08.02.2003 dismissed the appeal and affirmed those of the trial, Court. Against the said judgment and decree of affirmance, the plaintiffs filed Civil Revision No. 1910 of 2003 before the High Court Division. A learned Judge of the Single Bench hearing the revision by the impugned judgment and order made the Rule absolute setting aside those of the Courts below and directed RAJUK to mutate the suit plot in the name of the petitioners after perusal of the documents filed by them before it and to cancel the subsequent allotment of the suit plot to opposite party No. 1 (defendant No. 1). Against the judgment and order of the High Court Division, defendant No. 1 filed Civil Petition for Leave to Appeal No 884 of 2005 before this Division and leave was granted on 16.08.2006 to consider the submissions of the learned Counsel for the appellant as follows:

> "Mr. Khandaker Mahbubuddin Ahmed, the learned Senior Counsel, appearing for the petitioner, placed before us the impugned judgment of the High Court Division and contended that the plaintiff-respondents made averment in the plaint to the effect that the defendant No. 1 (petitioner) got allotment of the plot from RAJUK (defendant No. 2) and the petitioner having stated in the written statement that the defendant No. 1 (petitioner) obtained lease from-defendant No. 2, the High Court Division committed an error of law in misreading the prayer in the suit because of the fact that there was no prayer in the suit for cancellation of the registered lease deed of the petitioner affecting interest of the plaintiff-respondents under Section 39 of the Specific Relief Act and this has resulted in an error in the decision causing failure of justice.
>
> It has been further contended that the High Court Division committed an error of law in interfering with the findings and decisions concluded by concurrent finding of fact arrived at by the Courts below without referring to any finding of facts which are not based on any evidence on record and - as

such the High Court Division arrived at an erroneous factual finding affecting merit of the suit on the question of extension of time for construction on the suit land and in such view of the matter, the findings and decisions arrived at by the High Court Division are liable to be set aside.

Mr. Khandaker lastly contended that both the trial Court and the lower appellate Court having found the plaintiff 'out of possession and the plaintiff did not seek any' decree for recovery of possession and as such the appellate Court rightly held the suit to be not maintainable, High Court Division having misdirected himself in holding the suit to be maintainable committed an error of law resulting in an error in the decision causing failure of justice."

65. Mr. Abdul Wadud Bhuiyan, learned Counsel, appearing for the appellant, has reiterated the submissions on which leave was granted with reference to the pleading of the respective party and the evidence adduced. He has submitted that the Appellate Court being the last Court of fact, gave specific finding that it was not proved that the plaintiffs were in possession, in the, suit plot and the evidence and the documents proved possession of defendant No. 1 therein, but the High Court Division while setting aside the concurrent findings of facts did not reverse the said finding of possession of the Appellate Court and thus erred in law in passing the impugned judgment and order. In support of his contention that the Appellate Court rightly found possession of defendant No. 1 in the suit plot, Mr. Bhuiyan referred to exhibit-'R' dated 17.04.1996, exhibit-'T' series, the mutation khatian in the name of defendant No. 1 by RAJUK and rent receipts showing payment of rent. Mr. Bhuiyan has further submitted that since the plaintiffs failed to prove their possession in the suit plot, their suit for a declaratory decree without prayer for consequent relief by way of recovery of khas possession was not maintainable in law, but the High Court Division failed to consider this apparent legal aspect of the case while making the Rule absolute. In support of his contention, Mr. Bhuiyan has referred to the cases of Md. Sheikh Farid and others-Vs-Abdul Wadud Sikder and others, 12 MLR (AD) 2001; Erfan Ali-Vs-Joynal Abedin Mia (late) represented by his legal heirs Golenur and others, 35 DLR (AD) 216; Enjaheruddin Mia alias Md. Enjaheruddin Mia-Vs-Mohammad Hossain and others, 50 DLR (AD) 84; Mansur Ali Mallik Vs. Md. Nuru Haque Mallik and others, BCR 1986 (AD) 56; Government of Bangladesh and another Vs. Lutfunnesa and others 4 XP (AD) 94 and the case of Md. Serajuddin Ahmed and others-Vs-A.K.M. Saiful Alam and others, 9 MLR (AD) 201.

66. Mr. Bhuiyan has further submitted that the application filed by the plaintiff-respondents before this Division for amendment of the plaint by adding a prayer that registered lease deed dated 23.06.1996 (correct date is 23.09.1996) executed by RAJUK in favour of defendant No. 1 is illegal and not binding upon them, if allowed, the defendant will be prejudiced. Mr. Bhuiyan has seriously opposed the prayer by submitting that the plaintiffs filed the application for amendment of the plaint before this Division only on 08.07.2010 long after the expiry of the period of limitation and therefore, the same cannot be allowed and in support of his contention, Mr. Bhuiyan has referred to the cases of Abdul Wadud and others-Vs-Abdul Wahed and others, 14 MLR (AD) 106; Abu Naser Mohammad Wahedunnabi and another-Vs-Balaji Wahedunnabi Roy and others, 10 MLR (AD) 19; Abdur Rabban (Md.)-Vs-Aminul Hoque Sowdagar and another, 43 DLR (AD) 19; Nurun Nahar-Vs-Mohd. Fazlur Rahman, Bangladesh Supreme Court Reports, 1979, 135 and Raj Kumar-Vs-Dipender Kaur Sethi, (2005) 9 SCC, 304.

67. Mr. Mahmudul Islam, learned Counsel, appearing for the plaintiff-respondents, on the other hand, has submitted that the trial Court as well as the Appellate Court approached the case from a wrong stand point and failed to consider the case of the

plaintiffs that before the cancellation of the lease of their vendor, the original lessee, Khaleda Rahman and also cancelling the permission given to her to transfer the suit plot in favour of Amanullah, the plaintiffs' predecessor, neither the plaintiffs nor their vendor was given any notice or any chance of hearing and thus, erred in law in dismissing the suit, the High Court Division rightly considered those relevant and pertinent facts and interfered with the judgments and decrees of the Courts below. He has further submitted that though the High Court Division did not reverse the finding of possession of the Appellate Court, this Division can consider the evidence on record and decide the fact of possession. He has further submitted that admittedly the vendor of the plaintiffs' father, the original lessee was put into the possession of the suit plot and only after termination of the lease, the lessee shall surrender the lease hold property to the lessor forthwith subject to other conditions as mentioned in clause 5 of the standard lease agreement (hereinafter referred to as the lease deed) executed between lessee, Mrs. Khaleda Rahman and RAJUK and, then and then only the right, title and possession of the lease hold property shall be deemed to have automatically vested with the lessor who shall have the right to enter physically and remove any obstruction that might be found and dispose of the same in its discretion, but in the instant case, nothing happened, i.e., neither termination of lease of the suit plot was intimated to the lessee, Mrs. Khaleda Rahman nor she surrendered her possession of the suit plot nor the lessor refunded her money which she paid, so the story of delivery of possession thereof to defendant No. 1 is nothing but a got up story, but the Appellate Court totally failed to consider the said factual aspect of the case. He has further submitted that the very fact that in the written statement filed by defendant No. 1 no specific date as to the delivery of possession of the suit plot to him was mentioned prima facie shows that had the actual delivery of possession of the suit plot been given to him, he would have definitely mentioned the date of such delivery. And this is enough to construe that possession of the suit plot was not delivered to defendant No. 1. In this regard, he has also referred to the testimonies of P.Ws. 1, 2 and 3 who specifically stated about the plaintiffs' possession in the suit plot He has further submitted that the finding of possession of the Appellate Court' is based on misreading and non consideration of the evidence on record and as such, the same is not sustainable in law. Mr. Islam by referring to clause 23 of the lease deed has lastly submitted that the lessor (RAJUK) permitted the lessee, Mrs. Khaleda Rahman to sell the suit plot to the plaintiffs' father, Md. Amanullah and accordingly, transfer fee and other charges were deposited to the lessor and thus the condition that if the lessee fails to complete the building of such house and appurtenances within the period as referred to in clause 4 of the lease deed, the lease shall be liable to be terminated by the lessor as stipulated in clause 5 of the deed was waived, cancellation of the lease granted in favour of lessee, Khaleda Rahman on the ground of non-construction of the building on the suit plot was absolutely arbitrary and malafide, the High Court Division rightly interfered with the judgments and decrees of the Courts below And therefore, no interference is called for with the impugned judgment and order and the appeal be dismissed.

68. Mr. Islam in support of his contentions has referred to the cases of M/S. Gannysons Ltd. and another-Vs-Sonali Bank and others, 37 DLR (AD) 43, Chairman, Bangladesh Steel Mills Corporation, now Bangladesh Steel and Engineering Corporation-Vs-Md. Masood Reza and others, 30 DLR (SC) 169 and the case of Bangladesh Sugar and Food Industries Corporation-Vs-Md. Kashem and others, 55 DLR, 350.

69. From the judgment and decree of the trial Court, it appears that it did not give any finding as to the possession of the suit plot in favour of either of the parties (emphasis supplied). The trial Court gave the following findings:

(a) cancellation of the lease of Mrs. Khaleda Rahman was "legal and valid" as she did not "make or construct any building in the suit land" as per condition of the lease agreement.

(b) the name of Amanullah was not mutated in the office of RAJUK and he did not take any action against exhibit-'C'. Amanullah did not take any action to mutate his name in the office of RAJUK even after the issuance of exhibit-'C.'

(c) the conditions of exhibit-1 (exhibit-1 is the lease deed) were binding between the parties and as the original allottee transferred her interest in the suit plot to Amanullah, the conditions of exhibit-1 were also binding upon him; as Amanullah did not register and mutate his name in the office of the lessor and thus violated the conditions laid down in clause 24 of the lease deed, RAJUK had the right not to accept or recognize him as lessee of the suit plot. "so there was no need to give any notice to Mr. Amanullah before cancellation of the lease agreement of Mrs. Khaleda" (emphasis supplied), the plaintiffs had no lease hold right in he suit plot.

(d) RAJUK allotted the suit plot to defendant No. 1 observing all necessary formalities. "So the lease deed executed between the defendants is not illegal, void or voidable."

70. The Appellate Court as the last Court of fact dismissed the appeal with the following findings:

(a) No valid (সঠিক) paper about the transfer of the suit plot by the original allottee, Mrs. Khaleda Rahman to the plaintiffs' predecessor, Amanullah was filed within four months from 26.06.1988 as fixed by RAJUK, but was filed after two years which was a violation of the terms of agreement for which the allotment of the plaintiffs' predecessor was cancelled and then defendant No. 2 gave fresh allotment to defendant No. 1.

(b) from the papers filed (no reference to any particular paper or document or exhibit) it appeared that RAJUK gave notice to the original allottee to file documents.

(c) from the papers (no reference to any particular document or paper or exhibit and the evidence of any D.Ws.) filed by the defendants and their evidence it appeared that the allotment of the suit plot was cancelled and allotted to defendant No. 1 following all the rules (wewa weavb) as per terms of the contract.

(d) P.W. 1, Iqbal Ahmed (plaintiff No. 1) admitted "in his cross-examination that Mrs. Khaleda Rahman did not make any construction on the suit plot.

(e) P.W. 1 in his cross-examination admitted that he could not remember when Khaleda Rahman got possession of the suit plot, his father got possession from Khaleda Rahman in 1988, but he could not remember the date. As per the own admission of the plaintiffs, there are boundary walls on the suit plot; neither the plaintiffs made any claim that they or their predecessor constructed the wall nor any evidence was adduced on behalf of the plaintiffs in that respect, rather P.W. 1 admitted that he did not know by whom and when the boundary walls were constructed on the suit plot and

these proved that the plaintiffs were not in possession of the suit plot; from the evidence and the documents (no evidence referred), it was proved that defendant No. 1 was in possession of the suit plot.

(f) since the plaintiffs failed to prove their possession in the suit plot and they did not pray for any consequential' relief by way of recovery of khas possession suit for declaratory decree was not maintainable under section 42 of the Specific Relief Act.

(g) the suit was also barred under section 42 of the Specific Relief Act for not praying for any relief against the lease deed executed in favour of defendant No. 1.

71. The High Court Division made the Rule absolute on the findings:

(a) the letter dated 26.06.1988 was of much importance because on the basis of this letter transfer permission was cancelled in the meeting of RAJUK held on 26.09.1995. The allegation of the plaintiffs that they did not receive the letter dated 26688 gets support from the contention of RAJUK that it did not recognize father of the plaintiffs as a lessee of RAJUK for the suit plot, so the RAJUK did not consider it necessary to give any notice to Amanullah before cancellation of the lease agreement of the original lessee, Khaleda Rahman. There was nothings in the record that the petitioners (the plaintiffs) received the letter dated 26.06.1988 and willfully violated any term and direction of the letter.

(b) Khaleda Rahman was granted extension of time for construction and during that period she was granted permission by RAJUK to transfer the suit plot to Amanullah which shows RAJUK was very much aware that no construction was made on the suit plot, thus the condition in the lease deed for making construction before transfer was waived by RAJUK itself.

(c) Without hearing the original lessee or the petitioners (the plaintiffs) and without issuing any notice upon them, the transfer permission was cancelled, "which cancellation order was not even communicated to Khaleda Rahman or the plaintiff petitioners." The-petitioners (the plaintiffs) were not aware of the directions which they were to comply and before taking any action against them by way of cancellation of the transfer permission, they should have been given an opportunity to explain their position in the matter, except the time limit, other requirements were fulfilled by the predecessor of the petitioners within time.

