

Law and Our Rights

"All citizens are equal before law and are entitled to equal protection of law"-Article 27 of the Constitution of the People's Republic of Bangladesh

Judicial Administration in Bangladesh

By Syed Ishtiaq Ahmed

A welcome short-term measure was the establishment of the Judicial Training Institute in 1996 during the time of the caretaker government. Another measure of great significance is the initiation of the world Bank Project of Judicial Capacity Building. This, too, was initiated by the caretaker government. This project comprehend reform of judicial administration including modernization with a network of computerization of court administration and judicial management.

THE administration of justice in the sub-continent as it exists today evolved principally through two historical stages during the colonial rule in the sub-continent. The first states ended with the enactment of the Government of India Act 1935. During that period the three first High Courts were established at Calcutta, Bombay and Madras by Letters Patent granted in 1865. Three years earlier by the Letters Patent of 1862 the High Court of Calcutta was first established. Thereafter, the High Courts at Allahabad, Patna, Lahore and Rangoon were established by 1922 and after the Government of India Act of 1935 a High Court in each province was established.

Basically the two tier judicial system comprising supreme and subordinate judiciary is the legacy of the colonial rule. The term 'Subordinate Courts' is a part of that legacy. The term meant that the respective High Courts exercised Appellate, Revisional and Inherent Jurisdiction as well as the power of Superintendence and control over the Subordinate Courts. The Constitutions which came to be framed in the post-independence era retained that terminology. And so did the Constitution of Bangladesh in 1972 in Part IV, chapter II and some other provisions.

Before and after the Government of India Act 1935 a cardinal issue in the colonial struggle of the people and their leaders and of the legal profession was the demand for separation and independence of subordinate judiciary.

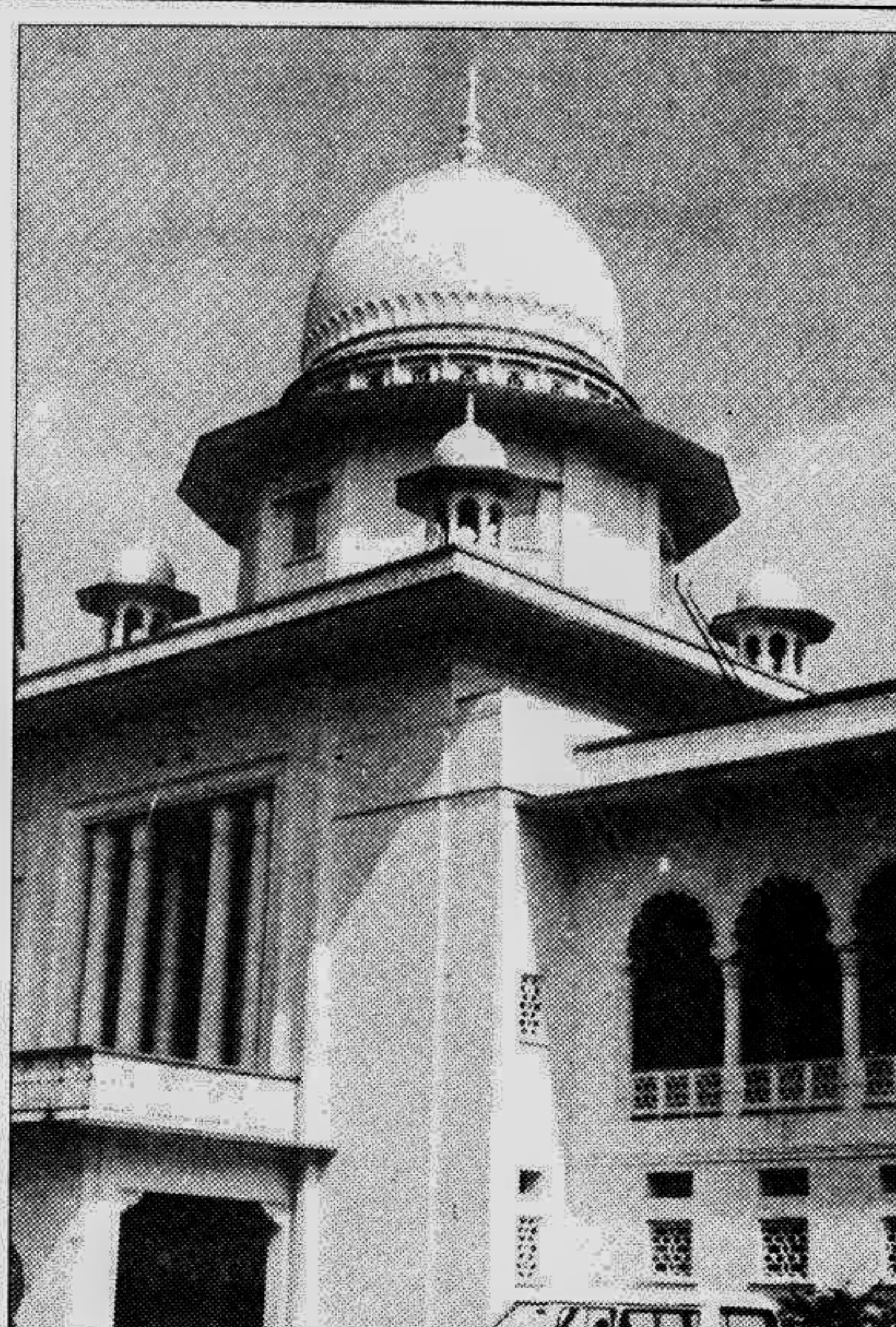
During the colonial rule for the purposes of colonial administration a loose control of judicial administration of the Subordinate Courts which were spread in the mullasid proved

