



Star LAW report

Right to easement

Change of character of property extinguishes the right

High Court Division (Civil)
The Supreme Court of Bangladesh
Civil Revision No. 5361 of 1991 with
Civil Revision No. 5362 of 1991
Osi Meah Sowdager

Tulsidham Akherar Madan Mahan Narasingha and others
Before Justice Gour Gopal Saha
Judgment: 13 May 2002
Result: Rules discharged

Background

Gour Gopal Saha J: These two rules are directed against the judgment and decree dated, 28.09.1983 (decrees signed on 01.11.86) passed in Other Appeals No. 2 of 1986 and 3 of 1986, heard and disposed of analogously by the District Judge, Chittagong on affirming the judgments and decrees dated 16.11.85 (decrees signed on 30.11.85) passed by the 1st Court of Subordinate Judge, Chittagong in Other Suits No. 49 of 1976, 130 of 1976 and 87 of 1979, whereby Other Suits No. 49 of 76 and 130 of 76 were decreed and Other Suit No. 87 of 79 was dismissed on contest.

The case of the plaintiff-opposite party is that the suit land recorded in R.S. Plot No. 358 of Mouza Ander Killa, P.S. Kowali, district-Chittagong belonged to the plaintiff Deity and it has been correctly recorded in his name in the R.S. and P.S. Khatians as a pond. The suit land is a pond and its banks. The plaintiff has been owning and possessing the same in his own right, till he was dispossessed from a part of the suit land by the contesting defendant in 1970, which necessitated the filing of Other Suit No. 99 of 1970, re-numbered as Other Suit No. 130 of 1976 and Other Suit No. 49 of 1976 respectively for declaration of title and recovery of khas possession and for declaration of title and confirmation of possession in the suit land or, in the alternative, for recovery of khas possession therein. The case of the plaintiff Deity in Other Suit No. 49 of 1976 is that taking advantage of the abnormal situation prevailing in the country during the war of liberation the contesting defendant illegally filled up the said pond and eventually dispossessed the plaintiff completely on creating fraudulent and fake kabalas from one Gita Rani, although the alleged vendor had no title and possession in the suit land. In other Suit No. 87 of 1979 the case of the plaintiff petitioner was for a declaration that the proceedings of Misc. Case No. 159 of 1972 of the Court of the S.D.O. (North) Chittagong and the orders passed therein on 23.02.72 and 04.03.72 directing him to deliver possession of the suit land in R.S. Plot No. 358 to the plaintiff-opposite party are illegal and void and also for permanent injunction.

The learned Subordinate Judge heard the aforesaid three suits analogously and by his judgment dated 16.11.85 decreed Other Suit No. 49 of 76 and other Suit No. 87 of 79 on contest against the present petitioners.

Being aggrieved by the aforesaid impugned judgments and decrees dated 16.11.85 (decrees signed on 30.11.85) passed by the 1st Court of Subordinate Judge, Chittagong, the present petitioners took two appeals before the District Judge, Chittagong being Other Appeals No. 2 of 86 and 3 of 86. The present petitioners did not prefer any appeal against the dismissal of their Other Suit No. 87 of 1979, as a result of which the decision of Misc. Case No. 159 of 1972 by the S.D.O. (North), Chittagong remains binding upon the present petitioners.

The learned District Judge, Chittagong heard Other Appeals No. 2 of 1986 and 3 of 1986 analogously and dismissed both the appeals by the impugned judgment dated 28.09.83, on affirming the impugned judgments and decrees passed by the learned Subordinate Judge, 1st Court Chittagong.

Being aggrieved by the aforesaid impugned judgments and decrees dated 28.09.83, Osi Meah Sowdager, the predecessor-in-interest of the present petitioners, moved this Court and obtained the present rules.