(d) While the plaintiffs were awaiting mutation, the lease deed of the original allottee was cancelled and permission for transfer was also cancelled and thereafter the suit plot was allotted to a 3rd person violating the mandatory provisions of section 101 of the Town Improvement Act wherein it is, prescribed that a notice by advertisement in the newspaper shall be given by RAJUK before giving out a property on lease.

(e) In the present case, the original allottee did not violate any conditions of the lease deed because she got "time extension" from RAJUK for construction and also for permission to transfer the suit plot without construction and subsequently, transferred the same in favour of Amanullah in compliance with the requirements of RAJUK, deposited transfer fee, service charges and the relevant documents with RAJUK for mutation, but as he was not aware of the prescribed time limit of such submissions directed by the letter dated

26.6.88, he submitted those at a belated stage. The opposite parties (the defendants in the suit) could not show anything before the Courts below that the letter dated 26.6.88 was received by Amanullah or by the petitioners.

(f) The Courts below failed to consider that before cancelling the transfer permission, notice ought to have been issued to the 'prospective transferee who filed the required documents before RAJUK and was awaiting for mutation; law requires that the authority exercising action of cancellation of the lease deed and the transfer permission must always act with fairness.

(g) the suit was maintainable as from the record it appeared that the plaintiffs also prayed for cancellation of the lease deed executed by RAJUK in favour of opposite party No. 1; the trial Court rightly held that the suit was maintainable.

Let us consider the submissions on which leave was granted. We shall consider submission No. 2 first.

72. It needs no reference to any decision for the well settled legal proposition that the High Court Division while exercising power under section 115(1) of the Code of Civil Procedure (the Code) can interfere with a finding of fact of the Appellate Court when such finding is based on misreading or non-consideration of the material evidence on record and that decision on any issue in the suit flown from misconception of law as well. We are also very much conscious that this Court is not a Court of fact that it shall reassess the evidence on record and give its own finding on facts by substituting the finding of the Courts below or the High Court Division. But, in view of the nature of the leave given on the point and the further fact that the trial Court in giving finding that cancellation of the lease of Mrs. Khaleda Rahman (the original lessee) was "legal and valid" as she did not "make or construct any building in the suit land" as per condition of the lease deed, did not consider a very material piece of evidence, namely, exhibit-'2' (the letter dated 24.01.1988 by which RAJUK permitted Mrs. Khaleda Rahman to transfer the suit plot to the plaintiff's predecessor) and that the Appellate Court did not give any finding whatsoever on the point. The finding "on the question of extension of time for construction on the suit land" can, in no way, be said concurrent, but while granting leave on the point, it was erroneously stated that the finding on the question of "extension of time for construction on the suit land" was concurrent (emphasis supplied). The High Court Division, on consideration of exhibit-'2' and other admitted fact and evidence on record, gave clear finding that Mrs. Khaleda Rahman(the original allottee) was granted extension of time by RAJUK for construction on the suit plot and during that period, she was granted permission to transfer the suit plot to Amanullah which shows that RAJUK was very much aware that no construction was made on the suit plot, thus the condition in the lease deed for making construction before transfer was waived by RAJUK itself. The High Court Division gave further finding that the original allottee did not violate any conditions of the lease deed, because she got "time extension" from RAJUK for construction and also for permission to transfer the suit plot without construction and thus reversed the finding of the trial Court, we find no other alternative but to look into the evidence to see whether the High Court Division was correct in giving the said findings.

73. It is necessary to state that the defendants in their written statements took two specific defence: (i) though permission was given to original lessee, Khaleda Rahman on 24.01.1986 (exhibit-'2') to sell the suit plot to Amanullah, the predecessor of the plaintiffs, the same was cancelled as they failed to file the agreement, the affidavit and the certified copy of the registered document within the stipulated time of

4(four) months from 26.06.1988, (ii) RAJUK cancelled the allotment of the original lessee (Khaleda Rahman) as she failed to make construction on the suit plot as per terms of the lease deed. So, in considering the finding of the High Court Division on the submission, now we are dealing the propriety of the decision of RAJUK in cancelling the permission to transfer the suit plot to Amanullah would naturally come in. In fact, the question of cancellation of the permission to sell, the suit plot is inextricably mixed and interlinked with the question of cancellation of allotment/lease of the original lessee and the facts on both the questions are also overlapping. Therefore, in seeing the correctness of the finding of the trial Court and the High Court Division on the point, the propriety of cancellation of permission to sell the suit plot has also be considered.

74. In paragraph 9 of the plaint, it was asserted that:

> "no notice was served upon the plaintiffs, nor his predecessor nor to the original allottee so far. In respect of the suit land stating violation of the terms of lease agreement and as such if anything is done beyond the knowledge of the plaintiffs or his predecessors that will be simply illegal, ultravires and against the principles of equity and good conscience."

75. As against this defendant No. 1 (defendant No. 1 is the appellant herein) in paragraph 21 of his written statement stated as follows:

> "21 .That it is not known to this defendant as stated in paragraph 9 of the plaint and alleged by the plaintiffs about non-service of notice upon the plaintiffs or their predecessor or to the original allotter. It is also not known to this defendant whether service of any seen (sic) notice was a necessity. This defendant asserts that the cancellation of allotment in the name of the plaintiff's predecessor was done by the defendant No. 2 lawfully and there had been no violation of the terms of lease Agreement. It is absolutely false that the cancellation was beyond the knowledge of the plaintiffs and their predecessor."

76. In the written statement of defendant No. 2 nothing was stated as to whether any notice was served upon the plaintiffs or their predecessor, Amanullah or the original lessee, Khaleda Rahman alleging violation of the terms of the lease deed before cancellation of her lease.

77. Thus from the respective written statement of the defendants, it is clear that they did not, at all, deny the plaintiffs' assertion that no notice was served either upon them or upon their predecessor or on the original lessee in respect of the suit plot stating violation of the terms of lease agreement before cancellation of the lease. Not only that the defendants in their written statements also did not specifically assert the fact that notice alleging violation of any terms of the lease deed was served upon the plaintiffs or their predecessor or the original lessee. Defendant No. 1 in paragraph 15 of his written statement stated that "RAJUK by its letter No. RAJUK/Hstae/1669 dated 26.06.1988 directed the said Janab Amanullah Mia to get the deed executed and registered and with the certified copy of the said Deed along with a deed of Agreement and a Deed of undertaking (অঙ্গীকারনামা) were required of him to be filed within 4 months of the issuance of the aforesaid letter for mutation of his name", but Amanullah had failed to follow the direction within the said period of time. After long last on 13.11.1990, Amanullah filed those papers before RAJUK after a lapse of two years. The defendant further stated that he gathered the above information on inquiry in the office of defendant No. 2 prior to his instruction to his

learned Advocate for drafting the written statement. Similar statements were made in the written statement filed by defendant 'No. 2 and it was further added that because of the failure to file the said documents the lease of the allottee was cancelled on 21.05.1995 and the same was allotted to defendant No. 1 by following all the rules. In none of the written statements, it was stated how the said letter (dated 26.6.88) was sent to the lessee or Amanullah, plaintiffs' predecessor, i.e. by post or by courier service or through peon book and when they received the same.

78. Plaintiff No. 1 as R.W. 1 categorically stated that Khaleda Rahman wanted to sell the suit plot allotted to her for her financial constrain and they took permission from RAJUK for such sale. The Deputy Director (Estate), RAJUK by a letter datec 24.01.1988 informed that the suit plot would be transferred to them if they deposited transfer fees of taka 1,72,313.00 and service charges of taka 886 and accordingly, pursuant to the direction of RAJUK, they deposited the transfer fees and the service charges on 22.02.1988 and 24.02.1988 respectively with Janata Bank Limited, DIT Branch and thereafter, Khaleda Rahman executed and registered the sale deed on 22.10.1988 being deed No. 13282. The permission letter dated 24.01.1988 was filed and proved as exhibit-'2', the original bank receipts showing deposit of transfer fees and service charges with the Janata Bank, the then DIT Branch were filed and proved as exhibits-3 and 3(Ka). P.W. 1 further stated that they claimed the suit plot on the basis of the kabala executed and registered by Khaleda Rahman. After-purchase, Khaleda Rahman handed over possession of the suit plot to them, they are in possession thereof. After getting possession of the suit plot they did not receive any notice from RAJUK either written or verbal, RAJUK also did not give any notice written or verbal in respect of giving reallotment of the suit plot to defendant No. 1. Since the plaintiffs are in possession of the suit plot they have 16(sixteen) annas right and title therein and if the lease had been cancelled that was done illegally. The sale deed executed and registered by Khaleda Rahman was filed and proved as exhibit-4 and her signature therein as exhibit 4(Ka).

79. Defendant No. 1 who examined himself as D.W. 1 in his deposition did not say a word as to the issuance of the alleged letter dated 26.06.1988 by RAJUK, either to the lessee, Khaleda Rahman or to the plaintiffs' predecessor, Amanullah and the receipts thereof by them asking either of them to submit the registered deed executed by the lessee and the other documents, such as: the agreement and the affidavit within 4(four) months from the date of issuance thereof and the issuance of any other notice or any other letter alleging violation of any terms of the lease deed prior to the cancellation of the lease of the original lessee, Khaleda Rahman and even did not deny the assertions made in the plaint that no notice was served upon the plaintiffs, their predecessor-Amanullah and the original lessee in respect of the suit plot stating violation of the terms of lease agreement (emphasis supplied). D.W. 3 who was examined on behalf of RAJUK stated in his examination-in-chief that in clause 4 of the permission letter to sell the suit plot, it was mentioned that after registration of the deed that has to be filed to RAJUK within 4(four) months along with 'Halafnama' and 'Angikarnama' for mutation of name, but the purchaser failed to file those documents within long two years as per terms of the said clause of the permission letter. In his deposition, the D.W. even did not mention the date of the permission letter in which such condition was incorporated and whether the same was sent to the original lessee or the purchaser Amanullah and they received the same.

80. D.W. 3 further stated that in 1988, (no date mentioned) a notice was issued to Khaleda to show cause within 15 (fifteen) days as to why allotment given to her in respect of the suit plot shall not been cancelled for not making construction thereon and then as per, Board's decision the lease was cancelled in 1995(again no specific

date was mentioned) and then the same was allotted to defendant No. 1 in 1996. But none of those documents were either filed or proved as exhibit. The DW did not at all state how those alleged letters were issued to Khaleda, i.e., by registered post, courier service or by peon book. When the defendants, particularly, defendant No. 2 took the specific plea that a letter was issued to Khaleda on 26.06.1988 asking her to get the deed executed and registered and to file the certified copy thereof with a deed of agreement and an angikarnama (hereinafter referred to as the documents) within 4 (four) months from the issuance of the letter and in fact, the permission to sell the suit plot was cancelled for her failure to file the said documents within the said period the onus was squarely upon RAJUK to file the said letter and prove he same as per the rules of evidence and at least to prove the fact that the said letter (26.06.1988) was sent either to the lessee or to Amanullah, but admittedly no such letter was filed and proved (emphasis supplied) and thus it failed to discharge its onus.

81. From the judgment of the trial Court as well as the Appellate Court, it appears that both the Courts below decided the fate of the suit taking it for guaranteed that by the letter dated 26.6.1988 the plaintiffs' father, Amanullah was given 4 months time to file the documents, but he filed those after two years in violation of the terms of the transfer permission, but unfortunately admitted fact is that the said letter was not filed by the defendants (emphasis supplied). The trial Court gave another apparent wrong finding that the plaintiffs and the defendants did not file the original and final permission letter by which permission was given to transfer the suit plot on certain conditions, as the plaintiff filed the permission letter and the same was proved and marked as exhibit'2'.

82. Both the Courts below failed to consider that the onus was upon the defendants to file the letter dated 26.06.1988 and prove the same, as they asserted the fact of issuance of the said letter to Amanullah or the lessee and thus made a fundamental error in forming an adverse opinion against the plaintiffs for non-filing of the same. We failed to understand how the Courts blow could refer to and rely on a document which never saw the day of the light. The trial Court by referring to the contents of the letter dated 29.11.95(91)/29.1.91 (the trial Court has described the letter as exhibit-'C'. We shall discuss about the document later on) to the effect:

" ... রাজউকের স্মারক নং-রাজউক/এস্টেট/১৬৬৯ স্বাঃ তারিখ ২৬-৬-৮৮ ইং এর মাধ্যমে উক্ত স্মারক ইস্যুর তারিখ হইতে ৪ (চার) মাসের মধ্যে বিক্রয় দলিল রেজিস্ট্রি করতঃ উহার সার্টিফাইড দলিলের কপি চুক্তিপত্র ও আংগীকার নামা দলিল করিতে বলা হয়েছিল কিন্তু (আপনি) উহা ৪(চার) মাসের পরিবর্তে ২ (দুই) বৎসরের অধিক কাল পরে দাখিল করা হইয়াছে যাহা হস্তান্তরের অনুমতির শর্তে চরম লংঘন।
অতএব, হস্তান্তরের অনুমতি পত্রের শর্তের উল্লিখিত লংঘনের দায়ে কেন প্রদত্ত হস্তান্তরের অনুমতি বাতিল বলিয়া গণ্য হইবে না এই মর্মে অত্র পত্র প্রাপ্তির ১৫ দিনের মধ্যে যথার্থ কারণ দর্শানোর জন্য আপনাকে অনুরোধ করা যাইতেছে। ব্যর্থতায় আপনার আবেদনপত্র বিবেচনা করা সম্ভব নয়।" gave the finding that "this letter was issued on 29.01.1991 to Mrs. Khaleda and a copy of the same was forwarded to Mr. Amanullah, but they did not respond to this letter. Ultimately the allotment of Mrs. Khaleda was cancelled on 21.05.1995 due to non-making of any construction on the suit plot as per condition of the lease agreement." Though it was the specific case of the plaintiffs that they did not receive any such letter; D.W. 3 did not also say anything in his examination-in-chief about the issuance of such letter The trial Court found fault with the plaintiffs' predecessor Amanullah for not taking any action against the said

letter (exhibit-'C' as described by the trial Court) and also for not taking any step to mutate his name in the office of RAJUK, after issuance of the letter, completely ignoring and forgetting the plaintiffs' case that they never received any such letter and RAJUK failed to produce any proof that such letter was addressed to the original lessee, the plaintiffs or their predecessor Amanullah and they received the same. The trial Court finally concluded that "For the violation of clause 24 RAJUK i.e. Lessor has the right not to accept or recognize any person as Lessee of the demised property in place of the transferor. RAJUK did not recognise the father of the plaintiff as a Lessee of RAJUK for the suit land. So there is no need to give any notice to Mr. Amanullah before cancellation of the lease agreement of Mrs. Khaleda." The above finding in effect, prima-facie prove the assertions made in paragraph 9 of the plaint as quoted hereinbefore.