adequate enough and functioned well. The Civil Rules and Orders (CRO), which contained elaborate instructions and guidance for the administration of civil justice by the Subordinate Courts, had its origin in 1981. These rules were formulated and published under the guidance of the Subordinate Courts. The CRO inherited in the post independence era by erstwhile east Pakistan was the one inherited from the Subordinate Court of Calcutta.

The CRO was last published in a more comprehensive form in 1935 and since then had been growing in bulk because of modifications and amendments added by correction slips. In 1971 when Bangladesh became independent the need for a thorough revision was felt not because of reformist urges or needs but because emergence of Bangladesh as independent and sovereign state had rendered a good number of rules obsolete. The rules were compiled and published again in 1981 under the authority of Supreme Court of Bangladesh incorporating the changes made up to that time by deleting the obsolete rules. It would be worth while to quote the following from the preface of the rules published in 1981.

"Many rules also became obsolete with the passage of time. A fairly large number of rules have been amended from time to time in the light of experience as well as to meet the changed circumstances. Formal amendments owing to the emergence of Bangladesh as an independent and sovereign country have also been made in the rules under the provisions of the Bangladesh (Adaptation of Existing Bangladesh Laws) Order, 1972."

Over and above, several rules have been newly incorporated



The Supreme Court of Bangladesh — the highest seat of justice

owing to the passing of few laws after the publication of the existing C.R. and O. as well as on the basis of experience during the past decades.

In order to rescind the obsolete rules, incorporate the amendments and new rules, the revision of the Civil Rules and Orders became an indispens-

able necessity. This volume, with a revised index, embodies all the up-to-date amendments and excludes all the obsolete rules."

These administrative rules prescribed instructions to be followed by each officer of the court at every stage from the presentation of a decree and appeal and revision. The responsibilities and duties of the administrative staffs are also contained in these Rules.

During the colonial rule these rules worked well. The control exercised over the subordinate courts were loose but nevertheless adequate. In an agrarian society where almost all the civil cases were litigations relating to land, the question of control of these courts did not present a problem. Sophisticated trappings of independent courts were for the High Courts established first at Calcutta, Bombay and Madras and later in each province.

In the post-colonial era in the independent states of the Sub-continent this administrative arrangement and dispensation continued unchanged. Under the Government of India Act 1935 which marked the second stage of the colonial administration of justice, independence and separation of the subordinate judiciary from the executive was secured to a great extent if not fully.