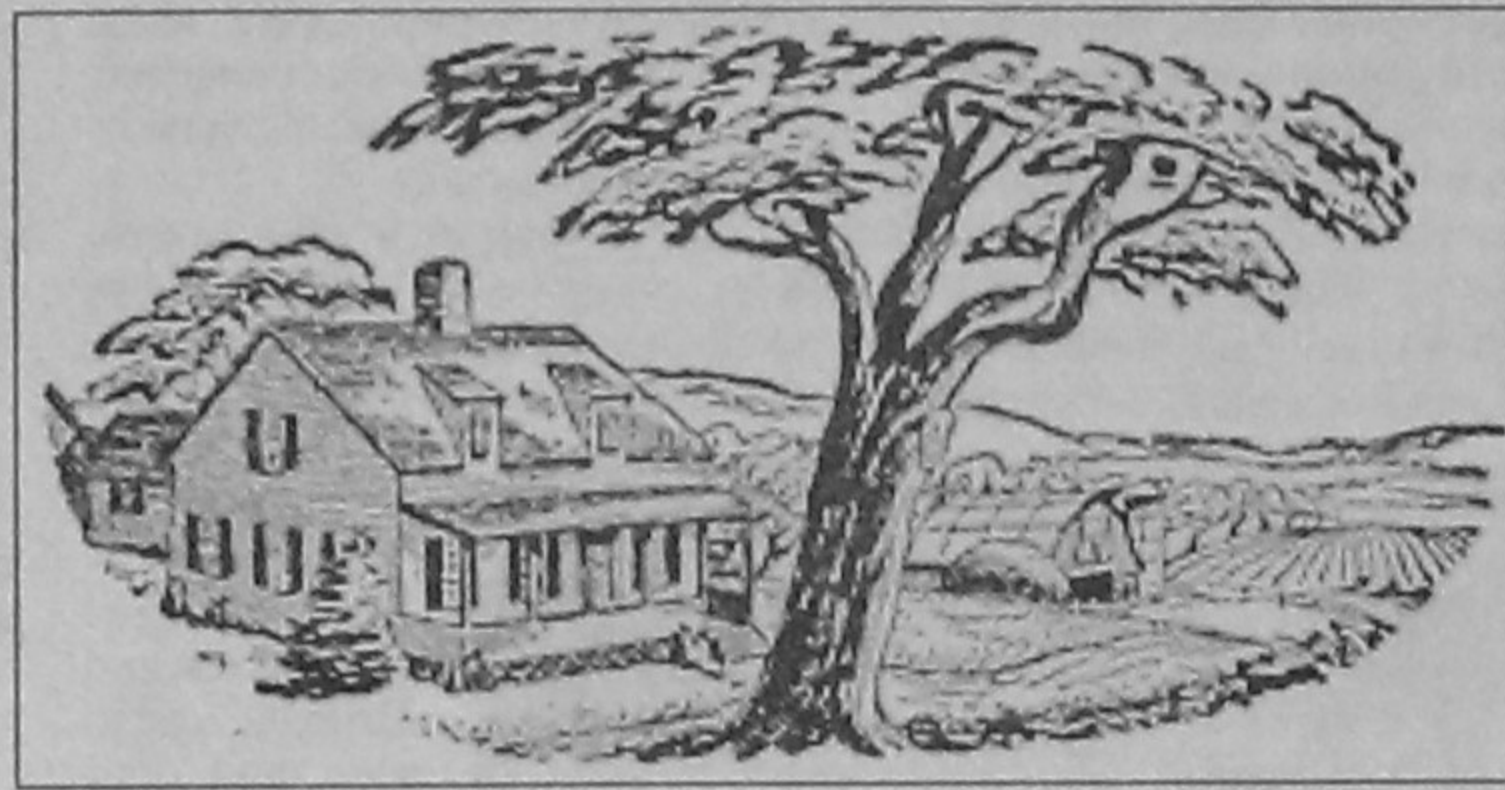
These two rules are disposed of by a single judgment as similar questions of law and facts are involved in the rules.

Point for determination

The only point for determination in the rules is to see whether the learned District Judge committed any error of law occasioning failure of justice in passing the impugned judgements.