83. The Appellate Court also without making reference to any document or exhibit in a vague way gave finding that " দালিখকৃত কাগজপত্র পর্যালোচনা করা হইল। ইহাতে প্রতীয়মান হয় যে, রাজউক কর্তৃক বাধিয়া দেওয়া ২৬-৬-৮৮ ইং তারিখ হইতে ৪ মাসের মধ্যে হস্তান্তরের সঠিক কোন কাগজপত্র দালিখ করা হয় নাই। বরং ৪ মাসের পরিবর্তে ২ বছর পরে দাখিল করা হয়। উক্ত রূপে চুক্তির শর্ত ভংগ করার ফলে রাজউক কর্তৃপক্ষ বাদীর পূর্ববর্তীর বরাদ্দপত্র বাতিল করেন এবং ২নং বিবাদী ১নং বিবাদীকে নতুন করিয়া বরাদ্দ দেন।" . It further appears that the Appellate Court in similar way without referring to any exhibit or document, whatsoever, gave further finding that "দাখিলী কাগজপত্র পর্যালোচনা প্রতীয়মান হয় রাজউক মূল বরাদ্দপত্র গ্রাহিতার কাগজপত্র দাখিলের জন্য নোটিশ প্রদান করেন।" Thus, the finding of the Appellate Court, though the last Court of fact, cannot be accepted as a finding of fact based on proper consideration of the evidence on record within the meaning of Order XLI, rule 31 of the Code.

84. In the context, we consider it very pertinent and relevant to quote exhibit-'2' i.e. the letter issued by RAJUK on 24.01.1988 to the lessee, Khaleda Rahman permitting her to sell the suit plot which is as follows:

" রাজধানী উন্নয়ন কর্তৃপক্ষ
রাজউক ভবন, ঢাকা-২।
স্মারক নং- রাজউক/ উঃপঃ (এ)/১৭৩ স্মা ঃ
তারিখ ঃ ২৪/১/৮৮ ইং।

প্রেরক ঃ এ, আর, ভূঞা
উপ-পরিচালক (এস্টেটস),
রাজধানী উন্নয়ন কর্তৃপক্ষ,
ঢাকা।

প্রাপক ঃ- মিসেস খালেদা রহমান
বি-৩৪৪, খিলগাঁও পূর্নবাসন এলাকা,
তালতলা, ঢাকা-১৯।

বিষয় ঃ উত্তরা আবাসিক এলাকার ৩নং সেক্টরের ১৫নং রাস্তার ৪১ নং প্লটের হস্তান্তর প্রসঙ্গে।

আপনার বিগত ১০/৫/৮৭ ইং তারিখের আবেদনপত্র মোতাবেক নিম্নস্বারকারী আর্দিষ্ট হয়ে জানাইতেছি যে, উপরোল্লিখিত খালি প্লট জনাব আমানুল্লাহ মিয়া, পিতা মৃত- কাজী রোশন আলী, ৩৩৮, তেজগাঁও শিল্প এলাকা, ঢাকা এর নিকট হস্তান্তর বিবেচনা স্বাপেক্ষে হস্তান্তর ফিস বাবদ টাকা ১,৭২,৩১৩ (টাকা এক লক্ষ বাহাত্তর হাজার তিনশত তের) মাত্র এবং ১/৭/৭০ ইং তারিখ হইতে ৩১/১২/৮৮ তারিখ পর্যন্ত সার্ভিস চার্জ

বাবদ টাকা ৮৬৮/- (টাকা আটশত ছিয়াশি) মাত্র জনতা ব্যাংক, রাজউক ঢাকায় ২৯/২/৮৮ ইং তারিখের মধ্যে জমা দিয়া জমাকৃত টাকার ব্যাংক রশিদ প্রয়োজনীয় কার্য্যকর ব্যবস্থা গ্রহণের জন্য নিম্নস্বারকারীর নিকট দাখিল করিতে হইবে। উল্লেখিত তারিখের মধ্যে টাকা দিতে ব্যর্থ হইলে কোন প্রকার নোটিশ ব্যতিরেকেই উক্ত আদেশ বাতিল বলিয়া গণ্য হইবে।

উপ-পরিচালক (এস্টেটস),
রাজধানী উন্নয়ন কর্তৃপক্ষ, ঢাকা।
তারিখ ২৮/১/৮৮ ইং।
স্মারক নং- রাজউক/উঃপঃ (এ)/

অবগতি ও প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য অনুলিপি প্রেরণ করা হইল।

১। ব্যবস্থাপক
জনতা ব্যাংক,
রাজউক শাখা
ঢাকা।

উপ-পরিচালক (এস্টেটস)
রাজধানী উন্নয়ন কর্তৃপক্ষ, ঢাকা।"

85. A mere reading of exhibit-'2' shows that permission was given to the lessee, Khaleda Rahman to sell the suit plot to Amanullah Mia subject to condition that she shall have to pay a sum of taka 1,72,313 as transfer fee and a sum of taka 886 as service charges with Janata Bank, RAJUK Branch, Dhaka by 29.02.1988 and then deposit the bank receipts with the author of the letter, the Deputy Director (Estate) RAJUK, Dhaka, the only penultimate line written in the permission letter was that

"উল্লে-খিত তারিখের মধ্যে টাকা দিতে ব্যর্থ হইলে কোন প্রকার নোটিশ ব্যাতিরেকেই উক্ত আদেশ বাতিল বলিয়া গণ্য হইবে"

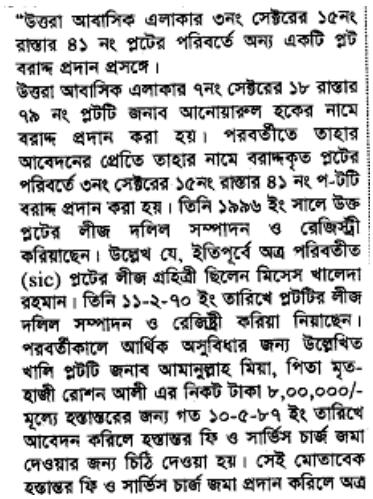
(emphasis supplied). From exhibits-3 and 3(Ka), it is prima facie proved that the transfer fee and the service charges as mentioned in the permission letter (exhibit-'2') were deposited on 22.02.1988 and 24.02.1988 respectively, i.e., well before 29.02.1988 and these facts have never been denied by RAJUK, rather admitted by it. From the permission letter (exhibit-2), it is apparent that there was no condition to file the documents mentioned in the so-called letter dated 26.06.1988 either by the lessee, Khaleda Rahman or the prospective purchaser, Amanullah within certain specific time. And if after deposit of the transfer fee and the service charges, some new conditions were put by issuing the letter dated 26.06.1988 as claimed by the defendants and also mentioned in the office note of RAJUK (the office note will be discussed later on) that required to be intimated/informed to the lessee and transferee, Amanullah as well, because by the purchase of the suit plot from the lessee by investing his good money Amanullah also acquired an inchoate right if not vested and that right could not be taken away or denied behind his back by just saying that since RAJUK did not recognize the father (Amanullah) of the plaintiffs as its lessee in respect of the suit plot, there was no need to give any notice to him before cancellation of the lease of lessee, Khaleda Rahman as held by the trial Court and confirmed by the Appellate Court(emphasis supplied).

86. Let us see also what documents were filed by defendant No. 2 in the suit. From the judgment and decree of the trial Court, it appears that the documents produced by defendant No 2 were proved and marked as exhibits-'A-F' The appellant (defendant No. 1 is the appellant) has filed the documents in a supplementary paper book. At page 148 of the supplementary paper book, description of the documents has been given, but the documents do not correspond with the description mentioned therein. We have also perused the testimony of D.W. 3 and except exhibit-'A' letter dated 09.11.1995, we do not find any conformity with the documents and the deposition of D.W. 3. None appeared for defendant No. 2 respondent. Mr. Bhuiyan

who appeared for the appellant could not also clarify the anomaly Therefore, we shall refer those documents by date and not by exhibit mark.

87. Exhibit-'A' is the letter dated 09111995 allegedly written by the Deputy Director (Estate), RAJUK, Dhaka to Mrs. Khaleda Rahman, the original lessee asking her to hand over possession of the suit plot to RAJUK within 15 days from the date of receipt thereof asserting that as she failed to make construction on the suit plot within the specified time as per terms of the lease deed and even within the extended time, her allotment was cancelled in the Board meeting of RAJUK held on 21.05.1995 (emphasis supplied) No proof, whatsoever, was field to show that exhibit-'A' was ever sent to the address of the original lessee, Khaleda Rahman through due process for service upon her and that the same was received by her, no proof was also filed by the defendant to show that the decision of the Board to cancel the allotment of the suit plot was served upon the lessee and even letter, intimating that lease was cancelled, was addressed to her It is very significant to note that the copy of the said letter was not issued to Amanullah, who, in the meantime, got the registered sale deed from the lessee on 24.10.1988 (exhibit-4) and who, as per own admission of the defendant, in the meantime on 30.12.1990, filed the required documents necessary for mutation. However, exhibit-'A' shows that its copy was given to the Executive Engineer, Uttara, Dhaka (RAJUK) Division, Dhaka and to the Magistrate 1st Class, RAJUK.

88. The next document is the office note prepared by the officials of RAJUK for placement before its Board meeting. The note reads as under



"উত্তরা আবাসিক এলাকার ৩নং সেক্টরের ১৫নং রাস্তার ৪১ নং প্লটের পরিবর্তে অন্য একটি প্লট বরাদ্দ প্রদান প্রসঙ্গে।
উত্তরা আবাসিক এলাকার ৭নং সেক্টরের ১৮ রাস্তার ৭৯ নং প্লটটি জনাব আনোয়ারুল হকের নামে বরাদ্দ প্রদান করা হয়। পরবর্তীতে তাহার আবেদনের প্রেক্ষিতে তাহার নামে বরাদ্দকৃত প্লটের পরিবর্তে ৩নং সেক্টরের ১৫নং রাস্তার ৪১ নং প-টটি বরাদ্দ প্রদান করা হয়। তিনি ১৯৯৬ ইং সালে উক্ত প্লটের লীজ দলিল সম্পাদন ও রেজিস্ট্রী করিয়াছেন। উল্লেখ যে, ইতিপূর্বে অত্র পরিবর্তীত (sic) প্লটের লীজ গ্রহিত্রী ছিলেন মিসেস খালেদা রহমান। তিনি ১১-২-৭০ ইং তারিখে প্লটটির লীজ দলিল সম্পাদন ও রেজিষ্ট্রী করিয়া নিয়াছেন। পরবর্তীকালে আর্থিক অসুবিধার জন্য উল্লেখিত খালি প্লটটি জনাব আমানুল্লাহ মিয়া, পিতা মৃত-হাজী রোশন আলী এর নিকট টাকা ৮,০০,০০০/- মূল্যে হস্তান্তরের জন্য গত ১০-৫-৮৭ ইং তারিখে আবেদন করিলে হস্তান্তর ফি ও সার্ভিস চার্জ জমা দেওয়ার জন্য চিঠি দেওয়া হয়। সেই মোতাবেক হস্তান্তর ফি ও সার্ভিস চার্জ জমা প্রদান করিলে অত্র