Consequently, separation and independence of the subordinate judiciary and the magistracy from the executive organ of the state continues to be the burning issue. Administrative reforms are not likely to bear fruit unless this cardinal issue is resolved.

In the constitution of Bangladesh of 1972 a real and effective guarantee for separation and independence of the subordinate judiciary was provided. But through the vicissitudes of time this has been reversed by retrograde steps. Standing at the dawn of a new century we find that the prevalent condition is indeed a matter of great national concern. What is worse, long periods of authoritarianism and martial law had by now resulted in mental resistance of the executive and every political government in power to the question of separation and independence of judiciary. Public con-

fidence in judiciary is continuing to erode. Yet the task is simple. A political government in power, if it has the requisite majority to amend the constitution, then by itself or if it does not have the majority then by a consensus has to take the initiative of restoring Articles 115 and 116 of the constitution as these were originally in 1972.

If this measure of reform is immediately undertaken and some more long-term and short-term measures are planned and initiated a real beginning will have been made. The initiative for short term measures should not be postponed till the full results of the long-term measures are achieved.

A welcome short-term measure was the establishment of the Judicial Training Institute in 1996 during the time of the caretaker government. Another measure of great significance is the initiation of the world Bank Project of Judicial Capacity Building. This, too, was initiated by the caretaker government. This project comprehend reform of judicial administration including modernization with a network of computerization and judicial management. It also recognises the need for rebuilding and expanding the physical infrastructure of the subordinate courts. From the reports available we learn that significant progress has been made in the working of this project.

Substantial and meaningful changes in the Civil Rules and Orders to suit the needs of the time, the reform of service conditions of the judges to attract honest and competent persons, expansion of their cadres to cope not only with the backlog but also with ever increasing number of cases every year, training up of adequate number of judges in commercial law including international trade, banking, sale of goods and other commercial contracts are some of the areas where initiatives are required to be taken immediately to promote justice and good governance and meaningful economic growth and development.

The writer, a former Adviser to the Caretaker Government of Bangladesh, is a Senior Advocate of Bangladesh Supreme Court.

law Watch

Islam gives women justice

By Asghar Ali

IT is generally thought that Islam treats women very unfairly and deprives them of all their rights. In practice, many examples are indeed available of such treatment meted out to women by Muslim men. Women are often put behind the veil, forbidden to leave their homes unless accompanied by a close male relative; they are often married off at an early age and have fewer opportunities for education. The treatment of women by the Taliban in Afghanistan reinforces this image of women in Islam.

However, these practices are in sharp contrast to the Quranic pronouncements. The Quran is not only fair to women, it gives them all the rights that women agitate for today. But when a religion is practised in a conservative cultural milieu, it often loses its original thrust. This is what has happened with Islam. What the Quran states about women is an ideal, the reality, as usual, is determined not by scriptural pronouncements alone, but by a combination of factors including the cultural ethos of a given society.

The Quran accepts all the fundamental rights of women. A woman must be a consenting party in marriage, and without her express consent, the nikah is invalid. Even her father cannot consent to a woman's marriage on her behalf. She has also been given the right to divorce in two forms: khula, to liberate herself from the marital bond, is her absolute right and a Kazi must grant her khula if she insists on it. Her only obligation is to return the mahr or dowry, as she is breaking the marital contract. The other route is mubarat or divorce with mutual agreement.

The Quran permits a woman to marry after widowhood; she can also choose another marital partner after iddah, the period of divorce, is over (three months, if she is not pregnant, and after the delivery of a child, if she is pregnant). She is also permitted to obtain a divorce if her husband is impotent or if he has not been heard from after four years or more. Thus, a woman in Islam is entitled to enjoy sexual pleasure as much as a man; it is no taboo for her. There is absolutely no mention of female genital excision in

the Quran; again, this is a tribal cultural practice in certain African countries like Egypt, Sudan and so forth.

Woman is also fully and absolutely entitled to property rights, as a man is. Her father or husband cannot take property away from her except by her express consent. As for inheritance, the Quran states that she will get half the share that her brother does. But this is not compensated by way of the mahr she receives at the time of marriage, and she has no obligation to maintain herself. The obligation to maintain her is her father's or husband's.