Deliberation

Section 44 of the Easement Act provides that an easement is extinguished



where the servant heritage or the subject-matter of the easement is so permanently altered that the dominant owner can no longer enjoy the easement. In the instant case, it is the specific case of the contesting defendant that with the lapse of time, the suit pond fully silted up and permanently changed its character as a pond, following which the contesting defendant's predecessors-in-interest Gita Rani and her mother Joga Maya constructed dwelling huts thereon. Subsequently the defendant purchased it from Gita Rani with structures standing thereon. In the facts of the case and the evidence on record, it stands proved beyond doubt that the pond in question has so permanently changed its character that the alleged dominant owner can no longer enjoy the easement. It is thus crystal clear that the alleged easement right of the contesting defendant in the suit property totally extinguished, by subsequent developments by a total change of the nature and character of the property. As a matter of fact, no right of easement in the suit property could be proved by the contesting defendant by adducing any evidence worthy of credence. The story of having an easement right in the suit property stands out as a sheer myth.

The learned District Judge, as the final Court of the fact, also clearly found that the plaintiff convincingly proved that he has title in the suit land, from which the contesting defendant-petitioner illegally dispossessed him in 1970-71. Admittedly the pond silted up around 1970 and with that the alleged easement right completely extinguished and the land reverted to the plaintiff as its undisputed owner. So, by purchase of the suit land by the contesting

defendant from Gita Rani by kabala dated 27.01.1970 and by obtaining decree in Other Suit No. 24 of 1971, the defendant acquired no right, title and interest in the suit land. These findings of facts arrived at by the learned Court of appeal below are well-supported by convincing oral and documentary evidence. The 3 PWs examined by the plaintiff uniformly and consistently stated in their evidence that the contesting defendant entered in a portion of the suit land in 1970 and thereafter forcibly dispossessed the plaintiff from the remaining portion of the suit land in 1971 and constructed huts thereon. Both the learned District Judge and the learned Subordinate Judge concurrently found that the defendant totally failed to prove that his predecessors-in-interest, namely Gita Rani and Joga Maya or Raimohan and Harimohan had acquired any title in the suit land so as to pass title to the defendant petitioner. It is also found from the patra dated 28.07.1933 that Raimohan and Harimohan settled RS Plot No. 358 with Joga Maya, albeit, with no title, for a period of 9 years only and allowed her to use the water of the pond and its bank for the same period. The learned Courts below also concurrently found that there is no evidence on record to prove that Joga Maya or Gita Rani ever claimed title in the suit land at any relevant time. I find no evidence on record to hold that Joga Maya continued to possess the suit land after the expiry of the period of the mortgage for 9 years. On elaborate discussion of the evidence, both oral and documentary, the learned Courts below concurrently found that the plaintiff has successfully proved his title and possession in the suit land till before he was forcibly dispossessed by the contesting defendant therefrom in 1970-71. It must therefore be held that the learned Courts below rightly found that the suit is not barred by limitation or by adverse possession. These material findings of fact are found to be well-reasoned and well-supported by the evidence on record. The learned District Judge as well as the learned Subordinate Judge duly applied their judicial mind into the material evidence and the material documents of the defendant on which the defendant relies, and discarded these documents on assigning convincing reasons. The impugned judgment is thus found to be concluded by concurrent findings of fact, which are fully supported by proper appreciation of the evidence on record. The grievances of the petitioner that his basic documents have not been duly considered and correctly construed are found to be totally baseless and unsubstantiated. I have carefully scrutinized the material Exhibits of the case and I find that the learned Courts below were fully justified in decreeing the suits on proper appreciation of the material evidence and right construction of the exhibited documents of the contending parties. I do not find any illegality in the impugned judgment occasioning failure of justice so as to justify interference by this Court exercising revisional power under sections 115(1) of the Code of Civil Procedure. I, therefore, find no merit in the rules which must fall accordingly.

Decision

The two rules are discharged without any order as to cost and the impugned judgments and decrees dated 28.09.1983 passed by the learned District Judge, Chittagong in Other Appeal No. 2 of 1986 and Other Appeal No. 3 of 1986, on affirming the judgments and decrees dated 16.11.1985 passed by the learned 1st Court of Subordinate Judge, Chittagong in Other Suit No. 49 of 1976 and Other Suit No. 130 of 1976 decreeing the suits, are affirmed.