অফিস স্মারক নং- রাজউক/ এস্টেট/ ১৬৬৯ স্বাঃ তারিখ ২৬-৬-৮৮ ইং এর মাধ্যমে উক্ত চিঠি ইস্যুর তারিখ হইতে ৪ (চার) মাসের মধ্যে হস্তান্তর দলিল রেজিষ্ট্রী করতঃ হস্তান্তর গ্রহিতার বরাবরে নামজারীর নিমিত্তে উহার সার্টিফাইড কপিসহ চুক্তিনামা, অংগীকার নামা দাখিল করার জন্য অনুরোধ করা হয়। কিন্তু ৪ মাসের পরিবর্তে ২(দুই) বৎসরের অধিক কাল পরে অর্থাৎ গত ৩০-১২-৯০ ইং উহা দাখিল করিয়াছেন। পত্রের নির্ধারিত সময়সীমার মধ্যে তিনি হস্তান্তর দলিল রাজউকে দাখিল করিতে ব্যর্থ হওয়ার কর্তৃপক্ষের বিগত ২৬-৯-৯৫ ইং তারিখে অনুষ্ঠিত সভায় উক্ত হস্তান্তরের অনুমতিপত্র বাতিল করা হয় এবং উল্লেখিত প্লটের লীজ দলিল ১৯৭১ সালের ৩১শে ডিসেম্বরের জন্য মধ্যে রেজিস্ট্রি হওয়ার বিগত ২১-৫-৯৫ ইং তারিখে অনুষ্ঠিত ৪/৯৫ তম সাধারণ সভায় সিদ্ধান্তের আওতায় অত্র প্লটটির লীজ ও বাতিল করা হয় বিধায় উল্লেখিত ২৬-৯-৯৫ ইং তারিখের সভার সিদ্ধান্তে ইহা বাতিল হিসাবে গণ্য করা হয়। সেই মোতাবেক অত্র অফিস স্মারক নং-রাজউক/এস্টেট/৩৮৭ স্বাঃ তারিখ ৯-১১-৯৫ ইং এর মাধ্যমে প্লটের লীজ বাতিলের চিঠি জারী করা হয়। পরবর্তীকালে হস্তান্তর গ্রহিতা জনাব আমানুল্লাহ মৃত্যুবরণ করায় তাহার ওয়ারিশগণ কর্তৃক আদালতে একটি দেওয়ানী মামলা তায়ের করিয়াছেন যাহার টি এস নম্বার ২৫২/৯৭ বর্তমানে ইহা বিচারাধীন আছে।
এমতাবস্থায়, বিষয়টির উপর সদয় সিদ্ধান্ত গ্রহনের নিমিত্তে কর্তৃপক্ষের সভায় উপস্থাপন করা হইল।"

89. The office note does not bear any date, so it is not possible, to know on which date actually the same was prepared. And in the deposition of P.W. 3, no date has also been mentioned. As already stated hereinbefore, the letter dated 26.06.1988 as mentioned in the office & note, has not been filed and proved as exhibit. It is also necessary to point out that in the office note, the letter dated 09.11.1995 (exhibit-'A') has wrongly been mentioned as the letter of cancellation of lease and no document was produced and proved to show that the said letter dated 09.11.1995 was sent to the original lessee, Khaleda Rahman and she received the same. Along with this office note, the alleged extract of the resolutions of the Board meeting, has been filed. Interesting thing is that neither the office note nor the resolutions of the Board meeting 'bears any date. From the resolutions of the Board meeting, it appears that there were several agenda for consideration by the Board. Agendum No. 2 is relevant to our purpose. The first line of the extract of the resolution of the Board meeting and agendum No. 2 read as follows:

" --- ৫/৯৫ ইং তারিখে অনুষ্ঠিত কর্তৃপক্ষের ৪/৯৫তম সাধারণ সভায় গৃহিত সিদ্ধান্ত হইতে লওয়া হইয়াছে।
২। রাজউকের আওতাবান বিভিন্ন আবাসিক ও পূর্নবাসন এলাকার যে সকল বরাদ্দ গ্রহিতা গত ৩১-১২-৭১ ইং তারিখের পূর্বে লীজ দলিল রেজিষ্ট্রী করিয়া নিয়াছেন কিন্তু প্লটে এখন ও ইমারত নির্মাণ করেন নাই তাহাদের ব্যাপারে সিদ্ধান্ত গ্রহণ প্রসঙ্গে (emphasis supplied) ।
১। আলোচনা ঃ
(১) বিষয়টি প্রসঙ্গে সভায় উপস্থাপিত সার-সঙ্গে এবং এতসংক্রান্ত বিষয়ে আনুসাঙ্গিক তথ্যাদি অবহিত হইয়া বিস্তারিত ও পুংখানুপুংখ আলোচনা কার্য্যে সদস্য-পদ নিম্নরূপ সিদ্ধান্ত গ্রহণ করেন।

২। সিদ্ধান্তসমূহ ঃ
(ক) ১৯৭১ ইং সালের ৩১শে ডিসেম্বর এর মধ্যে রাজউকের গুলশান, বনানী ও xxx উত্তরা আবাসিক এলাকার লীজকৃত যে সকল প্লটের লীজ গ্রহিতা/গ্রহিত্রী লীজ দলিলের শর্ত মোতাবেক নির্ধারিত সময় সীমা প্রার্থনা পরবর্তীতে প্রদত্ত দিতে সময়সীমার লক্ষ্যে স্ব-স্ব প্লটে অনুমোদিত নকশা মোতাবেক ইমারত নির্মাণ করিতে ব্যর্থ হইয়াছেন, ইমারত নির্মাণে ব্যর্থতার দায়ে ঐ সকল প্লটের লীজ বাতিল করা হইল।
(খ) ১৯৭১ ইং সালের ৩১শে ডিসেম্বরের লক্ষ্যে উল্লেখিত এলাকাসমূহে বরাদ্দকৃত যে সকল প্লটের বরাদ্দগ্রাদিতা স্ব স্ব প্লটের লীজ দলিল রেজিস্ট্রী করিয়া দিতে ব্যর্থ হইয়াছেন ঐ সকল প্লটের

বরাদ্দও বাতিল করা হইল।
(গ) উক্ত সিদ্ধান্ত মোতাবেক সংশ্লিষ্ট প্লটসমূহে লীজ প্রহিতা/বরাদ্দ গ্রহিতাদের অবগতির জন্য তাহাদের স্ব স্ব ঠিকানায় রেজিস্ট্রার্ড উইথ এ/ডি ডাকযোগে চিঠি প্রেরণের নিমিত্তে এস্টেট শাখাকে নির্দেশ দেওয়া হইল (emphasis supplied)
(ঘ) আগামী সভার Constitution এর জন্য অপো না করিয়া পরবর্তী প্রয়োজনীয় কার্য্যক্রম গ্রহণের জন্য সংশ্লিষ্ট শাখা/বিভাগকে নির্দেশ দেওয়া হইল।"

90. If we accept the follow up of the office note as the extract of the resolutions of the Board meeting dated 21.05.1995, it shows that the Board took decision in a general way to cancel the lease of those lessees/allottees of Gulshan, Banani and Uttara, who failed to make construction within 31st December, 1971 as per terms of the lease deed and also within the extended time. There is no specific reference to the lease of Khaleda Rahman and no decision was given on the office note.

91. The next document is also an office note prepared by the officials of RAJUK for placement before its Board meeting. Again this office note does not bear any date, so like the other office note, as discussed above, it is not possible to know the date of the same. Let us have a look at the office note which reads as follows:

"উত্তরা আবাসিক এলাকার ৩নং সেক্টরের ১৫নং রাস্তার ৪১ নং প্লটে ইমারত নির্মাণকরণ প্রসঙ্গে।
উত্তরা আবাসিক এলাকার ৩নং সেক্টরের ১৫নং রাস্তার ৪১ নং প্লটের বরাদ্দ গ্রহিত্রী জনাবা খালেদা রহমান জমির সমুদয় টাকা পরিশোধ করিয়া গত ১১-২-৭০ ইং তারিখে লীজ দলিল সম্পাদন ও রেজিস্ট্রী করিয়া নিয়াছেন।
পরবর্তীকালে লীজ গ্রহিত্রী আর্থিক অসুবিধার জন্য উল্লেখিত খালি প্লটটি জনাব আমানুল্লাহ মিয়া, পিতামৃত- হাজী রোশন আলী এর নিকট টাকা ৮,০০,০০০/- মূল্য হস্তান্তরের জন্য গত ১০-৫-৮৭ ইং তারিখে আবেদন করিলে তাহাকে হস্তান্তর ফি ও সার্ভিস চার্জ জমা দেওয়ার জন্য চিঠি দেওয়া হয়। সেই মোতাবেক তিনি হস্তান্তর ফি ও সার্ভিস চার্জ প্রদান করিলে অত্র অফিস স্মারক নং- রাজউক/ এস্টেট/ ১৬৬৯ স্বাঃ তারিখ ২৬-৬-৮৮ ইং এর মাধ্যমে উক্ত স্মারক ইস্যুর তারিখ হইতে ৪ (চার) মাসের মধ্যে হস্তান্তর দলিল রেজিস্ট্রি করতঃ হস্তান্তর গ্রহিতার নামজারীর নিমিত্তে উহার সার্টিফাইড কপিসহ চুক্তিনামা, অংগীকার নামা দাখিল করার জন্য বলা হয়। কিন্তু তিনি উহা ৪ মাসের পরিবর্তে ২(দুই) বৎসরের অধিক কাল পরে অর্থাৎ ৩০-১২-৯০ ইং তারিখে দাখিল করায় হস্তান্তরের অনুমতিপত্রের শর্তের চরম লংঘনের দায়ে কেন প্রদত্ত হস্তান্তরের অনুমতি বাতিল বলিয়া গণ্য করা হইবে না এই মর্মে পত্র প্রাপ্তির ১৫ (পনের) দিনের মধ্যে যথার্থ কারণ দর্শানোর জন্য অত্র অফিস স্মারক নং রাজউক/এস্টেট। ২৩৬ স্বাঃ তারিখ ২৯-৯-৯১ ইং এর মাধ্যমে চিঠি জারী করা হয়। কিন্তু তিনি অদ্যাবধি উক্ত চিঠির কোন জবাব দেন নেই। উল্লেখ্য যে, প্লটে কোন ইমারত নির্মান করা হয় নাই।
এমতাবস্থায়, বিষয়টির উপর সদয় সিদ্ধান্তের নিমিত্তে কর্তৃপক্ষের সভায় পেশ করা হইল।"

92. And nothing has been produced from the side of the defendant that the Board took any resolution/decision on the basis of this office note. However, in this office note, there is also mention of the alleged letter dated 26.6.1988. And there has been an addition that after filing the documents as mentioned in the letter dated 26.06.1988 on 30.12.1990 a letter was allegedly served upon the lessee, Khaleda Rahman to show cause within 15(fifteen) days through a letter dated 29.09.1991 as to why the permission letter shall not be treated as cancelled, as the filing of documents after two years was the clear violation of the conditions of the permission letter. Interesting thing is that this letter dated 29.09.1991 has also neither been filed nor exhibited in the suit.

93. The next document is a letter allegedly written by the Deputy Director (Estate)

RAJUK to the lessee, Mrs. Khaleda Rahman (this letter has been described by the trial Court as exhibit-'C' as already mentioned hereinbefore) asking her to show cause within 15(fifteen) days as to why the permission to transfer the suit plot shall not be treated cancelled for violating the conditions mentioned therein, i.e., to file the documents within 4(four) months from the date of issuance of the letter dated 26.06.1988. Two different dates are appearing on this exhibit, at the top of the right side, it is mentioned 29.11.1995, whereas at the bottom, the date mentioned is 29.1.1991, if we take the year 91 mentioned at the top of this document in place of 95, even then the anomaly as to the month remains. In the list of documents, it has been described as "খালেদাকে হস্তান্তরের চিঠি", D.W. 3 in his deposition described the document as "খালেদাকে হস্তান্তরের অনুমতির চিঠি", It is better to quote this letter in its entirety. The letter reads as follows:

" রাজধানী উন্নয়ন কর্তৃপক্ষ
রাজউক ভবন, ঢাকা।
স্মারক নং- রাজউক/এস্টেট/৩৮৮৭ স্বা ঃ তারিখ ঃ
২৯/১১/৯৫ (৯১)

প্রেরক ঃ এ. আর ভূঞা
উপ-পরিচালক (এস্টেট)
রাজধানী উন্নয়ন কর্তৃপক্ষ
ঢাকা।

প্রাপকঃ মিসেস খালেদা রহমান
বি-৩৪৪-, খিলগাঁও পূর্ণবাসন এলাকা,
তালতলা, ঢাকা-১১।

বিষয় ঃ উত্তরা আবাসিক এলাকায় ৩নং সেক্টরের ১৫নং রাস্তার ৪১নং খালি প্লটটি হস্তান্তর প্রসঙ্গে।
সূত্রঃ আপনার ৩০/১২/৯০ ইং তারিখে আবেদন।

সূত্রোল্লিখিত আবেদনের পরিপ্রেক্ষিতে আপনাকে জানান যাইতেছে যে, রাজউকের স্মারক নং- রাজউক/এস্টেট/১৬৬৯ স্বাঃ তারিখ ২৬/৬/৮৮ ইং এর মাধ্যমে উক্ত স্মারক ইস্যুর তারিখ হইবে ৪(চার) মাসের মধ্যে বিক্রয় দলিল রেজিস্ট্রী করতঃ উহার সার্টিফাইড দলিলের রেজিস্ট্রী কপিসহ চুক্তিপত্র ও অঙ্গীকার নামা দাখিল করিতে বলা হইয়াছিল। কিন্তু আপনি উহা ৪ (চার) মাসের পরিবর্তে ২(দুই) বৎসরের অধিককাল পরে দাখিল করা হইয়াছে যাহা হস্তান্তরের অনুমতিপত্রের শর্তের চরম লংঘন।
অতএব, হস্তান্তরের অনুমতি পত্রের শর্তের উল্লেখিত লংঘনের দায়ে কেন প্রদত্ত হস্তান্তরের অনুমতি বাতিল বলিয়া গণ্য হইবে না, এই মর্মে অত্র পত্র প্রাপ্তির ১৫ (পনের) দিনের মধ্যে যথাথ কারণ দর্শানোর জন্য আপনাকে অনুরোধ করা যাইতেছে।

ব্যর্থতায় আপনার আবেদনপত্র বিবেচনা করা সম্ভব নয়।

উপ-পরিচালক (এস্টেট),
রাজধানী উন্নয়ন কর্তৃপক্ষ
ঢাকা।

স্মারক নং- রাজউক/এস্টেট/ তারিখ
২৯/১/৯১

অবগতি ও প্রয়োজনীয় ব্যবস্থা গ্রহণের নিমিত্তে প্রতিলিপি প্রেরিত হইল।

জনাব আমানউল্লাহ মিয়া,
পিতা মৃত- হাজী রোশন আলী
৩৩৮, তেজগাঁও শিল্প এলাকা,
ঢাকা।

উপ-পরিচালক (এস্টেট),
রাজধানী উন্নয়ন কর্তৃপক্ষ
ঢাকা।

94. Whereas from the second office note as quoted hereinbefore, it appears that such

an alleged notice was served on 29.9.1991.