She can spend her inherited properties according to her own pleasure, as a man is. In case of divorce, also, she receives compensation by way of what the Quran calls mahr (provision for her maintenance until she lives or remarries). If a woman cannot marry, the Quran gives her father the right to make special provisions for her through wasiyah, his will, before the rest of the property is left to be inherited by other children. Thus, from whichever angle of the Quranic provisions, the rights of women have been taken care of by Islam in a just manner.

The Prophet of Islam also tried to combat prejudices against the girl child by stating that those who bring up girl children properly, feeds and clothes them and gives them the best possible education, will not be touched by hell-fire. The Prophet's dearest child was his daughter Fatima. When Ali, Fatima's husband, wanted to take a second wife, the Prophet showed his strong displeasure. Ali did not take another wife so long as Fatima was alive. This was also a message that polygamy is not a general license to marry more than one wife at one's pleasure, but is permitted only in some exceptional circumstances, to protect the interests of widows and orphans.

Muslim men have hardly been faithful in their observance of the Quranic injunctions for the empowerment of women. They have even resorted to weak hadith to violate Quranic injunctions. Thus, the male ego and the local cultural ethos must be held responsible for the plight of Muslim women today, and not the Quran.

OPINION

Writ Against Shipping Companies : An Issue of Concern

By Md Ayub Chowdhury

PRICING action on own product or services by a company is its right; accepting or rejecting the same is the right of customers in a free economy where market forces finally stabilise the price. Protection under Article 102 of the Constitution has been sought to stop collection of Terminal Handling Charge (THC) by shipping companies. This seems to limit rights of shipping companies (carriers) to price their own services, THC or whatever term it is called is one of the charge items in carriers' tariff resulted from corporate pricing decision having regard to the conference membership compliance, if any. Preference of writ to restrain latitude in pricing its own services by carrier drew criticism. Even in those old days, those valid and recognised cartel or pool actions were thrown out by market forces, not by any other special order. This smoke appears to have been formed in the trade from a recent HC rule on 24 shipping companies interim ordering to stop collection of THC which is a mere recovery of actual costs the shipping companies incur in handling the shipment of customers. Plan-ners in shipping industry including international regulating bodies and conference like FMC, TSA, ANERA, IPBC do not find this as a welcoming symptom. International carriers also require to operate under these regulatory bodies and any isolated local action not standing to correspond may affect the trade. If our national carrier BSC, not made a respondent in the writ, is found charging THC to customers, may or may not be in equal amount, it may add to further vouch the validity for THC bill.

While writ order is yet to be in the hands of respondents, respected applicants (customers) alleged that THC charged by shipping companies is a charge for use of port terminal while carriers can not legally charge as the CPA facility do not belong to them and also seek order to CPA to direct shipping companies not to collect any THC. I think, we should look more into the contents than the term THC which bears confusing word 'terminal' in it. What is charged by carriers as THC is not a charge item in CPA charge schedule but an item in carriers' tariff time to time adjusted by conference or corporate decision. By charging THC, carriers are not realising any port dues from customers nor the carriers are charging for any 'port service' as wrongly implied in writ application. Carriers are simply doing a pass-on action of few charges paid to various parties including CPA. Impact of costs may be on different players in service chain but the incidence shifts to ultimate consumers in the form of additions built into pricing at stages and so the THC is in this case. All charges including ocean freight could be lumped into one name or may be for strategic planning reasons charges are named in different terms. It is closely like

port handling contractor passing on some of his costs to carriers in the form of 'documentation and tally' so much so deemed to remain uncovered by what CPA pays to them plus their profit. Any carrier which prices in competitively will be forced out by market actions. It clearly answers that THC or whatever name it is called is not a charge by shipping companies for use of CPA terminal facility nor it's an item in CPA tariff being illegally charged by carrier. Had the THC been named otherwise with no mention of word 'terminal handling', would it have made any ground for writ? If it is not, charge term has been all the issue then which shipping companies should look into. In fact carriers designate local charge recovery item in various names like THC, DDC, CSC, GIC, LCL, CYRC, CFSRC or any other term but the term THC got the wide recognition in trade. Even many carriers officially designate this charge with term other than THC.