The order staying all further proceedings of Other Execution Case No. 22 of 1985 of the 1st Court of Subordinate Judge, Chittagong, and further proceedings of Other Execution Case No. 23 of 1985 of the 1st Court of Subordinate Judge, Chittagong, pending hearing of the rules, is vacated. The learned Execution Court is hereby directed to dispose of the execution cases with utmost expediency, preferably within 3 months from the date of receipt of this order.

No one appeared for the petitioner, Mr. Bhishna Dev Chakraborty, Advocate, for the opposite parties.

FOR YOUR information

The Five Most Important Constitutional Cases

i. **Kazi Mukhlesur Rahman vs Bangladesh**, 26 (1974) DLR (AD) 44
Article 36 of the Constitution guarantees right to movement within Bangladesh, including right to settle, move in and out of Bangladesh. However, when Bangladesh entered into an agreement with India, giving up its claim to Berubari and retaining Dhahagram, the Appellate Division held that the agreement involved cessation of territory as well as deprivation of the right to movement to that part of the territory which was given up. This could not be done without constitutional amendment and hence the agreement was illegal and ultra vires of the constitution. As a result, the Constitution (Third Amendment) Act, 1973 was passed to give effect to the agreement.

ii. **Aruna Sen vs Bangladesh**, 27 (1975) DLR (HCD) 122
In Aruna Sen the authority of the law enforcement agencies to detain a person without following the constitutional provisions was declared illegal, paving the way for subsequent evolution of 'objective principle' for assessing the validity of preventive detention under the Special Powers Act, 1974. Following from the Aruna Sen it has been calculated that more than 90% of the preventive detention cases under the Special Powers Act, 1974 which come to the High Court Division, are routinely declared illegal.

iii. **Anwar Hossain Chowdhury vs Bangladesh**, 1989 BLD (Spl) 1
Anwar Hossain Chowdhury vs Bangladesh, popularly known as the Eighth Amendment case, stemmed from the fact that by Martial Law Proclamation Order No. 11 of 1982 four permanent Benches of the High Court Division were set up at Dhaka, Jessore, Comilla and Rangpur. On the withdrawal of Martial Law and on the revival of the Constitution, six permanent Benches of the High Court Division were set up by amending Article 100 of the Constitution.

Petitions in the High Court Division under Article 102 of the Constitution were filed which was dismissed. The petitioner filed appeal in the Appellate Division, contending, among others, that the High Court Division with plenary judicial power over the Republic is a basic structure of the constitution which can not be altered by an amendment.

The basis for this argument is that the power of amendment of the Constitution under Article 142 is a power under the Constitution and not above and beyond it and is not an unlimited power. The concept that Parliament has unlimited power of amendment is inconsistent with the concept of supremacy of the Constitution embodied in the Preamble and Article 7 of the Constitution.

By a majority judgement (3:1, with Justice A.T.M. Afzal dissenting), the Appellate Division declared the offending part of the Eight Amendment to the constitution ultra vires of the constitution. The 'basic structure doctrine' of the constitution was established by this judgement.

iv. **Dr. Mohiuddin Farooque vs Bangladesh**, 17 (1997) BLD (AD) 1
Dr. Mohiuddin Farooque's case opened the door, as yet were, for public interest litigation. Before this case in 1996, 'aggrieved person' of Article 102 was interpreted narrowly to mean that only those who have actually suffered loss, or deprived of rights could come to the court under writ jurisdiction. This case expanded the meaning of aggrieved person to allow persons and groups with sufficient 'tack record' on an issue or matter to agitate violation of rights on behalf of others.

v. **Secretary, Ministry of Finance vs Masdar Hossain and others**, 52 (2000) DLR (AD) 84

This is the landmark judgment on the independence of the Judiciary. In this judgement the Appellate Division issued 12 directives to the government to bring about a number of changes in the way the sub-ordinate judiciary is appointed and controlled and other related matters. The Court ruled that the civil-administrative and executive services can not be treated as at par with the judicial services of the Republic. Judges are not civil servants. As such, the Bangladesh Public Service Commission can not recruit judges which now must be done by a separate Judicial Service Commission. Magistrates exercising judicial functions must be made part of the judiciary and brought under the control of the Supreme Court.