95. From the exhibits filed by defendant No. 2 as discussed hereinbefore, it is, prima-facie, clear that no copy of the letter dated 26.6.1988 was filed and exhibited in the suit. It is also, prima-facie, clear from, the second office note that an alleged show cause notice was allegedly served upon lessee, Khaleda Rahman vide Memo No. RAJUK/Estate/230-stha: dated 29.09.1991 asking her to show cause within 15 days as to why the transfer permission shall not be treated cancelled as the decrements mentioned in the letter dated 26.06.1988 were filed after 2 years, i.e., on 30.12.1990, if that was really served upon Khaleda Rahman what prevented RAJUK to produce the same.

96. From the contents of the letter dated 29.11.95(91)/29.1.91 as quoted hereinbefore, one thing is very clear that even if it is accepted for argument's sake that the letter dated 26.6.1988 was issued to the original lessee, Mrs. Khaleda Rahman and the copy of the letter was given to the plaintiffs' father-Amanullah asking them to file the documents mentioned therein with 4(four) months from the date of issuance of the same, there was no default clause, because had there been any default clause then the question of issuing any show cause notice would not have arisen (emphasis supplied). At the risk of repetition, it may be stated that in the permission letter (exhibit-'2'), there was no such condition. The whole controversy would have been set at rest if the letter dated 26.06.1988 was filed and proved as exhibit. We failed to understand what prevented RAJUK to file the letter dated 26.6.1988 by which the original lessee or the plaintiffs father as the case may was asked to file the necessary documents/papers, such as: the certified copy of the registered deed, the deed of agreement, the affidavit within 4 months from the date of issuance of the said letter dated 26.06.1988 as asserted by defendant No. 2 in his written statement when the defendant asserted the said fact, onus to produce and prove the document was surely upon him (emphasis supplied).

97. It is also very interesting to refer to the letter dated 09.11.1995 allegedly issued by RAJUK to Mrs. Khaleda Rahman (exhibit-'A'). From this letter, it appears that the lease was allegedly cancelled in the meeting of the Board held on 21.05.1995 (extract of the Board meeting has already been quoted hereinbefore) on the ground of Khaleda Rahman's failure to construct building on the suit plot within the period specified in the lease deed and also in the extended time, although admittedly before expiry of the extended time, RAJUK on 24.01.1988 (exhibit-2) gave permission to Khaleda Rahman to transfer the suit plot to Amanullah and as per direction of RAJUK, she deposited taka 1,72,313 as transfer fee and taka 886 as service charges on 22.02.1988 and 24.02.1988 respectively (exhibits-3 and 3(Ka)). The plea taken by RAJUK in cancelling the lease of Khaleda appears to us absolutely unfair and malafide (emphasis supplied). We wonder how RAJUK could cancel the lease of Khaleda in respect of the suit plot on the ground of non-construction of the building thereon when RAJUK itself permitted her to transfer the suit plot on the condition of deposit of transfer fee and other service charges and admittedly those had already been deposited (emphasis supplied). In this regard, the High Court Division rightly found that by giving permission to Khaleda to transfer the suit plot to Arnanullah during the extended time to construct the building, "the conditions in the lease deed for making construction before transfer was waived by RAJUK itself (emphasis supplied)."

98. Nowhere in the written statement as well as in the testimonies of D.W. 3 who was examined on behalf of RAJUK, it was stated as to how the letter dated 26.6.1988 was sent to the original lessee and the plaintiffs' father and as to how the same was served upon the plaintiffs or upon the original lessee, Mrs. Khaleda Rahman To us it appears that the letter dated 26.06.1988 allegedly issued by RAJUK either to the

original lessee or to Amanullah, the plaintiffs' predecessor asking them to file the documents within 4(four) months from the date of issuance thereof, in the facts and circumstances of the case, was very crucial, due to the failure of lessee/Amanullah to file the documents within the said period, permission to transfer the suit plot was cancelled, but that was not filed by RAJUK and no explanation, whatsoever, was given by it for non-filing the same, but none of the Courts below applied their mind to this aspect of the case and proceeded, in a manner to decide the merit of the suit as if the defendants proved that the letter dated. 26.06.1988 was issued and the same was received by the plaintiffs, but they failed to comply with the directions given therein (emphasis supplied). In the context, we find nothing wrong with the finding of the High Court Division that "I do not find anything from the record that the petitioners received the letter dated 26.06.1988 and willfully violated any term and direction of the letter.....It appears that the petitioners were not aware of the directions which they were to comply and before taking any action against them by way of cancellation of the transfer permission, they should have been given an opportunity to explain their position in the matter.....The opposite parties could not show anything before the Courts below that the letter dated 26.06.1988 was received by Amanullah or by the plaintiff petitioners."

99. Mr. Abdul Wadud Bhuiyan, learned Counsel, appearing for the appellants, could not assail the above quoted findings given by the High Court Division by referring to any material or evidence on record and could not also satisfy us why this letter dated 26.6.1988 was not produced and exhibited either from the side of defendant No. 1 or defendant No. 2.

100. It is the specific case of the plaintiffs that before cancellation of the lease as well as the transfer permission neither any notice was given upon the lessee or upon the plaintiffs' father nor were they heard. Onus was squarely upon defendant No 2 to show that before cancellation of transfer permission given to the lessee as well as cancellation of the lease, the lessee or the plaintiffs' father was heard and they were given any chance of showing cause or hearing, but defendant No. 2 failed to produce any paper/document, whatsoever, to show that they were either heard or given any chance of showing cause before cancellation of the permission letter to transfer the suit plot and cancelling the lease deed and that they had any knowledge of such cancellation as well. Rather D.W. 3 admitted that RAJUK did not give any notice to Khaleda Rahman to cancel the suit plot for not undertaking any construction work in the suit plot from 1969 to 1988. This D.W. first stated that a notice was issued to Khaleda Rahman before cancellation of her lease deed as to why her lease shall not be cancelled and then said that he could not remember whether any such notice was given before cancellation of the lease. The High Court Division held that "without hearing the original lessee or petitioners and without issuing any notice upon them, the transfer permission was cancelled, which cancellation order was not even communicated to Khaleda Rahman or the plaintiff petitioners." The High Court Division observed that "The Courts below failed to consider that before cancelling of the transfer permission, notice ought to have been issued to the prospective (sic) transferee who has filed required documents before RAJUK and was awaiting mutation. Law requires that authority exercising action of cancellation of lease deed and transfer permission must always act with fairness. "We find nothing wrong with the findings given and the observations made by the High Court Division in the facts and circumstances of the case and the state of evidence as discussed above.

101. RAJUK failed to file any decision of the Board on any specific agenda to cancel the lease of Khaleda Rahman on 21.05.1995 as mentioned in exhibit-'A' on the ground of non-construction of any building thereon as per terms of the lease deed as claimed by defendant No. 2. This was necessary because though admittedly, Khaleda

Rahman did not construct any building on the suit plot within the specified time mentioned in the lease deed and then during the extended time, she was allowed permission to sell the same to Amanullah as back as on 24.01.1988. As observed earlier, the extract of the Board meeting shows that the Board of RAJUK took a general decision in its 4th meeting of the year 1995 (it is accepted that the meeting was allegedly held on 21.5.1995) to cancel the lease of all the lessees, who in spite of getting the lease deed registered before 31.12.1971, failed to construct building on the lease hold land, there is no specific mention of the suit plot. Office note which preceded the Board meeting dated 21.5.1995 shows that the same was prepared for decision of the Board on the suit filed by the plaintiffs being Title Suit No. 252 of 1997 (giving rise to this appeal). And it does not appear either from the Board meeting or from any other exhibit that the Board gave any decision on the said office note (office note has been quoted hereinbefore). It is also necessary to state that although in the first office note, it was stated that the permission to sell the suit plot was cancelled in the Board meeting held on 26.09.1995, but no resolution of the said Board meeting was produced and proved (emphasis supplied). We failed to understand how the defendants could connect the general decision of the Board to cancel the lease of the lessees who failed to construct building on their lease hold land within 31.12.1971, with that of the lease of Khaleda Rahman, because RAJUK itself permitted her to transfer the suit plot knowing fully well that she did not make any construction therein. The very fact that permission was given to lessee, Khaleda on 24.1.88 to transfer the suit plot to Amanullah though, admittedly, she failed to make construction therein, the option of the lessor to cancel the lease for non construction of the building on the suit plot as per terms of the lease deed, no more remained. In this connection decision (M) of the Board meeting is very important which reads as follows:

"(গ) উক্ত সিদ্ধান্ত মোতাবেক সংশ্লিষ্ট প্লটসমূহে লীজ গ্রহিতা/বরাদ্দ গ্রহিতাদের অবগতির জন্য তাহাদের স্ব স্ব ঠিকানায় রেজিষ্ট্রার্ড উইথ এ/ডি ডাকযোগে চিঠি প্রেরণের নিমিত্তে এস্টেট শাখাকে নির্দেশ দেওয়া হইল। (emphasis supplied)"

102. At the risk of repetition, it is stated that defendant No. 2 failed to show that the so-called cancellation of lease of the original lessee, Khaleda Rahman was communicated to her by registered post with acknowledgment due pursuant to the decision of the Board in its 4th meeting of the year, 1995 (emphasis supplied). All these show that the whole episode of cancellation of the lease of Khaleda Rahman was fishy, mysterious, nontransparent, unfair and malafide, RAJUK is a statutory body, it must act with fairness and cannot act surreptitiously and in a fishy manner as has been done in the instant case (emphasis supplied). liven for argument's sake, the case of RAJUK is accepted that by letter dated 26.6.1988 the lessee, the vendor of the plaintiffs' father or plaintiffs' father was asked to file the required documents, within 4(four) months from the date of issuance thereof, but they the same on 30.12.1990, RAJUK did not inform anything other to the lessee or to the transferee whether they accepted the documents or not. Though by the letter dated 29/11/95(91)/29.1.91 RAJUK tried to show that a notice was issued upon the lessee to show cause as to why the transfer permission should not be treated to have been cancelled for filing the documents beyond the period of 4(four) months, but it was not also proved that any such letter was served upon her (emphasis supplied).

103. For the discussions made hereinabove, we are constrained to hold that the lease of Mrs. Khaleda Rahman was cancelled illegally, arbitrarily, unfairly, non-transparently and malafide behind her back without giving her any chance of hearing and giving her any notice, whatsoever, and even the fact of such cancellation was not

intimated to her. The High Court Division rightly set aside the finding of the trial Court as to the cancellation of lease of Khaleda Rahman on the ground of non construction of the building on the suit plot (as already stated at the beginning of the discussion of the submission the Appellate Court did not give any finding on the question of cancellation of the lease of Khaleda on the ground of non construction of the building on the suit plot) and also the finding of the Courts below as to the cancellation of permission given to Khaleda to sell the suit plot as both the findings were based on total misreading and non consideration of the material evidence and also on the basis of a non existing document, namely, the letter dated 26.06.1988. And such findings are not immune from interference by the High Court Division. Therefore, we find no substance in submission No. 2 on which leave was granted.

104. Now the 3rd submission on which leave was granted: whether the plaintiffs' suit for declaratory decree without the prayer for recovery of possession of the suit plot was maintainable in law and whether finding of the Courts below on the question of possession of the suit plot is concurrent.

105. The trial Court did not give any finding whatsoever on possession of the suit plot. The trial Court did not also frame any issue as well on the question of possession. The Appellate Court found possession of the suit plot with defendant No. 1, so finding of possession of the suit plot given by the Appellate Court is not concurrent (emphasis supplied).

106. The High Court Division did not reverse the finding of possession of the Appellate Court and did not also give any finding of its own. Mr. Mahmudul Islam has submitted that this Court as the last Court can see the evidence adduced by the parties and decide the question finally in order to do complete justice invoking the power bestowed on it, under article 104 of the Constitution of the People's Republic of Bangladesh (the Constitution). In support of his contention, he relied upon the case of M/S. Gannysons Ltd. and another (supra). That case arose out of the following facts:

107. Sonali Bank, respondent No. 1, obtained a decree in Title Suit No. 249 of 1976 for foreclosure and sale of the mortgaged properties belonging to the appellant company and put it into execution in Title Execution No. 46 of 1980. Appellant-company appeared before the Court and prayed for staying the execution of the decree on the grounds that since the Bank proceeded against the appellant Company's properties being treated as abandoned by the Government, the Directors of the appellant Company were not properly served with notice and that had, therefore, no knowledge of the aforesaid title suit. As a result they did not appear in the suit. Also the Government which was made a party did not take any steps. However, on the prayer of the appellant Company the proceeding in the execution case was stayed till October 20, 1981. In Writ Petition No. 720 of 1981 a Rule was issued at the instance of the appellant company on October 20, 1981. But it abated on 24 March 1982 after the proclamation of Martial Law. In Miscellaneous Case No. 958 of 1981 which was filed by the appellant Company under section 47 of the Code its prayer against the execution of the decree obtained in Title Suit No. 249 of 1976 was disallowed by the Court. The appellant Company's appeal against this order was dismissed by the High Court Division on 9 November 1982. The appellant Company, being aggrieved, moved this Court and succeeded in having the appeal (Civil Appeal No. 43 of 1983) against the order of the trial Court rejecting their objection under section 47 of the Code allowed. Appellants filed review petition against the concluding paragraph of the judgment which was as follows:

"Decree dated 27-3-80 passed by the Subordinate Judge, 3rd Court, Dhaka in

Title Suit No. 249 of 1976 be stayed for six months and the Miscellaneous Case No. 958 of 1981 pending in the 3rd court of Subordinate Judge, Dhaka be struck down."