For a sound growth of our trade including export, relationship between carriers and customers is extremely important which both parties equally realise. Carriers does not seem to be in a position to unduly overrate their services. Overcapacity and poor earning take a daily call at shipping industry. In fact, exchange control hold blessing for us with the given commission rates and many of our local agency houses may not be able to gauge mileage in the corporate books of principal companies. Many shipping companies got into receivership, many get merged and many are limping with fragile hopes in balance. Our operation is characterised with port congestion, long turnaround time, strikes, calamity, pilferage at port, stricter waiver regulation, piece contract for seal-inact FCL-LCL arrival, rent-seeking, limited terminal facilities, abnormal port tariff, super penal empty return and these all take an unbearable toll on shipping companies operating here. Ordinary costs incurred inland until a container takes load onto ship is sometimes over 30% of the total earning and port's penal return on empties often wash away hopes in the deal even before other costs begin to surface from its journey from Bay water. There is no better way than an action trying to match segmental cost and revenue in any business and THC is an alike example. Leaving the temporary surge in recent months, what answer would we have to the question as to how the carriers are surviving over the years when the freight rate slid annually by over 10% and cost kept continuously rising? Continuous currency devaluation do bring fortune for exporters but the fact that shipping companies, which also contribute towards timely transporting of country's export, greatly may lose on their locally-held remittable funds may lose sight of the fiscal

planning. Our import-export ratio is approx 3:2 and it is avoidable that there will be more imports than exports and so will be the more containers sitting at port. While port overruns its capacity, shipping companies at forefront get chopped with penal rent. Emergence of forwarding companies did play a greater role towards stabilising carriers' charges. It is market force which should fix the price of business service; unfortunately not a cost order.

As the shipping companies involve in container transportation as opposed to traditional vessel operation, they do involve in handling of container beyond the water limit and so they involve in charges outside water limit and, as evident from the contents of THC, it is a recovery of that costs incurred outside water limit. It is not unfair that chart of accounts do track the cost and revenues separately with the terms they best fit and THC is in this case. So is a need to take a proper look at the term 'THC' and also what it attempts to recover. For example, charges made on carriers by CPA, contract, equipment vendor and misc permitting parties make up more than 100% of the amount recovered from customers in the form of THC or whatever named let alone the other costs that the carrier keep incurring locally. Even writ application specified the fact of loading/discharging tariff of CPA which is charged on carriers and this is one of the parts of the costs carriers pass on to customers in the form of a revenue widely known as THC. Had not the CPA tariff been chargeable on carriers, significant part of THC might not have been an issue today. Fat part of inland haulage tariff (IHC) are railway freight and CPA lift-on/off charge. IHC charged by carriers is also a similar pass-on action but not an issue with the customers is a point to reckon.

Formulating own tariff or price so as to recover cost and margin is justified in all business with profit objective. Writ also mentioned that freight and C&P contracts are included in L/C and there can not be any other charge than freight. L/C is a contract between importer and exporter while Bill of Lading is the evidence of contract between importer/exporter and carrier which includes reference to carriers tariff having a local charge recovery item of THC in it. All charges including charges towards recovery of costs incurred at port in whatever name it is called are embodied in carriers' tariff, adjusted time to time, and collection of THC or similar charges in Bangladesh come under the purview of tariff. Instance of all-in contracts on exports is also sometimes seen which disposes at THC bill; choice goes to customers.

If we look at the definition of THC given by learned authors and seem to have been considered by authorities and UN bodies, definition not inserted

here for copyright limitation, it clearly establishes the fact that THC is an item payable to shipping companies. It did not say as an illegal charge by carriers. Whatever exporters or importers pay to CPA as per CPA tariff is customers' costs having impact on them, what shipping companies pay to CPA and other parties is also the cost incurred in handling the relevant shipment, burden of which is passed to customers as built in carriers' tariff spoken as THC. How THC tariff is made up might address many unanswered questions though the disclosure of confidential information by conference or carriers remain their choice. At times, conference members offering unofficial rate cuts to customers also remain unappreciated by trade. THC is not a recent action; it dates decades back possibly since the time container shipping saw light.