The government has already applied a dozen times to seek extension of the time for implementation of the directives of this judgement. On the most recent of such occasion (26th October, 2002), the bar has filed a number of applications to join the hearing as interveners to oppose the government's petition for yet another extension of time to implement this judgement.

Courtesy: ERGO, Legal Counsel.

LAW letter

Operation Clean Heart

Sixteen people have died so far since the beginning of 'Operation Clean Heart' started. Although security forces termed some of the deaths as the result of heart attacks, families of the dead persons didn't accept it. Relatives of the aforesaid persons are now alleging that the army have tortured them to death.

The army has no right to torture any person. It has been stated in Article 5 of the Universal Declaration of Human Rights that, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Even if the deceased persons were criminals, they should have been given some rights as per article 11 of the Universal Declaration of Human Rights which states, "Everyone charged with a penal offence has the right to



be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

Apart from this, our constitution has guaranteed that a person should be brought before the court within 24 hours of his arrest. It has been alleged that the law was not followed properly. If law enforcement agencies do not follow laws exactly, it would be a land of chaos and brutality.

However, people hailed army deployment as law and order situation had deteriorated drastically. Nobody is above law and government has deployed army to uphold law. Security forces involved in Operation Clean Heart should not forget the fact.

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Military swooped on the criminals from 17 October to net the criminals across the country. The minister of the Ministry of Law and Justice barrister Maudud Ahmed in an interview with the BBC had said that military had been deployed to consolidate the paramilitary force in the joint operation. He also declined that military was given magisterial power. But it is seen that the operation is being conducted by the military alone. They arrested the common people on mere suspicion and without any arrest warrant. How did military arrest the common people without magisterial power. At the time of operation military opened fired on a procession in Bogra which claimed the life of a rickshawpuller. Under what law military fired on the common people without magisterial power?

Jui
Dhaka University

Recent issue of "Law & Our Rights" of the Daily Star has caught my attention by its exclusion of an issue I think is very important.

The masthead reads "All citizens are equal before the law and are entitled to equal protection of the law." Article 27 of the Constitution of the Peoples Republic of Bangladesh. I presume that includes criminals. Shouldn't the Law Desk have commented on the events currently taking place in the army crackdown?

Joynto
Dhaka

LAW lexicon

Pendente lite

Pendente lite is a Latin term which means during litigation. For example, if the validity of a will is challenged, a court might appoint an administrator *pendente lite* with limited powers to do such things as may be necessary to preserve the assets of the deceased until a hearing can be convened on the validity of the will. Another example is an injunction *pendente lite*, to last only during the litigation and, again, designed simply to preserve something until the decisive court order is issued.

Pro

Pro forma means as a matter of form; in keeping with a form or practice. Something done *pro forma* may not be essential but it facilitates future dealings. For example, an invoice might be sent to a purchaser even before the goods are delivered as a matter of business practices. This phrase refers to court rulings merely intended to facilitate the legal process.

Pro bono means provided for free. *Pro bono publico* means "for the public good".

Pro rata, a Latin term, means to divide proportionately to a certain rate or interest. For example, if a company with two shareholders, one with 25% and the other with 75% of the shares, received a gift of Tk.10,000 and desired to split it "pro rata" between the shareholders, the shareholder with 25% of the shares would receive Tk.2,500 and the 75% shareholder, Tk.7,500.

Pro possessor means as a possessor. For example, a person may exercise certain rights over a thing not as owner but *pro possessor*, as a person who possesses, but does not own, the thing.

Pro socio means on behalf of a partner; not on one's personal behalf.