108. And leave was granted to consider the only ground to the following effect:

"For that consistently with the reasoning in the main body of. the judgment and the decision allowing the appeal (C.A. No. 43 of 1983) arising out of Miscellaneous Case No. 958 of 1981 started under section 47 C.P.C. (at the instance of M/S. Gannysons Ltd. and another) the Title Execution Case No. 46 of 1980 pending in the 3rd Court of Subordinate Judge, Dhaka, needs to be struck down and the said Miscellaneous Case No. 958, of 1981 of the same court allowed and that the order saying the decree dated 27.3.80 in Title Suit No. 279 of 1976 of the 3rd Court of the Subordinate Judge needs to be deleted."

109. Considering the definition of abandoned property as given in President's Order No. 16 of 1972, it was found that Gannysons Limited (Company, in no circumstances could be declared as an abandoned property, allowed the review application, declared that the property was not an abandoned property, struck down the execution case subject to payment (of the decretal amount to the Bank directly by the appellant and directed the Government to release the property treating Title Suit No. 508 of 1982 filed by the appellant as withdrawn being in fructuous. In that case, Fazle Munim, C.J. observed:

"17. In view of the circumstances above and in virtue of the power conferred upon this Court by the Constitution of Bangladesh, vide Article 104, to do complete justice in a case it is declared that Gannyasons Limited is not an abandoned property, it should, therefore, be immediately, released. Along with the release of Gannysons Limited any of its properties, assists and capital should also be released and returned to it."

110. The instant suit was instituted on 27.08.1997 and by now more than 15(fifteen) years elapsed. The Courts below are the Courts of fact and fundamentally, the question of possession is a question of fact. But, in fact, only one Court, i.e., the Appellate Court has given finding of possession of the suit plot. The High Court Division did neither give any finding of its own as to the possession of the suit plot nor reversed the finding of the Appellate Court, but the fact remains that plaintiffs asserted their possession in the suit plot and in support of their case of possession adduced oral evidence to which Mr. Islam has drawn out attention. Mr. Islam has also drawn out attention to the various clauses of the lease deed which need to be construed as rightly submitted by him, which the Appellate Court has not at all considered. Mr. Islam has also pointed out the misreading and non consideration of the metrical evidence on record by the Appellate Court in arriving at the finding of possession.

111. In view of the above, we find force in the submission of Mr. Islam and in order to do complete justice, we are inclined to examine whether the finding of the Appellate Court as to the possession of the suit plot was based on proper reading of the evidence on record as well as on non consideration of the material evidence including the various, clauses of the lease deed. At the same time, we record our strong disapproval and dismay at the failure of the High Court Division in not giving any consideration on the question of possession of the suit plot which was a very fundamental issue in a suit for declaratory decree concerning an immovable property and particularly when the Appellate Court gave finding that the plaintiffs were not in

possession of the suit plot and defendant No. 1 was in possession therein. Let us consider the evidence adduced by the parties as to the possession of the suit plot.

112. The plaintiffs examined 3(three) witnesses. P.W. 1 is plaintiff No. 1. This PW in his examination-in-chief categorically stated that Khaleda Rahman got allotment of the suit plot in 1970 and she had been in possession thereof till 1988 and after purchase of the suit plot by them (exhibit-'4' is the sale deed executed by Khaleda Rahman in favour of Amanullah, the plaintiffs' father), she delivered possession of the same to them and presently, they are in possession thereof and after getting possession of the suit plot, they did not get any notice from RAJUK verbal or written. In cross-examination by defendant No. 1, he asserted that his father got possession of the suit plot from Mrs. Khaleda Rahman in 1988, but he could not say the actual date. He also stated that he did not know when Khaleda Rahman got possession of the suit plot. This PW further stated that there were boundary walls in the suit plot, but he could not say who erected the same and when it was erected. This P.W. categorically denied the suggestion given to him that defendant No. 1 Anwarul Huq was in possession of the suit plot. In cross-examination by defendant No. 2, this P.W. further asserted that he could not remember on what date Khaleda Rahman delivered possession of the suit plot to them.

113. P.W. 2, Faruk Ahmed, also asserted in his examination-in-chief that the suit plot belonged to Amanullah shaheb. After the death of Amanullah Shaheb, his sons and daughters filed the suit. The suit plot was a vacant land and he used to look after the same occasionally (মাঝেমধ্যে নালিশী জমি দেখাশুনা করি) as the staff of the plaintiffs Amanullah was in possession of the suit plot. In cross-examination by defendant No. 1, this PW asserted that he had gone to the property last time in the last month, but he could not remember the date. There were boundary walls in the suit plot which were erected by Amanullah, but he could not say the accurate date of erection of such boundary walls. This P.W. denied defendant No. 1's suggestion that he constructed the boundary walls. He denied the further defence suggestion that he deposed falsely for the sake of his job.

114. P.W. 3, Nur Muhammad Khan, stated in his examination-in-chief that he resides at House No. 39, Road No. 15, Section-3 at Uttara, the owner of the house is S.M. Akram Hossain, M.P. He knows the suit plot which is adjacent to plot No. 39 and the suit plot is in possession of the plaintiffs. He categorically stated that he never saw the defendant to possess the suit plot. He further stated that at the request of the plaintiffs, he cultivates vegetables in the suit plot. He further stated that he had been residing in the house of S.M. Akram Hossain for the last 18 years. In cross-examination by defendant No. 1, he stated that he was the Darowan of the house of S.M. Akram Hossain and there are boundary walls in the suit plot and he saw the same when he came at the house of S.M. Akram Hossain and he also saw Amanullah who died 3(three) years before leaving behind 3(three) sons, and 2(two) daughters. He further stated that there was no house in the suit plot. He denied the defence suggestion that he does not cultivate vegetables in the suit plot and that he does not know the same and that he also was not the Darowan of S.M. Akram Hossain and that it is defendant No. 1 who possesses the suit plot and it is he who constructed the boundary walls. He further stated that he did not know Anwarul Haque. In cross-examination by defendant No. 2, he further stated that he heard that the suit plot was allotted to Mrs. Khaleda Rahman from whom the plaintiffs purchased, he heard this from his shaheb. He further asserted that Amanullah shaheb used to give him some money of and often for looking after the suit plot.

115. D.W. 1 is defendant No. 1. He stated that he applied to RAJUK on 28.02.1996 for giving him possession of the suit plot and thereafter, on 17.04.1996, possession

thereof was delivered to him physically. He filed the letter of delivery of possession (দখল হস্তান্তরপত্র) and the same was marked as exhibit-'R'. He further stated that he mutated his name and paid rents, the mutation paper and duplicate carbon receipts were proved and marked as exhibit-'T' series. The rent receipts were proved and marked as exhibit-'U' series. He further asserted that after getting possession of the suit plot, he erected boundary walls and also an iron gate and in the process, he had spent a sum of taka 79,800/00. He submitted a bill in proof of his expenditure. In cross-examination, the DW stated that the house of Akram Shaheb was to the east of the suit plot. but he could not say who was the owner of the contiguous plot on the southern side? He also could not say who was the owner of the next plot of Akram Shaheb? Before allotment to him, there was boundary wall on the western side of the suit plot. The plot of Mr. Akram Hossain is just adjacent to the southern side of the suit plot and there was boundary wall adjacent to the suit plot. He stated that it was true that there were boundary walls on the two sides of the adjacent plots to the suit plot (emphasis supplied) and he constructed the walls of the remaining two sides and also constructed a gate in front of Rabindra Sharani. He could not say the correct measurement of the gate of the boundary walls of the suit plot; There were trees on the suit plot, but he could not say the species of the trees. He denied the plaintiffs' suggestion that he did not erect any boundary wall on the suit plot.

116. D.W. 2, Zahid Hossain, who claimed to be a Director of City NT Bricks Limited, stated in his examination-in-chief that the company manufactures bricks and supplies the same. He knew defendant No. 1. He supplied bricks, sand and cement for constructing boundary walls around the Rabindra Sharani plot of defendant No. 1 worth of taka 79,8002. He proved the bills signed by him against supplying the goods as exhibit-'that' series. He further stated that he received the money of the bills on 15.05.1996. He further stated that "উত্তর এর আংশিক সম্পূর্ণ এবং পশ্চিমের আংশিক বাউন্ডারী ওয়াল নির্মাণ করা হয়। অপর দুই পার্শ্বে আগেই ছিল। (emphasis supplied)" In cross-examination, he stated that the height of the northern wall was 5-5 1/2 feel and was 60-70 feet at length. He could not say how many bricks would be required to construct a 5(five) feet wall. He further stated that in both the bills, the dates were, penned through. The trial Court recorded the deposition as follows:

> "অত্র দুটি বিলেই তারিখ কেটে সংশোধন করা হয়েছে emphasis supplied. He further stated that he could not say bricks of which brand were used in constructing the boundary walls of defendant No. 1.

117. D.W. 3, Abdul Mannan Sarkar, Superintendent of RAJUK, in his examination-in-chief, stated that after cancellation of the allotment of Khaleda Rahman as per decision of the Board, Anwarul Haque (defendant No. 1) took possession of the suit plot (no particular date mentioned) and as per the paper of RAJUK, he is in possession thereof and that "এবং তার নামে দখল রেজিস্ট্রারী ও সমস্ত করে দেওয়া হয়েছে।" In cross-examination, he admitted that RAJUK gave permission to Khaleda to transfer the suit plot to Amanullah and as per the documents kept with the record, Khaleda registered the deed in favour of Amanullah (emphasis supplied), but stated that Amanullah submitted the registered deed in his name after 2 years, though time for submitting the same was 4 months. The name of Amanullah was not mutated with RAJUK as he did not fulfill the conditions of RAJUK. This 1) W, however, asserted that the possession of the suit plot was given to defendant No. 1 (this time also no date was mentioned as to the delivery of possession).

118. From the evidence as discussed above, it is clear that the assertions of P.W. 1 in his examination-in-chief that Mrs. Khaleda Rahman, the lessee had been in possession of the suit plot and after purchase by Amanullah, their predecessor,

possession was given to him and they are in possession of the suit plot remained unsalted during cross-examination. The only thing he stated in cross-examination is that he could not say the actual date of the delivery of possession by Khaleda. P.W. 1 was corroborated by P.W.s 2 and 3 as to the possession of the suit plot. Though P.W. 2 is an employee of the plaintiffs, P.W. 3 is an independent and natural witness being the Darwan of the adjacent house. The defendants by cross examining P.W. 3 could not shake his credibility. More so, though D.W. 1 (defendant No. 1) claimed that he got possession of the suit plot on 17.04.1996, he could not say the name of the adjacent plot owners while deposed on 05.05.1999. Had defendant No. 1 got possession of the suit plot on 17.04.1996 as claimed by him, he would have been supposed to know the names of the adjacent plot owners. From the finding of the Appellate Court, it appears that it did not consider the evidence of P.W. 1 in its entirety. The Appellate Court did not at all consider the evidence of P.W.s 2 and 3 (emphasis supplied). It disbelieved the plaintiffs' case of possession by referring to a portion of the evidence of P.W. 1 that he could not say the date when Khaleda Rahman got possession of the suit plot and also the date when his father got possession thereof from Khaleda Rahman and that he could not say who and when the boundary walls in the suit plot were constructed. The Appellate Court further observed that the plaintiffs did not produce any evidence that the boundary walls were constructed either by them or their predecessor and then came to the abrupt conclusion that it was not proved that the plaintiffs were in possession of the suit plot completely overlooking the evidence of P.W.s 2 and 3 who clearly and categorically stated that the plaintiffs were in possession in the suit plot. The Appellate Court also failed to consider exhibit-'A' (dated 9.11.95) by which lessee, Khaleda was allegedly asked to hand over possession of the suit plot to RAJUK within 15(fifteen) days from the date of service thereof. It further appears that the Appellate Court without discussing the evidence of the D.W.s and referring to any particular exhibit abruptly came to the finding that on consideration of the evidence and the documents, it appeared that defendant No. 1 proved his possession in the suit plot (emphasis supplied). The Appellate Court recorded its finding that "স্বাঃ-প্রমান ও কাগজপত্র পর্যালোচনায় ১নং বিবাদীর দখল প্রমানীত হয়।".