Writ also sought CPA to issue directive to shipping companies to stop THC collection which CPA is not empowered because carriers are not billing any CPA charge item to a third party which CPA missed out collection. Carriers are CPA users like exporter and importer; CPA has its own charge tariff and do the carriers have their own. CPA can not ask carriers to stop collection of any revenue nor CPA can stop local charges incurred by carriers to be passed on. In other words, one party can not dictate the pricing of another party unless the issue falls within the parameter of government price control.

This writ paved an opportunity for shipping companies to explain ample valid commercial grounds and justify their pricing and firmly prove before honourable HC that THC is not an item on CPA charge schedule which CPA missed out collection: THC is a mere recovery of actual costs incurred on handling of customers' consignments; THC is just a pass on action by carriers as it is done in ordinary product pricing. THC is a charge which could even be named otherwise without the words 'terminal handling' in it to iron out confusion. CPA, not enjoying a price control right, can not dictate pricing decision of one of its users and this is an issue seeking order to limit rights to pricing.

Customers, here exporters and importers, do expect best transportation service at least cost and current intensity in competition offer them opportunity to cherry pick the service. THC or any other term used to recover local costs is a valid business action by carriers while we hope that, for the greater interest of our trade, more closure interaction between carriers and customers may bring more benefits than the size of THC in question and as a result our trade keeps growing. In whatever name or term, local costs incurred by carriers will have to remain recovered either in all-in rate or in an itemised bill.

The writer is a fellow member of Institute of Chartered Accountants of Bangladesh.

Flight over the boundary

On the occasion of World Cup Cricket '99
GrameenPhone flies over the marks with an
unbelievable offer

GP-GP Regular Connection with Handset

for Tk. 13,825 only

along with a 14" TV (B&W) Free



GrameenPhone

DHAKA : GrameenPhone Info Center : 9885261, Sales Officer : 017500032, 017500050, 017500055, 017500066, 017500094, 017500248, 017500249, GrameenTelecom : 9005257-69 ext. 1292, 017538151-2, 9664383, 017524824, 017524826, Brothers Limited : 836225, 410013-7, 9885156, 884738, 868523, 017525437, Flora Telecom : 9567846, 9667236, 501323, 9664399, 897525, 863890, 600836, Butterfly Marketing Limited : 9870123, 862820, 823314, 017528531, 9663331, 9715858, 017531143, Cell Telecom : 9133105, 9125537, 017526135, Panasonic Electronics : 9558666, 9562963, Future Tech International : 9122778, TeleWorld : 017537451, 017522255, City Link Cellular Phone Service : 9567063, 9551182, 9556400, Star Tel : 017686789, Mobile Mart : 017695401, 0175-6051-2, Sales Agent : 017563151, 017536536, 017546036, 017546037, 017546040, (Akhaura & Narshingdi) 017546038, (Kishoreganj & Bhaibab) 017695442, GAZIPUR : Grc-an Tel : (0881) 6257, 017650020, MYMENSINGH : Brothers Limited : 017688600, SAVAR : Bulbul Electronics : 017537224, 017685628, CHITTAGONG : GrameenPhone Info Center : 721912, 724519, Sales Officer : 017700232-4, 017700463, Grameen Telecom : 656716, 017720138, Flora Telecom : 616923, 616959, 017720627-8, One Stop : 656128-9, 613756, GSM Shoppe : 622035, 613497, 017720940, 017720950, Butterfly Marketing Limited : 741784, E.E.L. Tel : 715556, 655573, Sales Agent : 017762324, 017762313, 017762355, 017762321, COMILLA : Butterfly Marketing Limited : (081) 8864, Sales Agent : 017691271, 017696771, FENI : Butterfly Marketing Limited : S.S.K. Road, Teleshop : 74125

Limited stock, rush now.