Pro tempore means something done temporarily only and not intended to be permanent.

In

In limine means at the beginning or on the threshold. A motion "in limine" is a motion that is tabled by one of the parties at the very beginning of the legal procedures.

In pari delicto means both parties are equally at fault. Actually, the usual use of this phrase is "in pari delicto, potior est conditio possidentis" which means that where both parties in a dispute are equally at wrong, the person in possession of the contested property will retain it (i.e. the law will not intervene).

In personam right is a personal right attached to a specific person.

In rem rights are property rights and enforceable against the entire world. *In rem* rights are proprietary in nature; related to the ownership of property and not based on any personal relationship, as is the case with *in personam* rights.

Inter alia & Inter se

Inter alia means "among other things", "for example" or "including". Legal drafters would use it to precede a list of examples or samples covered by a more general descriptive statement. Sometimes they use an *inter alia* list to make absolutely sure that users of the document understand that the general description covers a certain element (which was covered in the general description anyway) without, in any way, restricting the scope of the general element to include other things that were not singled out in the *inter alia* list.

Inter se means "among themselves". For instance, certain corporate rights are limited only to the shareholders or only to the trustees as a group. These are *inter se* rights among the shareholders or trustees.

Source: Duhaime's Law Dictionary & Law.com Dictionary

LAW quotations

"Judge a law student not by marks his own examination papers."
Henry Lewis Mencken (1880-1956), U.S. journalist, critic.

"The law of God is a law of change, and... when the Churches set themselves against change as such, they are setting themselves against the law of God."
George Bernard Shaw (1856-1950), Anglo-Irish playwright, critic

"When law becomes despotic, morals are relaxed, and vice versa."
Honore De Balzac (1799-1850), French novelist.

LAW week

Military Operation caused death to 16 persons

Sixteen persons have died so far since the beginning of Operation Clean Heart conducted by the military. Relatives of some of the deceased persons have alleged that they were brutally tortured by the military after arrest which caused their death. On the backdrop of the deteriorating law and order situation military were deployed across the country to curb the crimes as well as net the criminals. About 3,500 were arrested since the countryside crackdown on criminals from 17 October. But during this time 16 persons died in the custody of the military. Allegations are there that the military are beating arrested people mercilessly, blindfolding them and treating them in humiliating way. As per Article 35(5) of our constitution torture or inhuman punishment or treatment is strictly prohibited. Article 5 of The Universal Declaration of Human Rights also prohibits torture and cruel, inhuman or degrading treatment or punishment. It is alleged that the military are not showing respect to these constitutional and internationally recognised fundamental human rights. Another allegation raised against the military is that they are not producing the arrested persons before the magistrate within 24 hours of arrest which is necessarily required by Article 33(2) of our constitution. About two weeks have passed since the beginning of the military operation but the government has not clarified as yet under which law the military are conducting the operation. It is also not clear whether the military have been given magistry power to arrest or not. Ambiguities in respect of legal basis of the military operation and allegations of the military's not respecting fundamental human rights have created confusion and sense of insecurity among the common people of the country. However, the army is investigating the reasons of the deaths. -Law Desk

Govt seeks time for separation of judiciary

The government has again sought time for the separation of judiciary. A petition was filed on 27 October by the government for extension of the Supreme Court's deadline for the separation of judiciary. This is for the 14th times the government is seeking time. In the same case 54 Advocates of the Supreme Court have filed a petition for including them as intervenor in the committee for the separation of judiciary. The lawyers also demanded the direction of the court to form Judicial Service Commission and Judicial Pay Commission. The hearing of both the petitions will be held in mid-November, since all the Justices of the Appellate Division would not be available before that period. Earlier the Appellate Division of the Supreme Court gave 12-point direction to the government for the separation of judiciary. The Appellate Division has extended the time for 13th times on petition from the government and gave a deadline on 26 October. But the government filed another petition for the extension of time having failed to comply with the direction of the higher court. -Law Desk