119. The reasoning of the Appellate Court in disbelieving P.W. 1 appears to us absolutely fallacious and not based on fair and sound judicial principle of assessing and sifting the evidence of a witness. Simply because a witness cannot remember the exact date as to the delivery of possession, his other unassailed assertions of possession of the suit plot corroborated by the other P.W.s cannot be disbelieved. The Appellate Court also failed to consider that this was never the case of RAJUK that Khaleda Rahman was not given possession of the suit plot after the lease deed was registered in her name as back as on 11.2.1970 (emphasis supplied). It also sounds absolutely ridiculous to think that Khaleda Rahman did not get possession of the suit plot though the lease deed was registered on 11.2.1970. Possession of the suit plot was given to Khaleda Rahman by RAJUK is, prima facie, manifested by exhibit-'A', i.e., the letter allegedly written by KAJUK. to her on 09.11.1995 whereby she was asked to deliver possession thereof to it (emphasis supplied) within 15(fifteen) days from the date of service thereof In the said letter (the letter has been quoted hereinbefore), it was clearly stated that in case she failed to deliver possession of the lease hold property, RAJUK should be compelled to take over the possession thereof Copy the said letter was also given to the Executive Engineer, Uttara Dhaka (RAJUK) Division, Dhaka and also Magistrate, 1st class, RAJUK. It is not the case of RAJUK that after the issuance of said letter (dated 9.11.1995), RAJUK took physical possession of the suit plot through its officials to whom copy was given. None was also examined by RAJUK to prove the fact of taking over possession of the suit plot from lessee, Khaleda Rahman after 09.11.95. The Appellate Court also failed to

consider a broad fact that RAJUK on 24.01.1988 by exhibit-'2' gave permission to Khaleda Rahman to transfer the suit plot to Amanullah subject to the payment of transfer fees and service charges and pursuant to that permission, she deposited taka 1,72,313/- as transfer fee and taka 886 as service charges on 22.02.1988 and 24.02.1988 respectively (exhibits-3 and 3(Ka)) and the sale deed was registered by Khaleda Rahman as back as on 24.10.1988 being deed No. 13282 in favour of Amanullah. Therefore, there could not be any reason on the part of Amanullah not to take over possession of the suit plot till 1995 when Khaleda's lease was allegedly cancelled for non-construction of the building after investing so much of money on account of transfer fee, service charges and also paying the vendor. (Khaleda) a sum of taka 8,00,00000 for the price of the suit plot. it is also against common course of natural events, human conduct and public and private business that a person shall allow the vendor to continue in possession even after getting the necessary deed registered as conceived of in section 114 of the Evidence Act. These facts couple with the testimony of P.W.s 2 and 3 that it is Amanullah who is in possession of the suit plot, in no way, could make the assertion of RW. 1 that they are in possession of the suit plot unbelievable, even if he failed to give the exact date of delivery of possession of the suit plot to them by Khaleda as found by the Appellate Court.

120. In the written statement filed by defendant No. 1 as well as defendant No. 2, no specific date was mentioned as to delivery of possession of the suit plot to defendant No. 1 by RAJUK after allotting him the same on cancellation of the lease of Mrs. Khaleda Rahman. In view of the specific averments made in the plaint that after allotment, the original lessee got possession of the suit plot and while she had been in possession thereof she transferred the same to the plaintiffs' predecessor after obtaining necessary permission from RAJUK and the claim of the plaintiffs that they are in possession of the suit plot, and particularly of the contents of exhibit-'A', the fact of stating the specific date of delivery of possession by RAJUK to defendant No. 1 was a must within the meaning of rules 2 and 4 of Order VI of the Code, mere statement that possession of the suit plot was delivered to defendant No. 1 by RAJUK, was not enough as provided in the said rules. It is also very pertinent to note that while P.W. 1 was examined, no suggestion was given to him that after setting allotment of the suit plot, defendant No. 1 was given possession thereof by RAJUK by mentioning any particular date. Suggestion given to P.W. 1 was that defendant No. 1 was in possession of the suit plot No suggestion was given on behalf of defendant No. 2 that after cancellation of the lease of Khaleda possession of the suit plot was taken over from her by RAJUK and then possession was delivered to defendant No 1 on a particular date It is for the first time when defendant No. 1 was examined as D.W. 1, he stated in his examination-in-chief that he got possession of the suit land on 17.04.1996 and in support of his said assertion he filed exhibit-'ঙ' . It is also necessary to state that the written statement of defendant No. 1 was filed on 03.03.1998, i.e. much after the alleged delivery of possession. This portion of the evidence is absolutely beyond pleading and the trial Court should not have recorded this portion of the evidence of D.W. 1 in view of the provision of Order VI, rule 7 of the Code. D.W. 3 who was examined on behalf of RAJUK also in his examination-in-chief simply stated to the effect "আনোয়ারুল হক প্লট এর দখল বুঝে নেয় এবং রাজউকের কাগজপত্র অনুযায়ীই ১নং বিবাদীর নালিশী দখলে আছে।" D.W. 3 did not say any specific date as to the taking of possession of the suit plot by defendant No. 1. D.W. 3 in his testimony did not also assert that after cancellation of lease of Khaleda, possession of the suit plot was taken over from her.

121. Let us have a look at exhibit-'R' and examine whether this can be treated as a document of delivery of possession The exhibit reads as follows:

"রাজধানী উন্নয়ন কর্তৃপক্ষ
রাজউক ভবন, ঢাকা।
উত্তরা আবাসিক এলাকার ৩নং সেক্টরের ১৫ সড়কের ৪১ নং দাগের জমি যাহার বরাদ্দ গ্রহিতা জনাব/আনোয়ারুল হক বরাদ্দ গ্রহিতার জনাব নিজ এর উপস্থিতিতে ০৬/০৩/৯৬ইং তারিখে চূড়ান্ত জরিপ সু-সম্পন্ন করা হইল। (emphasis added)
উক্ত জরিপ অনুযায়ী সরে-জমিনে পরিমাণ ৫৫১৩ বর্গফুট অথবা ৭ (সাত) কাঠা ১০(দশ) ছটাক ২৩ (তেইশ) বর্গফুট পাওয়া গেল। উক্ত জমির চতুর সীমানার বাহুগুলির পরিমাপ নিম্নে ছকের মাধ্যমে দেখানো হইল। বরাদ্দপাত্রর উক্ত জমির পরিমাণ ৩(তিন) কাঠা x ছটাক দেখানো হইয়াছে। চূড়ান্ত জরিপে ইহা ঠিক নাই।
সুতরাং বর্তমান চূড়ান্ত জরিপ অনুযায়ী পরিমাণ ৪(চার) কাঠা ১০ (দশ) ছটাক ২৩ (তেইশ) বর্গফুট বেশী আছে।
চূড়ান্ত- জরিপ গ্রহিতার স্বারঃ চূড়ান্ত জরিপ গ্রহিতার স্বারঃ
১৭.৪.৯৬
১৭.৪.৯৬
বরাদ্দ গ্রহিতার/বরাদ্দগ্রহিতার
জরিপকার,
প্রতিনিধি স্বারঃ-
বিষয়তদারকী শাখা,
রাজধানী উন্নয়ন কর্তৃপক্ষ ঢাকা।
জরিপকার,
প্রকৌশলী শাখা
রাজধানী উন্নয়ন কর্তৃপক্ষ ঢাকা।
জরিপকার,
১৭.৪.৯৬
কানুনগো
রাজধানী উন্নয়ন কর্তৃপক্ষ ঢাকা।"

122. Exhibit-'R' at the most shows that the area of the suit plot was measured by RAJUK in presence of the new allottee, defendant No. 1 on 06.03.1996 Nowhere, in this document, it has been stated that after measurement of the suit plot, possession thereof was delivered to defendant No. 1 and he accepted the same We are also at a loss to see the date put at the end of measurement as 17.04.1996, when the same was made/done on 06.03.1996, and this is enough to doubt its geniuses on the face of it (emphasis supplied) The story of delivery of possession of the suit plot to defendant No. 1 on 17.04.1996 vide exhibit-'R' is belied by the statements made by defendant No 1 in para-graph-24(d) and (e) of his written statement under the head "THE BRIEF FACTS AS FOLLOWS"

> "24(d) Originally the plot in question was show (sic) comprised of 3 kathas of land but subsequently by measurement it was found that actually the area of land was 7 kathas 10 chhatacks and 23 square feet equivalent" to 5513 square feet and, therefore, an excess of 4 kathas 10 chhatacks and 23 square feet was there in the 'plot. Accordingly, the price of the said excess land of 4 kathas 10 chhatacks and 23 square feet has' fixed at taka 3,72,556/00 and this defendant was directed by RAJUK under cover of letter dated 9.6.96 to deposit the said amount as price of the excess land by 20.7.96. This defendant had, accordingly, deposited the said amount in the Sonali Bank, RAJUK Rhaban Branch, Dhaka by voucher No. 6186 dated 23.6.96. This defendant got his name mutated and paid rents from 1390 B.S. upto 1403 B.S. on receipt of Dakhilas therefore.
>
> (e) That possession of the plot in question was duly delivered to this defendant by RAJUK and this defendant peaceful took over possession of the plot and has since then been in possession thin (sic) by demarcation and specification as a bonafide lessee in occupation under RAJUK for valuable consideration without any notice of the alleged right of the plaintiffs or their predecessor as claimed by them."

123. From the relevant statements made in paragraph 24(d) of the written statement as quoted hereinbefore, at best, it can be deduced that a measurement of the area of the suit plot might have been done by the officials of RAJUK in presence of the allottee, defendant No. 1 and that too without any specific date when such measurement look place. Paragraph 24(e) is also silent about the date of delivery of possession which is unusual in case of a plot of land allotted by RAJUK, a statutory body. Had there been any actual delivery of possession of the suit plot to defendant No. 1 than the date would have surely been mentioned and a bilateral document would have been executed between defendant No. 1 and RAJUK showing such delivery of possession and acceptance thereof. In the facts and circumstances of the case and the evidence as discussed above, it, prima-facie, appears to us that, in fact, exhibit-'R' was created after filing of the written statement just to show that possession of the suit plot was delivered to defendant No. 1 by way of measurement of the suit plot.

124. Order VII, rule 3 of the Code has clearly mandated that where the subject-matter of the suit is immovable property the plaint shall contain a description of the property sufficient to indefinitely it, and in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers. In the schedule to the plaint, the suit plot has been described as under:

SCHEDULE

125. Plot No. 41, Road No. 15, Sector No. 13 (old) New. 3 of the layout plan of the Uttara Residential Model Town within Mouja Faridabad, P.S. Uttara, District Dhaka measuring 612 square yards and 6 sq. ft.

126. The suit land being a plot of RAJUK has been correctly described in the schedule to the plaint within the meaning of rule 3 of Order VII of the Code. In paragraphs of the plaint the plaintiffs have prayed the same area of land that is the suit plot. So we find nothing wrong with the description of the suit land. It does not matter what was the quantum of land which was allegedly leased out to defendant No. 1 in view of the fact that we have already found that the lease of the original lessee was cancelled illegally, arbitrarily, unfairly, non-transparently and malafide.

127. Mr. Mahmudul Islam rightly referred to clause 5 of the lease deed (exhibit-'I') which in clear terms has stipulated that if the lessee fails to complete the building of such house and appurtenances within the period referred to in clause 4, the lease shall be liable to be terminated by the lessor and on such termination, the lessee shall surrender the demised property to the lessor forthwith and the lessor shall refund to the lessee the actual amount on account of premium excluding interest, if any, paid and the right, title and possession of the demised property shall be deemed to have automatically vested with the lessor who shall have right to enter physically and remove any obstruction that might be found and dispose of the land in the discretion of the lessor (emphasis supplied). But in the instant case, admittedly nothing was done, i.e., neither the lease was terminated with the intimation to the original lessee, Mrs. Khaleda Rahman 'nor she surrendered possession of the suit plot to the lessor, RAJUK nor the lessor refunded the lease money paid by the lessee nor RAJUK took over actual physical possession of the suit plot, then how the suit plot could be leased out to defendant No. 1 and how possession thereof could be delivered to him. In this regard, it is also significant to note that in the letter dated 09.1.1995 (exhibit-A), it was clearly stated to the effect

" আপনার কর্তৃক প্লটের দখল বুঝাইয়া দেওয়ার পর প্লটের মূল্য বাবদ জমাকৃত টাকা আপনার নিকট হইতে উক্ত মর্মে আবেদন প্রাপ্তি সাপেক্ষে ফেরৎ প্রদানের ব্যবস্থা গ্রহণ করা হইবে।"

(emphasis supplied). And this is quite in conformity with the terms of clause 5 of the lease deed. Mr. Abdul Wadud Bhuiyan tried to argue that after cancellation of lease, the lessor had the right to enter into possession of the lease hold plot, but the submission of Mr. Bhuiyan is negative by the terms of clause 5 of the 'case agreement and exhibit-'A' as discussed above. liven if for argument's sake, it is accepted that the letter dated 09.11.1995 was sent to Khaleda Rahman and she failed to hand over the possession of the suit plot, then RAJUK ought to have averred in its written statement that on the failure of Mrs. Khaleda Rahman to comply with the direction given in exhibit-'A', it took over possession of the suit plot, particularly, when, in the meantime, the suit plot was transferred to the plaintiffs' father on the basis of permission duly given by it and the registered sale deed executed by Khaleda Rahman along with other necessary documents had already been filed by-Amanullah on 30.12.1990.

128. A clause of a lease deed has to be read as a whole and not in the divisive manner and cannot just be given a too mechanical or too technical meaning or interpretation. The lessor being a statutory body cannot be given the latitude to take the benefit of a part of a term of a clause which benefits it at the woes of the lessee without complying or fulfilling with the other part of the clause. In this regard, we fully endorse the observations made by D.C. Bhattacharya, J. made in the case of Chairman Bangladesh Steel Mills Corporation, now Bangladesh Steel and Engineering Corporation (supra) to the effect:

> "54. I am not prepared to accept such an extremely mechanical proposition which looks merely for the form, rather than the substance of a matter. A property taken over as an abandoned property will not ipso facto vest in the Government. Under article 4 of the President's Order No. 15 of 1972 all abandoned properties within the meaning of article 2(1) of the Order vested in the Government of Bangladesh on the commencement of the Order. If any property, which has been taken over and treated as an abandoned property is not in fact an abandoned property within the meaning of the Order, it has certainly not vested in the Government. The Government has not acquired any right or authority in respect of such a property. In such a circumstance, the Government must be deemed to be not in lawful occupation of such a property and shall be, under the general law, accountable to the rightful owner for depriving him of the profits and gains of the property, subject to the provision of article 23 of the Order which gives legislative protection to the Government and any person for anything done in good faith under the Order and the rules framed thereunder. It is an inherent duty of every person in a State governed by the rule of law refrain from doing an act which is contrary to law and so it is also his duty to dissociate from, or purge himself of, any illegal action with which he may have unknowingly or inadvertently associated. This duty is all the more incumbent upon the Government, the executive organ of the State, which has the supreme duty of enforcing the rule of taw. So if it is found that a property which was not an abandoned property but 'through some mistake or misconception was taken over as an abandoned property and that under the law in force it has not vested in the Government the Government has certainly on a discovery, of such a mistake or misconception, the right nay the duty, to restore the property to the rightful owner forthwith, independently of any positive provision of law in this regard. So if it can be shown that the assets of the Respondents' firm were never abandoned properties and has never vested in the Government under any law, the impugned order of release may be taken as a valid and lawful order of release, although it was wrongly described to have been made under article 15(3) of the Order."

129. As already found hereinbefore, cancellation of lease of the original lessee Khaleda Rahman was done illegally, arbitrarily, unfairly, non-transparently and malafide behind her back and possession of the lease hold property, i.e., the suit plot was not taken over from her in compliance with the provisions of clause 5 of the lease deed, the plaintiffs, being the purchasers from the original lessee, Khaleda Rahman, shall be deemed to be in possession thereof, besides the evidence adduced by them in that respect.

130. The Appellate Court gave unnecessary stress on the fact of construction of boundary walls on the suit plot (evidence has already been discussed hereinbefore so those are not repeated herein) in coming to the finding of possession of the suit plot In the plaint, the plaintiffs stated that the original lessee, Khaleda Rahman after getting delivery of possession of the suit plot enjoyed the same from 12.02.1970 to 24.01.1988, that is, for more than 18 (eighteen) years by exercising all acts of possession and while in urgent need of cash money transferred the same to the predecessor of the plaintiffs, namely: Amanullah on payment of transfer fee and service charges amounting to taka 1,72,313/- and taka 886 respectively after obtaining necessary permission from RAJUK vide their letter dated 24.01.1988 and the transaction was complete between the vendor and the vendee in presence of defendant No. 2. After purchase of the suit plot from the original allottee, the predecessor of the plaintiffs for the purpose of his business as well as for treatment had to stay in United State of America as well as in the European Countries for a quite long time and kept the plot under the custody of his caretaker and after the death of the plaintiffs' predecessor, they inherited the suit plot. In the plaint, the story of construction of boundary walls was not at all stated by the plaintiffs. In the written statement, defendant No. 1 did not all state the fact that he constructed the boundary walls in the suit plot after he allegedly took possession of the same. But while he deposed in Court on 05.5.1999 for the first time stated that "নালিশী প্লটের দখল পাওয়ার পর সীমানা প্রাচীর করেছি, লোহার গেট নির্মান করেছি। উক্ত সীমানা প্রাচীর নির্মান কার্যে ৭৯ হাজার ৮০০ শত টাকা খরচ হয়েছে। আমি উক্ত তারিখে ৮-৫-৯৬ ইং তাং বিল অত্রাদালতে দাখিল করিলাম।" . This portion of the evidence of D.W. 1 is contrary to the pleading of defendant No. 1 as has already been discussed hereinbefore. D.W. 2 was examined to corroborate D.W. 1 that he constructed the boundary walls and gate on the suit plot by spending a sum of taka 79,800/- and it is City N.T. Brick Ltd. which supplied the bricks for the purpose (whose evidence has already been discussed hereinbefore). But this DW cannot be relied upon for two reasons: (i) though he claimed to be the Director of City NT Bricks Limited and specifically stated in his examination-in-chief that the company manufactures bricks and supplies the same, stated that they supplied sand and cement as well to defendant No. 1. When a company manufactures and supplies bricks, we cannot understand how it could supply sand and cement, (ii) he admitted that the dates mentioned in the two bills were penned through. This very fact of penning through the dates of the bills creates a doubt as to the supply of bricks to defendant No. 1 for constructing the boundary walls. Further the boundary walls in an immovable property, here the suit plot, are constructed by Mason and not by the bricks suppliers, but defendant No. 1 did not examine any Mason or any labourer who worked in constructing the boundary walls. Further D.W. 1 himself in his cross Examination clearly admitted that there were already boundary walls on the western and the southern side of the suit plot. Besides D.W. 2 in his examination-in-chief clearly stated that " উত্তর এর আংশিক সম্পূর্ণ এবং পশ্চিমের আংশিক বাউন্ডারী ওয়াল নির্মাণ করা হয়। অপর দুই পার্শ্বে আগেই ছিল।" . When, as per own admission of D.W. 1, there was already a boundary wall on the western side of the suit plot, how could he again, construct the wall on the said side? So, it cannot be said that defendant No. 1 got possession of the suit plot and then

constructed the boundary walls therein in the absence of any proof that actually he was delivered the possession of the same by RAJUK through a duly executed bipartite paper (reason already discussed earlier) Therefore, the Appellate Court was absolutely wrong in forming an adverse presumption against the plaintiffs' case of possession in discarding the evidence of P.W. 1 on the observation that

"নালিশী প্লটের চারিদিকে সীমানা প্রাচীর দেওয়া হইয়াছে। উক্ত সীমানা প্রাচীর কবে কে নির্মাণ করিয়াছেন তাহা তিনি বলিতে পারেন নাই। ---- বাদী পরে স্বীকৃত মতে এই সম্পত্তিতে দেওয়াল বিদ্যমান আছে বাদীপক্ষ বা তাহাদের পূর্ববর্তী এই দেওয়াল নির্মান করেন এই রূপ কোন দাবী বা প্রমান বাদীপক্ষ হইতে পাওয়া যায় না। বরং ১নং স্বাক্ষী নিজেই স্বীকার করেন যে, কে নালিশী জমিতে দেওয়াল নির্মাণ করিয়াছেন বা কবে নির্মান হয় তাহা তিনি জানেন না বলিতে পারেন না।"

131. Mr. Abdul Wadud Bhuiyan, by referring to the statements made in paragraphs 4 and 6 of the plaint, tried to show that the plaintiffs themselves admitted that defendant No. 1 brought bricks and sands in the suit plot to make some construction therein which, in fact, proved the fact of possession of the suit plot by defendant No. 1. But Bhuiyan is absolutely mistaken in relying upon those statements of the plaint to prove possession of defendant No. 1 in view of so many other broad facts as discussed above which prima facie proved that RAJUK never took back possession or got back possession of the suit plot from Khaleda Rahman and never put defendant No. 1 in possession thereof. The statements made in the said two paragraphs of the plaint, at best, prove that defendant No. 1 made an attempt to get into the possession of the suit plot forcibly by bringing some bricks being emboldened by the letter of allotment, though lease of lessee, Khalada was not cancelled legally and bonafide following a fair procedure. Further in paragraph 4, it was clearly stated that "and while the plaintiff predecessor protested the defendant No. 1 'fled away and did never come forward," Since we have found that the possession of the suit, plot was neither delivered to RAJUK by original lessee, Khaleda Rahman nor RAJUK took over possession thereof from her and further no proof was filed showing delivery of such possession by RAJUK to defendant No. 1 on the basis of duly executed bipartite document, the question of construction boundary walls in the suit plot by defendant No. 1 does not arise at all.

132. It is true that the name of defendant No. 1 has been recorded with RAJUK and he has paid rents as well, but these do not prove the fact of his possession in the suit plot when actual possession is with the plaintiffs as found earlier. More so, the name of defendant No. 1 was mutated 'by RAJUK when the case of mutation in the name of Amanullah, plaintiffs' predecessor, was pending with it.

133. From the above, it, prima-facie, appears to us that the finding of the Appellate Court that the plaintiffs failed to prove their possession in the suit plot and defendant No. 1 is in possession thereof, is based on total misreading as well as on non consideration of the evidence on record including the provisions of clause 5 of the lease deed (exhibit-'I') and therefore, the finding of the Appellate Court is not immune from interference. In view of the above, the Appellate Court was absolutely wrong in holding that the plaintiffs' suit for declaratory decree without the prayer for consequential relief, by way of seeking recovery of possession, was not maintainable in law. The cases cited by Mr. Bhuiyan as noted while noting his submission that the suit for declaratory decree without the prayer for consequential relief when the plaintiffs are out of possession, is of no help to him. We find no substance in submission No. 3.

134. Now, the first submission of the leave granting order whether the plaintiffs

were required to pray for any decree for cancellation of the lease deed executed on 23.09.1996 and registered on 16.10.1996 by RAJUK in favour of defendant No. 1 in respect of the suit plot.

135. Admittedly, neither Amanullah, predecessor of the plaintiffs nor the plaintiff's are parties to the lease, agreement 7 deed executed and registered by RAJUK in favour of defendant No. 1 in respect of the suit plot. It is an agreement between RAJUK and defendant No. 1. In view of our findings given hereinbefore that the lease of the original lessee, Mrs. Khalada was cancelled illegally, arbitrarily, unfairly, non-transparently and malafide and that the plaintiffs are in possession of the suit plot, they plaintiffs were not required to pray for cancellation of the lease deed executed and registered by RAJUK in favour of defendant No. 1 within the meaning of section 39 of the Specific Relief Act. However, the High Court Division misread the prayer of the plaint in saying that "on a perusal of the record I find that in the present suit plaintiff also prayed for cancellation of the Lease Deed executed by RAJUK in favour of opposite party No. 1" but that in no way affected its findings as discussed hereinbefore. Therefore we find no substance in the first submission of the leave granting order as well.

136. The suit as framed by the plaintiffs was for two declarations: (i) to declare their sixteen annas "lease hold right holder" to the suit plot and (ii) to declare the "cancellation of lease, if any, in respect of the suit land" as illegal, malafide and not binding upon them. No prayer was made in respect of the lease agreement executed and registered by RAJUK in favour of defendant No. 1 in respect of the suit plot. Before this Court, an application has been filed on behalf of the plaintiff-respondents for amendment of the prayer of the plaint by adding the prayer that the registered lease deed dated 23.6.1996 (the date is wrong, it would be 23.9.96) executed by RAJUK in favour of defendant No. 1, is illegal and not binding on the plaintiffs and the total prayer has been replaced as under:

> "(a) The suit may be decreed declaring that the plaintiffs have sixteen annas lease hold interest in the suit plot, that the cancellation of the leased deed dated 12.01.1970 executed in favour of Mrs. Khaleda Rahman is illegal and void and the registered lease deed dated 23.6.1996 (correct date is 23.09.96) executed by RAJUK in favour of defendant No. 1 is illegal and not binding on the plaintiffs."

137. Mr. Bhuiyan has opposed the prayer for amendment on the submission that the prayer for amendment has been filed long after the period of 6(six) years as provided in article 120 of the Limitation Act Mr. Bhuiyan referred to number of decisions of this Court and of the Indian Jurisdiction as well (the decisions noted while noting his submission). In the facts and circumstances of those cited cases, prayer for amendment of the plaint was rightly rejected and the principle of law enunciated in those cases has got no manner of application in the facts and circumstances of the instant case However, considering the facts and circumstances of the case and the findings given hereinbefore, we consider it a fit case to invoke the power conferred upon this Court under article 104 of the Constitution to do complete justice in a case by allowing the prayer for amendment of the prayer of the plaint made before this Court as quoted hereinbefore without entering into the niceties of law as to the amendment as argued by Bhuiyan.

138. It appears from the operative part of the judgment of the High Court Division that though it made the Rule absolute and set aside "the judgments of the Courts below", it did not say anything about the fate of the suit and as such, the operative part of the judgment of the High Court Division needs to be corrected as well; by

invoking the same power.

139. Accordingly, the appeal is dismissed. The suit is decreed. It is declared that the plaintiffs have sixteen annas lease hold interest in the suit plot. The cancellation of lease deed executed on 12.1.1970 in favour of Mrs. Khaleda is declared illegal and void and it is further declared that the lease deed executed and registered by RAJUK in favour of defendant No. 1 appellant in respect of the suit plot is illegal and not binding on the plaintiffs The other order/direction of the High Court Division except "and cancel the subsequent allotment of the suit plot to opposite party No. 1" is maintained.

140. There will be no order as to costs.

Nazmun Ara Sultana, J.

141. I have gone through the judgments proposed to be delivered by my brothers, Surendra Kumar Sinha, J. and Md. Abdul Wahhab Miah, J. I agree with the reasoning and findings given by Md. Abdul Wahhab Miah, J.

Muhammad Imman Ali, J.

I have gone through the judgments proposed to be delivered by my brothers, Surendra Kumar Sinha, J. and Md. Abdul Wahhab Miah, J. I agree with the reasoning and findings given by Md. Abdul Wahhab Miah, J.

Court's Order

The appeal is dismissed by majority decision without and order as to costs.