Fate of the upazila parishad undecided

The fate of the upazila parishad becomes undecided as the Cabinet failed to certain the reintroduction of the system after a prolonged debate in the cabinet meeting on 16 October. Communication Minister Nazmul Huda and Finance Minister M Saifur Rahman took their position against reintroduction of the upazila system. Barrister Nazmul Huda who played a key role to abolish the upazila system in 1991 again opposed the concept. They alleged that the system would create conflict of interest between the MP and the chairman of the Upazila Parishad. They also said that the system would split the political party. Earlier the Cabinet Committee on Upazila Parishad headed by the LGPR minister had finalised the proposal for reintroduction of the upazila system on 14 September to strengthen the local government. -Daily Star, 17 October.

Special police force against crimes

The government plans to form a special police force to curb the crimes soon. This force equipped with modern weapons and logistic support will be engaged only in combating terrorism. The force will be formed within one month. The special police team will be formed by the honest, competent and committed police personnel of the police department. -Proton, Alo, 29 October.

WB suggests amendment to laws

The World Bank (WB) suggested amendment to the Insurance Act 1938, the Companies Act 1994 and the Insurance Rues 1958. The suggestions were made to give the Chief Controller of the Insurance to act effectively to eliminate the unhealthy practices. World Bank suggested the modification of either the insurance rules or the Companies Act to allow amalgamation of some of the unlisted insurance companies and rationalised the non-life insurance sector. It also suggested the introduction of internationally accepted corporate governance principles in insurance sector. -Financial Express, 29 October.

Women and children trafficked each year

A large number of women and children are being trafficked from Bangladesh to India, Pakistan and Middle East every year. According to the report prepared by the United States Agency for International Development (USAID) the number of trafficked persons are 20,000. Women and girls aged between 7 and 24 and boys aged from 2 to 12 are the worst victims of the trafficking. Most of the women and girls are being trafficked for prostitution and domestic works and the boys for serving as the camel jockey. -Financial Express, 29 October.

Juvenile delinquency increasing

Juvenile delinquency is increasing in the Capital City. Police arrested 565 juvenile delinquents in connection with various offences last year while the number was only 44 in 1990. According to the police the juveniles are active in the under world crime of the city as the top terrorists abscond themselves to escape arrest. According to the report 20% of the offenders arrested last year in connection of various offences are below 16 years old. The juvenile gangs are well equipped with firearms. -Manvazamin, 29 October.

Drug stores without license

Nearly 10 thousand drug stores of the 8 northern districts are running their medicine business without any license from the government. This act of the drug traders caused huge loss to the government as well as threat to the public health. Besides, many of the unlicensed drug stores are selling spurious, banned, smuggled, and date expired medicine, which is violation of the law as well as consumer rights. The local people alleged that there is none to bring this drug sellers to justice. -News Today, 30 October.

Advocate Sirajul Haq passed away

Advocate Sirajul Haq, eminent lawyer of the Supreme Court, died on 28 October at the age of 78 years. He was an expert in criminal law. He entered the legal profession in 1955 and joined the East-Pakistan High court in 1957. He was the chief prosecutor of the historic Bangabandhu Murder case. -Law Desk

Violation of human rights by police

The police have allegedly violated the fundamental human rights at the time of the joint operation. Plain cloth police shot point blank at three suspected criminals in front of the press Institute of Bangladesh (PIB) in the city's Circuit House road on 22 October. Police also instigated the people to beat up the wounded criminals. Police claimed that the three persons were criminals who shot at them when they were chasing the criminals. But according to eyewitnesses, a team of about 12 plain cloth policemen were waiting in a microbus inside the department of Films and Publication premises, opposite the PIB building. At that time the police received wireless message that a gang of criminals were coming to the circuit house road from Shantinagar. As soon as a black cab came near the PIB the policemen chased the cab and grabbed the criminals. The policemen pulled the three criminals out of the cab pushed them to the wall of the PIB compound and shot them in their thighs. Police also left them in the road with blood gushing out from their wounds. The police then provoked the witnesses to beat the criminals up. -Daily Star, 23 October.

Corresponding Law Desk

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